

Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

2022

A Critical Race Theory Approach to Children's Rights

Jessica Dixon Weaver

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

A CRITICAL RACE THEORY APPROACH TO CHILDREN'S RIGHTS

JESSICA DIXON WEAVER*

This Article uses critical race theory to analyze the impact of corporal punishment and physical child abuse on African American children's rights in the United States. From an international perspective, the banning of corporal punishment is consistent with multidisciplinary research about the negative effects of physical discipline on children. However, throughout United States history, African American parenting oftentimes utilizes physical discipline to teach children strict compliance with authority in order to prevent deadly violence from being inflicted upon them by white people. Using critical race theory concepts, this Article illustrates how state endorsement of corporal punishment within the family and structural racism within the family regulation system diminishes the parental rights of many African American parents, as well as the rights of African American children. Exploring the thin line between reasonable parental discipline and abuse, this Article concludes that a federal ban on corporal punishment is not enough to protect African American children from harm or maintain their family integrity. When state-sanctioned violence against African American children and adults by police and white citizens is still prevalent, the United States must also recognize and reconcile the legal system's role in creating communities where African American bodies are often bound by violence and are yet to be freed.

* Professor of Law, Gerald J. Ford Research Faculty Fellow and Robert G. Storey Distinguished Faculty Research Fellow, *SMU Dedman School of Law*. The research for this Article would not have been possible without a generous research grant from the Joseph M. Knight Endowment Fund. For useful comments on this Article, I would like to thank Jonathan Todres, Shani King, Dr. Lolita Buckner-Inniss, Dr. Beverly Dureus, Robin Lenhardt, Melissa Murray, Martha Minow, Kristin Henning, Clare Huntington, Shanta Trivedi, Sacha Coupet, and the attendees of the Children and the Law Workshop at the *University of Connecticut School of Law* and the *SMU Dedman School of Law* Faculty Workshop. Thank you to my research assistants Eniya Richardson and Ambrosia Wilkerson.

TABLE OF CONTENTS

Introduction	1856
I. Critical Race Theory and Children’s Rights	1862
II. Intersections and Realities: Parental Rights and Children’s Rights	1865
A. Impact of Slavery Law on Parental Rights and Children’s Rights	1869
III. Two Sides of a Coin: Corporal Punishment and Physical Abuse	1873
A. Banning Corporal Punishment	1873
B. Allowing Physical Discipline	1878
C. Regulating Child Maltreatment	1880
IV. An Anti-Essentialist Approach to Raising African American Children: A Thin Line Between Love and Hate	1882
A. Love: Protecting Children from Outside Harm	1885
B. Love: Preparing Children for the Experience of Racism	1887
C. Hate: Projecting Experiences of Racism on Children Through Corporal Punishment	1888
D. Hate: Using the Master’s Tools to Dismantle the House	1893
E. Thin Line: A Child’s Right to Be Free	1895
Conclusion	1896

INTRODUCTION

In the spring of 2015, an African American¹ mother, Toya Graham, was exalted in the media after she found her sixteen-year-old son among a group of rioters in the aftermath of the death of Freddie Gray.² Ms. Graham, a single mother raising her only son along with five

1. The terms “African American” and “Black” are used interchangeably throughout this Article. According to the United States Office of Management and Budget’s Classification on Federal Data on Race and Ethnicity, a Black or African American person is defined as any person having origins in any of the Black racial groups of Africa. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,789 (Oct. 30, 1997).

2. Josh Levs et al., *Baltimore Mom Who Smacked Son at Riot: I Don’t Play*, CNN (Apr. 29, 2015, 5:54 PM), <http://www.cnn.com/2015/04/28/us/baltimore-riot-mom-smacks-son> [<https://perma.cc/VD4U-K8XS>]; see Kyle Smith, *Baltimore Riot Mom Is*

daughters in Baltimore, Maryland, was worried about his whereabouts during the protests after Gray, a young African American man, was severely injured and died in police custody.³ After searching for her son and finding him in a crowd of people who were throwing rocks at the police, Ms. Graham forcefully removed him from the crowd and knocked him upside the head repeatedly, stating that she was trying to protect him.⁴ Her actions were caught on film and broadcast across the country, earning her the title of “[M]other of the [Y]ear” and sparking conversation about whether her response was appropriate discipline or child abuse.⁵ During an interview about the incident, Ms. Graham made a statement with which most African American parents could relate: “[A]t the end of the day I don’t want him to be a Freddie Gray.”⁶

Throughout United States history, African American parents emphasized teaching their children how to prevent deadly or violent interactions inflicted by white people in positions of authority. Emmett Till is the most poignant example of a child dying because of an ordinary encounter. Till was kidnapped and brutally murdered after being falsely accused of whistling at a white woman in a local Mississippi store in 1955.⁷ Black parents had to thread a small needle: they had to teach their children to believe in themselves in order to succeed in life while, at the same time, teaching them to stay in a subjugated ‘place’ where they had to be deferential to white people.⁸

Mother of the Year, N.Y. POST (Apr. 28, 2015, 3:15 PM), <https://nypost.com/2015/04/28/baltimore-riot-mom-is-mother-of-the-year> [https://perma.cc/HF3T-D8R9] (advocating for Toya Graham to be dubbed “Mom of the Year”); Melanie Arter, *Dr. Phil Tips His Hat to Baltimore Mother Who Slaps Son for Taking Part in Riots*, CNS NEWS (Apr. 28, 2015, 4:22 PM), <https://www.cnsnews.com/blog/melanie-hunter/dr-phil-tips-his-hat-baltimore-mother-who-slaps-son-taking-part-riots> [https://perma.cc/82MH-NUYM].

3. Levs et al., *supra* note 2.

4. *Id.*

5. Marisol Bello, *Mom of the Year? Baltimore Woman Isn't a Hero to All*, USA TODAY (Apr. 29, 2015, 4:48 PM), <https://www.usatoday.com/story/news/2015/04/29/baltimore-mom-smacks-son-riots/26574143> [https://perma.cc/26M5-WGCM].

6. *Id.*

7. Richard Pérez-Peña, *Woman Linked to 1955 Emmett Till Murder Tells Historian Her Claims Were False*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/emmett-till-lynching-carolyn-bryant-donham.html> [https://perma.cc/97ZT-F9MP].

8. See Tamiya King, *Parenting in the Black Community: Why Raising Children Is Different for Us*, ATLANTA BLACK STAR (July 14, 2015), <https://atlantablackstar.com/2015/07/14/psychology-parenting-exploring-new-ideas-black-motherhood->

For Black youth, crossing this “color-line” risked violence, imprisonment, and sometimes death, often because of a perception of disrespect, or as in Till’s case, a blatant falsehood.⁹ Federal and state law enshrined this line of state authority, allowing white people to kill Black people with impunity.¹⁰ The “color-line” also represented the vast difference between citizenship rights and privileges for white people and Black people from the Reconstruction era through the passage of the Civil Rights Act of 1964¹¹ and the Voting Rights Act of 1965.¹² Even in the twenty-first century, African American children like Trayvon Martin and Tamir Rice have been killed by white citizens or police officers because of perceived stereotypes based on the color of their skin. In response to this disparate treatment, generations of African American parents instilled fear of authority into their children through harsh physical discipline, which sometimes resulted in severe physical and emotional abuse.¹³

Discipline is viewed as a parenting technique that shapes child behavior with regard to immediate compliance with expectations and norms and long-term socialization of developmental habits.¹⁴ The

fatherhood [<https://perma.cc/T5WF-TF6K>] (noting that Black parents want to ensure their children are seen as “non-threatening”).

9. See W.E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES* vii, 95–96, 166 (8th ed. 1909) (observing that the preeminent “problem of the Twentieth Century” was the “color-line,” which is defined as the racial segregation implemented after the abolition of slavery).

10. See Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives?*, 56 SANTA CLARA L. REV. 721, 722–31 (2016) (detailing the United States’ brutal history of violence against Black people and noting that U.S. laws have historically “provided scant protection of [Black] American lives”).

11. Civil Rights Act of 1964, Pub. L. No. 88-352, § 78 Stat. 240, 241.

12. Voting Rights Act of 1965, Pub. L. No. 89-110, § 79 Stat. 432, 437.

13. Stacey Patton, *Corporal Punishment in Black Communities: Not an Intrinsic Cultural Tradition but Racial Trauma*, AM. PSYCH. ASS’N (Apr. 2017) [hereinafter Patton, *Corporal Punishment in Black Communities*], <https://www.apa.org/pi/families/resources/newsletter/2017/04/racial-trauma> [<https://perma.cc/2MDB-4XRC>].

14. See *Effective Discipline for Children*, 9 PEDIATRICS & CHILD HEALTH 1, 2 (2004), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2719514/pdf/pch09037.pdf> [<https://perma.cc/XS6V-ZA3K>] (explaining how “[e]ffective and positive discipline” by parents “is about teaching and guiding children,” thereby “foster[ing] acceptable and appropriate behaviour in the child”); Doriane Lambelet Coleman et al., *Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse*, 73 LAW & CONTEMP. PROBS. 107, 145, 148 (2010) (observing how empirical studies have shown that “children who have been subjected to moderate corporal punishment display, on average, more-immediate compliance with parental directives” but also exhibit

nature of discipline varies from permissive, positive discipline that seeks to redirect children's thinking and actions through positive praise, to more authoritarian methods, ranging from grounding and physical restraint to corporal punishment.¹⁵ These variations are seen in international settings and in the United States. From a contemporary international perspective, the physical discipline of children is often viewed as a violation of human rights, dignity, and personal integrity; thus, some countries have banned corporal punishment.¹⁶ However, the United States still largely maintains that the parental right to use light or moderate spankings to educate and correct their children is within the realm of family privacy and autonomy.¹⁷ In fact, reasonable discipline is described as a duty of a parent, rather than a right, along with the duty of care, control, and protection.¹⁸ The American Law Institute (ALI) Restatement on Children and the Law sets forth that in the context of civil and criminal proceedings, the use of corporal punishment by a parent is privileged, as long as the punishment is reasonable, "determined in part by whether the corporal punishment caused, or created a substantial risk of causing, serious physical harm or gross degradation."¹⁹ This embrace of corporal punishment is especially prevalent in many African American households.²⁰

"increased anxiety, aggressive behavior, decreased academic success, and lower self-esteem").

15. See Judith G. Smetana, *Parenting Styles and Conceptions of Parental Authority During Adolescence*, 66 CHILD DEV. 299, 299–300 (1995) (comparing divergent parenting styles and the techniques typically employed by parents to regulate their children's behavior).

16. *Countdown, END CORPORAL PUNISHMENT*, <https://endcorporalpunishment.org/countdown> [<https://perma.cc/3G2Y-V7JT>] (listing 63 countries that, as of 2021, prohibit corporal punishment of children, including punishment of children in the home).

17. *Country Report for the USA, END CORPORAL PUNISHMENT* (Dec. 2021), <https://endcorporalpunishment.org/reports-on-every-state-and-territory/usa> [<https://perma.cc/ABM7-PKRN>] (noting that corporal punishment "is lawful in the home in all states").

18. TEX. FAM. CODE ANN. § 151.001 (West 2021).

19. RESTATEMENT OF CHILDREN AND THE LAW § 3.24 (AM. L. INST., Tentative Draft No. 1, 2018).

20. See Lynetta Mosby et al., *Troubles in Interracial Talk About Discipline: An Examination of African American Child Rearing Narratives*, 30 J. COMPAR. FAM. STUD. 489, 489 (1999) (noting a strong "preference for physical discipline" amongst Black parents and Black Americans).

Research on the effects of physical discipline of children by parents varies. The research that is specific to African American children and parents reflects that physical discipline is not utilized uniformly and that “it is impossible to make blanket statements about corporal punishment.”²¹ It also recognizes how Black parents “used physical discipline as a tool to teach their children lessons and consequences that correspond to their cultural and community context.”²² While use of corporal punishment as a parenting strategy is controversial, it can be a purposeful, controlled, and appropriate means to protect African American children and instruct them on how to behave and survive within a racist society.²³ But is physical violence, however well-intentioned, a valid way to exercise parental protection or privilege? If so, where does that leave the African American child with respect to their right to be free from physical harm, whether inflicted by a parent, any other citizen asserting statutory rights, or the state?

Using the critical race theory concepts of intersectionality, racial realism, and anti-essentialism, this Article illustrates how family and criminal laws work in tandem to diminish the parental rights of Black parents, as well as the rights of Black children. While most states allow for corporal punishment by parents in the home, they also have laws that limit parents from physically abusing their children. When physical abuse occurs, children can be removed from their homes and placed in the care of the state. This type of family regulation has disproportionately affected African American parents and children in that African American children are two times more likely to be removed from their parents and placed in foster care than white children.²⁴ So African American families who utilize corporal punishment risk a double harm in that their parental rights can be limited or terminated based on a substantiated allegation of child abuse, and their children’s rights can be diminished or disregarded while in the state foster care system. This Article also shows that there is a thin line between protecting children from greater society and inflicting long-lasting emotional harm. It is not so clear where the limit should be drawn at a time when violence against African American

21. Krista A. Thomas & Alan J. Dettlaff, African American Families and the Role of Physical Discipline: Witnessing the Past in the Present, 21 J. HUM. BEHAV. SOC. ENV’T 963, 973 (2011).

22. *Id.* at 969.

23. *Id.* at 963.

24. RACIAL DISPROPORTIONALITY AND DISPARITIES IN THE CHILD WELFARE SYSTEM 4 (Alan J. Dettlaff ed., 2021).

children and adults by police and white citizens is still prevalent. The question that remains for the United States is whether it will continue to endorse the right of both states and parents to inflict measurable and damaging harm against children of color.

In order to answer this question, this Article proceeds in four Parts. Part I discusses the basic tenets of critical race theory and how it can be utilized to examine children's rights. Part II sets forth the intersection of slavery with parental and children's rights, affirming the reality that slavery effectively negated family integrity for African American families for two and a half centuries. It also examines how new laws enacted after emancipation, known as Jim Crow laws, impacted the ability of African American parents to secure their family relationships and rights to their children. Part III defines corporal punishment and physical abuse and explores both sides of the law regarding the physical assault of children within the family regulation and criminal law systems. The international push for bans on corporal punishment is compared to United States laws that allow for this type of disciplinary technique in the home. Part III juxtaposes the law regarding a parent's right to discipline a child against the state's obligation to protect children from abuse or neglect by a parent. It further notes the disproportionate outcomes for African American children and parents within the family regulation system.

Finally, Part IV presents an anti-essentialist approach to raising African American children in light of the socio-legal duality that corporal punishment presents for African American parents. It evaluates the love it takes to protect children from physical harm by the state and prepare them to live in a racist society. It also examines the hate perpetuated by parents projecting experiences of racism onto their children via physical discipline that often leads to abuse. Part IV further analyzes the impact of using the 'master's tool,' physical violence, to dismantle the effect of hatred and racism on African American children. The Article concludes that before the United States can ban corporal punishment, it must acknowledge the role of family and criminal law in the creation and development of the African American parenting experience and the lack of rights of enjoyed by African American children. A critical race theory approach to children's rights ultimately calls for abolition of the current family

regulation system²⁵ and interdisciplinary guidelines on corporal punishment for parents, legal practitioners, social workers, and judges.

I. CRITICAL RACE THEORY AND CHILDREN'S RIGHTS

Critical race theory is a lens through which children's rights can be viewed in order to see a more complete picture of the various ways by which the law can either elevate or repress a child's agency. As a legal field of study, critical race theory is a method of challenging racial orthodoxy within the law. Scholars use this theory to explore how the complexity of race impacts legal doctrine, the creation of law, and public policy. With respect to children's rights, it has been used to evaluate racial discrimination, genocide, and the treatment of children as adults in the criminal system.

Foundationally, the three basic themes of critical race theory include: 1) racism is ordinary (and therefore difficult to cure because it is not acknowledged); 2) "interest convergence"²⁶ offers few opportunities to eradicate racism (because it only occurs with shared racial interests); and 3) the "social construction" of race is built on thoughts and relationships.²⁷ These themes have been used to explain the overrepresentation of Black children in both the child welfare and juvenile justice systems, the former of which is referred to now as the family regulation system.²⁸ This Article will illuminate how race and the

25. See generally DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022) [hereinafter ROBERTS, *TORN APART*] (arguing for abolition of the state governed system replaced by community-driven norms specific to various cultures).

26. "Interest convergence," a thesis created by Derrick Bell, sets forth that because white people—as the dominant group—benefit both materially and psychically from racism, "large segments of society have little incentive to eradicate it." RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 7 (2001) (providing that advances for racial justice are tolerated by the majority group when it suits its interests).

27. *Id.*

28. See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 7–10 (2002) (noting that, at the time of publication, forty-two percent of all children in the United States foster care system—described as an "apartheid institution . . . designed to deal with the problems of minority families"—are Black, "even though Black children constitute only 17 percent of the nation's youth"); Robert D. Crutchfield et al., *Racial and Ethnic Disparity and Criminal Justice: How Much Is Too Much?*, 100 J. CRIM. L. & CRIMINOLOGY 903, 910–12 (highlighting that as of 2005, the juvenile court case rate for Black juveniles is more than double the case rate for white juveniles); Emma Williams, *'Family Regulation,' Not 'Child Welfare': Abolition Starts with Changing Our Language*, IMPRINT (June 28, 2020, 11:45 PM), <https://imprintnews.org/opinion/>

law have impacted Black parenting and the discipline of Black children. This Article will also consider whether stronger laws that protect children's rights to bodily integrity and autonomy should go beyond restrictions on parents and, additionally, limit state discretionary authority to inflict serious physical injury or deadly harm in encounters with Black youth.

Intersectionality and anti-essentialism are two concepts introduced by African American feminist legal theorists to account for 1) the ways in which the legal examination of race is complicated by the combination of various identities, and 2) the silencing of gendered, racial, sexual orientation, and other experiences outside of the mainstream, respectively.²⁹ In this Article, intersectionality will be utilized to account for the connection of childhood status, gender, and race as it pertains to corporal punishment and child abuse. Anti-essentialism highlights the vastly different life experiences of Black youth in their communities, and how parental corporal punishment and physical abuse can serve as both preparation for, and protection against, state violence. At the same time, critical race theory compels a frank discussion of whether parental discipline mirrors violent treatment by the state, and in so doing, destroys a child's sense of self and the rationale for dismantling the state's imprimatur to treat Black youth as inferior.

Though they are often complimentary, intersectionality and anti-essentialism should not be conflated in the analysis of children's rights. Critical race theory does not always have to "avoid essentialism to achieve normative commitments to social transformation."³⁰ Rather than viewing "essentialism as conservative and bad and anti-essentialism as progressive and good," the probe of this concept should be: to what end is the essentialism being deployed, by whom, in what

family-regulation-not-child-welfare-abolition-starts-changing-language/45586 [https://perma.cc/2WAT-ZST3] (explaining how the term "family regulation system" more accurately encompasses the objective of the child welfare system).

29. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–46 (1991) (asserting that the experiences of Black women cannot be fully understood by looking at race and gender experiences separately); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (arguing that gender essentialism is troublesome as it often ignores the experiences of Black women in both feminist and legal theory).

30. Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2196 (2019).

context, and what are its effects?³¹ To view corporal punishment as all bad does not reflect the manner by which it has been applied by some African American families. An essentialist per se viewpoint also does not consider the context of whether corporal punishment is child-centered or parent-centered.

Child-centered indicates that parents are purposefully using physical discipline in a controlled matter because they believe it will be in the best interest of their children, whereas parent-centered disciplining stems from a place of rage, extreme stress, or loss of control because the child's actions are interfering with the parent's needs.³²

Both types of discipline "are used among African American families, depending on the family and the challenges they may be facing."³³ The effects on African American children must be considered in order to determine whether the immediate and long-term impacts justify or negate their future opportunities in society.

Another critical race theory concept, racial realism, accounts for the ways in which a strict adherence to the rule of law would still result in an unequal and negative outcome for Black children. Racial realism is the concept that racial equality for Black people is "not a realistic goal" because the law is an "instrument[] for preserving the status quo and only periodically and unpredictably" protects oppressed persons.³⁴ The theory of racial realism asserts that the quest for racial equality is useless because the subordinate status accorded to Black people through law is permanent.³⁵ Although the Civil Rights movement in the 1960s rid the country of blatant color barriers, other invisible forms of discrimination followed.³⁶

Today, [B]lacks experiencing rejection for a job, a home, a promotion, anguish over whether race or individual failing prompted their exclusion. Either conclusion breeds frustration and eventually despair. We call ourselves African Americans, but despite centuries of struggle, none of us—no matter our prestige or position—is more than a few steps away from a racially motivated exclusion, restriction or affront.³⁷

31. *Id.* at 2206 (citing DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE* 20 (1989)).

32. Thomas & Dettlaff, *supra* note 21, at 971.

33. *Id.* at 972.

34. Derrick Bell, *Racial Realism*, 24 *CONN. L. REV.* 363, 363–64 (1992).

35. *Id.* at 373–74.

36. *Id.* at 374.

37. *Id.*

Black parents unfortunately must embrace this racial reality above all other concepts regarding what it means for their children growing up in the United States. The statistics and brutal videos of police killings of African American people bear this truth out.

Thus, if applied to a hypothetical ban on corporal punishment within the United States, racial realism would not align with the typical paradigm of children's rights—conflicting, here, with protection against abuse. Any argument for human rights, dignity, and personal integrity for African American children flies in the face of legal and social vulnerability faced by Black people as a whole. Because African Americans as a people are still fighting for human rights within the United States justice system, Black parents are unable to pass down to their children an inheritance that they themselves do not own. In order for Black children's rights to be equal to those of white children, *all* parents would need to resist the unequal treatment of Black youth by law enforcement and within the educational, health, juvenile justice, and family regulation systems. There would need to be a world where the status quo is eradicated and racial equality for Black people, or better yet, racial equity, is accepted as an achievable goal.

II. INTERSECTIONS AND REALITIES: PARENTAL RIGHTS AND CHILDREN'S RIGHTS

The U.S. legal field of children's rights has evolved from existing as a subsidiary of parental rights to a field that recognizes the humanity, agency, and voice of children.³⁸ In order to analyze parental rights, the intersection of state power and children's needs must be considered. The authority of a parent over a child in the United States derives

38. See *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (establishing the right and “natural duty” of parents to “bring up children” and provide children a “suitable” education); Melissa L. Breger, *Against the Dilution of a Child's Voice in Court*, 20 IND. INT'L & COMPAR. L. REV. 175, 175 (2010) (arguing that children's rights have been diluted in courtroom settings, specifically); see also Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267 (1995) (setting forth the history of children's rights in the United States and the development of ‘rights’ as a term used by different advocates to argue for equal treatment of children as adults or for more paternalistic protection of children); Martha Minow, *Preface to THE OXFORD HANDBOOK OF CHILDREN'S RIGHTS LAW ix–xii* (Jonathan Todres & Shani M. King eds., 2020) (highlighting how consideration of children as rights-bearers forces a new analysis of traditional interpretation of rights discourse).

mostly from the Bill of Rights.³⁹ Federal family law, codified in state family codes, sets forth the right of parents to raise children in the way they see fit, and gives parents care, custody, and control over children and child-rearing.⁴⁰ The law presumes that parents act in the best interest of their children, a presumption that is only rebutted if the state determines that the parents are unfit.⁴¹ A critical race theory approach to children's rights explores the fact that the state as an actor is not blind to race. In fact, the legal history of laws and cases centered on the basic rights to establish and maintain a family demonstrate that race was used to withhold from Black families the autonomy and benefits afforded to white parents and children.⁴² As this Article later discusses, the reason that corporal punishment has been such a fixture of Black parenting has everything to do with the lack of control Black mothers and fathers had over the lives and safety of their children.⁴³

Structural racism—a form of racism embedded in laws or regulations—was an integral factor of American family law, as well as other laws that severely impacted families, such as housing, employment, and education laws.⁴⁴ The social construct of race helped

39. These rights are generally referred to under a penumbra of privacy rights that include the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. U.S. CONST. amends. I, IV, V, IX, XIV.

40. See *Meyer*, 262 U.S. 390, 400–01 (noting that parents have a power and duty to “control the education of their own”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (affirming the holding in *Meyer* by overruling an Oregon state law that would have interfered with “the liberty of parents . . . to direct the upbringing and education of children”); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (holding that a state’s interest in education must be balanced against the fundamental right of parents to upbringing their children as protected by the First Amendment).

41. *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (stating that because “there is a presumption that fit parents act in the best interests of their children . . . , there will normally be no reason for the State to inject itself into the private realm of the family”).

42. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 9–10 (1997) (explaining that the destruction of Black family rights was one of the strategies that Slave Power used to support itself); ROBERTS, *supra* note 28, at 257 (“The rights of Black children must be interpreted in the context of racial oppression.”).

43. See *infra* Section III.A (outlining how slavery impacted the use of corporal punishment in Black families).

44. CHRISHANA M. LLOYD ET AL., *CHILD TRENDS, FEDERAL POLICIES CAN ADDRESS THE IMPACT OF STRUCTURAL RACISM ON BLACK FAMILIES’ ACCESS TO EARLY CARE AND EDUCATION* 2 (2021), https://www.childtrends.org/wp-content/uploads/2021/02/FederalPoliciesStructuralRacism_ChildTrends_March2021.pdf [https://perma.cc/FA66-HGKK] (stating that the social standing of Black Americans has been shaped by a long history of racism in laws).

define and determine who in fact belonged to the family and what kind of rights parents, children, and the state maintained.⁴⁵ Because family law is centered on the private ordering of families, it naturally excluded the majority of Black people as a race for almost three centuries.⁴⁶ This is because the dominant status of Black people at the inception of the United States was as property rather than as persons; therefore, the law of slavery governed Black families rather than the state family code.⁴⁷ Instead, “[t]he rights of Black children must be interpreted in the context of racial oppression [because w]ithout . . . social justice, rights tend to reinforce social hierarchies and benefit the most privileged members of society.”⁴⁸

The entrenchment of American family dynamics for this period of time is important to note because the recognition of human rights of any kind for Black families did not truly begin until the mid 1950s and 1960s, when Congress passed the Civil Rights Act and Voting Rights Act, overturning Jim Crow laws and voting restrictions on African Americans.⁴⁹ In this way, the parental rights of Black parents was extralegal, yet depended on the law of the family in order to operate. Though all children were treated like property throughout the first three centuries U.S. history, white children were the property of their parents, whereas enslaved Black children were the chattel property of white individuals rather than their own parents.

One example of how the paradigm of Black parental rights operated outside of, yet subordinate to, the family law system of white parents is the slavery law of child status. Historically speaking, in the United States, white children born within marriage belonged to their fathers in the sense that their status and name followed the status of their

45. ROBERTS, *supra* note 28, at 257; Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 224, 229 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

46. See Shani M. King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 588–89 (2011) (discussing how Black American families “do not benefit to the same extent as white families from the autonomous family unit” because “family law dictates very different consequences for [Black] families”).

47. See *id.* at 595–97 (“[T]he law governing slaves specified that slaves were subject, first, to the will of their masters and second, to the will of all whites.”).

48. ROBERTS, *supra* note 28, at 257.

49. ROBERTA L. COLES, *RACE & FAMILY: A STRUCTURAL APPROACH* 195 (Rowan & Littlefield 2d ed. 2016) (2006) (explaining how the passing and enforcement of the Voting Rights Act and Civil Rights Act contributed to improvements in academic and career attainment among Black people).

father.⁵⁰ However, during slavery, Black children derived their status from their mother, regardless of whether she was married.⁵¹ Since most Black mothers were slaves, children born to them were automatically slaves.⁵² While there were Black children born to free white women who had partnered with Black men (either free or slave), there were fewer instances of this type of interracial relationship than of white men and Black women.⁵³ This is because the power differential between white men and Black women allowed for many more opportunities for rape and coerced sexual relationships.⁵⁴ The gendered manner in which the law operated relegated most Black children to lifelong slavery; thus, giving control over their existence to a white owner.⁵⁵ This control dictated how Black children would be raised, and it shaped how Black parents and kin prepared their children for a life of bondage under white authority.

The law also served to put a parental hierarchy in place within the Black family that was opposite that of the white family. Slave marriage was not legally supported, so there was not a legal unit to which children belonged.⁵⁶ Enslaved persons were allowed to commit to one another in marriage as long as both owners consented. During slavery, the Black father was completely emasculated, as he could not protect or provide for either his wife or child(ren).⁵⁷ In fact, the majority of

50. See generally Michael Waters, *A Patriarchal Tradition That Just Won't Budge*, ATLANTIC (Oct. 27, 2021), <https://www.theatlantic.com/family/archive/2021/10/patrilineal-surnames/620507> [<https://perma.cc/7J2R-JG9Q>]; see also Carol Lloyd, *In the Name Game, Tradition Usually Still Wins*, L.A. TIMES (Jan. 25, 2000), <https://www.latimes.com/archives/la-xpm-2000-jan-25-cl-57301-story.html> [<https://perma.cc/2V8E-Y8HR>] (“Originally, patrilineal names were part of the British and American common law called ‘coverture’ . . .”).

51. THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 71 (Greenwood Publ'g Corp. 1968) (1858).

52. *Id.* at 68–69; DAINA RAMEY BERRY, THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION 11 (2017).

53. See RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY AND ADOPTION 41–69 (2003); see also LOREN SCHWENINGER, FAMILIES IN CRISIS IN THE OLD SOUTH: DIVORCE, SLAVERY & THE LAW 19–27 (2012).

54. MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE 19TH-CENTURY SOUTH 3–4 (1997).

55. *Id.* at 4.

56. TERA HUNTER, BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY 6–9 (2017).

57. See JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH 88 (1972) (observing how white owners had complete control over a Black father's life, including determining his work schedule, punishment, visitation

slave families did not have fathers present on a daily basis because the slave marriages that were allowed reflected the preference of “abroad” spouses, and many fathers were separated from their families by sale.⁵⁸ On the other hand, the Black mother could, at times, operate in a way to gain some control over her children by virtue of being the conduit of new valuable property for her white owner.⁵⁹ While she often had no control over who impregnated her, Black mothers and other Black women played the largest role in raising children.⁶⁰ This same power dynamic grounded in the law of slavery can be seen in the gendered way that physical discipline and corporal punishment are meted out within the African American family. Most often, Black mothers more frequently deliver more severe discipline than Black fathers.⁶¹ And, with rates of single parents about as high within the Black community today as it was during slavery,⁶² the mother is often still the disciplinarian and nurturer of children.

A. *Impact of Slavery Law on Parental Rights and Children’s Rights*

While Black parents did not have parental rights over enslaved children, they were still tasked with raising them to fulfill their role in society.⁶³ At this time, Black parents faced the unfortunate duality of

with his family, provision of clothing, minimal food, shelter, and lack of safety for his wife and children).

58. COLES, *supra* note 49, at 188. “[A]broad” marriages are defined as marriages between slaves residing on different plantations with different owners. *Id.* The father usually lived separately from the mother and children, although there were occasions where the father was sold to the other plantation to allow the family to reside together. *Id.*

59. *Id.* at 187, 189.

60. *Id.* at 187 (noting that Black female slaves were impregnated by “husbands, breeders, or masters”).

61. Carla Adkison-Johnson et al., *African American Child Discipline: Differences Between Mothers and Fathers*, 54 FAM. CT. REV. 203, 209 (2016).

62. See Steven Ruggles, *The Origin of African-American Family Structure*, 59 AM. SOCIO. REV. 136, 136–37 (1994) (examining that “[f]rom 1880 through 1960, [B]lack children were two to three times more likely to reside without one or both parents than were white children” and that this disparity has grown more recently).

63. See Heather Andrea Williams, *How Slavery Affected African American Families*, NAT’L HUMANS. CTR., <https://nationalhumanitiescenter.org/tserve/freedom/1609-1865/essays/aafamilies.htm> [<https://perma.cc/5YY8-JB5H>] (discussing the tension felt by enslaved parents as they built familial connections under the constant threat of being separated from their children); see also James Q. Wilson, *Slavery and the Black Family*, AM. ENTER. INST. (May 1, 2002), <https://www.aei.org/articles/slavery-and-the-black-family> (arguing that higher rates of single-parent families among Black

teaching their children how to survive in a racist society while trying to create a better future for them, the latter of which required life-risking resistance.⁶⁴ Enslaved parents had to teach children proper deference and demeanor in front of white people as any action or language that questioned white persons in authority put children at risk for being whipped or sold.⁶⁵ Ultimately, the whippings that Black children received were about the assertion of power and control.⁶⁶

There were three primary rights that slaves did not possess at all or in full due to their status as human property: “personal security,” “personal liberty,” and the right to “private property.”⁶⁷ Lawmakers restricted or denied all of these rights to slaves.⁶⁸ Laws regarding personal freedom, for example, strictly forbade the physical movement and ability of slaves to gather without the express consent or presence of white people.⁶⁹ The Texas Penal Code of 1857 illustrates how laws preserved the social order of white supremacy.⁷⁰

In the following cases, it is lawful for a free white person to inflict chastisement upon a slave by moderate whipping: . . . 3. If a slave be found using improper language, or guilty of indecent or turbulent conduct in the presence of white persons; 4. If the slave be guilty of rude or unbecoming conduct in the presence of a free white female; 5. If a slave use insulting language or gestures towards a white person.⁷¹

“[M]oderate use of the whip” in this context could include beatings with a switch, a leather strap, a stick, or other weapon.⁷² One of the

Americans today can be traced, in part, to the legacy of slavery and the separating enslaved parents from their children).

64. See BLASSINGAME, *supra* note 57, at 98–99 (discussing how enslaved parents struggled to balance teaching their children enough obedience to protect themselves without instilling complete subordination).

65. STACEY PATTON, SPARE THE KIDS: WHY WHUPPING CHILDREN WON’T SAVE BLACK AMERICA 49 (2017) [hereinafter PATTON, SPARE THE KIDS].

66. *Id.* at 50.

67. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 337 (Thomas A. Green & Hendrik Hartog eds., 1996).

68. *Id.*

69. *Id.*

70. 1857 Tex. Crim. Stat. art. 802.

71. *Id.*

72. See generally Michael Dickman, Honor, Control, and Powerlessness: Plantation Whipping in the Antebellum South 39–45 (Apr. 2015) (Honors Thesis, Boston College) (<http://hdl.handle.net/2345/bc-ir:104219> [<https://perma.cc/XXJ6-HKQH>]) (contrasting “moderate” discipline through whipping with extreme abuse

main defenses of Black slave parents to the “right” to physically discipline their children was their belief that a whapping at their hands was better than one from a white person.⁷³

A critical tool of slavery was the demand for subordination. This tool was used not only by slave owners and police authorities, but by any white person in a position to use it.⁷⁴ Preservation of social order depended on the duty of the slave to be obedient and subservient.⁷⁵ Insubordination was not tolerated, and the penalty of homicide was justified in the law.⁷⁶ The factors used to determine if a slave was in a state of insurrection or rebellion were that: 1) they should be openly resisting lawful authority, and 2) this resistance should be by such force to indicate an intention to maintain it to the shedding of blood.⁷⁷ This law and other similar behavior-based laws are strikingly similar to the current laws that allow for police to kill an individual if threatened by bodily harm *or* if they can lay claim to a fear for their lives.⁷⁸

It should be noted that the penal code did not apply to Black Americans during slavery.⁷⁹ The definitive book regarding the law of the American slave set forth that “statutory enactments never extend to or include the slave, neither to protect nor to render him

leading to permanent physical deformity and illustrating that slaveowners expressed frustration and vulnerability regarding their sense of control by punishing slaves).

73. PATTON, SPARE THE KIDS, *supra* note 65, at 49.

74. *See, e.g.*, 1857 Tex. Crim. Stat. art. 802 (stating that a slaveholder has the right to “the obedience and submission of his slave” as well as the right to punish slaves for insubordination).

75. PATTON, SPARE THE KIDS, *supra* note 65, at 48–50.

76. *See, e.g.*, 1857 Tex. Crim. Stat. art. 802 (enumerating that the killing of a slave is justifiable “[w]hen a slave forcibly resists any lawful order of his master”).

77. *Id.*

78. *Compare* 1857 Tex. Crim. Stat. art. 564, *with* ME. STAT. tit. 17-a § 107(2)(A) (“A law enforcement officer is justified in using deadly force only when the officer reasonably believes such force is necessary . . . [f]or self-defense or to defend a 3rd person from what the officer reasonably believes is the imminent use of unlawful deadly force . . .”), *and* NEV. REV. STAT. § 171.1455(2)(b) (2021) (“A peace officer may . . . use deadly force to effect the arrest of a person only if there is probable cause to believe that the person . . . [p]oses an imminent threat of serious bodily harm or death to the peace officer or to others.”), *and* GA. CODE ANN. § 17-4-20(3)(b) (2021) (“Sheriffs and peace officers . . . may use deadly force to apprehend a suspected felon . . . when the officer reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others.”).

79. *See, e.g.*, 1857 Tex. Crim. Stat. arts. 32–33 (noting that “[a]ll free white persons” are punishable under a separate title of the penal code than are “[s]laves and free persons of color”).

responsible, unless specifically named or included by necessary implication.”⁸⁰ The slave, as property, cannot be deprived of what he does not have: “[t]o deprive a freeman of his liberty, is one of the severest punishments the law can inflict; and one of the most ordinary, especially when the penitentiary system is adopted. But to the slave this is no punishment, because he has no liberty of which to be deprived.”⁸¹ Every slaveholding state, therefore, adopted a slave code that defined criminal offenses of which a slave could be guilty, as well as penalties for the offenses.⁸²

Enslaved persons’ condition of perpetual servitude meant that ordinary punishments afforded to white people were not available to them; therefore, the only way that enslaved persons could be reached was “through [their] bodies.”⁸³ The only punishments inflicted upon enslaved persons were death, whipping, branding on the cheek and body mutilation depending on the crime committed.⁸⁴ Some crimes under the slave codes were capital offenses, such as the rape of a white woman, arson, attempt to poison, and insurrection.⁸⁵ Notably, these same crimes were not capital offenses if committed by a white person.⁸⁶ The difference in the punishment of Blacks and white individuals for the same crimes is rooted in the difference between the slavery codes and the penal code, as well as the fact that maximum control of Black people could only be exercised through physical violence or death.

The system of control over Black bodies was built on the rule of law in the United States. While the love Black parents had for their children was no different than the love of any other parent, the operation of the law set forth a painful system of correction for Black people. In order to protect their children from physical punishment meted out by white people, Black parents used physical discipline to guide their children’s behavior and impose an indelible imprint of the life-threatening dangers of disobedience.⁸⁷ Black children were often

80. COBB, *supra* note 51, at 263.

81. *Id.*

82. *African American Heritage & Ethnography: Laws that Bound*, NAT’L PARK SERV., <https://www.nps.gov/ethnography/aah/aaheritage/histContextsE.htm> [https://perma.cc/5277-EWBE] (noting that all American colonies developed laws intended to control and subordinate the enslaved and free African populations).

83. COBB, *supra* note 51, at 266.

84. *Id.*

85. *Id.*

86. *Id.*

87. Patton, *Corporal Punishment in Black Communities*, *supra* note 13.

whipped with small tree branches, which is still a common practice in the southern regions of the United States.⁸⁸ Though these branches were not as painful as the actual whips of the slave master, they caused serious and memorable physical damage to the child.⁸⁹

III. TWO SIDES OF A COIN: CORPORAL PUNISHMENT AND PHYSICAL ABUSE

A. *Banning Corporal Punishment*

From an international perspective, the United Nations Convention on the Rights of the Child (UNCRC), along with a good deal of social science research,⁹⁰ has influenced many countries to ban corporal punishment altogether.⁹¹ Articles 19⁹², 28⁹³, and 39⁹⁴ of the UNCRC support the idea that hitting children is wrong and should not be used as a form of discipline.⁹⁵ Article 19 governs the right of the child to freedom from all forms of violence,⁹⁶ Article 28 sets forth the right of the child to education,⁹⁷ and Article 39 governs the right of the child

88. See Jimmie E. Gates, *A Switch, Discipline and What Is Appropriate for a Child*, CLARION LEDGER (Sept. 19, 2014, 5:02 PM), <https://www.clarionledger.com/story/news/2014/09/19/switch-discipline-appropriate-child/15906211> [<https://perma.cc/9MR4-QPBB>] (discussing the author's personal experience growing up in a Black family and being disciplined with switches as a child); Clarence Page, *Why Some Parents Love the Whip Too Much*, OKLAHOMAN (Sept. 19, 2014, 12:00 AM), <https://www.oklahoman.com/story/opinion/columns/guest/2014/09/19/clarence-page-why-some-parents-love-the-whip-too-much/60798145007> [<https://perma.cc/RSA3-G9PF>] (“[W]hile spanking occurs in every major racial or ethnic group, African Americans approve more often than others do . . . [and] people are more likely to be in favor of spanking if they live in the South . . .”).

89. Patton, *Corporal Punishment in Black Communities*, *supra* note 13.

90. See, e.g., Tony Waterston & Staffan Janson, *Hitting Children Is Wrong*, 4 BRIT. MED. J. PAEDIATRICS OPEN, 1, 1 (2020) (discussing countries' countries decisions to ban corporal punishment).

91. See *Convention on the Rights of the Child Treaty Status*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en [<https://perma.cc/MYN3-WBA2>] (listing 141 signatory countries).

92. United Nations Convention on the Rights of the Child, art. 19, Nov. 20, 1989, 1577 U.N.T.S. 3.

93. *Id.* art. 28.

94. *Id.* art. 39.

95. See *id.* arts. 19, 28, 39.

96. *Id.* art. 19 (“States Parties shall take all appropriate . . . measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse . . .”).

97. *Id.* art. 28 (“States Parties recognize the right of the child to education . . .”).

to state assistance if he or she is harmed, neglected or mistreated.⁹⁸ Sixty-three countries have successfully banned all corporal punishment, with Sweden leading the way in 1979.⁹⁹ The most recent countries to ban this form of punishment include South Korea, Columbia, Japan, South Africa, and France, all of which banned corporal punishment as recent as 2019.¹⁰⁰ The rationale for the ban is simple: corporal punishment is an unlawful physical assault on a child that increases the probability of adverse physical, mental, and behavioral issues.¹⁰¹ Corporal punishment does not respect children's dignity as human beings and violates their equal protection of the laws. The Global Initiative to End All Corporal Punishment promotes the "universal prohibition and elimination of corporal punishment."¹⁰² Their goals are to ensure that no child ever experiences abuse for any reason and to transform attitudes and practice so that the physical punishment of children is no longer viewed as acceptable.¹⁰³

Globally, corporal punishment is widespread. Approximately sixty percent of children aged two to fourteen years regularly suffer physical punishment by their parents or other caregivers.¹⁰⁴ Research shows that the risk of being physically punished is the same for all genders and classes.¹⁰⁵ There are a range of negative outcomes that are linked to corporal punishment across countries and cultures, including physical and mental health, impaired cognitive and socio-emotional development, poor educational outcomes, increased aggression and perpetration of violence.¹⁰⁶

98. *Id.* art. 39 ("States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.").

99. Waterson & Janson, *supra* note 90.

100. *Id.* at 2.

101. *Id.* at 1.

102. *The Global Initiative to End All Corporate Punishment of Children: A History*, END CORPORAL PUNISHMENT, <https://endcorporalpunishment.org/global-initiative> [<https://perma.cc/XLT4-TUW8>].

103. *What Is Corporal Punishment?*, END CORPORAL PUNISHMENT <https://endcorporalpunishment.org/introduction> [<https://perma.cc/3FHC-W7RA>].

104. *Corporal Punishment and Health*, WORLD HEALTH ORG. (Nov. 23, 2021), <https://www.who.int/news-room/fact-sheets/detail/corporal-punishment-and-health> [<https://perma.cc/ZQ5H-QGXQ>].

105. *Id.*

106. *Id.*

The definition of corporal punishment within the family has been the subject of reports by the Committee on the Rights of the Child (“the Committee”).¹⁰⁷ It is defined as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.”¹⁰⁸ This includes (but is not limited to) smacking, slapping, spanking with the hand or an implement—whip, stick, belt, shoe, wooden spoon, etc.¹⁰⁹ It also includes kicking, shaking or throwing children, scratching, pinching, burning, scalding, or forced ingestion (washing children’s mouth out with soap or forcing them to swallow hot spices).¹¹⁰ The Committee differentiates between punitive, physical actions against children and necessary force aimed at protecting children from harm.¹¹¹ The Committee traces this human rights obligation back to the International Bill of Human Rights,¹¹² and notes that Article 19 of the UNCRC requires States to protect children “from all forms of physical and mental violence.”¹¹³

Proponents of corporal punishment refer to Article 5 of the UNCRC, claiming that it justifies reasonable chastisement.¹¹⁴ It sets forth that “states shall respect the responsibilities, rights and duties of parents . . . as provided for by local custom . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”¹¹⁵ For example, the United Kingdom maintained that ‘normal’ punishment within the family is a private matter and involves decisions that pertain to the rights and responsibilities of parents implied in Article 5 of the UNCRC.¹¹⁶ The Committee took a dual approach, linking Articles 5 and 19 as being

107. See, e.g., United Nations Convention on the Rights of the Child, General Comment No. 8, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007) [hereinafter General Comment No. 8].

108. *Id.* at 4.

109. *Physical Punishment*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Mar. 2018), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Physical-Punishment-105.aspx [https://perma.cc/Q2JU-JQGC?type=image].

110. *Id.*

111. General Comment No. 8, *supra* note 107, at 5.

112. *Id.*

113. *Id.* at 6.

114. Claire Breen, *The Corporal Punishment of Children in New Zealand: The Case for Abolition*, 2002 NZ L. REV. 359, 374.

115. United Nations Convention on the Rights of the Child, art. 5, Nov. 20, 1989, 1577 U.N.T.S. 3.

116. Breen, *supra* note 114, at 374.

interrelated and reading them together as prohibiting corporal punishment.¹¹⁷ The CRC is designed to advance the rights of the child, and “the Committee stated that corporal punishment does not fall within the margin of discretion accorded to parents by Article 5 in the exercise of their responsibilities.”¹¹⁸

From a practical standpoint, it has been difficult to regulate the ban on corporal punishment within families. The main reason is that although the international ban is in effect in some countries, the government has not fully implemented the UNCRC recommendations and many have not changed the corporal punishment laws that apply to children in the home.¹¹⁹ This is true in the United Kingdom and Canada, for example.¹²⁰ Still, there have been several unsuccessful challenges to corporal punishment under the domestic law of these countries.¹²¹ The reason that courts do not ban corporal punishment entirely in these cases is that courts wish to retain the discretion to determine if the physical punishment is reasonable and moderate chastisement.¹²² In other words, courts wish to allow corporal punishment in certain limited circumstances.

The United States is the only nation that has failed to ratify the UNCRC.¹²³ Many legal scholars attribute this failure to the perception

117. *Id.* at 375.

118. *Id.*

119. Cindy Miller-Perrin & Robin Perrin, *Physical Punishment of Children by US Parents: Moving Beyond Debate to Promote Children’s Health and Well-Being*, 31 *PSICOLOGIA: REFLEXÃO E CRÍTICA* [PSYCHOLOGY: REFLECTION & CRITICISM] 1, 1 (2018).

120. END CORPORAL PUNISHMENT, CORPORAL PUNISHMENT OF CHILDREN IN THE UNITED KINGDOM 1, 1 (2020), <http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/UK.pdf> [<https://perma.cc/9NLA-RELV>]; END CORPORAL PUNISHMENT, CORPORAL PUNISHMENT OF CHILDREN IN CANADA 1, 1 (2020), <http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Canada.pdf> [<https://perma.cc/YK96-UNGT>].

121. See *European Convention for the Protection of Human Rights and Fundamental Freedoms*, END CORPORAL PUNISHMENT <https://endcorporalpunishment.org/human-rights-law/regional-human-rights-instruments/european-convention-for-the-protection-of-human-rights-and-fundamental-freedoms> [<https://perma.cc/8Q3Y-6QS6>]; *Can. Found. for Child., Youth, & L. v. Canada*, [2004] 1 SCR 76 (Can.) (upholding section 43 of Canada’s Criminal Code, which justifies the use of reasonable force by parents and teachers in disciplining children in their care).

122. See, e.g., *Can. Found. for Child., Youth, & L.*, 1 SCR ¶ 26 (finding that a statute enabling the “reasonable under the circumstances” use of force by parents and teachers against children was not unconstitutionally vague).

123. Sarah Mehta, *There’s Only One Country that Hasn’t Ratified the Convention on Children’s Rights: US*, ACLU (Nov. 20, 2015, 1:30PM), <https://www.aclu.org/blog/>

that the United States already provides adequate rights to children through existing federal and state laws.¹²⁴ Others assert that the UNCRC will undermine parental rights and obligate the government to provide more welfare and resources to children and families than it can afford.¹²⁵ One of the primary rights that the UNCRC grants children is the right to be free from any physical harm.¹²⁶ This right is opposite the strong conception of fundamental parental rights set forth in federal family law cases from the early twentieth century.¹²⁷ United States law supports the parental discipline privilege, which allows parents the right to physically punish their children with no criminal liability for assault and battery.¹²⁸

It should be noted that the UNCRC's stance on corporal punishment is grounded in protecting children from both physical and mental harm.¹²⁹ Research shows that physical discipline is harmful to the emotional development of children and, in many cases, has a

human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens [https://perma.cc/HQQ2-CMZW].

124. See, e.g., Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty> [https://perma.cc/7JUB-4B5V] (discussing the view that the United States Constitution provides superior protections for human rights than the UNCRC); Charlotte Galvin, *The U.S. Should Not Ratify the United Nations Convention on the Rights of the Child*, 39 CHILD.'S LEGAL RTS. J. 198, 200 (2019) (noting that the United States is already largely in compliance with the obligations of the Convention on the Rights of the Child).

125. See, e.g., Wilkins et al., *Why the United States Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411, 418–19, 424, 429 n.101 (2003) (arguing that the UNCRC impermissibly strips parents of authority and would require the United States to invest new resources into programs for children); Mehta, *supra* note 123 (stating that opposition to ratification of the UNCRC is “based on incorrect assumptions about [the treaty’s] implications for U.S. law and how the convention affects U.S. sovereignty and our interpretation of federalism”).

126. United Nations Convention on the Rights of the Child, *supra* note 92, art. 19.

127. See *Meyer v. Nebraska*, 262 U.S. 390, 396–97, 399–400 (1923) (striking down a state statute that prohibited parents from teaching German to their children as infringing on the Fourteenth Amendment right of a parent to direct their child’s education); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (emphasizing the parental right to “direct the upbringing and education of children under their control”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (collecting caselaw upholding the assertion that there is a “private realm of family life which the state cannot enter”).

128. Cynthia Godsoe, *Redefining Parental Rights: The Case of Corporal Punishment*, 32 CONST. COMMENT. 281, 282 (2017).

129. General Comment No. 8, *supra* note 107, at 6.

negative impact on children that endures through adulthood.¹³⁰ Some studies have noted the cultural differences in the effects of corporal punishment, showing that there are significant differences in the behavioral problems of white versus Black Americans and Hispanics.¹³¹ The outcomes for children may depend on how children perceive their parents' disciplinary messages, and parental warmth and involvement can alter the message received by showing that the discipline is "carried out in a careful manner with their best interests at heart."¹³²

B. *Allowing Physical Discipline*

Every state in the United States allows for corporal punishment through statutory or common law.¹³³ These laws are based on the premise that properly administered physical discipline "promotes child welfare and helps to encourage proper behavior."¹³⁴ While the laws vary from state to state, physical punishment must be reasonable and not excessive. Parents are inoculated from criminal liability in every jurisdiction in that the right to use force against children is a privilege or an affirmative defense to the allegations of assault.¹³⁵ Broad language in many state statutes allow for discretion and subjectivity regarding whether the force is reasonable.¹³⁶ Typically, the laws governing corporal punishment provide that the physical discipline should be commensurate with the negative behavior or act(s) of the child.¹³⁷ Indeed, more than 70% of American parents surveyed in 2012

130. Elisabeth Gershoff, *More Harm than Good: A Summary of Scientific Research on the Intended and Unintended Effects of Corporal Punishment on Children*, 73 LAW & CONTEMP. PROBS. 31, 46–47 (2010).

131. Jennifer E. Lansford, *The Special Problem of Cultural Differences in Effects of Corporal Punishment*, 73 LAW & CONTEMP. PROBS. 89, 90–91 (2010).

132. *Id.* at 96.

133. RESTATEMENT OF CHILDREN AND THE LAW § 3.24 (AM. L. INST., Tentative Draft, 2019).

134. Hazel Blum, *Reforming (But Not Eliminating) the Parental Discipline Defense*, 49 U. MICH. J.L. REFORM 921, 921 (2016).

135. RESTATEMENT OF CHILDREN AND THE LAW § 3.24 (AM. L. INST., Tentative Draft, 2019); Blum, *supra* note 134, at 923.

136. Blum, *supra* note 134, at 923.

137. See, e.g., TEX. PENAL CODE ANN. § 9.61(a)(2) ("The use of force, but not deadly force, against a child younger than 18 years is justified . . . when and to the degree the [parent, stepparent, or person acting in loco parentis] reasonably believes the force is necessary to discipline the child or to safeguard or promote his welfare."); N.H. REV. STAT. ANN. § 627:6(I) ("A parent, guardian or other person responsible for the general care and welfare of a minor is justified in using force against such minor when and to the extent he reasonably believes it necessary to prevent or punish such minor's

agreed that “it is sometimes necessary to discipline a child with a good, hard spanking.”¹³⁸ However, a more recent cross-sectional study showed that 49% of children aged zero to nine were subject to corporal punishment, and 23% of older children aged ten to seventeen experienced corporal punishment, with an overall rate of 37%.¹³⁹

In addition, nineteen states allow physical discipline within public schools.¹⁴⁰ While the law regarding corporal punishment within schools is different than the law governing private families, there are similarities regarding the impact of the laws on African American children. Studies show that Black girls and boys were subject to harsher forms of discipline than their white counterparts, and that the relative magnitude of racial disparity is greater among Black girls.¹⁴¹ Often school is the site where Black children experience disparate treatment regarding situations that are normal for immature adolescence.¹⁴² In fact, research shows that among African American children, corporal punishment results in fewer behavioral problems in the school setting.¹⁴³ Because the primary rationale for Black parents who discipline their children with a child-centered outlook is teaching obedience and respect, firm stances against moderate parental

misconduct.”); NEB. REV. STAT. § 28-1413(1) (declaring that “[t]he use of force” by a parent, guardian, or a “person similarly responsible for the general care and supervision of a minor” is justified if used to “safeguard[] or promot[e] the welfare of the minor, including the prevention or punishment of his or her misconduct” so long as it does not “create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation”).

138. Emily Cuddy & Richard V. Reeves, *Hitting Kids: American Parenting and Physical Punishment*, BROOKINGS INST. (Nov. 6, 2014), <https://www.brookings.edu/research/hitting-kids-american-parenting-and-physical-punishment> [<https://perma.cc/UG4X-4WZ7>] (internal quotation marks omitted).

139. David Finkelhor et al., *Corporate Punishment: Current Rates from a National Survey*, 28 J. CHILD & FAM. STUD. 1991, 1993–94 (2019).

140. Elizabeth T. Gershoff & Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, SOC. POL’Y REP., Sept. 1, 2016, at 1, 1.

141. See Kimberlé Williams Crenshaw, Priscilla Ocen, and Jyotti Nanda, *Black Girls Matter: Pushed Out, Overpoliced and Underprotected*, African American Policy Forum and Center for Intersectionality and Social Policy Studies 9 (2015) (finding that in New York and Boston, Black boys and girls were also subject to larger achievement gaps, and on some measures the relative magnitude of the racial disparity between girls is greater than the disparity between boys).

142. KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* 36 (2021).

143. Thomas & Dettlaff, *supra* note 21, at 972.

physical discipline could present devastating outcomes for some children in all facets of their lives.¹⁴⁴

Scholars debate whether physical discipline should be supported by law, and the tension that exists regarding whether it is a duty, right, and/or privilege of a parent to exercise force when teaching or punishing a child has not been resolved by the growing global trend to ban corporal punishment. A child wellbeing framework posits that parents should be afforded their constitutional right to privacy within the home, and they are best suited to determine whether physical discipline will benefit their child.¹⁴⁵ Rather than viewing the privilege of reasonable or moderate discipline as an endorsement of corporal punishment, it can be interpreted as a limitation on state intervention, which all too often has detrimental effects on African American families.¹⁴⁶ If the privilege were to be abolished, state power to remove children from parents would greatly expand and the harm caused by child removal and coercive state intervention would likely be much greater than the harm caused by spankings.¹⁴⁷

C. *Regulating Child Maltreatment*

Although the majority of states legally support the physical discipline of children, each state has laws that regulate child abuse and neglect.¹⁴⁸ Physical abuse is usually defined as hitting a child so harshly that there are visible marks and skin bruises.¹⁴⁹ A substantiated report of physical abuse can result in the temporary removal of a child or children from a parent's care.¹⁵⁰ The presumption that all parents act in the best interest of their child is rebutted by sufficient proof that abuse or

144. See HENNING, *supra* note 142, at 292–97 (noting that the criminalization of Black youth, particularly those who are poor, can result in loss of secure housing, separation of family members, and placement of children in jail or group homes, disruption of education, and parental debt).

145. Clare Huntington & Elizabeth Scott, *Conceptualizing Legal Childhood in the Twenty-first Century*, 118 MICH. L. REV. 14 1371, 1415–22 (2020).

146. *Id.* at 1419–20.

147. *Id.* at 1421.

148. *Supra* note 137.

149. CHILD WELFARE INFO. GATEWAY, DEFINITIONS OF CHILD ABUSE AND NEGLECT 2 (2019), <https://www.childwelfare.gov/pubPDFs/define.pdf> [<https://perma.cc/4LM6-NJRZ>].

150. See U.S. DEP'T OF JUST., LAW ENFORCEMENT RESPONSE TO CHILD ABUSE 13 (1997), <https://www.ojp.gov/pdffiles/162425.pdf> [<https://perma.cc/GQ3W-QZVX>] (detailing instances where an officer may be required to place a child in protective custody where disclosure, allegation, or evidence of child abuse exists).

neglect has occurred, and there is an immediate danger to the child's safety and well-being.¹⁵¹ Psychological abuse typically accompanies physical abuse, although it is much more difficult to legally prove and demonstrate harm.¹⁵²

One of the primary issues related to the use of corporal punishment in African American families is the overrepresentation of African American children in the family regulation system. Research shows that African American children are disproportionately overrepresented in being victims of reported maltreatment, at a rate of almost twice their proportion in the general population.¹⁵³ While there has been debate about whether racial bias is the cause of this overrepresentation, findings do show a correlation between poverty and the role of race as a factor in contributing to a greater assessment of risk in decision-making regarding child removal.¹⁵⁴ Ultimately, racial bias and discrimination among child welfare staff and mandatory reporters (like teachers and health professionals), as well as institutional racism, may be inherent in the policies and practices of child welfare agencies.¹⁵⁵

While only 17% of Black children removed from their families and in foster care are because of allegations of physical and sexual abuse, over half of all Black children will undergo an investigation by the family regulation system before they reach the age of majority.¹⁵⁶ Typically child maltreatment allegations occur together, and neglect is the most common reason for child removal of all children.¹⁵⁷ Once an investigation begins, inquiries about child discipline and physical abuse are routine, and corporal punishment can often be a subsequent rationale for permanent separation or termination of parental rights if children report that objects are used and there are old scars on their bodies.

151. See generally CHILD WELFARE INFO. GATEWAY, *supra* note 149 (describing several statutes regarding child abuse or neglect at the state level).

152. Jessica Dixon Weaver, *The Principal of Subsidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL'Y & L. 247, 251 (2011) [hereinafter Dixon Weaver, *Subsidiarity*].

153. Nancy Rolock, et al., *Measurement Issues in Identifying and Describing Racial Disproportionality and Disparity in RACIAL DISPROPORTIONALITY AND DISPARITIES IN THE CHILD WELFARE SYSTEM* 27–28 (Alan J. Dettlaff ed., 2021).

154. Alan Dettlaff, *The Evolving Understanding of Racial Disproportionality and Disparities in RACIAL DISPROPORTIONALITY AND DISPARITIES IN THE CHILD WELFARE SYSTEM* 16–18 (Alan J. Dettlaff ed., 2021).

155. *Id.* at 19.

156. ROBERTS, TORN APART, *supra* note 28, at 37.

157. Dixon Weaver, *Subsidiarity*, *supra* note 152, at 263.

IV. AN ANTI-ESSENTIALIST APPROACH TO RAISING AFRICAN AMERICAN CHILDREN: A THIN LINE BETWEEN LOVE AND HATE

The stories of “Baltimore Mom” Toya Graham and National Football League (NFL) star, Adrian Peterson, are familiar to many Black families in the United States. Between 2014 and 2015, the physical harm both parents meted out against their children caused a media maelstrom.¹⁵⁸ In one family’s public situation, a mother was praised for physically assaulting her teenage son multiple times.¹⁵⁹ Alternatively, in the other family’s private situation, a father was arrested for negligent injury to a child for whipping his toddler son with a tree branch, leaving numerous bruises and cuts over the lower half of the child’s body.¹⁶⁰ In both instances, the parents asserted that they were disciplining their children from a place of love.¹⁶¹ Why was one parent’s actions lauded by the city police commissioner and the U.S. President¹⁶² while the other parent was jailed and chided by the NFL and most of America?¹⁶³ How is it that a mother’s public beat down of her sixteen-year-old son draws little sympathy for the physical welfare of her child, yet a father trying to instill a sense of authority and respect in his four-year-old son maintains no right to raise his child as he sees fit?

The contrast between these two situations is stark. One male child is arguably old enough to defend himself from an attack from an adult, while the other male child is helpless. One Black male is a teenager, who is often seen as a threat and a criminal by police, and the other Black male still has a baby face and several years before the police will

158. See Des Bieler, *The Details of Adrian Peterson’s Arrest Are Disturbing*, WASH. POST (Sept. 12, 2014), <https://www.washingtonpost.com/news/early-lead/wp/2014/09/12/the-details-of-adrian-petersons-arrest-are-disturbing> [https://perma.cc/ZT4X-M853] (reporting that Peterson’s son said that his father “likes belts and switches” and “has a whooping room”).

159. *Supra* notes 2–6 and accompanying text.

160. Bieler, *supra* note 158.

161. *Id.*

162. *Donations Pour in for Baltimore ‘Mom of Year’ After House Fire*, REUTERS (Mar. 13, 2020, 2:51 PM), <https://www.reuters.com/article/us-maryland-mother-idINKCN10S20O> [https://perma.cc/K2K5-8P9W] (detailing a story of a mother who gained national praise was awarded “Mother of the Year” for publicly reprimanding her child for participating in a riot).

163. *Adrian Peterson Indicted for Child Abuse, Turns Himself in*, CBS MINN. (Sept. 12, 2014), <https://minnesota.cbslocal.com/2014/09/12/adrian-peterson-indicted-for-child-abuse> (explaining how Adrian Peterson was deactivated from the Minnesota Vikings and indicted by a grand jury for reckless or negligent injury to a child after admitting to “whooping” his son).

view him with suspicion. But many Black parents, especially those with sons, acknowledge that the toddler's time is coming.¹⁶⁴ In fact, many Black parents live in fear of what might happen to their Black man-child if or when the police, or another white person with authority, perceives him as a threat to their life.¹⁶⁵

American children are often essentialized in that the normative standard for a child's status and well-being is often that of a white, middle-class child.¹⁶⁶ Children whose identities encompass more than one identifier—female, Black, poor, disabled—experience life in a much different way than the norm. African American children grow up in a much different reality than white children, and African American parents do not have the privilege of believing that most white adults and white police officers will treat their children as they treat their own white children. This vast difference in the way in which Black parents must parent their children was not given much attention by mainstream America until 2015 and 2016, after the deaths of many unarmed Black men and women by police.¹⁶⁷ “The Talk,” often viewed as a rite of passage, is the conversation initiated by parents and elders with Black children about how to survive in racist world. It particularly provides instructions on how to react when the police pull you over in a car, stop and frisk you on the street, or when a shop owner follows you in a store.¹⁶⁸ An anti-essentialist approach of rights that support parenting would recognize that Black parents must impart certain survival tactics to their children that white parents do not have to consider. Their children's life circumstances are vastly distinct because of the history of police brutality and legal treatment of Black people.

164. See German Lopez, *Black Parents Describe “The Talk” They Give to Their Children About Police*, VOX (Aug. 8, 2016, 11:40 AM), <https://www.vox.com/2016/8/8/12401792/police-black-parents-the-talk>.

165. See *id.*

166. See Erin N. Winkler, *Children Are Not Colorblind: How Young Children Learn Race*, PRAC. APPROACHES FOR CONTINUING EDUC., no. 3, 2009, at 1, 3, <https://inclusions.org/wp-content/uploads/2017/11/Children-are-Not-Colorblind.pdf> [<https://perma.cc/P83N-HRPE>] (arguing that “[c]onsciously or unconsciously, middle-class white culture is presented as a norm or a standard in the United States in terms of appearance, beauty, language, cultural practices, [and] food”).

167. Geeta Gandbhir & Blair Foster, *A Conversation with my Black son*, N.Y. TIMES (Mar. 17, 2015), <https://www.nytimes.com/video/opinion/10000003575589/a-conversation-with-my-black-son.html>; Lopez, *supra* note 164 (exploring the conversation many Black parents have with their children about the potential for violent encounters with police officers).

168. *Id.*

Anti-essentialism provides a lens with which to evaluate corporal punishment in different ways based on the varying circumstances of parents and children. The questions posed regarding how one parent's violent action can be revered while the other's is condemned opens a larger conversation about the interpretation of anti-essentialism. The concept of anti-essentialism begins with pushback on a unitary framework based on one point of view. In *Race and Essentialism in Feminist Legal Theory*, Professor Angela Harris critiques white feminists for presenting women as white, and for theorizing sexism from the experiences of white women.¹⁶⁹ Anti-essentialism stands for the concept that there is no one way of viewing the experiences of a group of people. In the instance of corporal punishment, all children cannot be lumped together and viewed as similarly situated. At every turn, Black children in the United States are dealt with differently by the state, and any freedom that they acquired came with the hard-fought freedom of their parents. As mentioned earlier in this Article, 1965 was the turning point for Black citizens and the rights afforded them by the federal government. The reality that the racial caste system in the United States is only one generation removed from present day is a reminder of the concept of racial realism. Current politics that misconstrue critical race theory in order to remove discussions of race, the history of slavery, and the harm caused by structural racism from the public educational system demonstrate how efforts to subordinate racial groups morph to achieve the goal of maintaining the status quo of color blindness, while ignoring the realities faced by those seeking equality or equity.

The parenting of Black children was inextricably affected by the dehumanizing and violent experience of slavery and terror inflicted on Black communities during the post-Reconstruction era. The law was designed to allow white people to exert control over Black human beings through control over their bodies.¹⁷⁰ There were specific laws that slave holders used to force slaves to submit to their commands,¹⁷¹ and there was a specific ideology grounded in racial inferiority that was the foundation of these laws.¹⁷² Rooted in science, the belief that Black people were less mentally equipped and more physically endowed

169. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

170. *Supra* notes 66–67 and accompanying text.

171. *Supra* notes 68–70 and accompanying text.

172. *Supra* notes 74–76 and accompanying text.

played a large part in the cycle of abuse within Black families.¹⁷³ It also plays a large part in “The Talk” that sometimes comes after a parent’s physical abuse, explaining why the parent must be hard on a Black child, or at a later age when a Black child is able to understand race as a concept, and how it impacts his or her larger environment.¹⁷⁴ A recent documentary and commercials have highlighted “The Talk” that African American parents have with their children about how the world may treat them negatively because of the color of their skin.¹⁷⁵ Both depict the words that parents use as uplifting and encouraging, strongly promoting love of self and identification as members of a proud ancestry.¹⁷⁶ “The Talk” can be viewed as both incongruent with physical discipline and an accompaniment to corporal punishment intended to educate or correct. The two methods highlight the thin line between what a child views as love and hate.

A. *Love: Protecting Children from Outside Harm*

One of the primary goals of a parent is to teach their child that they are safe and that, as a parent, they will protect the child from harm. Black parents in the United States, no matter what socio-economic status, have never been able to inoculate their children from the harm that is associated with racism. Racism as a theory is founded on the idea that a particular race is inferior, or less than, another race, and that, because of this inferiority, the treatment of that particular race should be different, or worse than, the other race. Love of self is key to teaching a child to be secure as they step out into the great big world. Racism experienced by Black children can cause them to question their self-identity and doubt their worth within society.¹⁷⁷ Personal liberty and personal security are still rights that African American

173. See Patton, *Corporal Punishment in Black Communities*, *supra* note 13 (suggesting that slaves were “in constant fear of their lives and those of their children,” causing “parents to interpret cruelty as love” and attempting to prepare their children for “the chronic stresses they would face to keep them alive”).

174. Sam Sanders & Kenya Young, *A Black Mother Reflects on Giving Her 3 Sons ‘The Talk’ . . . Again and Again*, NPR (June 28, 2020, 5:05 AM), <https://www.npr.org/2020/06/28/882383372> [<https://perma.cc/V4GC-9E2C>].

175. *E.g.*, THE TALK—RACE IN AMERICA (PBS television broadcast Feb. 20, 2017), <https://www.pbs.org/video/talk-race-america-talk-race-america>.

176. *Id.*

177. Thomas J. Mowen & Richard Stansfield, *Probing Change in Racial Self-identification: A Focus on Children of Immigrants*, 2 SOCIO. RACE & ETHNICITY 323, 327 (2016).

children cannot truly claim because there is an abiding knowledge that they are not free to move about their communities in the same way as white children, and their safety is continuously imperiled.

Everyday occurrences in Black communities around the United States reinforce the idea that Black children and Black people as a group are at risk for harm and early death. In his book, *Chokehold: Policing Black Men*, Paul Butler explains how the Black experience in America is analogous to a chokehold.¹⁷⁸ He defines a chokehold as “a process of coercing submission that is self-reinforcing,” and explains that it “is a way of understanding how American inequality is imposed.”¹⁷⁹ He expounds by stating that the chokehold “is the process by which [B]lack lives are made vulnerable to death imposed by others and . . . [by] African Americans themselves,” made possible “through overt state violence—such as the way communities of color are policed—and slower forms of vulnerability,” like gentrification and murder within the Black community.¹⁸⁰ Corporal punishment can be seen as another form of vulnerability that causes overall harm to African American children because it serves to teach and reinforce deference to a violent state.

Discriminatory and aggressive policing in Black communities has socialized a generation of Black teenagers to fear, resent, and resist the police.¹⁸¹ In fact, when interviewed, Toya Graham’s son, Michael Singleton, stated that the reason that he protested the police was because of friends who had been beaten up and killed by the police.¹⁸² The pervasiveness of state control over Black people manifested in coping mechanisms and survival skills that African Americans have developed to persevere and raise families within an oppressive social structure.¹⁸³ Author Stacey Patton connects the destructive cycle of physical discipline for Black parents:

Black parents are taught, and teach one another, that the only way to protect kids from the violence of white racism is to mimic the

178. PAUL BUTLER, *CHOKEHOLD [POLICING BLACK MEN]* 5–6 (2017).

179. *Id.*

180. *Id.*

181. KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* xvi–xvii (2021).

182. Desire Thompson, *Son of “Mother of the Year” Reveals Why He Participated in Baltimore Riots*, LIGHT 103.9 FM (2015), <https://thelightnc.com/9539210/son-of-mother-of-the-year-reveals-why-he-participated-in-baltimore-riots> [<https://perma.cc/VA58-GTP9>].

183. Thomas & Dettlaff, *supra* note 21, at 966.

methods and logic of society, but they become vilified and punished for doing that as well. And as [B]lack parents perpetuate this culture of physical discipline against their children, white America argues that violence, including whupping children, is exceptional and unique to Blackness even though white people taught us to whup and break the will of our children during slavery.¹⁸⁴

Despite the fact that the concept of beating a child into submission or good behavior came from slavery and Christian teachings,¹⁸⁵ it has contributed to the disproportionate number of child removals in Black families.¹⁸⁶

B. Love: Preparing Children for the Experience of Racism

While there are many minorities who experience racism and discrimination, there is a unique part of the job of Black parenting—or parenting a Black child—in America that is unlike that of any other race. For most parents, “the general goal of the socialization process is to make children familiar with statuses, social roles, and prescribed behavior.”¹⁸⁷ Black parents are responsible for socializing their children such that they are aware of their history and place within the United States. This requires teaching them about the significance of racism and discrimination, as well as being a buffer between their children and society.¹⁸⁸ Parents are “a filter of societal information and a primary interpreter of the social structure for their children.”¹⁸⁹ Inculcating race into the socialization process is part of establishing a racial identity for children in Black families across all income levels because history has proven that economic status cannot protect any Black child from the systematic restrictions, disparate treatment, and degradation that comes with being a member of the Black race.

184. PATTON, SPARE THE KIDS, *supra* note 65, at 21.

185. *Id.* at 37–50; Thomas & Dettlaff, *supra* note 21, at 966–68.

186. See Marian S. Harris, *Racial Bias as an Explanatory Factor for Racial Disproportionality and Disparities in Child Welfare*, in RACIAL DISPROPORTIONALITY AND DISPARITIES IN THE CHILD WELFARE SYSTEM 144 (Alan J. Dettlaff ed., 2021) (noting that a U.S. Children’s Bureau study of nine child welfare agencies revealed that parents of color are reported for child abuse and neglect more often than white parents, and failure to understand cultural norms of populations of color in addition to racial bias prevented caseworkers from making good child welfare decisions).

187. Michael C. Thornton, *Strategies of Racial Socialization Among Black Parents: Mainstream, Minority, and Cultural Messages*, in FAMILY LIFE IN BLACK AMERICA 201 (Robert J. Taylor et al. eds., 1997).

188. *Id.*

189. *Id.*

Research shows that Black children are not as negatively affected by corporal punishment as white children or European children, and a primary reason for this difference in outcome is that the disciplinary practices of most Black parents originate from a place of family strength and love.¹⁹⁰ When used moderately and appropriately, corporal punishment has sometimes shown beneficial outcomes for African American children.¹⁹¹ There is research that places the physical discipline of African American children in context with 1) the trauma rooted in slavery and present-day institutional racism, and 2) the potential relationship between the overrepresentation of African American children in the U.S. family regulation system and African American parenting strategies.¹⁹²

Interestingly, most of the studies about the physical discipline of children include only the mother as parent, and not the father.¹⁹³ The gendered dynamic of the mother as chief disciplinarian of the children within the family is a reflection of family structure as well as the mother's role within the family.

C. *Hate: Projecting Experiences of Racism on Children Through Corporal Punishment*

“Parenting While Black” has been a popular phrase used to highlight the different stressors on parents raising African American children in the United States.¹⁹⁴ Despite celebrating several civil rights milestones in the past few years,¹⁹⁵ Black parenting is still plagued by the legacy of slavery laws.¹⁹⁶ Many of the problems that Black families face are

190. Anne S. Lau et al., *Factors Affecting the Link Between Physical Discipline and Child Externalizing Problems in Black and White Families*, 34 J. CMTY. PSYCH. 89, 90–91 (2006).

191. *Id.* at 91, 98, 100.

192. Thomas & Dettlaff, *supra* note 21, at 964.

193. *See id.* at 99, 101–03 (citing studies that mostly included mothers only); Jennifer E. Lansford et al., *Physical Discipline and Children's Adjustment: Cultural Normativeness as a Moderator*, 76 CHILD DEV. 1234 (2005).

194. Tanya Hayles, *Parenting While Black and Starting the Conversation on Racism with Your Kids*, CBC (June 4, 2020), <https://www.cbc.ca/parents/learning/view/parenting-while-black-and-starting-conversation-racism-with-your-kids> [https://perma.cc/AX4B-Y43P].

195. 2014 and 2015 marked the celebration of the 50th Anniversary of the Voting Rights Act of 1964, the Civil Rights Act of 1965, and the Selma Civil Rights March, respectively.

196. *See supra* Section III.A (discussing how Black parents used physical discipline during slavery to teach their children obedience and protect them from the life-

related to their fears for the safety of their children, particularly their sons.¹⁹⁷ Often harsh, physical discipline was historically, and continues to be, used by Black parents as a tool to teach their children how they could survive and excel in spite of discrimination.¹⁹⁸

To say it plainly, the very survival of Black children depended on their compliance with laws designed to subordinate them. These laws are designed to mentally and physically lock the Black child in a certain place.¹⁹⁹ Ultimately, slavery laws were about the control of Black bodies. Current day family, housing, education, employment, and criminal laws and practices arguably still do the same exact thing.²⁰⁰ These laws accomplish the same goal: they instill fear in Black parents and children such that it inhibits where and how they move throughout the world. This fear is passed down through generations because in every generation there are experiences of violence that children see in their environment.

Perhaps the most well-known violent act against a Black child that the United States laid witness to was the brutal murder of Emmett Till, a fourteen-year-old Black youth from Chicago, Illinois, who was beaten and drowned for allegedly whistling at a white woman in Money, Mississippi.²⁰¹ The difference between what children living in the North and South learned from their parents, and what they were disciplined for, was crucial. Lessons in the South were often more brutal because the consequences were deadly.

threatening punishments the slave code allowed white people to inflict if a slave was considered disobedient).

197. NANCY FRANKLIN-BOYD, *BLACK FAMILIES IN THERAPY: UNDERSTANDING THE AFRICAN AMERICAN EXPERIENCE* 22 (2d. ed. 2003).

198. Patton, *Corporal Punishment in Black Communities*, *supra* note 13 (explaining that Black parents' use of corporal punishment is a byproduct of centuries of slavery).

199. See Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1358, 1370 (1988) (arguing that "[a]ntidiscrimination law . . . has allowed the perpetuation of material subordination of Blacks" and providing that "formal reform has merely repackaged racism").

200. See Jessica Dixon Weaver, *Juneteenth Shows that Black Freedom Remains Elusive*, WASH. POST (June 19, 2020), <https://www.washingtonpost.com/outlook/2020/06/19/juneteenth-shows-that-black-freedom-remains-elusive> [https://perma.cc/RQN6-H5LN] (explaining how unequal education opportunities, discriminatory housing laws, and banks' denying loans to Black businesses perpetuate the "inhumane treatment of [Black] Americans throughout history").

201. *Emmett Till*, FBI, <https://www.fbi.gov/history/famous-cases/emmett-till> [https://perma.cc/Z3PD-KEES].

Ta-Nehisi Coates' highly acclaimed book, *Between the World and Me*, poignantly captures how his parents' fear of violence from the outside world impacted him, and how the same fear influenced his grandparents' parenting of his mother and father.²⁰² Coates' book is a letter to his son that tries to explain the meaning of race and racism and what it means to live in a Black body in the United States. In the book, Coates illustrates how the fear is passed down:

I felt the fear in the visits to my Nana's home in Philadelphia . . . I barely knew her, but what I remember is her hard manner, her rough voice. And I knew that my father's father was dead and that my uncle Oscar was dead and that my uncle David was dead and that each of these instances was unnatural. And I saw it in my own father, who loves you, who counsels you, who slipped me money to care for you. My father was so very afraid. I felt it in the sting of his black leather belt, which he applied with more anxiety than anger, my father who beat me as if someone might steal me away, because that is exactly what was happening all around us. Everyone had lost a child, somehow, to the streets, to jail, to drugs, to guns.²⁰³

Coates states that his father's fears manifested within him a fear of those who loved him the most:

I remember watching him in a kind of daze, awed at the distance between punishment and offense. Later, I would hear it in Dad's voice—"Either I can beat him, or the police." Maybe that saved me. Maybe it didn't. All I know is, the violence rose from the fear like smoke from a fire, and I cannot say whether that violence, even administered in fear and love, sounded the alarm or choked us at the exit.²⁰⁴

Coates, in turn, shared with his son the observation that "[i]n America it is traditional to destroy the [B]lack body—it is *heritage*."²⁰⁵ On the heels of the acquittal of the Ferguson, Missouri police officers for the death of Michael Brown, Coates' book is written to make sense of the more recent killings of multiple Black individuals at the hands of white police or citizens, including Eric Garner, Renisha McBride, John Crawford, Tamir Rice, Jordan Davis, and Trayvon Martin, a seventeen-year-old unarmed Black youth who was shot to death in his own neighborhood by a white-Hispanic male "policing" the

202. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 14–15 (2015).

203. *Id.* at 15–16.

204. *Id.* at 16–17.

205. *Id.* at 103.

community.²⁰⁶ Martin's death was the match that lit a national civil rights movement, Black Lives Matter, which gained traction with every Black teen and adult killed by the police across the United States.²⁰⁷

Of particular note was the shooting death of Jordan Edwards, a Black fifteen-year-old, straight A student-athlete from Dallas, Texas.²⁰⁸ Edwards was shot and killed in a car when he was leaving a high-school party.²⁰⁹ Unarmed and in the front passenger seat, his life was taken in the presence of his older brother who was driving, another brother, and two friends (who were twin brothers).²¹⁰ The policeman who shot Edwards, Roy Oliver, lied initially about what happened, apparently to try and show that he was in fear for his life when he shot into the vehicle.²¹¹ His version of the incident did not hold water: his partner, Tyler Gross, told jurors that he did not feel like his life was endangered, and bodycam footage showed Jordan's car driving away.²¹² The officer was immediately terminated from the police department, and a jury eventually found him guilty of murder.²¹³ A Dallas county jury sentenced him to fifteen years in prison, and he was the first police officer convicted and sentenced in Dallas County since the 1970's.²¹⁴

206. *Id.* at 9–12; See Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1161–65 (2017) (recounting the events precipitating Trayvon Martin's death).

207. Darran Simon, *Trayvon Martin's Death Sparked a Movement that Lives on Five Years Later*, CNN (Feb. 26, 2017), <https://www.cnn.com/2017/02/26/us/trayvon-martin-death-anniversary/index.html> [<https://perma.cc/2BLJ-AF2C>].

208. Doug Criss, *Who Was Jordan Edwards? Teen Killed by Police Called a Good Student, Athlete*, CNN (May 3, 2017), <https://www.cnn.com/2017/05/02/us/jordan-edwards-shooting-trnd/index.html> [<https://perma.cc/MD3G-3SSE>].

209. Phil Helsel, *Twin Teens in Car When Jordan Edwards Killed by Cop Speak Out*, NBC NEWS (May 9, 2017), <https://www.nbcnews.com/news/us-news/twin-teens-car-when-jordan-edwards-killed-cop-speak-out-n757081> [<https://perma.cc/CMM5-QHXR>].

210. *Id.*

211. Scott Neuman, *Texas Officer Who Fatally Shot Black Teen Is Sentenced to 15 Years in Prison*, NPR (Aug. 30, 2018, 4:38 AM), <https://www.npr.org/2018/08/30/643207427/texas-officer-who-fatally-shot-black-teen-sentenced-to-15-years-in-prison> [<https://perma.cc/TBJ7-ZNMW>].

212. *Roy Oliver: Ex-Police Officer Jailed for Jordan Edwards Shooting*, BBC (Aug. 30, 2018), <https://www.bbc.com/news/world-us-canada-45352610> [<https://perma.cc/2NA3-E3DB>].

213. Neuman, *supra* note 211.

214. Jeff Anastasio, *The Last Dallas Co. Cop Convicted of Murder, Four Decades Before Roy Oliver*, WFAA (Aug. 28, 2018), <https://www.wfaa.com/article/news/crime/the-last-dallas-co-cop-convicted-of-murder-four-decades-before-roy-oliver/287-588494234> [<https://perma.cc/H9FZ-A7BF>].

The passage of time has brought more deaths of Black men and women shot by the police. Eighteen-year-old Michael Brown was shot by Officer Darren Wilson in Ferguson, Missouri “based on the descriptions he heard on the radio” of a suspect for shoplifting in 2014.²¹⁵ He was innocently walking down the street when approached by Officer Wilson.²¹⁶ Michael Brown’s murder sparked the “hands up, don’t shoot” chant in the protests that ensued.²¹⁷ Twenty-two-year-old Stephon Clark was shot multiple times in Sacramento, California after officers responded to a 911 call reporting someone breaking windows.²¹⁸ Officers spotted Stephon Clark in the area hopping the fence to his grandmother’s home.²¹⁹ Twenty-eight-year-old Atatiana Jefferson was shot in her home after hearing a disturbance in her backyard.²²⁰ She grabbed her pistol to investigate the noise and was fatally shot by a police officer responding to a welfare check after noticing her front door was open.²²¹ Twenty-five-year-old Ahmaud Arbery was targeted by a retired police officer, Gregory McMichael, and his son during his Sunday jog.²²² The McMichaels claimed Ahmaud Arbery matched the description of a burglar who had been hitting their neighborhood.²²³ Forty-seven-year-old George Floyd was confronted by police officers investigating his alleged use of a

215. Press Release Memorandum, U.S. Dep’t of Just., Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson, 4, 6 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [<https://perma.cc/3ENS-X23G>].

216. *Id.* at 12.

217. Cheryl Corley, *Whether History or Hype, ‘Hands Up, Don’t Shoot’ Endures*, NPR (Aug. 8, 2015), <https://www.npr.org/2015/08/08/430411141/whether-history-or-hype-hands-up-dont-shoot-endures> [<https://perma.cc/682G-TRDZ>].

218. France Robles & Jose A. Del Real, *Stephon Clark Was Shot 8 Times Primarily in His Back, Family-Ordered Autopsy Finds*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/us/stephon-clark-independent-autopsy.html> [<https://perma.cc/P97F-24KB>].

219. *Id.*

220. Holly Yan, *Atatiana Jefferson’s Nephew Watched Her Get Killed by Fort Worth Police. The Aunt may Have Saved the Boy’s Life*, CNN (Oct. 14, 2019), <https://www.cnn.com/2019/10/14/us/atatiana-jefferson-profile-fort-worth-woman-shot-by-police/index.html> [<https://perma.cc/U379-FX8U>].

221. *Id.*

222. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Jan. 31, 2022), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/45EK-S4QC>].

223. *Id.*

counterfeit bill.²²⁴ Video footage of Officer Derek Chauvin shows the officer's knee on George Floyd's neck, causing him to suffocate to death.²²⁵ The frequency with which these killings occurred was only surpassed by the number of times that the police were acquitted of any criminal wrongdoing by the court system. Arbery's killers and Derek Chauvin have been some of the few white men or police officers convicted and held accountable for killing a Black man.²²⁶

D. Hate: Using the Master's Tools to Dismantle the House

It has long been recognized within the Black community that the mindset behind the abuse meted out against Black children is similar to that of the master during slavery.²²⁷ The perpetuation of this ugly form of mental and physical violence within our Black families is a curious dichotomy, one that can be analogized to an Audre Lord quote:

For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.

. . . .

Racism and homophobia are real conditions of all our lives in this place and time. I urge each one of us here to reach down into that deep place of knowledge inside herself and touch that terror and loathing of any difference that lives here. See whose face it wears. Then the personal as the political can begin to illuminate all our choices.²²⁸

A famous but false publication entitled "The Willie Lynch Letter and the Making of a Slave"²²⁹ by Willie Lynch, gained traction among

224. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/9UF8-7562].

225. *Id.*

226. See Dakin Andone et al., *Ahmaud Arbery's Killers Sentenced to Life in Prison for 25-year-old Black Man's Murder*, CNN (Jan. 8, 2022), <https://www.cnn.com/2022/01/07/us/ahmaud-arbery-sentencing-killers-mcmichael-bryan/index.html> [https://perma.cc/F6L4-BFRR]; Bill Chappell, *Derek Chauvin is Sentenced to 22 1/2 Years for George Floyd's Murder*, NPR (June 25, 2021), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/06/25/1009524284/derek-chauvin-sentencing-george-floyd-murder> [https://perma.cc/RC6F-J4VG].

227. Patton, *Corporal Punishment in Black Communities*, *supra* note 13.

228. AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 112–13 (1984) (emphasis omitted).

229. William Lynch, *The Untold "Story" 1712*, in *THE WILLIE LYNCH LETTER & THE MAKING OF A SLAVE* 5, 7 (1999).

African American scholars and a few leaders by exhorting that white slave owners taught Black male slaves how to oppress Black women and children through domestic violence.²³⁰ In so doing, control of the Black race was assured because of fear. While William Jelani Cobb has debunked the veracity of the Willie Lynch Letter, he explains the true foundations upon which the lie was built.²³¹

Often individual responsibility and culture are used to explain Black parents' harsh discipline of their children. This is an incomplete and myopic assertion, based on an essentialist framework that a child's environment and how a child is raised is within the sole control of the parent. America has not been called to the truth and reconciliation necessary to move past the legacy of slavery in its citizens' educational, political, legal, economic, or social lives. Similarly, the Black community has not reconciled the personal intergenerational effects of slavery and racism on children's experience of violence in the home.

From an intersectionality and anti-essentialist perspective, Black childhood exists in many forms, and the experience of a Black female cisgender child in the northeastern city is completely different than a Black homosexual male child a southern town. The intersections for both Black children and parents are many, and none of them are the same or "regular."²³² In order to break down the master's tool of violence within Black families, perhaps the best way to view the choices available for parenting strategies for African American parents is that there can be multiple sets of categories for teaching children necessary obedience, as well as introducing them to societal realities.

230. William J. Cobb, *Is Willie Lynch's Letter Real?*, FERRIS ST. UNIV. (May 2004), <https://www.ferris.edu/HTMLS/news/jimcrow/question/2004/may.htm> [<https://perma.cc/K2LB-TL3Y>] (explaining that while some tactics to spread discord among slaves were used, the Willie Lynch letter itself is rife with inaccuracies and historically inaccurate language).

231. *See id.*

232. Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 20 (1995) (noting that the white, middle-class experience is considered "regular").

E. Thin Line: A Child's Right to Be Free

“At the end of the day, I don’t want my son to be another Freddie Gray.”²³³

“If it was me, I’m gonna beat you before I let the cops kill you . . . I’m not gonna let them fall victim to the streets.”²³⁴

These quotes reflect the desire of two African American parents who want their sons to survive and thrive in a world designed to keep them in a certain place. An enduring question for Black parents is ‘what can be done to ensure that our children will be truly free?’ Most parents would give their lives to secure their child’s life. The love a parent has for a child is the highest love humans claim to experience. How does a parent love, nurture, and care for a child only to teach them repeatedly that you have to *act* in a way that does not *conform* to the way you *think* about yourself or others? It is a dichotomy that has not been reconciled within the Black community because one generation still operates from a well-founded fear that if they do not beat children into submission, they will be sacrificing them to the greater world, which does not love them. Black parents who physically discipline their children, sometimes to the point of abuse, often believe that they are teaching the child that they cannot behave in the same manner as a white child because a Black child is not free to move or operate in the world as they please. Black parents are teaching their children that many white people, especially those in authority, have and hold a power over them. As criminal law and critical race scholar Paul Butler states poignantly, the chokehold “is the invisible fist of the law.”²³⁵

Critical race scholar and professor Hiroshi Motomura set forth three principles at the center of each civil rights movement in the United States: 1) freedom of movement, 2) citizenship rights, and 3) economic integration.²³⁶ Slavery laws and most every law pertaining to persons of color within the 365 years of legal apartheid in the United

233. CNN, *Baltimore Mom: I don’t Want Him to Be a Freddie Gray*, YOUTUBE (Apr. 28, 2015), https://www.youtube.com/watch?v=mVd3sEWteaM&ab_channel=CNN.

234. PATTON, *SPARE THE KIDS*, *supra* note 65, at 175 (citing a neighbor who was robbed by the children of Schaquana Spears, a Black mother arrested on two counts of cruelty to juveniles).

235. BUTLER, *supra* note 178, at 5.

236. See Hiroshi Motomura, Plenary Remarks on Trends in Immigration Law and Policy, *The Present and Future of Civil Rights Movements: Race and Reform in 21st Century America*, Duke University School of Law (Nov. 20, 2015) (on file with the author).

States were designed to suppress these three principles. These align with the rights that were taken from the enslaved person—personal liberty, personal security, and the right to private property. Violence is the tool that was used in the past to prevent Black people from seeking these three rights and principles. It is still a very present threat for Black parents and children who continue to see violent encounters with citizens and police during the normal course of Black people's lives.

The rule of law has enshrined violence against Black children as well as adults. While Coates' statement that the destruction of the Black body is part of America's heritage, the question remains: should the United States continue to endorse the right of both the states' and parents' right to inflict measurable and damaging harm against children of color? If the United States were to ban corporal punishment in the home, would it also reconcile the sheer force with which the state kills the Black body with legal impunity? Would this ban be merely pro forma in the sense that it would be enacted to satisfy the minimum international requirements, but in practice would continue to uphold parental rights to physically discipline their children?

From a historical perspective, slavery, Jim Crow laws, and the bifurcation of punishment of white and Black Americans for crimes has ultimately had more influence over Black parenting than current family regulation laws. Despite the fact that Black parents may suffer temporary or permanent removal of a child, they may prioritize their child's ultimate survival in a racist world above their family integrity. The reality is that many states will not terminate the parental rights of Black parents or jail them for physical discipline of their children that does not rise to the level of abuse. Some states have an interest in order and obedience, and prefer Black children feel fear. Other states will remove Black children from their parents to prevent further physical harm, and some of these cases are warranted. In order for legal and policy changes to occur in the United States, family, juvenile, and criminal law systems must acknowledge the role of the law in the creation and development of the Black parenting experience.

CONCLUSION

In the context of assessing corporal punishment laws, a critical race theory approach opens a dialogue that leads to more questions than answers. While banning corporal punishment in order to align with international law trends and policy would make logical sense, it does not consider the ideology of slavery laws and their influence on African American families who struggle to survive and pass down survival

techniques to their children in the United States. Moreover, banning corporal punishment in the home does not change state laws or practices that allow for state agents to inflict violent death on Black children and parents. The concepts of intersectionality and anti-essentialism illustrate that the solution to protecting the rights of Black children in the home and in society is multifaceted and cannot be boiled down to just one thing. Critical race theory pushes legal scholars and the legal system to question how Black children's dignity and safety can best be preserved within larger structural systems in need of reform or even eradication.

While several states have actively passed laws so that race, slavery, and structural racism cannot be taught in the public education system, there are efforts being made by children themselves to forge discussions with each other and their parents about how race impacts their communities and immediate environment. Efforts to reform policing and change hearts and minds may be the only way to address the larger societal problem of quashing the freedom and spirit of Black children. While racial realism may be accepted by some, children and their collective voices may force a new type of realism that parents cannot imagine because it has not been part of U.S. history. Abolition of the family regulation system could mean that community accountability for parents who genuinely need help with disciplining their children is not family separation, but provision of intersectional and interdisciplinary guidelines for managing children's behavior. State recognition and acknowledgment of the role of law and policy in the creation of a feared environment for Black children could force a de-escalation of control tactics used in schools and neighborhoods such that parenting strategies and goals for children change from reinforcing strict compliance to engaged fulfillment.