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Cover Page Footnote

Professor of Law, Mercer University Walter F. George School of Law. The author thanks God for his goodness and her husband, Mark Anthony Chubb, for his enduring love of this Magical Black Girl. This essay is dedicated to Magical Black Girls everywhere -- those who are still in girlhood, and those who are now women but carry their girls inside them still.

Magical Black Girls in the Educational Industrial Complex: Making Visible the Wounds of Invisibility

By Teri McMurtry-Chubb¹
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Wound I.

The Damaging Singular Narrative of Addressing Harm to Black Boys: Whose Black Lives Matter?

The Incredible, Super-Human, Impervious to Bullets Boy did not always know he was incredible. Like most of his kind, he was an orphan raised communally by his people. His raising, they said, started as he sailed away from the place where his people told him he was born. His earliest memory was of being on a boat, chained and sandwiched between familiar and unfamiliar bodies and faces that looked like him, their various hues of brown, black, blue-black. The chains hurt his hands and ankles, but the love of his people somehow made that pain less. They told him he was born before the boats left, but his knowledge of his birth was much deeper. He had a knowing about his birth into incredibility. He wasn't born those hundreds of years ago when he was beaten and told to work more quickly; that pain too was swathed by his people's love. He wasn't born when the government passed a law to "free" him and his people; they were already free. Everyone knew it, they just waited for everyone else, everyone not brown, black, blue-black, to catch up with their knowing. No, he was actually born, really born when he learned that bullets had no ability to harm him. This fact was so extraordinary as to seem impossible, the definition of incredible.

The Incredible Super-Human, Impervious to Bullets Boy, although at this point on the cusp of incredible, was curious about the world just outside of his people's community. Each time he tried to leave it, black, brown, blue-black hands and arms would yank him back with embraces tightened by equal parts adoration and anxiety. They never told him that he couldn't leave. They just gave him reasons, spoken and not, to stay. His people were home, and they had built that home inside of him. That home was The Girl. She gave him shape, dimension and structure. She was the breath, the life of their people. With her, he felt confident to stray, to explore this power that powered him. So he left, which is how he came face-to-face with who he was and who he would become. He left in the early morning hours when the day was but a suggestion and full of possibilities. He dressed simply: t-shirt, jeans, hooded sweatshirt, white socks and sneakers, clothes that reflected his comfort and self. As he passed the boundaries of his physical home, he found himself eye-level with a gun. The person holding it was not of his people, not brown, black, or blue-black. He who held this firearm met The Boy's

¹ Professor of Law, Mercer University Walter F. George School of Law. The author thanks God for his goodness and her husband, Mark Anthony Chubb, for his enduring love of this Magical Black Girl. This essay is dedicated to Magical Black Girls everywhere -- those who are still in girlhood, and those who are now women but carry their girls inside them still.

eyes with surprise, which turned to disbelief, and then fear. He fired. The bullet hit The Boy's chest. Nothing happened, except the fear in the gunman's eyes turned to confusion and then hardened to hate. The Boy remained alive.

Witnesses to The Boy's Imperviousness to Bullets led to him being called Incredible. After all, being unharmed by a bullet fired at point blank range was a fact so extraordinary as to seem impossible. His people watched year after year as the Incredible, Impervious to Bullets Boy increasingly gained renown for his ability to fend off bullets, baseball bats, knives, and worst of all words – hateful, degrading words. They watched with sorrow as those not brown, black, blue-black people misunderstood the home his people built inside The Boy as something Super-Human and deviant, something that bestowed upon him imperviousness without consequence. They listened as those not brown, black, blue-black repeated that The Boy's existence in the world was enough to cause them harm and ruin because he could not be destroyed; as an agent of this evil he was a Demon. They watched with longing as The Boy himself, once protected among them, became emboldened by his mythic narrative and believed his incredibleness came without cost. The Boy carried The Girl, his home, inside but wandered further from those who were their architects.

It so happened that the reckoning for the Incredible, Super-Human, Impervious to Bullets Boy came as reckonings always come, when least expected. Now fully comfortable with leaving and returning to the physical boundaries of his community, he set out on another possibility filled morning to explore the murmured suggestions of the nascent day. On this occasion he dressed up: white dress shirt, dress pants and shiny shoes; he dressed as he thought the not brown, black, blue-black people desired to see him. The Boy packaged himself in such a way so that those who were not his people could see their projections of him clearly on his body. As he traversed the physical boundaries of his community he found himself at eye level to a not brown, black, blue-black person in the uniform of a state agent, a police officer. The officer knew of The Boy's legend, that The Boy could not be killed. He looked at The Boy and viewed his projections as they flashed across The Boy's body: malice, frustration, envy, terror, fallibility, and contempt - a boy who could not be killed. "Demon," the officer whispered low and menacing as he fired his gun at The Boy's chest, and The Incredible, Super-Human Boy ceased to be Impervious to Bullets. The evil of the word pierced The Boy's skin. The officer's bullet found The Boy's heart. The bullet revealed The Girl.

The Incredible, Super-Human, Impervious to (only some) Bullets Boy crumpled to the ground, but in his place stood the Invisible, Forgotten, Harmless Yet Harmed Unheard Girl. She was The Boy's deep knowing, that freedom before free, the love power that powered him, his home, his community helping him to walk on two legs. She was angry, livid. Each time The Boy decided to leave their people, she had no choice; she had to go too. The Girl was his fuel, but she had no lungs but his to breathe and make words. The Boy could listen, she knew he could hear her. He just didn't have to give her words shape with his voice. Each time someone not brown, black, blue-black shot The Boy with bullets, hit him with a baseball bat, stabbed him with a knife or whipped him with words The Boy's myth grew stronger. She remained invisible,

harmless. But with each derogation her exposure gained inch and degree.

The Girl absorbed those bullets, those blows from the bats, the stabs from the knives, and the lashes from the words. Yet, she was the power that powered The Boy. She was compelled to go where his legend led. At these times when she was harmed and The Boy was not, he was dressed simply: t-shirt, jeans, hooded sweatshirt, white socks and sneakers; dressed in clothes that reflected his comfort and self. She was clothed in his skin. When he dressed to project: dress shirt, dress pants and shiny shoes, The Girl was shamed and made transparent by his body as a canvas for images of him that did not come from their people. This one act, playing dress up so that those not brown, black, blue-black could see their thoughts of him on his body, made her visible by inch and degree. Their hatred, "demon" uttered on jagged, raspy breath, unveiled her. Dressing to project was a type of violence that allowed familiar violence, a bullet, to make their people's love vulnerable and risk demolition of the home they built for
The Boy and The Girl.

As Invisible, Forgotten, Harmless Yet Harmed Unheard Girls are known to do, she screamed at the police officer, gathered the body of The Boy in her arms, and went back to her and The Boy's community. She was, after all, the breath and life of their people, The Boy's shape, his dimension and structure. The Girl told their people that the girls of the community should not be used to support the bodies of Incredible, Super-Human, Impervious to Bullets Boys, because to do so costs the girls visibility and voice. It too costs brown, black, blue-black communities their memory, replaces it with violence brought on by projection, and divests these communities of all power. This is a fact so extraordinary as to seem impossible, the definition of incredible.

Wound II.

Racialized Gender Harassment and the Defense of White Supremacy: *Fennell v. Marion Independent School District*

Black girls in public school are constantly exposed to physical violence, racialized gender hostility and harassment, and hate speech. Yet, the national narrative perpetuates the belief that Black boys are the main targets of such behaviors. This narrative renders Black girls invisible, and normalizes their treatment as another beam in the framework of White supremacy.

In the groundbreaking study *Black Girls Matter: Pushed Out, Overpoliced, and Underprotected* (hereinafter *Black Girls Matter Report*), the Center for Intersectionality and Social Policy Studies and the African American Policy Forum found that Black girls were disproportionately disciplined in comparison to White girls under zero-tolerance disciplinary policies in schools.² There is no shortage of

² Kimberlé Williams Crenshaw, *Black Girls Matter: Pushed Out, Overpoliced and Underprotected* (African American Policy Forum & Center for Intersectionality and Social Policy Studies 2015) (hereinafter *Black Girls Matter Report*).

data linking zero tolerance disciplinary policies to criminal supervision and incarceration for Black boys, known as the “school to prison pipeline.” However, the number of studies available on this phenomenon as it relates to Black girls is infinitesimal in comparison. Black girls remain hidden by Black boys, but vulnerable to the same and additional harms, as critical study and resources are directed to ameliorating Black boys’ capture into the educational industrial complex to the detriment of their sisters.

Accordingly, Black girls remain invisible as they suffer and endure the physical, emotional, and psychological wounds of discipline for simply acting as girls, as themselves. They are subjected to discipline because their gendered behavior is racialized and subsequently criminalized. There is no comfort in conformity, or in “dressing to project.” They cannot hide because their race and gender prevent their societal assimilation into racialized gender norms. As the *Black Girls Matter Report* points out, “[r]esearchers have sought to measure the possibility that Black girls may be subject to harsher disciplinary interventions because they are perceived to be unruly, loud and unmanageable . . . teachers sometimes [exercise] disciplinary measures against Black girls to encourage them to adopt more ‘acceptable’ qualities of femininity, such as being quieter and more passive.”³ When Black girls attempt to protect and/or defend themselves against harassing behavior, they are often disciplined for fighting or other behavior prohibited by zero-tolerance disciplinary polices.⁴

In contrast, their attackers, especially when they are White girls, avoid discipline.⁵ In a study released by the Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood (hereinafter Girlhood Interrupted)*, researchers found that Black girls between the ages of 5-14 were perceived to: “[1] need less nurturing; (2) need less protection; (3) need to be supported less; (4) need to be comforted less; (5) be more independent; (6) know more about adult topics; and (7) know more about sex]” than White girls.⁶ The authors of *Girlhood Interrupted* concluded that Black girls are not presumed innocent, which contributes to them be channeled into the school to prison pipeline.⁷ Adding complexity to this subject is the trope of the “Angry Black Woman,” or in this case, the “aggressive Black girl.” As law professors Trina Jones and Kimberly Jade Norwood argue in their article *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, when Black women defend themselves against racialized gender attacks by White people (termed

³ *Id.* at 24

⁴ *Id.* at 10-11.

⁵ *Id.* at 21.

⁶ Rebecca Epstein, Jamilia J. Blake, and Thalia Gonzalez, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood* 1,8 (Georgetown Law Center on Poverty and Inequality 2018) (hereinafter *Girlhood Interrupted*).

⁷ *Id.* at 8-13.

“aggressive encounters”) they are often blamed and punished for their responses.⁸ The trope of the Angry Black Woman works to take the blame from the perpetrator of the racial harm (the aggressor) and shift it to the Black woman (denigrated as “Angry” and “Aggressive”).⁹ As the *Black Girls Matter Report* and *Girlhood Interrupted* support, the same is true for Black girls. The *Fennell v. Marion Independent School District* case is illustrative.¹⁰ The case involves three sisters, Kyana Fennell, Kyrianna (hereinafter Kyra) Adams Fennell, and Kavin Johnson, their mother Lawanda Fennell-Kinney and an their collective struggle to force the school district and the Court to acknowledge racialized gender harassment against Black girls as they pursue an education.¹¹

Kyana (18 years old), Kyra (15), and Kavin (13) attended school in the Marion Independent School District (hereinafter Marian ISD) in Marion, Texas from their first grade year until the end of the 2011-2012 academic year.¹² Marion is a small Texas town with less than five percent Black residents.¹³ Beginning in 2008, the girls began to experience harassment by their peers in person, electronically, and on social media.¹⁴ According to the complaint the girls filed against Marion ISD, Kyra received a text message from a White classmate, which contained an animated picture of a member of the Klu Klux Klan (KKK) swinging a noose to the beat of contemporary song.¹⁵ The subsequent confrontation ended in a fight, for which Kyra was suspended for three days.¹⁶ The school took no disciplinary action against the White classmate. Kyra experienced continued racial harassment from her White classmates at the school for the next four years.¹⁷

Kavin, a student at Marion Middle School, reported to school officials that her White classmates called her “‘blackie,’ ‘black girl,’ and ‘nigger.’”¹⁸ Her attempts to try out for the School cheerleading squad resulted in similar racial harassment when her White classmates told her “black girls are not pretty enough to be cheerleaders” and that ‘she looked like a boy.’¹⁹ Kyra persisted and made the team only to be

⁸ Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 Iowa L. Rev. 2017, 2044-2046 (2017).

⁹ *Id.*

¹⁰ *Fennell v. Marion Independent School District*, Order Granting Defs’ Mot. Summ. J., August 28, 2014, ECF No. 48.

¹¹ *Id.*

¹² *Fennell v. Marion Independent School District*, Second Am. Compl. ¶ 11, March 14, 2013, ECF No. 15.

¹³ *Id.* ¶ 12.

¹⁴ *Id.* ¶ 13

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* ¶ 15.

¹⁹ *Id.*

“excluded from cheerleader activities sponsored by many of her white classmates, and ostracized by her teammates.”²⁰ In 2011, during the same school year when the cheerleading tryouts took place, Kavin suffered further harassment when one White student and two Hispanic students, all girls, encircled her and teased her at her locker.²¹ In all of these incidents no White students were punished.²² On the contrary, Kavin was suspended for two days for attempting to defend herself in the locker incident; only one of her harassers, a Hispanic girl, was suspended for that attack.²³

Kyana, the oldest sister, suffered sustained harassment over the course of her entire education at Marion ISD.²⁴ While in elementary school, Kyana was called “nigger” by a white boy on her school bus.²⁵ Her middle school and high school years were marred by more racial name-calling.²⁶ High school brought additional disparagements about Kyana’s appearance, when the Assistant Principal and school Athletic Director, both White, allegedly “targeted [Kyana] for ‘ethnic’ hairstyles, when she was required to wear her hair in ‘microbraids’ because of damage to her hair.”²⁷ Further, a teacher and member of the coaching staff, a White woman, allegedly called Kyana a “‘bad influence’ because Kyana had a child at age 17.”²⁸ These remarks were made in the presence of White students.²⁹ Each time Kyana attempted to defend herself or lashed out in anger, she was disciplined.³⁰ Each time her attackers escaped punishment and accountability from Marion ISD.³¹

The girls’ mother, Lawanda Fennell-Kinney, took to social media in attempt to restore Kyana’s good name. In a Facebook post, Mrs. Fennell-Kinney called the teacher’s action of judging Kyra for her pregnancy unprofessional and inappropriate.³² This event was the catalyst for the escalating harassment of Mrs. Fennell-Kinney and her daughters. The teacher’s fiancé confronted Mrs. Fennell-Kinney at a community event and was escorted from the building by “acting” security.³³ A few days following that event, Mr. and Mrs. Fennell-Kinney met with school officials about Kyana’s safety at the school.³⁴ The day after her parents’

²⁰ *Id.*

²¹ *Id.* ¶ 14.

²² *Id.*

²³ *Id.*

²⁴ *Id.* ¶ 16.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* ¶ 17

²⁹ *Id.*

³⁰ *Id.* ¶ 16-17.

³¹ *Id.*

³² *Id.* ¶ 18.

³³ *Id.*

³⁴ *Id.*

meeting, Kyana suffered harassment at the hands of the teacher's fiancé's sister and other White classmates.³⁵ At this point, Mrs. Fennell-Kinney began taking the steps to file a complaint against her daughters' harassers through the Marion ISD grievance process.³⁶ Among other items, Mrs. Fennell-Kinney alleged violations of Marion ISD's zero tolerance policy concerning harassment.³⁷

Approximately two weeks later, Mrs. Fennell-Kinney discovered a noose by Kyana's car and a note that read:

Die fuckin 'nigger sisters' . . . Bitches!!
You can never bring our families down . . .
Whites will always rule this town and this school!!!
Damn spooks!!!
So go ahead and file your stupid damn complaints and grievances . . .
NIGGERS . . . that the 'Nigger lover' you have a baby with . . .³⁸

The harassment continued, with racial threats to the Fennell-Kinney family and calls for them to leave Marion even after Mrs. Fennell-Kinney filed the grievance.³⁹ Finding no appropriate remedy for her daughters through the Marion ISD grievance process, Mrs. Fennell-Kinney removed Kyra and Kavin from the school and enrolled them in another school district.⁴⁰ At the time she and her daughters filed their complaint against Marion ISD, Kyana had graduated from high school and was attending college.⁴¹

Kyana, Lawanda, Kyra, and Kavin (hereinafter "Plaintiffs") sued Marion ISD and multiple named defendants in 2012 & 2013. In their 2013 Complaint, the Plaintiffs alleged that the defendants violated: (1) Title VI of the Civil Rights Act of 1964 (as amended), which prohibits schools from excluding students from educational programs funded with federal dollars, and requires a school to affirmatively act to end racially hostile educational environments; and (2) 42 U.S.C. section 1983 (formerly The Civil Rights Act of 1871), which prohibits school officials from acting to deprive students of Constitutional rights under color of law.⁴² The Court dismissed both complaints on grounds that even if all of the facts Plaintiffs alleged were true, they failed to meet the legal standard required for recovery on their claims.⁴³ For the purposes of this essay, only the Title VI complaint requires closer examination.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* ¶ 26.

³⁸ *Id.* ¶ 19.

³⁹ *Id.* ¶¶ 20-22.

⁴⁰ *Id.* ¶ 26.

⁴¹ *Id.*

⁴² *Id.* ¶¶ 29-37.

⁴³ Order Granting Defs' Mot. Summ. J., August 28, 2014, ECF No. 48; J., August 28, 2014, ECF No. 49.

Title VI of the Civil Rights Act of 1964 (as amended) states that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁴⁴

Pursuant to the Act, the terms “program or activity” include “a local educational agency, system of vocational education, or other school system such as a school district.”⁴⁵ For a court to find a racially hostile educational environment to exist, a plaintiff must prove that the discrimination and harassment she suffered was intentional or the result of “deliberate indifference.”⁴⁶ To show deliberate indifference, a plaintiff must demonstrate that the school had notice of the harassment and failed to act to end it.⁴⁷ A racially hostile educational environment exists when the harassment is “so ‘severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by the recipient,’” the harassment “interferes with the educational program of a reasonable person of the same age and race as the victim,” and that the environment so disrupted a plaintiff’s education that she was “effectively denied equal access to an institution’s resources and opportunities.”⁴⁸ Moreover, a plaintiff must convince the court that the harassment had a “concrete, negative, effect’ on the victim’s education, which may include dropping grades, becoming homebound or hospitalized due to harassment, physical violence, or physical exclusion from a school resource.”⁴⁹ The Court ended this particular articulation of the law with the admonition that, “[i]n the school context, the Court must also remain cognizant of the fact that some degree of teasing or name calling is unavoidable.”⁵⁰

The Court found the racial epithets hurled at the girls to exceed teasing and determined that a racially hostile educational environment existed at the school, which deprived the girls of educational opportunities.⁵¹ However, it declined to find that Marion ISD acted with deliberate indifference. The Court opined that Marion ISD’s acts of working with the Justice Department to provide “cultural sensitivity” training to supplement training already in place; assigning a staff member to walk with Kavin around campus; allowing Kyana to work the School counselor’s office when she expressed anxiety; and promptly investigating the noose and note found

⁴⁴ *Id.* 32-33.

⁴⁵ Second Am. Compl. ¶ 30.

⁴⁶ Order Granting Defs’ Mot. Summ. J. 33.

⁴⁷ *Id.*

⁴⁸ *Id.* 33-35.

⁴⁹ *Id.* 35.

⁵⁰ *Id.*

⁵¹ *Id.* 39.

by Kyana’s car showed the School acted to end the racially hostile educational environment.⁵² Citing the fact that the harassment the Plaintiffs suffered was attributable to various individuals over a ten-year time span, the Court called the incidents “unfortunate,” and characterized them as “reflecting the bigoted views of a few individual students rather than the culture of Marion as a whole.”⁵³ In dismissing Plaintiffs’ allegation that Marion ISD violated Title VI of the Civil Rights Act of 1964, the Court went on to say that: “[a]s a public school, Marion cannot control who it is bound to educate, and when racist attitudes are already ingrained in a segment of the students it serves, Marion has an obligation to take reasonable steps to eliminate the racially hostile environment; and Marion has done so. It is unrealistic, and the Court declines, to hold Marion liable for the bigoted remarks of individual students when Marion made substantial efforts to prevent that type of conduct.”⁵⁴

Kyana, Lawanda, Kyra, and Kavin’s claims were dismissed before a jury could hear them. These girls and their mother were denied visibility by that dismissal. They are the definition of Black girls, *Invisible, Forgotten, Harmless Yet Harmed Unheard Girls*, who endure racial trauma only to see their educational institutions remain unaccountable for addressing systemic racialized gender violence and toxic educational environments.

Wound III.

Magical Black Girls in Invisibility Cloaks: Our Future in the Educational Industrial Complex

Kyana, Lawanda, Kyra, and Kavin’s story is not unique. Neither are the school policies and procedures that failed them, nor the Court’s dismissal of their Complaint. Addressing the plight of Black girls in the educational industrial complex must go deeper than cultural sensitivity training. It must go further than allowing schools to escape accountability for entrenched racial attitudes that it fails to rectify in its educational culture. As the *Black Girls Matter Report* underscores, Black girls “must have the opportunity to actively engage their teachers, school administrators, community leaders, families and other stakeholders about their experiences in school and in other institutions that shape their lives.”⁵⁵ Such engagement necessitates that at the least, teachers, school administrators, coaches, and peers interact with Black girls and their families on an interpersonal level and treat them as people. It is telling that the remedies Mrs. Fennell-Kinney requested through the Marion ISD grievance process that were personal and would reinforce the humanity of her girls were the remedies that were denied. For example, Mrs. Fennell-Kinney asked for: “formal apologies from the Marion faculty involved in each of the [alleged] incidents which have not been rectified to [Kyana, Kyra, and Kavin] for

⁵² *Id.* 41-42.

⁵³ *Id.* 43.

⁵⁴ *Id.* 43-44.

⁵⁵ *Black Girls Matter Report* at 43.

[the faculty's] inappropriate, unethical, and humiliating comments" ... and "a verbal group apology by all Coaching staff to all students in the athletics department for issues perceived as unprofessional behavior and the language of the athletics staff."⁵⁶ Cultural sensitivity training Marion ISD could do, but apologies in an effort to begin the Plaintiffs' emotional and psychological healing it could not. As Monique Morris notes in her ovular study of Black girls and school discipline, Pushout: The Criminalization of Black Girls in Schools, schools can avoid funneling Black girls into the school to prison pipeline by investing in them personally; by seeing the magic in them and using it to propel them into excellence and success – into visibility.⁵⁷ To this end, Morris urges us to focus on the relationships that form the foundation of education.⁵⁸ Most importantly, she asks us to "[i]magine a future for Black girls that is filled with dignity and where their learning spaces are places they are invited to critically engage, alongside educators, in the construction of their education and the redemption of their lives."⁵⁹ This is a vision *so extraordinary as to seem impossible, the definition of incredible*.

⁵⁶ Order Granting Defs' Mot. Summ. J. 24-25.

⁵⁷ Monique W. Morris, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 175 (The New Press 2016).

⁵⁸ *Id.* at 176; 185-186.

⁵⁹ *Id.* at 176.