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RE-ENVISIONING CHILD WELL-BEING: DISMANTLING THE INEQUITABLE INTERSECTIONS AMONG CHILD WELFARE, JUVENILE JUSTICE, AND EDUCATION

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Twenty years after *Shattered Bonds*,¹ Dorothy Roberts' indictment that the family regulation system polices, disrupts, and restructures Black families and communities remains urgent.² Black families remain over-represented in foster care with enshrined disparate treatment and outcomes.³ Black children are more likely to be removed from their homes, and their longer stays in foster care are characterized by placement instability, overly restrictive placements, the risk of abuse and exploitation, and inadequate mental health and other services.⁴ Black children also have worse educational outcomes than even other children in foster care, are over-referred to the juvenile justice system, and are more likely to age out of foster care to face disturbing future outcomes.⁵ Given this dismal record, if our goal is to maximize the well-being of Black children, the last thing we should do is place them in foster care. Rather than improving life chances, foster care involvement fuels the cycle of poverty, undereducation, criminal justice involvement, housing instability, and poor health outcomes plaguing low-income Black communities.

The family regulation system interacts with two other systems marked by stark racial inequity—education and juvenile justice.⁶ These systems, individually and in concert, adopt approaches that result in and

¹ See generally DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (describing the adverse effects of the family regulation system on Black children and families).

² As suggested by Dorothy Roberts, this Piece uses the term “family regulation system” when referring to the judicial and administrative network of agencies historically referred to as the “child protection” or “child welfare” system. Roberts conceptualized the term to more accurately reflect the surveillance, policing, and social control—rather than protection or welfare—that the system imposes on families. See, e.g., Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM) [hereinafter Roberts, *Abolishing Policing*], <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/K3G4-NQWG>].

³ See, e.g., ORONDE MILLER ET AL., *CHANGING COURSE: IMPROVING OUTCOMES FOR AFRICAN AMERICAN MALES INVOLVED WITH CHILD WELFARE SYSTEMS 1–3* (Ctr. for the Study of Soc. Pol'y ed., 2014) (urging action on behalf of African American young men and boys who are disproportionately affected by contact with the family regulation system); John Fluke et al., *Research Synthesis on Child Welfare Disproportionality and Disparities, in DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH 1, 5* (Ctr. for the Study of Soc. Pol'y ed., 2011) (reviewing literature that addresses racial disparities in the family regulation system). Native American children are also overrepresented in foster care, while Latinx children are underrepresented nationally but overrepresented in certain states. See CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., *FOSTER CARE STATISTICS 2019*, at 9–11 (2021).

⁴ Fluke et al., *supra* note 3, at 23–42.

⁵ After aging out of care, they suffer poor outcomes as adults, including low college attainment and job earnings, and high rates of homelessness and incarceration. Joseph P. Ryan, Mark F. Testa, & Fuhua Zhai, *African American Males in Foster Care and the Risk of Delinquency: The Value of Social Bonds and Permanence*, 87 *CHILD WELFARE* 115, 131–32 (2008) (studying the effects of foster parent–foster child attachment, commitment, and permanence on the risk of future delinquency for African American children).

⁶ Gloria Ladson-Billings & William F. Tate IV, *Toward a Critical Race Theory of Education*, 97 *TCHRS. COLL. REC.* 47 (1995) (explaining educational inequities through a critical race theory lens); Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 *J. CRIM. L. & CRIMINOLOGY* 392 (1996) (describing racial disparities within the juvenile justice system).

compound structural denials of opportunity.⁷ Each system uses seemingly neutral policies and practices that obfuscate the role of race and class and operate in particularly pernicious ways in the same poor communities of color. The mechanisms by which they disadvantage Black children share a common pattern. Black children are pathologized and labeled as defective and deviant, subjected to harsh and traumatizing treatment, and separated from their families and communities—which taken together destroys relationships, opportunities for healthy development, and educational access. The intersecting operation of these systems contributes to racial subordination by exacerbating trauma and leaving children without the educational and social-emotional skills to break out of the cycle of poverty, and further depletes neighborhoods with concentrated poverty of the human capital to be resilient. It is important to illuminate the mechanisms by which these systems intersect to entrench structural inequality, so that they can be dismantled.

This Symposium spotlights the burgeoning call for abolition of the family regulation system premised on the idea that the primary function of the system is punitive control of families of color and that meaningful reform is impossible.⁸ The carceral and family regulation systems are deeply interconnected,⁹ and Roberts and others advocate for abolition of all these systems in favor of “radically different ways of meeting families’ needs.”¹⁰ The goals articulated by prison abolitionists coalesce with child welfare abolitionist calls that envision healthy communities where families have the resources to thrive. As we work towards that vision, it is important to get a more holistic understanding of Black children in the family regulation system, within the context of their communities and the multiple, inter-connected systems that work together to limit opportunities. This Piece unpacks how the family regulation system magnifies harm to Black children through its interactions with the juvenile justice and education systems. By exploring the structural mechanisms through which these systems work together to compound disparity and perpetuate inequity, this Piece provides further evidence of the family regulation system’s failings and contributes to thinking about how we help children and families in the communities where they live, rather than through punitive practices.

⁷ David Dante Troutt, *Trapped in Tragedies: Childhood Trauma, Spatial Inequality, and Law*, 101 MARQ. L. REV. 601, 605–08 (2018) (analyzing the link between childhood trauma and structural inequality).

⁸ Erin M. Cloud, *Toward the Abolition of the Foster System*, SCHOLAR & FEMINIST ONLINE (2019), <https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/> [<https://perma.cc/HG4E-E7UQ>] (calling for abolition of the family regulation system because it targets and marginalizes Black individuals and families just as the criminal legal system does); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1474 (2012) [hereinafter Roberts, *The Systemic Punishment of Black Mothers*] (arguing that the prison and foster care systems work together to punish Black mothers).

⁹ Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577 (1997) (discussing how coercive state intervention, justified through a rhetoric of protection, acts along gender, race, and class bias to punish women and harm children); Roberts, *The Systemic Punishment of Black Mothers*, *supra* note 8, at 1476.

¹⁰ Roberts, *Abolishing Policing*, *supra* note 2.

This analysis is consistent with an ecological perspective that situates the child in their full environment, including their family, school, and neighborhood.¹¹ The ecological perspective considers the reciprocal relationship between the child and their environment as well as the interlocking systems that produce the negative outcomes that Black children experience. The other theoretical frame emerges from scholarship on the ways state structures and cultural forces create racial hierarchies that endure for generations.¹² To contribute to the child welfare abolition discussion, this Piece extends analysis beyond the family regulation system to understand how systems created by the state relegate poor children of color to the lowest rung in society, rather than helping children and families. This Piece will then offer solutions grounded in a vision of dismantled child welfare and juvenile justice systems, well-resourced educational systems, and strengthened communities with the capacity to foster the healthy development of children.

Part I will discuss the racialized outcomes in each system and the relevant features of the architecture by which U.S. society is organized around hierarchies. Part II will describe each system's role in perpetuating disparity, focusing on the common themes of isolation, trauma, and the use of stereotypes and bias to dehumanize children. Part III will explore the harmful intersections among the child welfare, education, and juvenile justice systems underscoring the ways that interaction between these systems compounds harm. Part IV offers some community-centered strategies that account for intersecting systems and advance the move towards abolition.

I. RACIALIZED OUTCOMES, POVERTY AND AMERICA'S HIERARCHY

A. Racialized Youth Outcomes

There is a system of state control of entire communities that has for decades operated to extinguish life chances for Black youth. The family regulation and juvenile justice systems coercively remove children from their families and communities and exacerbate trauma through myriad harmful practices. At the same time, the education system serves as a funnel to both systems and a co-facilitator in the under-education of Black children. The harmful force of these systems is concentrated in impoverished Black neighborhoods. These three institutions function very differently depending on where a person lives and, in low-income Black communities, help to reproduce inequality. As David Troutt summarized, "personal opportunities are often mediated by place, . . . because of the

¹¹ This ecological approach considers the social environment in which a health problem exists, not only to identify contributing factors and harmful elements, but also to preserve or strengthen the positive elements of a child's environment. Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 424–27 (2005); Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 924 (2014).

¹² See generally ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020) (describing the hidden caste system that structures American society along several axes of hierarchy); NANCY E. DOWD, *REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR* (2018) (recognizing the structural inequality that creates hierarchies among children and arguing for a developmental equality model to unravel these hierarchies).

differences in rules and resources by which key institutions operate.”¹³ A host of unequal outcomes results from inequitable application of law and institutional policies, practices, and norms.

Each system independently produces racialized outcomes. Black children are overrepresented in both the child welfare and juvenile justice systems, and disproportionately bear the brunt of the negative outcomes endemic to both systems.¹⁴ Children who age out of foster care, more than a third of whom are Black nationally, suffer negative outcomes as adults, including low college attainment, job earnings, housing instability, and incarceration.¹⁵ The story is similar with juvenile justice, where Black children are overrepresented at every decision point. Black children are more likely to be arrested and charged, to receive more severe sentences, to be placed in secure detention facilities, and to stand trial as adults.¹⁶ Youth involved with the juvenile justice system have lower high school graduation rates and higher unemployment rates than the general population.¹⁷ Race is also a salient factor in educational outcomes. Black children perform worse than their white peers on a number of achievement measures, including standardized tests, high school graduation rates, and dropout rates.¹⁸

These harms collide for Black children in foster care. Black children in foster care are at higher risk for juvenile justice involvement.¹⁹ Black children in both the foster care and juvenile justice systems perform below their peers on a range of achievement measures.²⁰ Being in the family regulation and juvenile justice systems also increases the risk for continued criminal justice involvement in adulthood. Within two years of leaving care, a quarter of foster care alumni have contact with the criminal justice

¹³ Troutt, *supra* note 7, at 605.

¹⁴ Wanda J. Blanchett, *Disproportionate Representation of African American Students in Special Education: Acknowledging the Role of White Privilege and Racism*, 35 EDUC. RSCHER. 24 (2006) (analyzing the potential causes of and remedies to address the disproportionate representation of African American students in special education); MILLER ET AL., *supra* note 3.

¹⁵ CHILD. BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., COMPARING OUTCOMES REPORTED BY YOUNG PEOPLE AT AGES 17 AND 19 IN NYTD COHORT 1, at 3–5 (Nat’l Youth in Transition Database, Data Brief no. 4, 2014).

¹⁶ ANNIE E. CASEY FOUND., REDUCING YOUTH INCARCERATION IN THE UNITED STATES 2 (2013); OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUST., 2019 ANNUAL REPORT 30 (2019).

¹⁷ Richard Mendel, Annie E. Casey Found., *No Place for Kids: The Case for Reducing Juvenile Incarceration*, INST. OF EDUC. SCIENCES 12 (2011), <https://files.eric.ed.gov/fulltext/ED527944.pdf> [<https://perma.cc/V99N-BEMC>]; DIANA TATE VERMEIRE, NATALIA MERLUZZI & LAURA JOHN RIDOLFI, BALANCING THE SCALES OF JUSTICE: AN EXPLORATION INTO HOW LACK OF EDUCATION, EMPLOYMENT, AND HOUSING OPPORTUNITIES CONTRIBUTE TO DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 1 (2010).

¹⁸ For the 2018–2019 school year, the national adjusted cohort graduation rate was eighty percent for Black children and eighty-two percent for Latinx children, compared to eighty-nine percent for white children. NAT’L CTR. FOR EDUC. STATS., U.S. DEP’T OF EDUC., PUBLIC HIGH SCHOOL GRADUATION RATES 2 (2021), <https://nces.ed.gov/programs/coe/indicator/coi> [<https://perma.cc/4HXE-2X4A>] [hereinafter NCES, PUBLIC HIGH SCHOOL GRADUATION RATES].

¹⁹ J.J. Cutuli et al., *From Foster Care to Juvenile Justice: Exploring Characteristics of Youth in Three Cities*, 67 CHILD & YOUTH SERVS. REV. 84, 85, 90–91 (2016).

²⁰ Ryan, Testa, & Zhai, *supra* note 5, at 116–17.

system.²¹ A recent national survey of the prison population found that eighty percent of incarcerated adults reported being in foster care.²² The three systems interact to create worse outcomes for Black children.

B. The Role of Poverty

Poverty is a significant factor in the inequitable outcomes experienced by Black children.²³ Much of the research on child welfare disproportionality seeks to understand the reasons for disproportionality. This is an oversimplification, but there are essentially two schools of thought—one that views disproportionality as a function of poverty,²⁴ and another that centers racism as the cause.²⁵ The poverty theory suggests that more Black children are in the system because more Black children are poor and maltreated.²⁶ While it is important to understand the complexities of causality, the framing of the debate has undermined efforts to address disproportionality in child welfare. Stakeholders in the family regulation system can lament disproportionality but console themselves that they are saving Black children from the conditions in their neighborhood and, moreover, that the family regulation system has no power to address structural problems in Black communities.

The debate around poverty misses the point that the prevalence of concentrated poverty in Black communities is itself the result of structural racism.²⁷ That narrative also negates the role of vague neglect statutes that equate poverty with neglect. Sixty percent of child welfare cases are for neglect.²⁸ Scholars theorize that the family regulation system looks the way

²¹ *What Is the Foster Care-to-Prison Pipeline?*, JUV. L. CTR. (May 26, 2018), <https://jlc.org/news/what-foster-care-prison-pipeline> [<https://perma.cc/56VW-PANW>].

²² *Unacceptable Facts and Stories*, FOSTER CARE 2.0, <http://www.fostercare2.org/ask-the-pros-2> [<https://perma.cc/XUE3-HY5R>] (last visited Feb. 28, 2021).

²³ “A number of theories seek to explain crime and delinquency as a function of poverty, all of which have the common theme that the pressures associated with economic deprivation may significantly impair an individual’s ability to conform to social rules and behavioral expectations,” Miriam Stohs, *Racism in the Juvenile Justice System: A Critical Perspective*, 2 WHITTIER J. CHILD & FAM. ADVOC. 97, 112 (2003) (further pointing to interrelated problems of “chronic unemployment, inadequate living conditions, poor schools, a climate of violence, inadequate family structure, and racism”).

²⁴ See Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253, 255–56 (2020) (exploring racial disparities in the family regulation system as a function of poverty).

²⁵ See Hyunil Kim & Brett Drake, *Child Maltreatment Risk as a Function of Poverty and Race/Ethnicity in the USA*, 47 INT’L. J. EPIDEMIOLOGY 780, 782–83 (2018) (finding that racial disproportionality in child maltreatment is driven by racial disparities in poverty).

²⁶ Compare *id.* at 782–83, and Dettlaff & Boyd, *supra* note 24, at 255–26, with *Ten Common Child Welfare Misconceptions: Essential Reading for Child Welfare Commentators and Policymakers*, CHILD WELFARE MONITOR (Nov. 1, 2021), <https://childwelfaremonitor.org/2021/11/01/ten-common-child-welfare-misconceptions-essential-reading-for-child-welfare-commentators-and-policymakers/> [<https://perma.cc/R537-AJUS>] (debunking common misconceptions about child abuse, child neglect, and child welfare programs which produce policies that harm children).

²⁷ DOWD, *supra* note 12, at 18.

²⁸ CHILD. BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2018, at ii (2018), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2018.pdf> [<https://perma.cc/5JEC-AWJ6>].

it does due to the moral construction or deficit model of poverty.²⁹ These frames, which drive policy, explain poverty based on individual failure, rather than structural causes. As Khiara Bridges noted, these individual explanations of poverty—that people are lazy, irresponsible, promiscuous, feel entitled to government benefits—are primarily ascribed to people of color, whereas structural explanations are accepted to explain white poverty in places like the rust belt or coal country.³⁰ Situating child welfare disproportionality within a place-based and intersecting regulatory context that accounts for multiple state actors doing harm in the same poor Black communities is critical to addressing the root, structural causes that ensnare families in the family regulation system.

C. Hierarchies

Nancy Dowd theorizes that “hierarchies among children dramatically impact their development.”³¹ She explains:

Beginning before birth, and continuing during their progression from birth to age 18, structural and cultural barriers separate and subordinate some children, while they privilege others. The hierarchies replicate patterns of inequality along familiar lines, particularly those of race, gender, and class, and the intersection of those identities. These barriers and co-occurring support of privilege for other children emanate from policies, practices and structures of the state, including health, policing, and juvenile justice.³²

Dowd proposes developmental equality as a model to identify the structural components of inequality created and sustained by the state and to compel the state to dismantle, reorganize, and reorient those systems.³³ In *Caste*, Isabel Wilkerson illuminates more generally how the United States operates with a hidden caste system, a rigid hierarchy of human rankings for which race is a signal.³⁴ Caste is the infrastructure for

²⁹ See KHIARA M. BRIDGES, *The Moral Construction of Poverty*, in THE POVERTY OF PRIVACY RIGHTS 37 (2017) (describing the rhetorical link between poverty and morality); KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION 10 (2011) (analyzing pregnancy as a “racially salient event” that reproduces poverty).

³⁰ Khiara M. Bridges, Peggy Cooper Davis & Dorothy Roberts, *Elie Hirschfeld Symposium on Racial Justice in the Child Welfare System Transcript*, 44 N.Y.U. REV. L. & SOC. CHANGE 129, 133–34 (2019). Scholars have suggested that the “deficit model of poverty”—individual deficiency on the part of undeserving poor people—also explains the punitive nature of public assistance policies that have shrunk the social safety net and imposed strict time limits and work mandates. See, e.g., Lynn D. Lu, *Restorative Relationships and “Radical Help”: Reimagining Welfare-to-Work Beyond the Market-Family Divide*, 50 U. BALT. L. REV. 157, 162 (2020); Marie Failing, *A Truly Good Work: Turning to Restorative Justice for Answers to the Welfare-to-Work Dilemma*, 15 GEO. J. ON POVERTY L. & POLY 209, 213–15, 229 (2008).

³¹ Nancy E. Dowd, *Children’s Equality: The Centrality of Race, Gender, and Class*, 47 FORDHAM URB. L. J. 231, 231 (2020).

³² *Id.*

³³ DOWD, *supra* note 12, at 3.

³⁴ A caste system is defined as “an artificial construction, a fixed and embedded ranking of human value that sets the presumed supremacy of one group against the presumed inferiority of other groups on the basis of ancestry and often immutable traits . . .

economic, political, and social interactions that “relies on stigmatizing those deemed inferior to justify the dehumanization necessary to keep the lowest-ranked people at the bottom and to rationalize the protocols of enforcement.”³⁵

Dehumanization is one of the processes by which marginalized groups are excluded from the “norms of humanity” in order to justify inhumane treatment.³⁶ Scholars have applied the theory of otherness—that some humans are alien—to explain why Black parents are perceived and treated as the “other” in the criminal justice, child welfare, and public benefits contexts.³⁷ Black children also confront strong negative stereotypes that directly damage their development and serve as the basis for implicit bias and the othering process against them.³⁸ This process of dehumanization also serves to normalize the treatment and life outcomes of marginalized groups. State policies and practices that permit the perpetuation of cultural norms infused with bias and discrimination translate into “state complicity in a culture of denigration, fear and subordination.”³⁹ It helps to explain why we have tolerated the inequitable outcomes in our juvenile justice, child welfare, and education systems for such a long time, and have failed to muster the political will to create real change. Intergenerational replication of race and class-based subordination also occurs through the many mechanisms that privilege families who are white and from higher socioeconomic means.

II. THE CHILD WELFARE, EDUCATION, AND JUVENILE JUSTICE SYSTEMS

The child welfare, juvenile justice, and education systems deploy mechanisms that function in three similar and significant ways. First, they isolate Black children and destroy familial and other relationships, in addition to the experiences that contribute to healthy child development. Family separation, placement in the most restrictive settings like locked psychiatric facilities, segregation in self-contained classrooms or alternative schools, and juvenile justice confinement are examples of the practices that disproportionately harm Black children. Second, these systems pathologize and label Black children as defective or disruptive as part of a process that justifies placement instability, restrictive

[that] are ascribed life-and-death meaning in a hierarchy favoring the dominant caste whose forebears designed it.” WILKERSON, *supra* note 12, at 17.

³⁵ *Id.* at 17, 19–20.

³⁶ See, e.g., *id.* at 141–42; W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* 5 (1903) (introducing the notion of “double-consciousness,” the awareness that difference not only exists but is held in contempt and created as a tool of domination and subordination).

³⁷ Deborah Ahrens, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737, 738 n.3 (2000) (drawing on Foucault and post-modern intellectuals); FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 18 (Charles Lam Markmann trans., 1967) (reflecting on the lived experience of blackness in an anti-black world); Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 680–81 (2002) (analyzing racial disparities in the perception and treatment of African American children).

³⁸ Nunn, *supra* note 37, at 704–06; Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform*, 86 GEO. WASH. L. REV. 1604, 1628–29 (2018) [hereinafter Henning, *The Challenge of Race and Crime*].

³⁹ DOWD, *supra* note 12, at 43.

placements, zero tolerance discipline measures, school pushout, and harsh juvenile justice penalties.⁴⁰ Third, despite policies intended to protect children, these systems fail to provide nurturing, developmentally appropriate, or trauma-informed care, and inflict new trauma on children.⁴¹ While the policies driving racial disparities in individual systems have been explored elsewhere,⁴² this Part highlights some similarities in the approaches used by all three systems, focusing on individual system mechanisms that are key sites for intersection with other systems.

A. The Family Regulation System

Almost every policy pillar of the current family regulation system has been theorized to drive disproportionality and the destruction of Black families. Mandatory reporting laws in every state require professionals and neighbors to report suspected abuse and neglect, subjecting Black families to hyper-surveillance.⁴³ Vague statutes define neglect based on a parent's inability to meet their child's basic needs, such as food, shelter, and access to medical care, allowing intervention for poverty-related reasons and biased decision-making.⁴⁴ The 1997 passage of the Adoption and Safe Families Act ("ASFA") mandates termination of parental rights in short time frames, while simultaneously incentivizing adoptions.⁴⁵ Inequitable

⁴⁰ Jada Phelps Moultrie, *Reframing Parental Involvement of Black Parents: Black Parental Protectionism 1–7* (May 11, 2016) (Ph.D. dissertation, Indiana University) (exploring the relationships between education, racism, and parental involvement); Subini Annamma, Deb Morrison, & Darrell Jackson, *Disproportionality Fills in the Gaps: Connections Between Achievement, Discipline, and Special Education in the School-to-Prison Pipeline*, 53 *BERKELEY REV. EDUC.* 53–54 (2014) (describing how school systems constrain student achievement through racial disparities in discipline, assignments, and juvenile justice).

⁴¹ Trauma is the result of acute or chronic exposure to physically or mentally adverse experiences that produces on-going impairment to an individual's functioning. Traumatic experiences include exposure to domestic or community violence, loss of loved ones, family disruptions due to deportation, incarceration or the foster care system, systemic racism and discrimination, and the extreme stress of lacking basic necessities like food or shelter. SAMHSA'S TRAUMA & JUST. STRATEGIC INITIATIVE, SAMHSA'S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 8 (2014).

⁴² See, e.g., Roberts, *Abolishing Policing*, *supra* note 2; BRIDGES, *The Moral Construction of Poverty*, *supra* note 29, at 37 (exploring the rhetorical link between poverty and immorality); TINA LEE, *CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM* 4–5 (2016) (analyzing the effects of the family regulation system and definitions of child neglect on poor women of color).

⁴³ OFF. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUM. SERVS., *CHILD NEGLECT: A GUIDE FOR PREVENTION, ASSESSMENT, AND INTERVENTION* 15–16 (2006); Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 *AM. SOCIO. REV.* 610, 611 (2020) (arguing that the mandatory reporting system reinforces inequality by facilitating state surveillance over marginalized families); Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 *COLUM. J. RACE & L.* 641, 678 (2021).

⁴⁴ OFF. ON CHILD ABUSE & NEGLECT, *supra* note 43; Patricia Turner Hogan & Sau-Fong Siu, *Minority Children and the Child Welfare System: An Historical Perspective*, 33 *SOC. WORK* 493, 494 (1988); Tanya A. Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 *MARQ. L. REV.* 215, 226–29 (2013).

⁴⁵ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.); Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 *COLUM. J. RACE & L.* 713, 716–

funding and services, and heightened licensing requirements, have either excluded relatives as substitute caregivers or subjected their placements to intense state scrutiny.⁴⁶ Despite the goal of protecting children, these and other policies are implemented inequitably so that Black families do not get the services and assistance they need.

Family separation is the most damaging aspect of the family regulation system. Children need positive attachments and a sense of belonging for healthy psychological, emotional, and social development. The act of removal is itself an extraordinarily traumatic event that has long-term emotional and psychological consequences.⁴⁷ Ongoing separation from parents, siblings, and extended family, or ultimate termination of parental rights, creates toxic stress, destroys essential attachments, and causes grief and loss. Children experience lasting symptoms such as anxiety, emotional distress, behavioral problems, depression, and lifelong health consequences.⁴⁸ “When a child is expected to be physically a part of a new family while she is still psychologically a part of her biological family, it can cause her distress and lead her to believe she doesn’t belong to any family.”⁴⁹ Children benefit from maintaining family relationships, even flawed or dysfunctional ones, which explains why many children in foster care yearn to go home despite everything.⁵⁰ The family regulation system uses removal as its default intervention to allegations of abuse creating an institutional culture that minimizes the violence of removal.⁵¹

There are a number of state actions that make the trauma of family separation even worse. Child Protective Services (“CPS”) separates siblings when it can’t find a placement together, another source of loss and trauma.⁵² Black children from large sibling groups, or families with older,

27 (2021) (describing the racial politics that led to the enactment of the Adoption and Safe Families Act); Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J. L. & SOC. POL’Y 303, 311–12 (2006).

⁴⁶ Christina A Zawisza, *Protecting the Ties that Bind: Kinship Relative Care in Florida*, 23 NOVA L. REV. 455, 470–77 (1998) (recognizing the benefits of placing children with relative caretakers and critiquing Florida’s emphasis on surveillance over caretakers receiving state benefits).

⁴⁷ Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 531–32 (2019) (advocating for consideration of the trauma of removal in every child welfare decision).

⁴⁸ *Id.* at 549–50; Colleen Kraft, *AAP Statement Opposing Separation of Children and Parents at the Border*, AM. ACAD. OF PEDIATRICS (May 8, 2018) <https://www.aap.org/en/news-room/news-releases/aap/2018/aap-statement-opposing-separation-of-children-and-parents-at-the-border/> [<https://perma.cc/45ZR-4Q5W>] (advocating against separation of families at the border because family separation can cause irreparable harm to children); Christopher M. Layne, Ernestine C. Briggs & Christine A. Courtois, *Introduction to the Special Section: Using the Trauma History Profile to Unpack Risk Factor Caravans and Their Consequences*, 6 PSYCH. TRAUMA: THEORY, RSCH., PRAC., & POL’Y 1, 2–3 (2014) (explaining the adverse, long-term outcomes that result from traumatic childhood experiences).

⁴⁹ Trivedi, *supra* note 47, at 533.

⁵⁰ *Id.* at 528.

⁵¹ *Id.* at 557–62.

⁵² See generally Armeda Stevenson Wojciak, Lenore M. McWey & Jeffery Waid, *Sibling Relationships of Youth in Foster Care: A Predictor of Resilience*, 84 CHILD. & YOUTH SERVS. REV. 247, 247 (2018).

harder-to-place siblings in the group, are especially likely to be separated.⁵³ Black parents are more likely to have parental rights terminated, permanently severing legal ties even in situations where there is no prospective adoptive parent or where statistics show adoption is unlikely. This class of legal orphans are among those more likely to age out without the relationships that sustain us through adulthood.⁵⁴ Upon removal, children are also disconnected from their communities and from a network of relationships to childhood friends, churches, neighborhoods, and other supportive adults. Removal from their community also impacts a child's sense of identity and belonging, which are important for child development. Problems with identity development may be exacerbated if a child is moved to a family or community of a different race or religion.⁵⁵ This disconnection from the relationships and community experiences that so many take for granted as essential to a "normal" childhood contributes to feelings of sadness, loss, isolation, and anxiety.

Rather than finding refuge to heal, children, especially adolescents of color with intersectional identities, are bounced from placement to placement without receiving consistent or effective mental health treatment. The well-documented harms of the foster care experience fall disproportionately on Black children.⁵⁶ Children in foster care experience physical and sexual abuse at alarming rates, and are at high risk for commercial sexual exploitation.⁵⁷ Studies document racial disparities in the provision of mental health services.⁵⁸ Black children are also more likely to experience inappropriate placement settings and placement

⁵³ Family visits are more likely to occur if the permanency goal is reunification, as parents' attorneys may seek to enforce legally mandated visits, but these are much less likely to be enforced if the permanency goal changes to adoption.

⁵⁴ See Erin Rebecca Singer, Stephanie Cosner Berzin & Kim Hokanson, *Voices of Former Foster Youth: Supportive Relationships in the Transition to Adulthood*, 35 CHILD. & YOUTH SERVS. REV. 2110, 2111 (2013).

⁵⁵ See Mary Elizabeth Collins & Judith C. Scott, *Intersection of Race and Religion for Youth in Foster Care: Examining Policy and Practice*, 98 CHILD. & YOUTH SERVS. REV. 163, 166 (2019).

⁵⁶ Dettlaff & Boyd, *supra* note 24, at 254–55.

⁵⁷ MICH. DEP'T OF HUM. SERVS. FOSTER CARE & ADOPTION PROGRAM, THE CHILD.'S RSCH. CTR. & CASEY FAM. PROGRAMS, IMPROVING CHILD SAFETY AND WELL-BEING IN FOSTER AND RELATIVE PLACEMENTS: FINDINGS FROM A JOINT STUDY OF FOSTER CHILD MALTREATMENT 27–52 (2014) (analyzing maltreatment rates for children in foster care); NAT'L COAL. FOR CHILD PROT. REFORM, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY AND WELL-BEING 1–2 (2021) (describing the increased risk of maltreatment for children removed from their families).

⁵⁸ Ann F. Garland, John A. Landsverk & Anna S. Lau, *Racial/Ethnic Disparities in Mental Health Service Use Among Children in Foster Care*, 25 CHILD. & YOUTH SERVS. REV. 491, 493–97 (2003); Lionel D. Scott Jr. & Larry E. Davis, *Young, Black, and Male in Foster Care: Relationship of Negative Social Contextual Experiences to Factors Relevant to Mental Health Service Delivery*, 29 J. ADOLESCENCE 721, 725 (2006); Julie S. McCrae & Richard P. Barth, *Using Cumulative Risk to Screen for Mental Health Problems in Child Welfare*, 18 RSCH. ON SOC. WORK PRAC. 144, 144 (2008); Bonnie T. Zima et al., *Behavior Problems, Academic Skill Delays and School Failure Among School-Aged Children in Foster Care: Their Relationship to Placement Characteristics*, 9 J. CHILD & FAM. STUD. 87, 98–101 (2000) (analyzing whether foster children's behavioral and academic problems are correlated with placement characteristics).

instability.⁵⁹ Black children are disproportionately likely to be in congregate care or in the most restrictive placement settings, such as locked psychiatric facilities.⁶⁰

Placement instability, which is more likely to occur the longer a child is in foster care, is a significant factor associated with social, behavioral, and academic problems.⁶¹ School age children in foster care experience an average of 3.38 placements in different foster homes,⁶² with a higher average for children of color and LGBTQ youth.⁶³ It is well-recognized even in the law that “[t]hese frequent moves—whereby children are ‘passed from one foster home to another with no constancy of love, trust or discipline’—have tangible negative consequences and results in worse outcomes for children.”⁶⁴ For some children, this perpetuates a vicious cycle. Being moved from a home reinforces the idea that the child is unlovable and worsens a child’s trauma and behaviors, making it even more difficult for the child to connect with other caregivers. Children who experience frequent placement changes are more likely to develop emotional and behavioral problems than children in stable foster care settings.⁶⁵ As discussed further in Part III, *infra*, living in congregate care and going through placement instability are major predictors of both juvenile justice involvement and academic and disciplinary problems in school.

There is an often-masked racialized dynamic to the experience of children with placement instability. A complaint filed in *H.G. v. Carroll* on behalf of approximately 2,000 children in foster care in Miami and neighboring Monroe County, alleges that, due to an extreme shortage in foster homes, children bounce between different types of placement while their mental health needs go unmet.⁶⁶ According to this complaint, between

⁵⁹ Reiko Boyd, *African American Disproportionality and Disparity in Child Welfare: Toward a Comprehensive Conceptual Framework*, 37 CHILD. & YOUTH SERVS. REV. 15, 23 (2014).

⁶⁰ See generally Lindsey Palmer et al., *Correlates of Entry into Congregate Care Among a Cohort of California Foster Youth*, 110 CHILD. & YOUTH SERVS. REV. 1, 4–5 (2020) (finding that older age, Black race, and behavioral, emotional, or mental health concerns are more predictive of movement into congregate care placement).

⁶¹ See GLORIA HOCHMAN, ANNDEE HOCHMAN & JENNIFER MILLER, THE PEW COMM’N ON CHILD. IN FOSTER CARE, FOSTER CARE: VOICES FROM THE INSIDE 3 (2004) (outlining the human costs of the child welfare system and foster care); Carolien Konijn et al., *Foster Care Placement Instability: A Meta-Analytic Review*, 96 CHILD. & YOUTH SERVS. REV. 483, 488–89, 494–95 (2019) (examining factors associated with and affecting placement instability); Susy Villegas et al., *Educational Outcomes for Adults Formerly in Foster Care: The Role of Ethnicity*, 36 CHILD. & YOUTH SERVS. REV. 42, 48 (2014) (finding that placement instability in foster care predicts future low educational outcomes).

⁶² NAT’L WORKING GRP. ON FOSTER CARE & EDUC., EDUCATION IS THE LIFELINE FOR YOUTH IN FOSTER CARE 1–2 (2011)

⁶³ Gerald P. Mallon, Nina Aledort & Michael Ferrera, *There’s No Place Like Home: Achieving Safety, Permanency, and Well-Being for Lesbian and Gay Adolescents in Out-of-Home Care Settings*, 81 CHILD WELFARE 407, 410 (2002).

⁶⁴ Trivedi, *supra* note 47, at 545 (quoting Santosky v. Kramer, 455 U.S. 745, 789 (1982) (Rehnquist, J., dissenting)).

⁶⁵ Theodore P. Cross et al., *Why Do Children Experience Multiple Placement Changes in Foster Care? Content Analysis on Reasons for Instability*, 7 J. PUB. CHILD WELFARE 39, 54 (2013).

⁶⁶ Complaint at 1–4, *H.G. v. Carroll*, No. 4:18-cv-100-WS-CAS, 2018 U.S. Dist. LEXIS 232879 (N.D. Fla. Feb. 20, 2018).

January 2016 and June 2017, over 400 children endured ten or more placements, at least 185 children lived in twenty or more places, over fifty children lived at in at least fifty places, and twenty-seven children were bounced around between eighty and 140 placements during their total time in state care.⁶⁷ While the complaint did not raise racial disproportionality, the majority of the children with the highest level of placement instability were children of color.⁶⁸

When children in foster care display behavioral problems, symptoms of trauma, or norm-violating behavior, they are often labeled as troublesome, hostile, or pathological.⁶⁹ These are children who do not have severe mental health disorders, but for whom the policy response is often punitive and extreme, such as psychotropic medication, placement in a locked psychiatric facility, or juvenile justice involvement.⁷⁰ In a recent example, the Florida legislature considered a proposal to place children who had refused a placement offered by CPS into a secure juvenile detention center.⁷¹ The head of the local privatized CPS agency described the children this way: “They do whatever they want to do; they smoke drugs, they commit petty crimes; they fight with our staff. They break up the building and we just have to stand up and watch them.”⁷² This narrative blamed the children for their behavior but did not acknowledge the system’s failure to nurture or provide basic stability for these children. The thirty-nine Florida children who refused placements in the prior years and were the impetus for the proposal had an average of thirty-six placements before they first refused a placement.⁷³ Race was never explicitly discussed during the proposal, but a subsequent study revealed that the children at issue in the proposal were overwhelmingly youth of color.⁷⁴ The narrative about the out-of-control children were coded, stereotypical narratives.

⁶⁷ *Id.* at 42.

⁶⁸ Other class action lawsuits have challenged the state’s failure to create stability or provide appropriate mental health treatment for children in foster care. *See generally* Rosie D. v. Baker, Nos. 19-1262, 19-1767 (1st Cir. May 4, 2020); Braam v. Washington, 81 P. 3d 851 (Wash. 2003).

⁶⁹ *See* Lois A. Weithorn, *Envisioning Second-Order Change in America’s Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1314–30 (2005) (challenging the legal system’s conventional, harmful response to troubled and troublesome youth); MILLER ET AL., *supra* note 3, at ii (reporting that young Black men in the family regulation system report that “their behavior is often misunderstood and based on negative stereotypes that fail to account for the trauma in their lives”).

⁷⁰ *See* Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 773–75 (1988) (arguing that increases in adolescent admission rates to psychiatric units are a result of increased use of hospitalization for youth who do not suffer from severe mental illnesses).

⁷¹ Christopher O’Donnell, *Problem Foster Kids Could be Locked up in ‘Secure’ Facility Under New Plan Pushed by Tampa Bay Child Welfare Agency*, TAMPA BAY TIMES (Sept. 10, 2019), <https://www.tampabay.com/news/hillsborough/2019/09/09/problem-foster-kids-could-be-locked-up-in-secure-facility-under-new-plan-pushed-by-tampa-bay-child-welfare-agency/> [<https://perma.cc/F5Y3-A9JF>].

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Robert Latham, *54 Pages About 49 Kids: The Children Who Refused Placement in Hillsborough County*, ROBERTLATHAMESQ.ORG (Jan. 10, 2020), <https://robertlathamesq.org/54-pages-about-49-kids-the-children-who-refused-placement-in-hillsborough-county> [<https://perma.cc/AGQ6-WFKR>].

B. The Juvenile Justice System

Despite its goal of rehabilitation, the juvenile justice system disproportionately steers youth of color on a path to high school dropout and later criminal justice involvement. Since the 1970s, legislative initiatives in many states abandoned the rehabilitative model in favor of one based on accountability, retribution, and deterrence. These reforms included mandatory transfer to adult court, mandatory minimums, and determinate sentencing. During the 1990s, states moved to make the juvenile justice system even tougher by allowing juvenile courts to impose more punitive sanctions and transferring more youth to adult courts.⁷⁵ This “get tough on juvenile crime” approach was driven by a public perception and political rhetoric that juvenile crime posed a widespread threat to public safety. Indeed, “[c]entral to the development of the myth of the juvenile justice system in crisis was the concurrent development of the racialized myth of the ‘superpredator.’”⁷⁶ This “superpredator,” presented as a new kind of juvenile delinquent who was immoral, remorseless, and extremely violent, relied on explicitly racist imagery and stereotypes so that it became code for young Black males. In 1988, Congress amended the Juvenile Justice and Delinquency Prevention Act (“JJJPA”) to, among other things, require states to address issues of disproportionate minority confinement.⁷⁷ Subsequent amendments made it a core requirement of the JJJPA and expanded funding and the scope of mandated data collection.⁷⁸ While this mandate has improved data collection and spurred state-level initiatives, the juvenile justice system remains highly racialized today.⁷⁹

For youth of color, there are reduced opportunities for diversion, high rates of detention, disparities in use of out-of-home placement, and a lack of permanency planning. Disproportionality begins with increased policing at schools and in communities.⁸⁰ Most youth arrests are for status offenses like truancy, ungovernability, running away, alcohol possession, or other offenses that would not be crimes for adults.⁸¹ The other major category of youth offenses are low-level property offenses, drug possession, probation violations, and public order offenses.⁸² Generally, the violent

⁷⁵ Ellen Marrus & Nadia N. Seeratan, *What’s Race Got to Do with It? Just about Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 J. MARSHALL L. J. 437, 448–74 (2015) (demonstrating the racial disparities in increased punitive measures for children in the juvenile justice system).

⁷⁶ Nunn, *supra* note 37, at 711.

⁷⁷ Juvenile Justice and Delinquency Protection Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (amended by Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181).

⁷⁸ HEIDI M. HSIA, GEORGE S. BRIDGES & ROSALIE MCHALE, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUST., NCJ NO. 201240, DISPROPORTIONATE MINORITY CONFINEMENT: 2002 UPDATE 9 (2002); 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

⁷⁹ KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 6–13 (2021) [hereinafter HENNING, THE RAGE OF INNOCENCE] (examining how Black youths’ behavior results from constant racial policing, discrimination, and trauma).

⁸⁰ Marrus & Seeratan, *supra* note 75, at 479–80.

⁸¹ Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y. L. SCH. L. REV. 875, 879–85 (2009) (describing how meeting special education needs may help reduce status offense charges for minors).

⁸² Marrus & Seeratan, *supra* note 75, at 456.

crime arrest rate and the general arrest rate have fallen dramatically over the past few decades, but the overrepresentation of Black children has remained constant.⁸³ White youth are more likely to be diverted out of the formal juvenile process, through a referral to a community organization for services, participation in a diversion service, or an informal citation instead of prosecution, whereas Black children are more likely to be formally charged and pushed deeper into the system.⁸⁴

Juvenile court judges are more likely to confine Black youth in secure detention facilities both pre- and post-adjudication, than to offer less restrictive alternatives like home detention or probation.⁸⁵ Black youth are also held in confinement for longer periods.⁸⁶ Youth in the delinquency system also experience multiple placement changes as they may be transferred among pre-trial detention centers and multiple post-disposition facilities. In confinement, youth experience poor conditions including systemic violence, abuse, excessive use of isolation and/or restraints, and inadequate health care or educational opportunities.⁸⁷ Black children are also overrepresented among those transferred to adult criminal court where they are more likely to be confined for longer periods without receiving treatment and rehabilitation, thereby increasing their chances of recidivism.⁸⁸ Many children in the juvenile justice system have disabilities or a history of adverse childhood experiences; not only are these psychological and emotional needs not met, but these experiences also make matters worse.

Implicit racial bias and stereotypes explain why Black children receive harsher treatment in the juvenile justice system.⁸⁹ Studies have found evidence of implicit racial bias among juvenile justice decision-makers including police officers, probation officers, judges, prosecutors and defense attorneys.⁹⁰ These stakeholders, who wield broad discretion in the juvenile justice system, showed across several studies negative views of Black youth, including views that they appear more adult-like, more

⁸³ *Id.* at 464.

⁸⁴ *Id.* at 460–61; *see also* NAT'L CTR. FOR JUV. JUST. & OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 175–81 (2014); OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., HOW OJJDP IS WORKING FOR YOUTH JUSTICE AND SAFETY 21 (2012) (outlining the Office of Juvenile Justice and Delinquency Prevention's ("OJJDP") work in addressing racial disparities in the juvenile justice system).

⁸⁵ CHRISTOPHER HARTNEY & LINH VUONG, NAT'L COUNCIL ON CRIME & DELINQ., CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM 3 (2009); *Black Children Five Times More Likely Than White Youth to Be Incarcerated*, EQUAL JUST. INITIATIVE (Sept. 14, 2017), <https://eji.org/news/Black-children-five-times-more-likely-than-whites-to-be-incarcerated/> [<https://perma.cc/5DKQ-A3E9>]. In 2019, "forty-one percent of youths in placement were Black, even though Black Americans comprise only 15% of all youth across the United States." SENT'G PROJECT, BLACK DISPARITIES IN YOUTH INCARCERATION 1 (2021), <https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/> [<https://perma.cc/8D7C-MCH2>].

⁸⁶ HARTNEY & VUONG, *supra* note 85, at 12.

⁸⁷ Mendel, *supra* note 17, at 5–6, 22–25.

⁸⁸ Marrus & Seeratan, *supra* note 75, at 469–70.

⁸⁹ *See id.* at 482–83; Nunn, *supra* note 37, at 688; Bishop & Frazier, *supra* note 6, at 407–08.

⁹⁰ Henning, *The Challenge of Race and Crime*, *supra* note 38, at 1628–29.

culpable, and more deserving of punishment.⁹¹ Kevin Nunn theorized that the “othering” of Black children, particularly Black males, accounts for the disparities we see in the juvenile justice system.⁹² Black children, viewed as coming from dysfunctional families headed by single mothers, have been the subject of centuries of racial stereotypes.⁹³ These stereotypes and the systemic dehumanization of Black children allow delinquency courts to justify the enrollment of children in restrictive settings.

C. The Education System

In today’s global economy, a quality education positively impacts all aspects of adult life,⁹⁴ and the academic achievement gap drives economic inequality.⁹⁵ Race and socio-economic status are among the most significant indicators of test scores, graduation rates, and other educational measures.⁹⁶ With a public education system funded largely by local community wealth and enduring residential segregation, Black children are more likely to attend schools with fewer resources.⁹⁷ The educational system systematically alienates, punishes, and ultimately pushes out students based on intersections of race, class, gender, sexual orientation, and disability.⁹⁸ Federal and state education funding policies

⁹¹ *Id.* at 1630–31. In studies which administered Implicit Association Tests to different stakeholders in the justice system, police officers, juvenile probation officers, judges, and defense attorneys all showed that they had negative perceptions of Black youth and associated them with criminality. Studies have also linked prosecutorial decision-making with racial and ethnic disparities in case outcomes. Marrus & Seeratan, *supra* note 75, at 492–95.

⁹² Nunn, *supra* note 37, at 682.

⁹³ Roberts, *The Systematic Punishment of Black Mothers*, *supra* note 8, at 1493.

⁹⁴ Higher educational levels are linked to higher incomes, lower unemployment, fewer chronic health problems, longer life expectancy, and even increased likelihood of marriage. Anna Zajacova & Elizabeth M. Lawrence, *The Relationship Between Education and Health: Reducing Disparities Through a Contextual Approach*, 39 ANN. REV. PUB. HEALTH 273, at 3–5 (2018) (assessing the relationship between education and health).

⁹⁵ EMMA GARCIA & ELAINE WEISS, ECON. POL’Y INST., EDUCATION INEQUALITIES AT THE SCHOOL STARTING GATE 1 (2017) (finding that social class is one of the most significant predictors of low educational success).

⁹⁶ NCES, PUBLIC HIGH SCHOOL GRADUATION RATES, *supra* note 17; Ladson-Billings & Tate, *supra* note 6, at 59–60.

⁹⁷ Ellen Marrus, *Education in Black America: Is It the New Jim Crow?*, 68 ARK. L. REV. 27, 27–29 (2015) (describing how and why Black children face diminished access to quality education).

⁹⁸ Amy J. Petersen, Exploring Intersectionality in Education: The Intersection of Gender, Race, Disability, and Class 170–215 (Dec. 2006) (Ph.D. dissertation, University of Northern Iowa) (studying the educational experiences of Black women labeled with a disability and from a disadvantaged social class). The term “push out” refers to school system practices that lead to students leaving school without graduating. These include unwelcoming school climates, harsh discipline policies, and referral to alternative schools and GED programs with inadequate educational resources. ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW ZERO TOLERANCE AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 4–5 (2010). In addition to the zero-tolerance movement, there are two policy trends that incentivize schools to push out problem or low-achieving students. First, accountability laws require schools to do high stakes achievement tasks and impose consequences for failing to meet specified criteria. Second, Supreme Court jurisprudence weakening students’ constitutional rights has resulted in minimal or illusory procedural protections for school suspensions and made it easier for schools to provide prosecutors with evidence that would otherwise be inadmissible. Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L. J. 313, 328–31 (2016).

do not provide adequate resources to serve students with acute needs.⁹⁹ With race as a central factor, special education and school discipline are among the structural mechanisms that contribute to disparate treatment and poor academic outcomes for Black children. Students in special education and students with school discipline records, who overlap substantially, perform poorly in school and are less likely to graduate and matriculate to higher education. The school system labels students as disabled, disruptive, or troublesome as one step in a process likely to lead to academic delays, disengagement, dropout, and juvenile justice involvement.¹⁰⁰ As explained in Part III, schools are more likely to label students in foster care with one or more of these categories, subjecting them to the mechanisms that contribute to the most severe outcomes.

The federal Individuals with Disabilities Education Act (“IDEA”) guarantees students with disabilities a free and appropriate public education in the least restrictive setting.¹⁰¹ The impetus for the IDEA’s precursor was *Brown v. Board of Education*’s ideal that access to education is of central importance.¹⁰² While IDEA provides beneficial individualized services and procedural protections to children with disabilities, the benefits of special education have not been equitably distributed on the basis of race and social class.¹⁰³ Youth with Individual Education Plans (“IEP”) are more likely to be from low-income backgrounds.¹⁰⁴ A disproportionate number of Black students are referred for special education services and isolated in separate classrooms, rather than integrated into mainstream classes.¹⁰⁵ Students of color are also more likely to be labeled with Emotional Behavior Disorder (“EBD”), a category that creates stigma with long-term effects on higher education and employment prospects.¹⁰⁶ This is also the most common disability category

⁹⁹ Nance, *Dismantling the School-to-Prison Pipeline*, *supra* note 98, at 317.

¹⁰⁰ Annamma, Morrison, & Jackson, *supra* note 40, at 58; Thurston Domina, Andrew Penner & Emily Penner, *Categorical Inequality: Schools as Sorting Machines*, 43 ANN. REV. SOCIO. 311, 319–20 (2017).

¹⁰¹ Individuals with Disabilities Education Act, 20 U.S.C. § 1400.

¹⁰² In 1975, Congress passed the initial federal special education law, Education for All Handicapped Children, Pub. L. No. 94-142, 89 Stat. 773, in the wake of two groundbreaking cases alleging that children with education-related disabilities received no educational services from the school system. *Pa. Ass’n for Retarded Child v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) (challenging Pennsylvania legislation that restricted the education available to students with disabilities); *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (relying on *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), to rule that the exclusion of children with disabilities violated equal protection).

¹⁰³ Blanchett, *supra* note 14, at 25.

¹⁰⁴ NAT’L CTR. FOR EDUC. EVALUATION & REG’L ASSISTANCE, PREPARING FOR LIFE AFTER HIGH SCHOOL: THE CHARACTERISTICS AND EXPERIENCES OF YOUTH IN SPECIAL EDUCATION 10 (2018). An IEP is a written plan to document the goals, needs, and services for children determined eligible for services under IDEA. Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.22 (2004).

¹⁰⁵ Alfredo J. Artiles, Sherman Dorn & Aydin Bal, *Objects of Protection, Enduring Nodes of Difference: Disability Intersections With “Other” Differences, 1916 to 2016*, 40 REV. RSCH. EDUC. 777, 783–806 (2016) (analyzing the history of disability practices and recognizing disproportionality along racial lines).

¹⁰⁶ James M. Patton, *The Disproportionate Representation of African Americans in Special Education: Looking Behind the Curtain for Understanding the Solutions*, 32 J. SPECIAL EDUC. 25, 26 (1998); David S. Mandell et al., *Ethnic Disparities in Special Education Labeling Among Children with Attention-Deficit/Hyperactivity Disorder*, 16 J. EMOTIONAL & BEHAV. DISORDERS 42, 43, 45 (2008).

for children in foster care. Children with an EBD label often do not get the mental health or classroom accommodations they need, are at greater risk for dropping out of school, and have alarming overlaps with the juvenile delinquency system. Hence, it is not the label itself, but rather the failure to appropriately implement special education laws, especially in schools with large minority populations, that contributes to inequitable educational outcomes.¹⁰⁷

School discipline policies are also applied inequitably and contribute to poor academic outcomes.¹⁰⁸ Black students are more likely than their white peers to be targeted with school disciplinary actions, even for similar behaviors.¹⁰⁹ Students in special education and foster care—groups with racial disparities—are more likely to be referred for disciplinary actions and more likely to be suspended or expelled than their peers.¹¹⁰ These disciplinary measures are linked to poor academic achievement.¹¹¹ They also fuel the school-to-prison pipeline—the conceptual interplay among education and criminal justice policies that pushes students out of school and into the criminal justice system.¹¹² Schools adopt zero-tolerance policies that impose harsh consequences such as suspensions, expulsions, referrals to law enforcement, and school-based

¹⁰⁷ Tulman & Weck, *supra* note 81, at 877–78.

¹⁰⁸ Laurence Parker & David O. Stovall, *Actions Following Words: Critical Race Theory Connects to Critical Pedagogy*, 36 EDUC. PHIL. & THEORY 167, 168–69 (2004) (recognizing the importance of critical race theory in education, including in racial disparities in school discipline); Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 SOC. PROBS. 68, 68–69, 70–71 (2016) (arguing that racial disparities in punishment are a critical factor in explaining racial achievement gaps).

¹⁰⁹ Sarah D. Sparks & Alyson Klein, *Discipline Disparities Grow for Students of Color*, *New Federal Data Show*, EDUCATIONWEEK (Apr. 24, 2018), <https://www.edweek.org/leadership/discipline-disparities-grow-for-students-of-color-new-federal-data-show/2018/04> [<https://perma.cc/7J5K-2QLH>]; Na'ilah Suad Nasir et al., *Dirt on My Record: Rethinking Disciplinary Practices in an All-Black, All-Male Alternative Class*, 83 HARV. EDUC. REV. 489, 499–507 (2013) (using the setting of an all-black, all-male classroom to reframe the nature of discipline in schools); Dalun Zhang et al., *Minority Representation in Special Education: 5-Year Trends*, 23 J. CHILD & FAM. STUDS. 118, 118–20 (2014) (investigating racial disparities in special education); Annamma, Morrison, & Jackson, *supra* note 40, at 58–59. Black children are sixteen percent of the student population, but represent thirty-two percent of in-school suspensions, thirty-three percent of out-of-school suspensions, thirty-four percent of expulsions, thirty-one percent of school-based arrests, and twenty-seven percent of referrals to law enforcement. CIV. RTS. DATA COLLECTION, U.S. DEPT' OF EDUC., DATA SNAPSHOT: SCHOOL DISCIPLINE 2, 6 (2014).

¹¹⁰ SID COOLEY, SUSPENSION/EXPULSION OF REGULAR AND SPECIAL EDUCATION STUDENTS IN KANSAS: A REPORT TO THE KANSAS STATE BOARD OF EDUCATION 4 (1995); Russell J. Skiba, Reece L. Peterson, & Tara Williams, *Office Referrals and Suspension: Disciplinary Intervention in Middle Schools*, 20 EDUC. & TREATMENT CHILD. 295, 295 (1997) (finding a pattern of disproportionality in the administration of school discipline based on race, gender, low academic performance, and disability).

¹¹¹ Skiba, Peterson, & Williams, *supra* note 110.

¹¹² SARAH E. REDFIELD & JASON P. NANCE, SCHOOL-TO-PRISON PIPELINE TASK FORCE, THE AMERICAN BAR ASSOCIATION JOINT TASK FORCE ON REVERSING THE SCHOOL-TO-PRISON PIPELINE PRELIMINARY REPORT 7–9 (2016) (investigating potential remedies for the school-to-prison pipeline); *see generally* JOHANNA M. WALD & DANIEL J. LOSEN, DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE (2003) (analyzing how and why the school-to-prison pipeline operates).

arrests for violation of school rules.¹¹³ Derived from the war on drugs, zero-tolerance policies in schools were initially intended for the most serious offenses but have evolved to ensnare students on a path to law enforcement involvement even for typical adolescent behavior.¹¹⁴ These policies, when implemented in a context with low expectations and engagement, low achievement, poor or lacking school relationships, and over-classification in special education, results in students being funneled into the juvenile justice system.¹¹⁵ Black students and students with disabilities are overrepresented in the school-to-prison pipeline. They are more likely to be referred to law enforcement or to face other harsh penalties (suspension, expulsion) that increase the likelihood of juvenile justice intervention. As explained below, children in foster care are disproportionately likely to encounter the complex mechanisms of the school-to-prison-pipeline.

III. THE COMPOUNDING EFFECT OF INTERACTION BETWEEN THE THREE SYSTEMS

Each system independently contributes to racial inequality. For children who experience the family regulation system, the interaction among the three systems leaves them worse off and helps to reproduce hierarchy. Here I focus on three ways the systems interact to exacerbate harm for children, especially Black children.

A. Pipelines that Exacerbate Harm

Foster care involvement increases the likelihood children will be funneled into the juvenile justice system, either directly from a foster care setting or via the school system. The Midwest Evaluation of Adult Functioning of Former Foster Youth found that more than half of children aging out were incarcerated by their mid-twenties.¹¹⁶

The harms of the foster care experience, as discussed in Part II.A, increase the likelihood that children in foster care become entangled in the school-to-prison pipeline. Students of color, with disabilities, and in foster care are disproportionately targeted for school disciplinary actions. The negatives experienced by each group individually are compounded where a student is in more than one group, e.g., students of color who are also students with disabilities who are also students in foster care. One study, for example, found that youth in foster care with disabilities had lower

¹¹³ SEBASTIAN CASTRECHINI, EDUCATIONAL OUTCOMES FOR COURT-DEPENDENT YOUTH IN SAN MATEO COUNTY, JOHN W. GARDNER CTR. YOUTH & THEIR CMTYS. 3 (2009); Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1065 (2016) [hereinafter Nance, *Over-Disciplining Students*] (analyzing increases in extreme disciplinary measures which are imposed disproportionately along racial lines); Andrea G. Zetlin, Lois A. Weinberg, & Nancy M. Shea, *Seeing the Whole Picture: Views from Diverse Participants on Barriers to Educating Foster Youths*, 28 CHILD. & SCHS. 165, 167–71 (2006) (discussing the academic challenges that foster youths face). In one study, almost one-third of youth in foster care for more than two years had experienced a suspension and 4.1% had been expelled. NAT'L WORKING GRP. ON FOSTER CARE & EDUC., *supra* note 62, at 11.

¹¹⁴ Nance, *Over-Disciplining Students*, *supra* note 113, at 1064; The Gun Free Schools Act of 1994, 20 U.S.C. 7961, for example, was originally adopted to promote school safety by declaring zero tolerance for weapons in school.

¹¹⁵ REDFIELD & NANCE, *supra* note 112, at 7.

¹¹⁶ MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 90–93 (2011).

academic performance than youth in foster care or youth with disabilities alone.¹¹⁷ Educators' expectations are critical for student learning, the quality of instruction, and the approach to punishment.¹¹⁸ If educators have low expectations, it becomes a self-fulfilling prophecy, and students underperform. "Where labeling of young people is virtually omnipresent—Limited English Proficiency, emotionally disturbed, intellectually disabled, troubled, trouble-maker, noncompliant, insubordinate, delinquent, from a bad family—decisions and actions flow from these labels and expectations engender among both educators and students."¹¹⁹ Children in foster care, especially Black children, are likely to be assigned these kinds of negative labels and consequences.¹²⁰ Implicit bias imbues a host of daily discretionary decisions about how students get categorized and how to respond to a violation of school rules. For example, a decision to call a parent or send a student to the office, rather than refer to law enforcement, makes a big difference. Children in foster care may not have a parental figure who comes to the school when called. Relationships with school officials are also critical. Due to school instability, children in foster care are less likely to have the relationships that might make a difference.¹²¹ Low school performance, common among children in foster care, also leads to acting out in the classroom, which leads to discipline, which in turn leads to underachievement. Special education is also a site where the school-to-prison pipeline occurs. Although the IDEA limits school suspensions or charges for behavior that was caused by or is related to the students' disability, students in special education are far more likely to be suspended from school and expelled than other students.¹²² The largest racial disparities occur among students with disabilities who are suspended.¹²³

Foster care is also a pathway to the juvenile justice system, recently termed the foster-care-to-prison pipeline.¹²⁴ Children in foster care are overrepresented within the juvenile justice system, and children in both systems are disproportionately Black.¹²⁵ A 2014 Massachusetts study of dual-system youth found that youth in CPS custody made up thirty-nine percent of the detention population and thirty-seven percent of the delinquency committed caseload. Compared to the overall DCF population, multi-system youth were disproportionately Black or Latino (sixty percent compared to thirty-nine percent).¹²⁶ While factors that bring children into the family regulation system increase the risk for juvenile justice

¹¹⁷ Sarah Geenen & Laurie E. Powers, *Are We Ignoring Youths with Disabilities in Foster Care? An Examination of Their School Performance*, 51 SOC. WORK 233, 238 (2013) (finding that involvement with foster care and special education multiplied the risk of academic difficulties).

¹¹⁸ REDFIELD & NANCE, *supra* note 112, at 18–19.

¹¹⁹ *Id.* at 19.

¹²⁰ Kayla McLaughlin, Kaley Greenman & Cindy Greenman, *A Fractured System: Is it Time for New Programming Within the Child Protection Services?*, 4 J. ADVANCES SOC. SCI. & HUMS. 487, 491–92 (2018).

¹²¹ CASTRECHINI, *supra* note 113 (analyzing the educational difficulties that dependent youth face); Zetlin, Weinberg, & Shea, *supra* note 113, at 170.

¹²² REDFIELD & NANCE, *supra* note 112, at 37.

¹²³ *Id.*

¹²⁴ *What Is the Foster Care-to-Prison Pipeline?*, *supra* note 21.

¹²⁵ CITIZENS FOR JUV. JUST., MISSED OPPORTUNITIES: PREVENTING YOUTH IN THE CHILD WELFARE SYSTEM FROM ENTERING THE JUVENILE JUSTICE SYSTEM, at ii (2015).

¹²⁶ *Id.*

involvement, conditions in the family regulation system itself leads to contact with law enforcement. Complex trauma caused by family separation and the foster care experience, and all of the ways it impairs a child's ability to self-regulate, increases the likelihood of juvenile justice involvement.¹²⁷ Children in foster care are often arrested for experiencing a mental health crisis or exhibiting symptoms of trauma.¹²⁸ The horrific high-profile police killing of sixteen-year old Ma'Khia Bryant, a foster youth who was brandishing a knife when police arrived on the scene, exemplifies the worst that can happen when traumatized children with impaired abilities to self-regulate encounter the police.

There are other systemic factors. Children in foster care are often subjected to status offenses. For example, the responses to teenage behavior that would ordinarily be handled within a family, like running away or taking a car without permission, are more likely to be referred to law enforcement. Children in congregate settings, where Black adolescents disproportionately live, are particularly likely to be referred to law enforcement for minor infractions like fights, petty theft, property damage, or smoking marijuana.¹²⁹ Youth in group homes are 2.5 times more likely to enter the juvenile justice system.¹³⁰ Placement instability also increases the likelihood that a foster child will enter the juvenile justice system.¹³¹ Other systemic reasons children in foster care are funneled into the juvenile justice system include lack of positive attachments with adults and lack of opportunities to participate in positive youth development activities like sports, extracurricular activities, and mentoring programs.

There are negative consequences to this push into the criminal justice system. There is some evidence to suggest that youth in foster care experience worse outcomes in their delinquency cases. They are more likely than other youth to be adjudicated delinquent and to be detained rather than receive probation.¹³² "Incarceration produces long-term detrimental effects on youth, including reinforcement of violent attitudes and behaviors; more limited educational, employment, military, and housing opportunities; an increased likelihood of not graduating from high school; mental health concerns; and increased future involvement in the criminal justice system."¹³³

In a vicious cycle, these pipelines run in the other direction and both juvenile justice and schools can be a gateway to child welfare. School officials are the largest professional category of mandatory reporters to call the hotline, yet their reports are less likely to allege abuse and neglect, more likely to be referred for alternative response, and less likely to be

¹²⁷ Sydney L. Goetz, *From Removal to Incarceration: How the Modern Child Welfare System and Its Unintended Consequences Catalyzed the Foster Care-to-Prison Pipeline*, 20 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 289, 289–90 (2020).

¹²⁸ HENNING, THE RAGE OF INNOCENCE, *supra* note 79; Dorothy Otnow Lewis et al., *Race Bias in the Diagnosis and Disposition of Violent Adolescents*, 137 AM. J. PSYCHIATRY 1211, 1215–16 (1980) (finding that Black youth were more often placed in correctional facilities while white youth were more often placed in psychiatric facilities).

¹²⁹ Cutuli et al., *supra* note 19, at 89, 91–92.

¹³⁰ *What Is the Foster Care-to-Prison Pipeline?*, *supra* note 21.

¹³¹ CITIZENS FOR JUV. JUST., *supra* note 125, at 4.

¹³² Goetz, *supra* note 127, at 296–97.

¹³³ Nance, *Dismantling the School-to-Prison Pipeline*, *supra* note 98, at 319–20.

substantiated.¹³⁴ Because these reports must all be investigated, they play a significant role in the surveillance of Black families, while undermining the trust between families and schools.¹³⁵ When it is time for discharge from juvenile justice, it may not be possible for a child to return home, or a parent may feel that they do not have the capacity to handle the child's behaviors. It is also possible that the child's home circumstances, which come to light during the juvenile justice or probation process, trigger a referral to child welfare. Once families have become involved with either the juvenile justice or family regulation system, hyper-vigilance increases the likelihood of later contact with these systems.

B. Trauma is Punished Rather Than Treated

Despite the level of trauma among children in the foster care, juvenile justice, and some school systems, these systems fail to adequately address the impact of trauma and interact to create additional trauma.¹³⁶ In *Peter P. v. Compton Unified School District*, a class of students and three teachers sued the school district for its failure to provide trauma-informed service to address the way trauma from multiple sources interfered with students' ability to learn.¹³⁷ As a result of the behavioral symptoms of their exposure to multiple traumatic experiences—complex traumas that included mass shootings, molestations, stabbings, racism, and removals to foster care—all of the child plaintiffs had been severely disciplined by school authorities.¹³⁸ Peter P. exemplified the foster care experience. In early childhood, Peter P.'s mother abused drugs, and he was abused by her boyfriends. CPS removed him from his mother at age five, separated him from most of his siblings, and shuttled him through multiple foster care placements and short-term reunification, until he was ultimately adopted. He has witnessed stabbings and shootings at school and in his community. He was homeless for a period of time at age fifteen. He was repeatedly suspended and expelled from multiple schools.¹³⁹ His story highlights the way multiple systems not only fail to help, but also inflict additional trauma on the children they are supposed to nurture and protect.

For children impacted by multiple systems, instability—and the resulting emotional and psychological consequences—are magnified. Children are cycled through different foster care placements, juvenile justice settings, and schools. They are caught in a vicious cycle. Once a child enters the juvenile justice system, it becomes more difficult to find home placements as foster parents do not want a “bad” child in their home. This rejection, in turn, increases the likelihood a child will exhibit behaviors or be placed in situations that lead to more juvenile justice

¹³⁴ Brianna Harvey, Josh Gupta-Kagan, & Christopher Church, *Reimagining Schools' Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575, 585–87 (2021).

¹³⁵ *Id.* at 588.

¹³⁶ Karen M. Abram et al., *Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 ARCHIVES GEN. PSYCHIATRY 403, 407–08 (2004) (finding higher rates of trauma and PTSD among juvenile detainees); Cathy Widom & Michael G. Maxfield, *An Update on The Cycle of Violence*, NAT'L INST. OF JUST., U.S. DEP'T OF JUST. 7 (2001).

¹³⁷ See *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1126, 1131–33 (C.D. Cal. 2015).

¹³⁸ *Id.* at 1132.

¹³⁹ *Id.* at 1130–31.

involvement. It also increases the likelihood that a child will be shuffled through different schools. This instability often means that a child never receives needed treatment and behavioral health services.

From an ecological perspective, the interaction of these systems fails to appreciate the importance of the child's immediate context in positively influencing their well-being. All of the child's most important contexts—home, school, community—are stressful and causing harm. Children are isolated into the most restrictive settings in all three systems under the guise of providing services when in fact they do not get appropriate treatment and are retraumatized. Children are not able to build relationships with family, teachers, peers, or other supportive adults that can be a source of resilience. Children not only lack a consistent caregiver, but are also unable to establish stable relationships with teachers and peers. The child welfare and juvenile justice systems disrupt the usual mechanisms that might serve as protective factors for children growing up in the same communities.

C. Education is Disrupted and Denied

Children are undereducated through the interplay between all three systems—children in child welfare and juvenile justice are worse off academically than children from the same communities.¹⁴⁰ Youth in juvenile justice and child welfare have more frequent school disruption, more suspension, lower high school graduation rates, and lower college matriculation.¹⁴¹ While in the criminal justice system, children are supposed to participate in school, but educational opportunities at detention facilities are inadequate.¹⁴² When children are released, credits may not transfer, and their regular school may be averse to their return. They are then pushed into alternative schools from which they are more likely to drop out.

Due to multiple placement changes, children in foster care are likely to have multiple school changes. In a Colorado study, Black students in foster care were more likely to experience school changes, and more likely to experience more than one school change in the same school year, than their white peers in foster care.¹⁴³ Each change results in academic delays, and children in care are unable to develop relationships with peers and teachers or participate in in-school and extracurricular activities, all of which are critical to healthy development. Without these networks, children in foster care are unable to accumulate the social capital that acts as a protective factor and helps in a host of everyday, practical ways, like helping students remain engaged in school, having adults at school who

¹⁴⁰ Antonis Katsiyannis et al., *Juvenile Delinquency and Recidivism: The Impact of Academic Achievement*, 24 *READING & WRITING Q.* 177, 180–82 (2008); WENDY WIEGMANN ET AL., *THE INVISIBLE ACHIEVEMENT GAP: HOW THE FOSTER CARE EXPERIENCES OF CALIFORNIA PUBLIC SCHOOL STUDENTS ARE ASSOCIATED WITH THEIR EDUCATION OUTCOMES PART TWO* 43–45 (2014) (exploring the achievement gap for students in foster care).

¹⁴¹ WIEGMANN ET AL., *supra* note 140, at 22–42.

¹⁴² Donna Macomber et al., *Education in Juvenile Detention Facilities in the State of Connecticut: A Glance at the System*, 61 *J. CORR. EDUC.* 223, 224 (2010).

¹⁴³ Elysia V. Clemens, Trent L. Lalonde & Alison Phillips Sheesley, *The Relationship Between School Mobility and Students in Foster Care Earning a High School Credential*, *CHILD. & YOUTH SERVS. REV.* 68, 193, 196 (2016).

know and can advocate for a child, and aiding the college application process.¹⁴⁴ Youth who had even one less placement change per year were almost twice as likely to graduate from high school before leaving foster care.¹⁴⁵

Children in foster care are over-represented in special education and specifically in the category of EBD.¹⁴⁶ One study noted that children in foster care with disabilities had poorer academic outcomes than children in general education or in foster care only, and that they were in more restrictive settings than non-foster care children in special education.¹⁴⁷ This suggests that the impact of being in both foster care and special education has a negative multiplier effect. Researchers conducted a systematic review across a twenty-six-year period on factors associated with educational outcomes for children in foster and kinship care. They concluded that male gender, ethnic minority status, and special education status consistently predicted poor educational outcomes.¹⁴⁸

D. Community-Level Effects

Across the country, the family regulation, juvenile justice, and education systems operate in the very same places. In Miami, for example, where Black children are nineteen percent of the child population, Black children are sixty percent of the out-of-home care population and fifty-one percent of the juvenile justice population.¹⁴⁹ Two of the three zip codes with the highest child welfare removal rates are also the two zip codes with the highest juvenile justice involvement.¹⁵⁰ These patterns, which occur across the country, are what social scientist Robert Sampson refers to as

¹⁴⁴ Michelle Levy et al., *The Educational Experience of Youth in Foster Care*, 18 J. AT-RISK ISSUES 11, 16 (2014); JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, SOCIAL CAPITAL: BUILDING QUALITY NETWORKS FOR YOUNG PEOPLE IN FOSTER CARE 1–7 (2012) (explaining the importance of social capital and relationships particularly for older youth in foster care).

¹⁴⁵ Peter J. Pecora et al., *Assessing the Educational Achievements of Adults Who Were Formerly Placed in Family Foster Care*, 11 CHILD & FAM. SOC. WORK 220, 225 tbl.3 (2006).

¹⁴⁶ Andrea Zetlin, Elaine MacLeod & Christina Kimm, *Beginning Teacher Challenges Instructing Students Who Are in Foster Care*, 33 REMEDIAL & SPECIAL EDUC. 4, 5 (2012); NAT'L CTR. FOR EDUC. STATS., U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2012, at 15–118 (2012) (providing statistics on students, teachers, and schools in 2012); NAT'L CTR. FOR EDUC. STATS., U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2019, at 11–508 (2021) (providing statistics on students, teachers, and schools in 2019); John Emerson & Thomas Lovitt, *The Educational Plight of Foster Children in Schools and What Can Be Done About It*, 24 REMEDIAL & SPECIAL EDUC. 199, 201 (2003); Zetlin, Weinberg, & Shea, *supra* note 113, at 169.

¹⁴⁷ Geenen & Powers, *supra* note 117, at 233.

¹⁴⁸ Aoife O'Higgins, Judy Sebba, & Frances Gardner, *What Are the Factors Associated With Educational Achievement for Children in Kinship or Foster Care: A Systematic Review*, 79 CHILD. & YOUTH SERVS. REV. 198, 206–07 (2017) (finding that male gender, ethnic minority, and special education needs predicted poor educational outcomes).

¹⁴⁹ FLA. DEP'T OF JUV. JUST., DISPROPORTIONATE MINORITY CONTACT/RACIAL ETHNIC DISPARITY BENCHMARK FY 2019–20 (2020), <https://web.archive.org/web/20220214090853/https://www.djj.state.fl.us/research/reports-and-data/interactive-data-reports/disproportionate-minority-contact-reports/dmc-red-profile-fy2019-20> (last visited Feb. 14, 2022) (filtered for Miami-Dade County).

¹⁵⁰ MIAMI DADE CNTY. JUV. SERVS. DEP'T, 2020 YEAR END REPORT (2020), <https://www.miamidade.gov/juvenileservices/library/2020-end-of-year-report.pdf> <https://perma.cc/A796-JJVQ>].

“ecological concentration of disparate aspects of well-being” or “geographic ‘hot spots’ of compromised health.”¹⁵¹

The amplifying effects of these intersecting systems cause harm not only to individuals and families, but also to the communities in which these situations are concentrated. Dorothy Roberts has explained the significant community impacts of the family regulation system. Families are not only essential for transmitting values to the next generation, but they form the base through which processes like social capital—the intangible good from relationships among people—operate.¹⁵² As Roberts explained, “families form the base of support from which neighbors can join together to accomplish communal networks.”¹⁵³ Roberts argues that placing large numbers of children in state custody “depletes a community’s social capital, weakening the group’s ability to form productive connections among its members and with people and communities outside of the community.”¹⁵⁴ It also erodes a means of fighting injustice and the “family and community networks that prepare children to participate in future political life.”¹⁵⁵ Finally, child removal negatively impacts neighbors’ sense of control over their lives and collective ability to get things done.¹⁵⁶

All of these effects also reinforce stereotypes about people in the neighborhood and the reality of the neighborhood’s inequality. “We react to neighborhood difference, and these reactions constitute social mechanisms and practices that in turn shape perceptions, relationships, and behaviors that reverberate both within and beyond transitional neighborhood borders, and which taken together further define the social structure of the city.”¹⁵⁷

IV. TOWARDS OPPORTUNITIES FOR CHILDREN AND FAMILIES TO THRIVE

The family regulation system’s interaction with the juvenile justice and education systems magnifies harm and oppression to Black families and communities. These systems are in a perpetual state of failure and reform, yet there is no meaningful improvement, and their replication of hierarchy is used to justify continued need for the systems to operate the way they do. This vicious cycle supports the growing sense that reform within existing paradigms is fundamentally unjust and abolition is necessary.¹⁵⁸ A group of symposium contributors who are directly impacted—mothers, community organizations, and allied advocates from across the country—note that “[a]bolition teaches us to unroot oppressive structures, disrupt and dismantle them while simultaneously supporting a

¹⁵¹ ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 13 (2012).

¹⁵² ROBERTS, *SHATTERED BONDS*, *supra* note 1, at 237.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 239.

¹⁵⁵ *Id.* at 243.

¹⁵⁶ *Id.* at 241.

¹⁵⁷ SAMPSON, *supra* note 151, at 21.

¹⁵⁸ Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455, 460 (2021) (noting that efforts to address disproportionality have not made a meaningful difference); Ashley Albert et al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861, 866–68 (2021).

praxis of imagination, healing, and building.”¹⁵⁹ Having explored the mechanisms among the family regulation, education and juvenile justice systems that intensify harms, this Part offers some steps along the long road to abolition that dismantle the punitive pillars of the current systems and build alternative ways to create the environments necessary for Black children and their families to thrive. This Part contributes to the collective project by highlighting some approaches that account for these interlocking systems.

Transformative approaches to child and family well-being cannot occur within the existing punitive policy framework for these systems, and instead must be centered around the families and in the communities most harmed by these systems. We need holistic approaches that physically and conceptually leave children within their families and communities and create the conditions that foster individual and community well-being. As a society we need to keep families together, provide them the material resources and services they need to care for their children, and address the structural conditions that make it difficult to parent, like poverty and the lack of quality affordable housing or childcare. We also need to help people heal from trauma using culturally appropriate approaches. These core concepts, if taken seriously, can help achieve the purported goals of all three child-serving systems: family regulation (safety, permanency, well-being), juvenile justice (rehabilitation) and education. We need to radically shrink the reach and scope of the family regulation and juvenile justice systems. Schools, on the other hand, need increased investments to offer a quality education regardless of a child’s zip code and transform into places that cultivate well-being and achievement. While a comprehensive analysis of these themes is beyond the scope of this Piece, this Part offers some ideas that advance these goals in light of the intertwined operation of the three systems.

A. Adopt a Holistic Approach to Helping Children and Families

We demand a world where systems do not dictate the futures of families, nor are the complexities of human pain, love, and need, reduced to checklists and algorithms; where there are numerous community-based alternatives to provide the rites of passage for healing. . . . In this world, we govern our own communities, and have participatory policy making. . . . All top-down systems are eradicated. Instead, grassroots efforts anchor us and lead the fight for the health and well-being of families.¹⁶⁰

We need a holistic approach to helping families that accounts for dysfunctional, interlocking systems and addresses the root structural problems that ensnare families in the family regulation and juvenile justice systems.¹⁶¹ Families policed by the family regulation and juvenile justice systems, and who lack access to quality schools, confront the same adverse community conditions. Poverty, neighborhood violence, racism, inadequate housing, and lack of economic opportunity and social capital are the same

¹⁵⁹ Albert et al., *supra* note 158, at 863.

¹⁶⁰ *Id.* at 871.

¹⁶¹ DOWD, *supra* note 12, at 142–46.

overlapping community-level factors that research indicates heighten risk for CPS intervention, juvenile justice involvement, and thwarted educational opportunities.¹⁶² These conditions result from over a century of policies like Jim Crow codes, highway infrastructure that destroyed Black neighborhoods, redlining, the war on drugs, mass incarceration, welfare reform, school funding, and other policy choices.¹⁶³ As this Piece documents, rather than addressing these community-level root causes leading to system involvement, the family regulation, juvenile justice, and education systems intertwine punitive approaches that pathologize Black families, separate children from their families and communities, and inflict trauma rather than helping children to heal.¹⁶⁴ As we move to dismantle these systems, we should develop a more holistic view of families, address the root structural issues driving disproportionality in all of these systems, and work across sectors to build what families and communities indicate would be most helpful.

Despite the overlapping community-level risk factors, policymaking, reform efforts, and practice all inefficiently and ineffectively operate through a siloed system-oriented lens that coercively seeks to fix broken families. The dominant intervention of these systems has been on individual or family factors prefaced on deficit models of fixing parents and their children. The dominant approach used by the family regulation system is to fix parents' alleged deficits using family separation as the primary means to exercise control and punishment.¹⁶⁵ The juvenile justice system focuses on rehabilitation after children are already involved in the system. Although juvenile arrests and incarceration rates have generally gone down, the overrepresentation and disparately harsh treatment of Black children has remained constant, largely for behavior that is typical of adolescents or manifestations of trauma.¹⁶⁶ Federal policy and funding structures funnel billions of dollars in resources intended to help families through these individual carceral systems. System-centered reform efforts

¹⁶² Wendy R. Ellis & William H. Dietz, *A New Framework for Addressing Adverse Childhood and Community Experiences: The Building Community Resilience Model*, 17 *ACAD. PEDIATRICS* 86, 87 (2017). The community-level risk factors for delinquency include poverty (e.g., high public assistance and unemployment rates), neighborhood violence and crime, community instability (e.g., housing mobility and low home ownership), social and physical disorganization (e.g., poor external housing conditions, vandalism, and non-enforcement of building codes). DEV. SERVS. GRP., INC., OFF. OF JUV. JUST. & DELINQ. PREVENTION, LITERATURE REVIEW: RISK FACTORS FOR DELINQUENCY 8–10 (2015). The community-level risk factors for abuse and neglect are poverty, limited educational and economic opportunities, neighborhood violence and crime, low community involvement among residents, unstable housing and high residential mobility, high levels of food insecurity, and few community activities for young people. *Risk and Protective Factors*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/childabuseandneglect/riskprotectivefactors.html> [<https://perma.cc/NUE3-6A6D>] (last updated Mar. 15, 2021).

¹⁶³ Ellis & Dietz, *supra* note 162, at 86 (proposing a model for building resilience in communities affected by toxic stress and childhood adversity).

¹⁶⁴ See *supra* Parts II and III.

¹⁶⁵ Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 *COLUM. J. RACE & L.* 767, 781 (2021).

¹⁶⁶ HENNING, *supra* note 79, at xv–xviii.

have not achieved improved outcomes or led to the kind of change we need.¹⁶⁷

That our policy frameworks remain so committed to these approaches is all the more striking in light of evidence that addressing structural problems and material resources reduces the maltreatment that brings children into the current system. Studies show that minimum wage, earned income tax credits, and stable housing are linked to lower reported rates of neglect.¹⁶⁸ As another example, lack of stable, affordable, and safe housing is a significant factor in removals (and juvenile justice).¹⁶⁹ Studies have shown that lack of safe housing negatively impacts a child's health, development, education, and emotional well-being.¹⁷⁰ A holistic approach would directly address these kinds of structural issues and redirect the resources currently used to fund failing carceral systems.

Adopting a holistic approach means families deciding what they need to thrive and local communities leading efforts to decide how to best provide it.¹⁷¹ This should be done with authentic leadership by people who live and work within the communities most impacted by existing carceral systems. It should include broad collaborations among the many sectors that can form community-based support networks needed for children to thrive including schools, health centers, churches, grassroots and civic organizations, early childhood providers, and local businesses. This kind of collaboration allows community organizations to work collectively to coordinate family support efforts and resources in order to benefit the entire community. These networks are needed to advocate for and develop the range of possible strategies including structural investments in neighborhoods, economic policies to address poverty (affordable housing, living wage, child tax credits, child care) and the many other ideas explored at this symposium. These networks are also needed to educate elected officials, legislators, policymakers, practitioners, philanthropic organizations, and others to view the issues impacting children and families in a more holistic way.

Such an effort cannot originate within the contours of the current family regulation or juvenile justice systems because the current policy framework and coercive power dynamics do not allow for the kind of community-wide change that is needed. The Building Community Resilience (“BCR”) framework is one example that provides a “continuum of cross-sector cooperation and services to build the ‘social scaffolding’ that will support children and families and contribute to community resilience.”¹⁷² BCR pushes beyond traditional models of multi-agency collaborations by explicitly integrating a racial equity lens and

¹⁶⁷ Jerry Milner & David Kelly, *The Need for Justice in Child Welfare*, 99 CHILD WELFARE J. (Dec. 2021), <https://www.cwla.org/the-need-for-justice-in-child-welfare/> [<https://perma.cc/AR5D-UYVH>] (arguing that, despite wide agreement that the family regulation system needs transformative change, theories of change centered around developing better interventions to “fix” parents have proved largely unsuccessful).

¹⁶⁸ Mack, *supra* note 165, at 790 (citing studies showing that increases in the minimum wage and earned income tax credits corresponded with lower reports of neglect).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 795.

¹⁷¹ Milner & Kelly, *supra* note 167.

¹⁷² Ellis & Dietz, *supra* note 162, at 87.

understanding of the policy reasons for the adverse community environments that put children at risk for adverse childhood experiences.¹⁷³ It seeks to create stronger linkages across health systems, community-based agencies, community members, and government agencies to strategically address the root causes of toxic stress.¹⁷⁴ By suggesting this type of cross sector coordination, this Piece does not mean to say that the current carceral systems should better collaborate and coordinate with each other. Collaboration and coordination can be a useful ameliorative approach in the current carceral context to address the intersections among the family regulation systems and education and juvenile justice. But it has not, and is unlikely to, bring about the kind of transformative change this symposium challenges us to imagine. It also creates the potential to push people deeper into carceral systems.¹⁷⁵ Instead, what this Piece suggests is the kind of coalitions that are authentically centered in the communities where people most impacted live and work.

A holistic approach also means we must act now to end the criminalization of youth in foster care and disrupt the pipelines that funnel children from school or foster care placements into the juvenile justice system. As discussed in Part II, due to the trauma of family separation, experiences in foster care including placement instability and placement in congregate or restrictive settings, children in foster care may engage in behaviors that reflect their trauma and the harm they have experienced. This begins with preventing children from entering the family regulation and juvenile justice systems in the first place, thereby reducing the number of children who can cross over to other systems.¹⁷⁶ It requires disrupting the school-to-prison pipeline. Once children are already in the family regulation system, they should not be referred to the delinquency system for behaviors that are either typical adolescent behavior or manifestations of trauma. When they are, the case should be diverted quickly out of the delinquency system. More generally, children should be directed to school and community-based services that address trauma and provide opportunities known to promote resilience.¹⁷⁷ Simultaneously, action must be taken at every stage of the juvenile justice system to stop criminalizing Black youth.¹⁷⁸

B. Keep Families Together

We demand a world where family integrity of all families is valued and family integrity held sacred. In this world, families are supported and

¹⁷³ Another example is the Mobilizing Action for Resilient Communities. Jennifer Jones et al., *Translating Brain Science Research into Community-Level Change*, 17 *ACAD. PEDIATRICS* 24, 24–25 (2016).

¹⁷⁴ Ellis & Dietz, *supra* note 162, at 87.

¹⁷⁵ Wendy Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 *YALE J. L. & FEMINISM* 317, 378–79 (2014) (recommending caution in collaboration contexts where agencies share data that could potentially be used for punitive purposes).

¹⁷⁶ ALEXANDRA MILLER & LISA PILNIK, *NEVER TOO EARLY: MOVING UPSTREAM TO PREVENT JUVENILE JUSTICE, CHILD WELFARE, AND DUAL SYSTEM INVOLVEMENT* 13 (2021).

¹⁷⁷ Eduardo R. Ferrer, *Transformation Through Accommodation: Reforming Juvenile Justice by Recognizing and Responding to Trauma*, 53 *AM. CRIM. L. REV.* 549, 584 (2016).

¹⁷⁸ HENNING, *supra* note 79, at 326–41.

given the resources they need to thrive, and the family death penalty, or termination of parental rights, no longer exists.¹⁷⁹

Keeping families together is essential to children's well-being. This would be a truism if we were talking about any family other than poor families of color. Strong family relationships are critical for children to develop and be resilient. Children need at least one adult who loves them unconditionally and, better yet, a network of caring adults. Parents and caring adults improve adolescent resilience by nurturing personal attributes like positive self-esteem and teaching good problem-solving skills to help youth resolve conflicts with others. Parents also help youth develop a strong racial identity and support racial socialization, which is also important for healthy adolescent development. The poor outcomes documented in Part II of this Piece demonstrated that the state is a poor substitute parent. As demonstrated above, the family regulation system cannot provide the love, care, nurturing, and host of benefits that stem from growing up within a family. And the juvenile justice system's disproportionate confinement of Black youth also disrupts family ties and the family's role. It does more harm than good. As others at this conference have asked us to do, imagine the possibilities if we marshaled the same level of resources currently devoted to separating and confining children and terminating parental rights, to keeping families together and helping families care for children.¹⁸⁰ We cannot seek to help Black children if we do not also care about the parents.¹⁸¹

Keeping families together requires dismantling the features of the current systems that destroy relationships with the parents who are so essential to their healthy development and long-term well-being. In the family regulation system, this means ending removals as the dominant means of addressing neglect. ASFA should be repealed for all of the reasons more extensively documented elsewhere by parents, advocates and scholars.¹⁸² ASFA implemented a fifteen-month time limit for filing termination of parental rights rather than continued reunification services, waived the state's obligation to attempt reunification if aggravated circumstances exist, and incentivized adoptions over other permanency options that would leave parental rights intact.¹⁸³ Among its many problems, this approach does not account for inequitable access to services, the timeline and process for addiction recovery, racism, and the relationship between addiction and trauma.¹⁸⁴ More pervasively, ASFA's funding structure funnels billions of dollars to states annually to support foster care and adoption services. Until recently, "the key to all of these Title IV-E funding programs was the requirement that the children for whom the funds were allocated be removed from their homes to the foster

¹⁷⁹ Albert et al., *supra* note 158, at 869.

¹⁸⁰ Mack, *supra* note 165, at 776–82; Burton & Montauban, *supra* note 43, at 678.

¹⁸¹ HENNING, *supra* note 79, at 304.

¹⁸² Albert et al., *supra* note 158, at 875–78; Milner & Kelly, *supra* note 167; Mack, *supra* note 165, at 776–82.

¹⁸³ Adoption and Safe Families Act, *supra* note 45.

¹⁸⁴ Milner & Kelly, *supra* note 167.

system.”¹⁸⁵ In the juvenile justice system, we should end the use of confinement as a response to situations that are symptoms of trauma.¹⁸⁶

C. Support Families Within Their Communities

Keeping families together also means parents must have the resources they need to help them care for their children. Parents must have resources to meet their needs and address the root causes that push families into the current family regulation and juvenile justice systems. Angeline Montauban, a symposium contributor and parent with lived experience with the family regulation system, writes:

The best way to protect children is to have resources readily available to families in the community. . . . The resources needed to support families are already available and so it is time to redirect those federal, state, local, and private funds to developing and maintaining creative and innovative ways to help people who need it Rather, we need to invest in community-based organizations and resources to eliminate housing insecurity and food insecurity, and to provide whatever is necessary to help children and families thrive—whether it be clothing, educational support, domestic violence support, or child care and workforce development.¹⁸⁷

These approaches must be community-driven and must strengthen and align formal and informal forms of help for families through neighborhood-level strategies that build the social fabric of the community. Solutions must focus on primary prevention and building power and relational capacity in the communities most harmed by these systems. Families would be supported in their natural social contexts—“embedded in the settings where families live, work, study, worship, and play.”¹⁸⁸ The current family regulation system’s role as an arbiter of services would shrink, and resources would be redirected to strengthen a connected network of community-based institutions. Help is available in the community when families need services and supports such as prenatal care, mental health services for parents and children, employment, housing, child care, early childhood education, parenting coaching, drug treatment, domestic violence support.

We should also explore other neighborhood-level interventions that improve the social processes that have been linked with improved child and community well-being. Studies have shown that neighborhoods with high collective efficacy¹⁸⁹ (social cohesion and social control) and social networks

¹⁸⁵ Mack, *supra* note 165, at 778.

¹⁸⁶ Ferrer, *supra* note 177, at 584–85.

¹⁸⁷ Burton & Montauban, *supra* note 43, at 678.

¹⁸⁸ Robin J. Kimbrough-Melton & Gary B. Elton, “*Someone Will Notice, and Someone Will Care*”: *How to Build Strong Communities for Children*, 41 CHILD ABUSE & NEGLECT 67, 67 (2015).

¹⁸⁹ Collective efficacy is a group’s shared belief in their capability to succeed at given tasks. It measures social control—neighbor’s capacity to regulate behavior of other residents—and social cohesion—mutual trust and solidarity among neighbors. Beth E. Molnar et al., *Neighborhood-Level Social Processes and Substantiated Cases of Child Maltreatment*, 51 CHILD ABUSE & NEGLECT 41, 42–43 (2016).

(physical proximity of close friends and families) have lower rates of substantiated abuse and neglect and substance exposed infants.¹⁹⁰ Intergenerational closure (the extent to which parents know the neighborhood's children and the parents of their children's friends) has been linked to academic achievement and lower rates of substantiated abuse and neglect.¹⁹¹ Robert Sampson, a leading researcher in the field, found that residential stability and organizational density are key explanations for collective efficacy and social altruism.¹⁹² Sampson notes that "collective efficacy is primarily about informally activated social control and shared expectations rooted in trust."¹⁹³ The density of nonprofit organizations (e.g., neighborhood watches, block groups, tenant associations, and after-school programs) predicted collective efficacy and collective civic action.¹⁹⁴ These types of organizations must be provided the organizational resources and capacity to "generate a web of mundane routine activities that can lubricate collective life."¹⁹⁵ This enhances the community, but also forms an integral part of the network through which families can find support. These should then be integrated into other types of community-based organizations that can provide more intensive services for things like substance abuse and mental health treatment. "It is the totality of the institutional infrastructure that seems to matter in promoting civic health and extending to unexpected economic vitality."¹⁹⁶ Sampson's research makes the case for community-level interventions as well as holistic policy interventions that recognize the important interconnected social fabric of neighborhoods in American cities. They would include a range of strategies including public safety, opportunities to enhance citizen participation and mobilization, community economic development, and mixed-income housing.¹⁹⁷

To be effective, however, these approaches must be developed simultaneously with the dismantling of key pillars of the family regulation system that lead to the level of surveillance and coercion that cannot continue if we want to better serve families. Mandatory reporting laws—requiring professionals to report and child protection agencies to investigate all instances of suspected neglect—prevent professionals in a range of helping professions (e.g. social workers, doctors, community organizations) from making more effective interventions for millions of children. Under the current framework, a parent who seeks help within the community for situations like domestic violence, substance use disorder, or mental illness face significant risk that they will be reported to CPS, making it less likely people will seek services and undermining the relationship when they do.¹⁹⁸ State laws' overly broad and vague definitions of "neglect" expand mandatory reporting and investigation to a

¹⁹⁰ *Id.* at 41.

¹⁹¹ *Id.* at 43.

¹⁹² SAMPSON, *supra* note 151, at 402–03.

¹⁹³ *Id.* at 370.

¹⁹⁴ *Id.* at 370–72.

¹⁹⁵ *Id.* at 371.

¹⁹⁶ *Id.* at 372.

¹⁹⁷ William Julius Wilson, *Foreword* to ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT*, at xii–xiii (2012).

¹⁹⁸ Burton & Montauban, *supra* note 43, at 668.

range of poverty-related situations, making coercive interventions the dominant means of responding to the needs of poor families. “Once entrapped in the CPS system, as a condition of maintaining or regaining custody of their children, parents are subjected to oppressive oversight by CPS caseworkers under the rubric of child abuse services and treatment—so-called ‘preventive services’ and foster care or reunification programming.”¹⁹⁹ CPS forces parents to participate in the type of services CPS dictates with the provider CPS selects, rather than services families choose, want, or need.²⁰⁰ These are often standardized services that do not address families’ actual needs or the root causes of the situation that triggered the mandatory report; that are not offered in culturally-competent or relevant ways; and that are so driven by the judicial process that even potentially helpful services are hijacked as evidence to help CPS agencies prove parents’ dangerousness to justify removal or termination of parental rights.²⁰¹ The network of public and private agencies that provide these services, through their contracts with the CPS agency, form part of this coercive web.

D. Invest in Schools as a Place for Learning and Healing

In this world, those of us who live with addiction, or trauma are afforded the space, time and support necessary to heal, and our children are allowed to be participants in that healing. In this world, our children learn that adversity can be overcome, that mistakes can be forgiven, and that the experience of suffering does not make permanent outcasts of us We would be living in a world where practicing the skills to end harm, mediate conflict is an imperative.²⁰²

Schools play such an important role in children’s development that they are important sites for transformation. We need high quality schools in every neighborhood and a special education system that lives up to its promise. Symposium contributors Brianna Harvey, Josh Gupta-Kagan & Christopher Church offer schools as a potential place to provide supports and services from which families reported to the family regulation system might benefit such as public benefits, legal services referrals, health care, social workers and peer support.²⁰³ For schools to become places that foster achievement, well-being and family support, they must abandon the punitive approaches emblemized by the school-to-prison pipeline in favor of a culture that values trust, respect and learning. Restorative justice offers one approach that offers promise along the way. Grounded in “indigenous traditions that emphasize interconnectedness and relationality to promote well-being of all of its community members”,²⁰⁴

¹⁹⁹ *Id.* at 670.

²⁰⁰ *Id.* at 655.

²⁰¹ *Id.* at 657–61 (noting that mental health evaluations contracted by the family regulation system are used as a prosecutorial tactic to establish abuse and neglect and justify CPS intervention, rather than to meaningfully diagnose and treat issues, and are often poor quality that does not comply with general standards of the profession).

²⁰² Albert et al., *supra* note 158, at 870–71.

²⁰³ Harvey, Gupta-Kagan, & Church, *supra* note 134, at 599–610.

²⁰⁴ Thalia González, Heather Sattler, & Annalise J. Buth, *New Directions in Whole-School Restorative Justice Implementation*, 36 CONFLICT RESOL. Q. 207, 208 (2018); *see also*

restorative justice is a theory and diverse set of practices that seek to “hold individuals accountable for their behavior, while also providing community support to manage the external forces that can influence individual decisions or motivations.”²⁰⁵ Restorative justice “shifts the focus away from individual retribution and stigmatization and towards restoring and strengthening bonds of trust and mutual reliance for the future.”²⁰⁶

Used most often in the criminal and juvenile justice systems, scholars have argued to extend its applicability to the family regulation, public assistance, and other human services contexts.²⁰⁷ Dorothy Roberts argues that the “restorative justice paradigm is better suited than the retributive paradigm for addressing black mothers’ involvement in the prison and foster care systems because it focuses on needs rather than punishment and extends beyond individuals to include the community.”²⁰⁸ Roberts, however, argues that current dominant conceptions of restorative justice must go beyond repairing harm among individual perpetrators and victims, so that the state make amends for its role in the systematic harm to individuals.²⁰⁹ She also joins other feminist scholars in suggesting that restorative practices that are entangled in carceral justice systems are likely to be coopted and corrupted.²¹⁰ Restorative strategies should be explored to address a range of private harms that typically trigger punitive intervention by family and youth systems. These efforts would “rely on the strengths and accountability of community members rather than on punitive state intervention.”²¹¹ This Piece explores its applicability in the school context.

Schools are increasingly using restorative-justice practices.²¹² The broad goal in the school context is for “educational policy and practice to be more responsive and restorative to the needs and concerns of the school community.”²¹³ While there are various models for integrating restorative practices at schools, studies have found that the whole-school approach is most effective for improving student outcomes.²¹⁴ Consistent with public health and ecological frameworks, whole-school models seek to improve relationships among all teachers, students and staff and strengthen the climate of the entire school, rather than using restorative practices solely

Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 COLUM. J. RACE & L. 681, 705–08 (2021).

²⁰⁵ Lu, *supra* note 30, at 174.

²⁰⁶ SAMPSON, *supra* note 151, at 305.

²⁰⁷ Lu, *supra* note 30, at 177 (arguing that “[i]n the welfare context, restorative justice can focus on better processes and more humane interactions over faceless and remote government bureaucracy on the one hand, and abandonment to and dependence on unaccountable, unsupportive, and even potentially abusive private relationships on the other.”)

²⁰⁸ Dorothy Roberts, *Black Mothers, Prison, and Foster Care: Rethinking Restorative Justice*, in RESTORATIVE AND RESPONSIVE HUMAN SERVICES 116, 121 (Gale Burford, John Braithwaite & Valerie Braithwaite eds., 2019).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 122–23.

²¹¹ *Id.* at 123.

²¹² González, Sattler, & Buth, *supra* note 204, at 207.

²¹³ *Id.* at 208.

²¹⁴ *Id.* at 209.

to address specific disciplinary incidents.²¹⁵ Whole-school approaches promote school connectedness, the development of health and trusting relationships within the school, which is a protective factor for youth who might otherwise be targeted by punitive systems. It also supports positive school culture, equitable climate, improved academic outcomes, and opportunities to develop improved social-emotional capacities, and listening and conflict resolution skills.²¹⁶

While approaches can be aimed narrowly at reducing reliance on punitive discipline practices in schools,²¹⁷ restorative justice has the potential to transform the overall culture of a school. Restorative justice has been linked to improved school climate and safety. This includes increased school connectedness, relationship building, conflict resolution skills development, academic performance, and social emotional learning. One study concluded that in addition to addressing school safety, circles are an “important school-level resilience-building strategy for both educators and students. As their analysis revealed, restorative approaches aimed to build resilience to counter the negative impacts of zero tolerance policies by building supportive relationships and to create spaces for students to productively express their thoughts and emotions.”²¹⁸

As with well-intentioned ideas, this can be coopted as another tool for marginalization and oppression. In the school context, this could happen in the dominant model where adults exclusively monopolize facilitation and decision-making. Thalia Gonzalez, Heather Sattler, and Annalise Butth studied one very successful model that offers a critical guardrail against this coopting. The school democratized the approach, integrating restorative practices at all levels of the school, so there was no central leader of restorative justice, rather teachers, staff and students were empowered as circle keepers.²¹⁹ Student leadership was central to the success of the model studied, and in addition to leading circles within the school, the students also served as practitioners outside of their school at conferences, other schools, and community settings.²²⁰ These types of models should be further explored for its potential to disrupt the school’s role in co-facilitating the harms of the family regulation and juvenile justice systems.

Power U Center for Social Change (“Power U”) is an example of a grassroots organization that integrates restorative strategies in its organizing around multiple issues.²²¹ Power U is a grassroots membership organization whose mission is “organizing and developing the leadership of Black and Brown youth and Black women in South Florida so that they

²¹⁵ Whole school approaches integrate a multi-level system of primary (relationship building skills for all community members), secondary (restorative processes to repair harm among specific individuals) and tertiary interventions (more intensive processes for those with chronic behavioral problems). *Id.*

²¹⁶ *Id.* at 211.

²¹⁷ *Id.* at 208 (citing studies finding that restorative practices reduce disciplinary referrals and incidents and serve as a protective factor for students of color in particular).

²¹⁸ *Id.* at 209.

²¹⁹ *Id.* at 216, 218.

²²⁰ *Id.* at 212, 216.

²²¹ *About, POWER U*, <https://www.poweru.org/about/> [<https://perma.cc/EEC9-QEXX>] (last visited Mar. 11, 2022).

may help lead the struggle to liberate all oppressed people.”²²² They organize around a range of issues including environmental justice, affordable quality housing, and the school-to-prison pipeline. They use restorative strategies in various spaces within the community, and a central focus right now is organizing young people to fight for safe and supportive schools including a successful campaign to bring restorative practices to schools.²²³

Restorative practices are one approach to whole-school trauma sensitive practices and another promising way to effectively address the needs of children affected by childhood trauma. Children impacted by trauma need an “educational environment that places relationship, trust and emotional and physical safety at the center of teaching.”²²⁴ They cannot effectively learn when they are in a fight, freeze, or flight mode. A trauma-responsive education avoids using punitive and exclusionary disciplinary measures and instead builds accountability through relationships to people who are attuned to the child’s emotional needs and communicate care, acceptance, and empathy. This approach also strengthens self-regulation and other executive functioning skills. For these reasons, advocates and scholars have begun advocating for trauma-responsive schools in those communities where a significant portion of the school population has experiences trauma.²²⁵ Studies have showed that shifting to a whole-school trauma responsive model improves student educational progress, behavior, and relationships with educators.²²⁶ In a Massachusetts study of four schools that implemented a trauma-based approach, schools reported that they felt calmer and safer with a decrease in the number of crises, a decrease in daily detentions and disciplinary incidents, and improved relationships.²²⁷ There is a critique that trauma-sensitive practices are ameliorative and do not address the structural issues that created the trauma. We also need structural change. In the meantime, trauma

²²² *Id.*

²²³ *Smashing the School-to-Prison Pipeline*, POWER U, <https://www.poweru.org/smashing-the-school-to-prison-pipeline/> [<https://perma.cc/3JK3-G8JK>] (last visited Feb. 21, 2022).

²²⁴ Nicole Tuchinda, *The Imperative for Trauma-Responsive Special Education*, 95 N.Y.U. L. REV. 766, 823 (2020).

²²⁵ See *Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1126 (denying a motion to dismiss for an action claiming that exposure to a traumatic event is a disability under the Rehabilitation Act or the ADA); see also *Stephen C. v. Bureau of Indian Educ.*, No. 17-08004, 2019 U.S. Dist. LEXIS 216436 (D. Ariz. Dec. 16, 2019) (rejecting plaintiffs claim on summary judgment that defendant schools failed to provide plaintiff students with a system to help those impacted by trauma).

²²⁶ WEHMAN JONES & DAVID OSHER, TRAUMA AND LEARNING POLICY INITIATIVE (TLPI): TRAUMA-SENSITIVE SCHOOLS DESCRIPTIVE STUDY, AM. INSTS. FOR RSCH. 19–58 (2018) (observing how an inquiry-based process can create the conditions for a trauma-sensitive school environment); Sheryl Kataoka et al., *Effect on School Outcomes in Low-Income Minority Youth: Preliminary Findings from a Community-Partnered Study of a School Trauma Intervention*, 21 ETHNICITY & DISEASE 1, 6–8 (2011) (finding a positive correlation between academic success and early intervention for students who have been exposed to community violence); Regents of the Univ. of Cal., *UCSF HEARTS: Healthy Environments and Response to Trauma in Schools*, <https://hearts.ucsf.edu/> [<https://perma.cc/GCP2-J5E3>] (last visited Jan. 11, 2022); Christina D. Bethell et al., *Adverse Childhood Experiences: Assessing the Impact on Health and School Engagement and the Mitigating Role of Resilience*, 33 HEALTH AFFS. 2106, 2111 (2014).

²²⁷ JONES & OSHER, *supra* note 226, at 45.

sensitive practices can help children to heal and transform schools into what they should be to realize the abolitionist vision of safe and healthy communities.

V. CONCLUSIONS

Efforts to dismantle the carceral state should account for the ways that the family regulation system's interactions with the juvenile justice and education systems significantly intensify harm and oppression of Black families and communities. The family regulation system itself rips families apart largely for reasons stemming from poverty and structural inequality and also inflicts a host of other harms endemic to the failed system. That alone would be reason enough to sound the alarm. Making things worse, it funnels children into the juvenile justice system, which independently produces negative outcomes for children of color, and creates conditions that intersect with educational inequity to limit educational opportunity. All three systems, permeated by "demonizing stereotypes that cause others to fear and devalue" Black children and their families²²⁸, operate through mechanisms that pathologize and label children as defective or dangerous, separate children from their families and communities, and subject them to multiple traumatic experiences. Rather than continuing systems-oriented reforms that tinker at the edges without meaningful change, we should adopt a holistic approach that directly centers families and the communities where they live. We need to keep families together, provide them the material resources and services they need to care for their children, and address the structural conditions that make it difficult to parent like poverty and the lack of quality affordable housing. We need high quality schools in every neighborhood and explore the potential for schools to be important sites for transformation, helping children to heal and fostering their well-being.

²²⁸ HENNING, *supra* note 79, at 303.