

Re-Envisioning Child Well-Being: Untangling the Inequitable Intersections among Child Welfare, Juvenile Justice and Education (working title)

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Almost twenty years after *Shattered Bonds*,¹ Roberts' indictment that the child welfare system polices, disrupts and restructures black families and communities remains just as pressing. Black children remain over-represented in foster care with enshrined and normalized disparate treatment and outcomes.² They are more likely to be removed from their homes, and their longer stays in foster care are typically characterized by placement instability, overly restrictive placements, and inadequate mental health and other services.³ Black children 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 another set of disturbing outcomes as adults.⁴ Given this alarming record, if our goal is to maximize the likelihood that Black children thrive, 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 certain Black communities.

There is a burgeoning call for abolition of the child welfare system premised on the idea that the primary function of the system is punitive control of families of color and meaningful reform within the current structure is not possible.⁵ The carceral and child welfare systems are deeply interconnected,⁶ and Roberts and others advocate for abolition of all carceral systems – including the family regulation system, in favor of “radically different ways of meeting families’ needs.”⁷ The goals articulated by prison abolitionists coalesce with child welfare abolitionist calls that envision healthy communities where people have the resources needed to thrive. Prison abolitionists advocate a public health approach to combat violence and help people re-enter

¹DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

²Oronde Miller et al., *CHANGING COURSE: Improving Outcomes for African American Males Involved with Child Welfare Systems*, CENT. STUDY SOC. POLICY 31 (Mar. 2014); John Fluke et al., *Disparities and Disproportionality in Child Welfare: Analysis of the Research*, CENT. STUDY SOC. POLICY 162 (Dec. 2011).

³John Fluke et al., *Disparities and Disproportionality in Child Welfare: Analysis of the Research*, CENT. STUDY SOC. POLICY 162 (Dec. 2011).

⁴After 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* 115–140 (2008).

⁵Erin M. Cloud, *Toward the Abolition of the Foster System*, SCHOLAR AND FEMINIST ONLINE (2019), <https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/>; Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 *UCLA LAW REV.* 1474 (2012).

⁶Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 *S. C. LAW REV.* 577 (1997).; Roberts, *supra* note 5.

⁷Roberts, *supra* note 5, at 1491.

communities after incarceration,⁸ while the move to dismantle the family regulation system envisions communities where families can access the resources needed to safely care for children.⁹ Even in the context of child welfare reform efforts, there has recently been elevated policy discussion around prevention and community-based intervention strategies.¹⁰ As we work towards that vision, it is important to get a more holistic understanding of Black children in the child welfare system within the context of their communities and the multiple, inter-connected systems that work together to limit opportunities.

The child welfare system interacts with two systems that are also marked by stark racial disparities – the education and juvenile justice systems. Race has been theorized as a salient factor driving inequity in the child welfare, education, and juvenile justice.¹¹ All three systems individually, and in concert, enact policies and practices that result in, and compound, structural

⁸ The prison abolitionists movement views abolition as devolving responsibility for public safety to local communities and redistributing government spending from police and prisons to creating opportunity in communities. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA LAW REV. 1156, 1164 (2015).

⁹ Roberts, *supra* note 5 at 1227. See also Kele Stewart, *Relative Care Within a Public Health Paradigm*, IMPACT: COLLECTED ESSAYS ON THE THREAT OF ECONOMIC INEQUALITY, NEW YORK LAW SCHOOL IMPACT CENTER FOR PUBLIC INTEREST LAW 1 (2015); Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. LAW REV. 897 (2014); Martin Guggenheim, *Issues Surrounding Initial Intervention*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 359 (2005). While the broad goals are the same, as Dorothy Roberts recently cautioned, some of the calls to transfer resources from the police to agencies that handle child protective services “will result in even more state surveillance and control of black communities.” *Abolishing Policing Also Means Abolishing Family Regulation*, THE IMPRINT (2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> (last visited Feb 28, 2021).

¹⁰ Despite articulating family preservation as a policy goal, the child welfare system has never truly invested resources in prevention or in providing families with the kinds of resources and services that would actually be helpful. Martin Guggenheim, *The Foster Care Dilemma and What to Do About it: Is the Problem that Too Many Children are Not Being Adopted out of Foster Care or that Too Many Children are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141 (1999). Families First Prevention Act gives a nod to prevention but will not bring about the kind of transformative change needed to make a difference because system is still premised on removal as the primary intervention, the types of services offered under Families First are limited, there are time limits for funding, the requirement for evidence-based practices precludes a lot of service providers especially community-based providers. Some child welfare scholars and advocates have proposed a public health approach as an alternative paradigm to provide a continuum of community-based services to children and families, and relegate the current crisis-oriented child welfare system to fewer situations with severe maltreatment. Stewart, *supra* note 9.; Gupta-Kagan, *supra* note 9.; Guggenheim, *supra* note 9. *Public Health Priority*, 30 ZERO THREE J 6. n. 5, 4-6 (2010).

¹¹ Gloria Landson-Billings & William F. Tate IV, *Toward a Critical Race Theory of Education*, 97 TEACH. COLL. REC. 47–68 (1995).; 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).

denials of opportunity.¹² Each system uses seemingly neutral policies and practices that often obfuscate the role of race and class, and they 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 removed and isolated from their families and communities destroying relationships, opportunities for healthy development, and educational access; pathologized and labeled as defective and deviant; and subjected to harsh and traumatizing treatment. The intersectional operation of these systems contributes to inequality and subordination by exacerbating trauma and leaving children without the educational and social-emotional skills to develop into healthy and productive adults. It is important to investigate and illuminate the mechanisms by which these systems intersect to entrench structural inequality, especially in certain communities, so that they can be dismantled.

This article will explore the structural mechanisms through which all three systems work together to compound disparity and perpetuate inequality. This intersectional perspective is critical to understanding and dismantling structural discrimination in all three systems. This analysis is consistent with an ecological approach that situates the child in his or her full context as part of families, communities and systems.¹³ An ecological perspective necessitates looking at the interlocking systems that operate together to oppress and produce the negative outcomes often experienced by Black children in foster care. The other frame for this analysis is the work of scholars who have theorized about the ways state structures and cultural forces create hierarchies within American society that endure for generations.¹⁴ This article contributes to the project of understanding the ways in which the systems created by the state to help children and families replicate inequality, relegating poor children of color to lowest rung in society. The paper will offer solutions grounded in a vision of dismantled child welfare and juvenile justice systems, a well-resourced educational system, and resources to strengthen communities and their capacity to care for and create opportunities for children to develop.

The Article will proceed in four sections. Part I will briefly discuss the racial disparities in each system and, to provide a theoretical frame for the paper, discuss relevant features of the architecture by which US society is organized around hierarchies. Part II will briefly 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 system interaction compounds harm. This section will focus on the pipelines among systems that often exacerbate harms, the traumatizing effect of the system interaction in the lives of children, and the ways in which all systems cooperate in the undereducation of children. Part IV offers some strategies that account for intersecting systems advance the move towards abolition.

¹² David Dante Troutt, *Trapped in Tragedies: Childhood Trauma, Spatial Inequality, and Law*, 101 MARQ. L. REV. 601 (2018).

¹³ 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, 423 (2005).; Gupta Kagan, *supra* note 9.

¹⁴ ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020).; NANCY E. DOWD, *REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR* (2018).

I. Negative Outcomes and Hierarchy

A. Racial Disproportionality

There is a system of state control of entire communities that has for decades helped to extinguish life chances for Black youth. The child welfare and juvenile justice systems coercively remove children from their families and communities, and through myriad harmful practices exacerbate trauma, while 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 primarily in Black impoverished and segregated neighborhoods. These three institutions function very differently depending on where a person lives and, in Black communities, help to reproduce inequality. As David Troutt summed up, “personal opportunities are often mediated by place, or residency, because of the differences in rules and resources by which key institutions operate.”¹⁵ A host of unequal outcomes result from inequitable application of law and institutional policies, practices and norms.

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.¹⁶ Black families are more likely to be reported to CPS agencies and have children removed from their homes, and children are less likely to be reunited or adopted. In many places, as Black children move through the system, their over-representation grows, so that the children who stay the longest or ultimately age out of foster care are overwhelmingly Black.¹⁷ Children who age out of foster care, more than a third of whom are Black, suffer negative outcomes as adults including low college attainment, job earnings, housing instability and incarceration.¹⁸

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, receive more severe sentences, and stand trial as adults.¹⁹ Even when charged with the same offense, Black youth are more likely to receive harsher treatment than White children. The cumulative effect of racially disparate treatment throughout the juvenile justice process is reflected at secure detention facilities where the population is overwhelmingly youth of color. Although the juvenile justice system is supposed to be rehabilitative, justice-involved youth face grave consequences in the long-term. Youth involved with the juvenile justice system have lower high school graduation rates and higher

¹⁵ Troutt, *supra* note 13.

¹⁶ Wanda J. Blanchett, *Disproportionate Representation of African American Students in Special Education: Acknowledging the Role of White Privilege and Racism*, 35 24–28 (2006); Miller et. al., *supra* note 2.

¹⁷ For example, Black children spend an average of 29 months in out-of-home care, Latino children an average of 23 months, and white children an average of 18 months. Martha L. Raimon et. al., *Better Outcomes for Older Youth of Color in Foster Care* (Mar. 25, 2015), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2015/better-outcomes-older-youth-color-foster-care/>; *see also* U.S. Gov’t Accountability Office, GAO-07-816, *African American Children in Foster Care: Additional HHS Assistance Needed to Help States Reduce the Proportion in Care 1* (2007)

¹⁸ National Youth Transition Database, 2014.

¹⁹ The Anney E. Casey Foundation, *Reducing Youth Incarceration in the United States* (2013).; Office of Juvenile Justice and Delinquency Prevention (2019).

unemployment rates than the general population.²⁰ They also experience higher rates of homelessness and eviction.

Child welfare and juvenile justice involvement interact with educational inequity. Black children perform worse than their White peers on a number of achievement measures including standardized tests, high school graduation rates and drop out rates.²¹ The public education system is funded largely based on the wealth of local communities. Due to enduring residential segregation, black children are more likely to attend segregated neighborhood schools with fewer resources leading some legal scholars to call the education system the new Jim Crow.²² Children in both the foster care and juvenile justice systems perform below their peers on a range of achievement measures, and are pushed out of the school system through a number of mechanisms that ultimately lead to high school drop out. There are generally poor educational outcomes for children in foster care but, due to the large proportion of Black children in the deep end of the child welfare system and interactions with school system inequality, these academic challenges fall disproportionately on Black children in foster care.²³ Studies suggest that students in foster care experience even greater achievement gaps than for other marginalized youth,²⁴ and that children of color in foster care are even more at risk for failure than the general population of foster youth.²⁵

B. The Role of Poverty

Poverty is a significant factor in the inequitable outcomes experienced by children of color²⁶ Much of the research on child welfare system disproportionality has centered around trying to understand the reasons for disproportionality. This is an oversimplification but there are essentially two schools of thought – one that views disproportionality as largely a function of

²⁰ Richard Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, ANNIE E CASEY FOUND. (2015).; DT Vermeire & N. Merluzzi, *Balancing the scales of Justice: An exploration of how lack of education, employment and housing opportunities contribute to disparities in the criminal justice system*. American Civil Liberties Union of Northern California and W. Haywood Burns Institute.

²¹ The national adjusted cohort graduation rate for Black children is 79% and 81% for Latinx children, compared to 89% for White children. National Center for Education Statistics (NCES) Home Page, <https://nces.ed.gov/> (last visited Feb 28, 2021).

²² Ellen Marrus, *Education in Black America: Is It the New Jim Crow?*, 68 Ark. L. Rev. 27 (2015).

²³ Ryan et. al., *supra* note 4.

²⁴ Piescher et. al., *An evaluation of the effects of an integrated services program for multi-service use families on child welfare and educational outcomes of children*, 41 CHILD. YOUTH SERV. REV. 16–26 (2014)..

²⁵ Ryan et. al., *supra* note 4.

²⁶ “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. In addition to poverty itself, interrelated sources of frustration include chronic unemployment, inadequate living conditions, poor schools, a climate of violence, inadequate family structure, and racism.” Miriam Stohs, *Racism in the Juvenile Justice System: A Critical Perspective Notes and Comments*, 2 WHITTIER J. CHILD FAM. ADVOCACY 97–124 (2003).

poverty, and another that centers racism within the child welfare system as the cause. The poverty theory suggests that more Black children are in the system because more Black children are poor and maltreated. While it is important to understand the complexities of causality, the framing of that debate has undermined efforts to address disproportionality in child welfare and structural inequality more broadly. Child welfare stakeholders can lament disproportionality, but console themselves that they are saving Black children from the conditions in their neighborhood and, moreover, that the child welfare 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. “State policies create and perpetuate structural causes of poverty, fail to provide support to families and communities to move out of poverty, and fail to provide resources sufficient for families to provide critical developmental support for their children.”²⁷ That narrative also negates the role of vague neglect statutes that equate poverty with neglect in children in the system. Sixty percent of children in the child welfare system are there for neglect only, with as many as 75% if you count two or more maltreatment categories.²⁸ Khiara Bridges argues that the child welfare system looks the way it does due to the moral construction of poverty. It explains poverty based on individual failure, rather than structural causes of poverty. 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.²⁹ Situating child welfare disproportionality within a place-based context that accounts for multiple, state actors operating in the same poor black communities is critical to addressing the root, structural causes that ensnare families in the child welfare system.

C. Hierarchies

Nancy Dowd theorizes that “hierarchies among children dramatically impact their development.”³⁰ 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.³¹

²⁷ Dowd, *supra* note 15 at 18.

²⁸ U.S. Department of Health & Human Services, *Child Maltreatment 2018 The Administration for Children and Families* (2020), <https://www.acf.hhs.gov/cb/report/child-maltreatment-2018>.

²⁹ Khiara Bridges, Peggy Cooper Davis & Dorothy Roberts, *Transcript of Elie Hirschfeld Symposium on Racial Justice in the Child Welfare System: January 23, 2019*, 44 N.Y.U. REV. L. & Soc. CHANGE 129 (2019).

³⁰ Nancy E. Dowd, *Children's Equality: Strategizing a New Deal for Children*, 47 Fordham Urb. L.J. 379 (2020).

³¹ *Id.*

She proposes developmental equality as a model to identify the structural components of inequality created and sustained by the state, and compel the state to dismantle, reorganize, and reorient those systems.³² In *Caste*, Isabel Wilkerson illuminates more generally how America operates with a hidden caste system, a rigid hierarchy of human rankings for which race is a signal.³³ Caste is the infrastructure for 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.”³⁴

Dehumanization is one of the processes by which marginalized groups are excluded from the “norms of humanity” in order to justify inhumane treatment.³⁵ The concept of the “other”, that some human beings are different or alien, the antheses of self, has been critically examined in different intellectual traditions.³⁶ Scholars have applied the theory of otherness to explain why Black children are perceived and treated as the “other” in the juvenile justice, child welfare and educational systems.³⁷ This process of dehumanization also serves to normalize the treatment and life outcomes of marginalized groups. Nunn points out that the othering process is “not inevitable or necessarily intentional, but because the inferiority or deficiency . . . of the African American would appear natural and unremarkable.”³⁸ 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. As Nunn summed up, “it appears so normal because we have been socialized to undervalue the lives and realities of African people.”³⁹

³² Dowd, *supra* note 15 at 3.

³³ A caste system is defines 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, traits that would be neutral in the abstract but are ascribed life-and-death meaning in a hierarchy favoring the dominant caste whose forebears designed it.” Wilkerson, *supra* note 15.

³⁴ *Id.* at 17, 19-20

³⁵ Wilkerson, *supra* note 15 at 141-142; Dowd, *supra* note 15 at 20.

³⁶ *See, e.g.*, W. E. B DU BOIS, *THE SOULS OF BLACK FOLK* (1903) (introducing notions of “double-consciousness” as awareness that difference not only exists but is held in contempt and created as a tool of of domination and subordination); Deborah Ahrens, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N. Y. UNIV. LAW REV. 737, 738 n. 2 (2000) (drawing on Foucault and post-modern intellectuals); FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 18 (2008).

³⁷ Nunn focuses on fours aspects of otherness . . . focuses on four key concepts of otherness: (1) the other is a means of defining the self; by using other to define self it creates a common identity of the dominant racial group whose identity and interests are defined in opposition to the other; (2) the other is an abstract social construction; (3) the other, as a social construct, cannot define itself and, when it does change, does so at the bequest of the self; and (4) the other is perceived as a threat that must be feared and controlled. Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679 (2002)

³⁸ *Id.*

³⁹ *Id.*

Black children confront strong negative stereotypes that are directly damaging to their development and also serve as the basis for implicit bias and the othering process against them. The study of implicit racial bias focuses on those cognitive shortcuts that involve race and include both unconscious stereotypes (beliefs about social groups) and attitudes (feelings, either positive or negative, about social groups).⁴⁰ Studies show that racial bias impacts perceptions of childhood and adolescent innocent and culpability. In a phenomenon referred to as “adultification of black youth,” adults view both black males and females as more adult-like and less innocent than their white peers. Society is less willing to grant black children the same leniency as other children, despite studies controlling for socioeconomic status and race have found similar patterns of impulsivity, sensation seeking, susceptibility to peer influence, and limited future orientation across all youth groups.

State policies and practices that permit and arguably support the perpetuation of cultural norms infused with bias and discrimination translate into “state complicity in a culture of denigration, fear and subordination.”⁴¹

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 pathologize and label Black children as defective trouble-makers.⁴² The child welfare, juvenile justice and school systems label students as disabled or disruptive as part of a process that justifies placement instability, restrictive placements, academic delays, drop out and harsh juvenile justice penalties.⁴³ Second, they isolate Black children and destroy the relationships and experiences that contribute to healthy child development. Disproportionate child welfare removal, segregation in self-contained classrooms or alternative schools, and juvenile confinement are examples of the mechanisms that are inherently harmful and also destroy Black children’s relationships to family, friends, teachers and community. Third, despite policies that are framed as protecting children, these systems fail to provide basic care and nurturing or appropriate trauma-informed services, and inflict new trauma on children. While the policies driving racial disparities in individual systems have been explored in depth elsewhere,⁴⁴ this section builds on that analysis by highlighting some similarities in the mechanisms used by all three systems and focusing on the individual system mechanisms that are the key sites for intersection with other systems.

⁴⁰ 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. LAW REV. 1604 (2018).

⁴¹ Dowd, *supra* note 15 at 43.

⁴² J. Moultrie, *Reframing Parental Involvement of Black Parents: Black Parental Protectionism* (2016).

⁴³ Subini Annamma et. al., *Disproportionality fills in the gaps: Connections between achievement, discipline and special education in the School-to-Prison Pipeline*, 5 BERKELEY REV. EDUC. 53–87 (2014).

⁴⁴ See e.g. Roberts *supra* note 1.; KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* (2011).; TINA LEE, *CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY’S CHILD WELFARE SYSTEM* (2016).

A. *The Child Welfare System*

Almost every policy pillar of the current children welfare system has been theorized to drive disproportionality and the destruction of Black families. Mandatory reporting laws in every state requires professionals and neighbors to report suspected abuse and neglect subjecting Black families to hyper-surveillance.⁴⁵ 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, encouraging intervention for poverty-related reasons.⁴⁶ The 1997 passage of the Adoption and Safe Families Act mandates termination of parental rights in short time frames, while simultaneously incentivizing adoptions.⁴⁷ Inequitable funding and services, and heightened licensing requirement, have either excluded relatives as substitute caregivers or subjected their placements to intense state scrutiny.⁴⁸ 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.

The loss of relationships with family, friends and community is perhaps the most damaging aspect of foster care for children. 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 psychological consequences.⁴⁹ Ongoing separation from family compounds this trauma and negatively effects a child’s development. When it occurs in early childhood, interrupting the parent-child bonding process, there are lasting symptoms of emotional distress, behavioral problems and depression. Children mourn their parents and experience psychological ambiguity. “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.”⁵⁰ The child welfare system uses removal as its default intervention to allegations of abuse creating an institutional culture that minimizes the violence of removal.⁵¹

Children are also separated from siblings when CPS is unable to find a single placement to accommodate a sibling group. Foster care youth often identify sibling separation as a source of grief and anxiety. Black children from large sibling groups, or where there are older siblings in the group, are especially likely to be separated. Once separated, CPS may not prioritize sibling visitation and other means to foster sibling relationships. Family visits are more likely to occur if the permanency goal is reunification, as parents’ attorneys may seek to enforce legally mandated visits between parents and children, but these are much less likely to be enforced if the permanency goal changes to adoption. This leads to estrangement from both parents and siblings, who are an invaluable source of support in later life.

⁴⁵ U.S. Department of Health and Human Services et al., *Child Neglect: A Guide for Prevention, Assessment and Intervention* (2006).

⁴⁶ *Id.*

⁴⁷ Adoption and Safe Families Act (P.L. 105-89) (1997).

⁴⁸ Christina A Zawisza, *Protecting the Ties that Bind: Kinship Relative Care in Florida*, 23 NOVA LAW REV. 455–477 (1998).

⁴⁹ Shanta Trivedi, *The Harm of Child Removal* (2019), 43 N. Y. UNIV. REV. LAW SOC. CHANGE 523 (2019).

⁵⁰ *Id.*

⁵¹ *Id.*

Upon removal, children are also disconnected from their communities and a network of relationships to childhood friends, churches, neighborhood sports leagues, neighbors and other supportive adults. Removal from their community also impacts a child's sense of identity and belonging which are important for child development. Even when children are moved from one Black community to another, these neighborhoods are not fungible, and there might be a tremendous sense of loss. Problems with identity development may be exacerbated if a child is moved to a family or community of a different race or religion. A healthy sense of ethnic identity has been identified as a resilience factor for children. These may lead to feelings of sadness, loss, isolation and anxiety.

Rather than finding a refuge to heal from their trauma, children, especially adolescents of color with intersectional identities, are bounced from placement to placement without receiving consistent or effective mental health treatment. Black children have longer stays in foster care and are slower to exit. As a result, the well-documented harms of the foster care experience fall disproportionately on Black children. While in foster care children experience physical and sexual abuse at alarming rates. Children in foster care also have higher rates of physical, developmental, dental, and behavioral problems than other children, even controlling for poverty.⁵² There is a high incidence of psychiatric disorders. Studies show that children often do not receive routine health care, do not receive appropriate mental and behavioral health treatment, and as adolescents, engage in high risk sexual behavior and drug use leading to adverse health consequences. Multiple studies document racial disparities in the provision of mental health services.⁵³ Black children are less likely to receive mental health services. One study found that Black children received fewer mental health services than White children, who were more likely to receive services even when the severity of their mental health problems was low.⁵⁴

Placement instability, which is more likely to occur the longer youth are in foster care, is a significant factor associated with social, behavioral and academic problems.⁵⁵ School age

⁵² FOSTERING HEALTH: HEALTH CARE FOR CHILDREN AND ADOLESCENTS IN FOSTER CARE, (American Academy of Pediatrics ed., 2nd ed ed. 2005).; Susan Cosgrove et.al., *Strengthening Health Outcomes for Foster Care Children*, 869 WORKSHOP PUBLIC AFF. DOMEST. ISSUES PUBLIC AFF. 1–25 (2013).

⁵³ Ann F. Garland et.al. , *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 SOC. WORK PRACT. 144–159 (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. 87–103 (2000).

⁵⁴ Garland, *supra* note 54.

⁵⁵ Glorida Hochman, Anndee Hochman & Jennifer Miller, *Foster Care: Voices From the Inside*, PEW COMM. CHILD. FOSTER CARE (2004).; Carolien Konijn et al., *Foster care placement instability: A meta-analytic review*, 96 CHILD. YOUTH SERV. REV. 483 (2019).; Susy Villegas et al., *Educational outcomes for adults formerly in foster care: The role of ethnicity*, 36 CHILD. YOUTH SERV. REV. 42 (2014).

children in foster care experience an average of 3.1 placements in different foster homes,⁵⁶ with a higher average for children of color and LGBTQ youth.⁵⁷ “These 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.”⁵⁸ For some children, this perpetuates a vicious cycle. Children may have low self-worth. Being moved from a home reinforces the idea that the child is unloveable 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.⁵⁹

There is an often-masked racialized dynamic to the experience of children with placement instability. A complaint filed in *H.G. v. Carroll*, alleged that between January 2016 and June 2017 over 400 kids endured 10 or more placements, at least 185 kids lived in 20 or more places, more than 50 children lived at least 50 places, and 27 children were bounced around between 80 and 140 placements during their total time in state care. The complaint was filed on behalf of approximately 2000 children in foster care in Miami and neighboring Monroe county that alleges that, due to an extreme shortage in foster homes, children bounce between different types of placement while their mental health needs go unmet. While the complaint did not raise racial disproportionality, the majority of the children with the highest level of placement instability stability were children of color.

Black children are not only shuffled through inappropriate placements without adequate services, but they are often labeled and pathologized as problem children. When children in foster care display behavioral problems, symptoms of trauma, or norm-violating behavior, they are often labeled as troublesome, hostile or pathological.⁶⁰ 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.⁶¹ In a recent example, the Florida legislature considered a proposal to place children who had refused a placement offered by the child welfare agency into a secure juvenile detention center.⁶² 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

⁵⁶ National Working Group on Foster Care and Education, *Education is the Lifeline for Youth in Foster Care*, RES. HIGHLIGHTS EDUC. FOSTER CARE (2011).

⁵⁷ Gerald P. Mallon et. al., *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 WELF. J. POLICY PRACT. PROGRAM 407 (2002).

⁵⁸ Trivedi, *supra* note 50.

⁵⁹ Theodore P. Cross et al., *Why Do Children Experience Multiple Placement Changes in Foster Care? Content Analysis on Reasons for Instability*, 7 J. PUBLIC CHILD WELF. 39 (2013).

⁶⁰ Lois A. Weithorn, *Envisioning Second-Order Change in America’s Responses to Troubled and Troublesome Youth*, 33 HOFSTRA LAW REV. 1305 (2005).; Miller et. al., *supra* note 2.

⁶¹ Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 Stan. L. REV. 773 (1988).

⁶² 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/>.

our staff. They break up the building and we just have to stand up and watch them.” The 39 Florida children who refused placements in the prior years and were the impetus for the proposal had an average of 36 placements before they first refused a placement. A study revealed that the children at issue in the proposal were overwhelmingly youth of color.⁶³

B. Juvenile Justice System

Despite its stated goal of rehabilitation, the juvenile justice system has not helped children learn from youthful indiscretion, but rather steers children of color on a path to high school drop out and later criminal justice involvement. States created juvenile courts in the first half of the 20th century as a system that provided separate judges and a summary proceeding for juvenile proceedings, and separation of juveniles from adults when confined in the same facility. Black children were excluded from the early version of the system, and continued to be housed with adults until well into the 20th century. Despite the philosophy of rehabilitation, it became clear that juveniles were often being punished rather than treated. A series of Supreme Court cases in the 1960s, most famously *In re Gault*, recognized a panoply of due process rights applicable to children.⁶⁴ As European immigrants became integrated into American society, they were replaced by black children as the urban poor.

While the Supreme Court’s decisions of the 60s resulted in more formal proceedings, state legislatures moved in a more punitive direction. As early as 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.⁶⁵ 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. “Central to the development of the myth of the juvenile justice system in crisis was the concurrent development of the racialized myth of the “superpredator.”⁶⁶ 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 (JJDP). to, among other things, require states to address issues of disproportionate minority confinement.⁶⁷

⁶³ Latham, 2019.

⁶⁴ See *Kent v. United States*, 383 US 541 (1966) (entitled to a lawyer, hearing and due process protections in decision to transfer to adult court); See also *In re Gault*, 387 US 1 (1967)(establishing a set of due process rights where a child faces institutionalization including the right to notice of charges, the right to counsel, the right to confrontation and cross-examination of witnesses, and the right against self-incrimination); See also *In re Winship*, 397 US 358 (1970) (establishing the standard of conviction beyond a reasonable doubt).

⁶⁵ 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 (2015).

⁶⁶ Nunn, *supra* note 38.

⁶⁷ Juvenile Justice and Delinquency Protection Act, Pub. L. No. 93-415 (1974), (amended by Alcohol and Drug Safety Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988)).

Subsequent amendments made disproportionate minority confinement a core requirement of the JJDP, and expanded funding and the scope of mandated data collection.⁶⁸ While this mandate to address disproportionality has improved data collection and spurred state-level initiatives, the juvenile justice system remains highly racialized today.⁶⁹

The disparities in the juvenile justice system reveal that for youth of color, there are reduced opportunities for diversion, high rates of detention, disparities in use of out of home placement, and lack of permanency planning. Disproportionality begins with increased policing at schools and in communities.⁷⁰ Most youth arrests are for status offenses like truancy, ungovernability, running away, alcohol possession or other offenses that would not be crimes for adults.⁷¹ The other major category of youth offenses are for non-violent low-level property offenses, drug position, technical probation violations and public order offenses.⁷² Generally, the violent crime arrest rate and the general arrest rate has fallen dramatically over the past few decades, but the overrepresentation of Black children has remained constant.⁷³ At the front end of the system, White youth are more likely to be diverted out of the formal juvenile process by being given a warning and sent home, or through a referral to a community organization for services, participation in a diversion services, or an informal citation instead of prosecution, whereas black children are more likely to be formally charged and pushed deeper into the system.⁷⁴

Juvenile court judges are more likely to remove Black youth from their communities and confine them in secure detention facilities both pre- and post-adjudication, rather than offering less restrictive alternatives like home detention or probation.⁷⁵ In 2015, 44% of juveniles in locked residential facilities were black, a percentage that is almost three times the percentage of black youth in the population.⁷⁶ Black youth are also held in confinement for longer. 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.⁷⁷ Black children are also over-represented among those transferred to adult criminal court where they are more likely to be

⁶⁸ Heidi M. Hsia et al., *Disproportionate Minority Confinement* (2002). ; 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

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⁷⁰ Marrus et.al., *supra* note 66 at 479-80.

⁷¹ 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 (2009).

⁷² Marrus et al. *supra* note 66 at 461.

⁷³ *Id.*

⁷⁴ *Id.*; National Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Report* (2014).; U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *How OJJDP is Working for Youth Justice and Safety* (2012).

⁷⁵ Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System*, NATL. COUNC. CRIME DELINQUENCY (2009).

⁷⁶ Black Children Five Times More Likely Than White Youth to Be Incarcerated, , EQUAL JUSTICE INITIATIVE (2017), <https://eji.org/news/Black-children-five-times-more-likely-than-whites-to-be-incarcerated/>.

⁷⁷ Mendel, *supra* note 21.

confined for longer periods without receiving treatment and rehabilitation, thereby increasing their chances of recidivism.⁷⁸

Implicit racial bias and stereotypes help explain why Black children receive harsher treatment in the juvenile justice system.⁷⁹ Studies have found evidence of implicit racial bias not only in the general population, but among juvenile justice decision-makers including police officers, probation officers, judges, prosecutors and defense attorneys.⁸⁰ These stakeholders, who wield broad discretion in the juvenile justice system, were shown across several studies to hold negative views that Black youth appear more adult-like, more culpable and more deserving of punishment.⁸¹ Kevin Nunn theorized that the “othering” of Black children, particularly Black males, accounts for the disparities we see in the juvenile justice system. Black children are viewed as coming from dysfunctional families headed by single-parent households. These single mothers have been the subject of centuries of racial stereotypes. “The sexually licentious Jezebel, the family-demolishing Matriarch, the devious Welfare Queen, the depraved pregnant crack addict accompanied by her equally monstrous crack baby—all paint a picture of a dangerous motherhood that must be regulated and punished.”⁸² These stereotypes and the systemic dehumanization of Black children allow delinquency courts to justify the enrollment of children in restrictive settings.

Juvenile justice involvement has negative effects on educational outcomes. Children in the juvenile justice system are educated in alternative schools, either because of confinement or because the “regular” school system funnels them into alternative schools. Arrests, particularly at a young age, increase the likelihood that a child will drop out of high school.⁸³

C. Education System

In today’s global economy, a quality education positively impacts all aspects of adult life⁸⁴ and the academic achievement gap has been a significant driver of economic inequality.⁸⁵ Race and socio-economic status are among the most significant indicators of test scores, graduation rates and other educational measures. The national adjusted cohort graduation rate for Black children

⁷⁸ Marrus et. al., *supra* note 66.

⁷⁹ Marrus et. al., *supra* note 66 at 483.; Nunn, *supra* note 38.; Bishop et. al. *supra* note 12 at 407-08.

⁸⁰ Henning, *supra* note 41.; Studies in which Implicit Association Tests were administered 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 et. al. *supra* note 66.

⁸¹ Henning, *supra* note 41.

⁸² Roberts, *supra* note 5.

⁸³ Marrus, *supra* note 23.

⁸⁴ 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 ANNU. REV. PUBLIC HEALTH 273 (2018).

⁸⁵ Emma Garcia & Elaine Weiss, *Education Inequalities at the School Starting Gate*, ECON. POLICY INST. (2017).

is 79% and 81% for Latinx children, compared to 89% for White children.⁸⁶ Even controlling for geography and class, race has been theorized as a salient factor in understanding inequities in the education system.⁸⁷ Families of color are disproportionately concentrated in impoverished neighborhoods with under-resourced schools leading some legal scholars to call the education system the new Jim Crow.⁸⁸

The educational system systematically alienates, punishes and ultimately pushes out students based on intersections of race, class, gender and sexual orientation and disability.⁸⁹ 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 generally with compounded effect for foster children. The school system labels students as disabled, disruptive or troublesome as one step in a process likely to lead to academic delays, drop out and juvenile justice involvement.⁹⁰ Students in special education and with school discipline records, who overlap substantially, perform poorly in school and are less likely to graduate and matriculate to higher education.

The primary federal special education law, the Individuals with Disabilities Education Act (IDEA), guarantees students with disabilities a free and appropriate public education in the least restrictive setting. The impetus for the precursor to the IDEA was premised on *Brown v. Board of Education*'s ideal that access to education is of central importance.⁹¹ While IDEA provides beneficial individualized services to children with disabilities and procedural protections to children and families, "the benefits of special education have not been equitably distributed on the basis of race and social class."⁹² Youth with IEPs are more likely to be from lower-SES backgrounds.⁹³ A disproportionate number of Black students are referred for special education services and isolated in separate classrooms.⁹⁴ Students of color are also more likely to be labeled as Emotional Behavior Disorder (EBD), a category that creates stigma that has long-

⁸⁶ National Center for Education Statistics

⁸⁷ Ladson-Billings & Tate, *supra* note 12.

⁸⁸ Marrus, *supra* note 23.

⁸⁹ Amy J. Petersen, *Exploring intersectionality in education: The intersection of gender, race, disability, and class*, UNIV. NORTH. IOWA (2016).

⁹⁰ Annamma etl al., *supra* note 44.

⁹¹ Congress passed the initial federal special education law Education for All Handicapped Children in 1975 in the wake of two groundbreaking cases alleging that children with education-related disabilities received no educational services from the school system. *Pennsylvania Association for Retarded Children v. Pennsylvania and Mills v. Board of Education*, 343 F.Supp. 279 (E.D. Pa 1972). Relying on *Brown v. Board of Education*, the Judge in *Mills* ruled that the exclusion of children with disabilities violated equal protection. *Mills v. Board of Education*, 348 F.Supp. 866 (DC Dist. of Columbia 1972).

⁹² Blanchett, *supra* note 17.

⁹³ NCEE Evaluation Brief (2018).

⁹⁴ Alfredo J. Artiles, Sherman Dorn & Aydin Bal, *Objects of Protection, Enduring Nodes of Difference: Disability Intersections With "Other" Differences, 1916 to 2016*, 40 REV. RES. EDUC. 777(2016).

term effects on higher education and employment prospects.⁹⁵ 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.

School discipline policies are also applied inequitably and contribute to poor academic outcomes.⁹⁶ Annamma et. al analyzed Colorado’s disproportionality rates in multiple systems, along with school discipline laws and policies, to document mechanisms by which students of color are labeled disabled, suspended, expelled and/or funneled from schools into the juvenile justice system. The researchers concluded that “race-neutral” education and legal policies lead to racially disproportionate outcomes in special education, discipline, and juvenile justice. Students in special education, many of whom are students of color, are more likely to be referred for disciplinary actions and they are more likely to be suspended or expelled than their general education peers.⁹⁷ These all fuel the school-to-prison pipeline of schools referring students to law enforcement or other harsh penalties (suspension, expulsion) that increase the likelihood of juvenile justice intervention.

III. The Compounding Effect of Interaction among the Three Systems

A. The Systems Serve as Pipelines that Exacerbate Harm

The foster care and school systems serve as an inequitable pipeline into the juvenile justice system. The school-to-prison pipeline -- the conceptual interplay among education and criminal justice policies that lead to students being pushed out of school and into the criminal justice system -- has been well documented.⁹⁸ Two decades ago, schools started enacting zero-tolerance policies that impose harsh consequences such as suspensions, expulsions, referrals to law enforcement and school-based arrests for violation of school rules.⁹⁹ Derived from the war on drugs, zero-tolerance policies in schools were initially intended for the most serious offenses

⁹⁵ Patton (1998); David S. Mandell et al., *Ethnic Disparities in Special Education Labeling Among Children With Attention-Deficit/Hyperactivity Disorder*, 16 J. EMOT. BEHAV. DISORD. 42 (2008).

⁹⁶ Laurence Parker & David O. Stovall, *Actions Following Words: Critical race theory connects to critical pedagogy*, 36 EDUC. PHILOS. THEORY 167 (2004).; ^[1] Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 SOC. PROBL. 68 (2016).

⁹⁷ Cooley, 1995; Russell J. Skiba, Reece L. Peterson & Tara Williams, *Office Referrals and Suspension: Disciplinary Intervention in Middle Schools*, 20 EDUC. TREAT. CHILD. 295 (1997).

⁹⁸ Sarah E. Redfield & Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 UNIV. MEMPHIS LAW REV. 1 (2016).; JOHANNA M WALD & DANIEL J LOSEN, *DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE* (2003).

⁹⁹ Sebastian Castrechini, *Educational Outcomes for Court-Dependent Youth in San Mateo County*, JOHN W GARDNER CENT. YOUTH THEIR COMMUNITIES (2009).; Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. Rich. L. Rev. 1063 (2016). Almost one-third of youth in foster care for more than two years had experienced a suspension and 4.1% had been expelled.; A. G. Zetlin, L. A. Weinberg & N. M. Shea, *Seeing the Whole Picture: Views from Diverse Participants on Barriers to Educating Foster Youths*, 28 CHILD. SCH. 165 (2006).

but evolved to ensnare students on a path to law enforcement involvement even for typical adolescent behavior.¹⁰⁰ These policies, when implemented in a context with low expectations and achievement, and over-classification in special education, creates a sorting system. Black students are more likely than their White peers to be targeted with school disciplinary actions, even for similar behaviors.¹⁰¹ Children with disabilities and who are LGBTQ, and with intersectional identities, are also more likely to be caught in the school-to-prison pipeline.

Children in foster care experience school suspension and expulsions at higher rates than their non-foster care peers, and are at increased risk to become caught in the school-to-prison pipeline.¹⁰² When a child gets into trouble at school, advocacy from a parent may dissuade the school from taking further action. For children in foster care, there may not be an adult to pick a child up after an incident or advocate for the child.

Foster care is also a direct pathway to the juvenile justice system. There is overrepresentation of children in foster care within the juvenile justice system and the majority of those dually involved children are Black. Child welfare contributes to juvenile justice involvement.¹⁰³ Factors that brought children into the child welfare system may put them at higher risk for juvenile justice involvement, but the system itself creates conditions that bring children into contact with law enforcement. Children in foster care are often subjected to status offenses, one of the large categories of juvenile justice offenses. For example, the responses to teenage behavior that would ordinarily be handled within a family like running away, taking a car without permission, or smoking marijuana are more likely to be referred to law enforcement when a child is in foster care. Children in congregate settings, where black adolescents disproportionately live, are particularly likely to be referred to law enforcement for minor infractions like verbal or physical fights, petty theft, property damage, running away or smoking marijuana. Youth in group homes are 2.5 times more likely to enter the juvenile justice system. Placement instability also increases the likelihood a foster child will enter the juvenile justice system.

Children in foster care are also more likely to be arrested for experiencing a mental health crises or exhibiting symptoms of trauma. Other contributing factors are lack of positive attachments with adults and lack of opportunities to participate in positive youth development activities like sports, extracurricular activities and mentoring programs. Girls are overrepresented among dual involved youth. One explanation is the adultification of girls. Girls in foster care are vulnerable to sex trafficking and may get arrested for sex work or other criminal activity in which their traffickers might be involved.

¹⁰⁰ Areto Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 UNIV. FLA. J. LAW PUBLIC POLICY 46 (2011). The Gun Free Schools Act of 1994 (“GFSA”, for example, was originally adopted to promote “school safety by declaring zero tolerance for weapons in school.” 20 U.S.C. 7151 (2002).

¹⁰¹ Bryant (2013); Dalun Zhang et al., *Minority Representation in Special Education: 5-Year Trends*, 23 J. CHILD FAM. STUD. 118 (2014). ; Annamma, *supra* note 44. Black children are 16% of the population, but represent 33% of school suspensions, 42% of expulsions, 31% of school-based arrests, and 27% of referrals to law enforcement. U.S. Department of Education, Civil Rights Data Collection, Data Snapshot: School Discipline 2 (2014).

¹⁰² Castrechini, *supra* note 100. Almost one-third of youth in foster care for more than two years had experienced a suspension and 4.1% had been expelled.; Zeitlin et. al. *supra* note 100.

¹⁰³ Joseph P. Ryan et.al., *Kinship Foster Care and the Risk of Juvenile Delinquency*, 32 CHILD. YOUTH SERV. REV. 1823 (2010).

Being in the child welfare and juvenile justice system also increases the risk for continued criminal justice involvement in adulthood. In New York, 57.1% of young people who were both in foster care and the juvenile justice system had criminal justice contact within six years, compared to 14.7% of all foster care alumni. Within two years of leaving care, a quarter of foster care alumni have contact with the criminal justice system.¹⁰⁴ A recent national survey of the prison population found that 80% of incarcerated adults reported being in foster care.¹⁰⁵

Although less common, juvenile Justice can also be a gateway to child welfare. After a child is ready for discharge, it may not be possible for a child to return home. It is also possible that the child's home circumstances, which come to light during the juvenile justice or probation process, triggered a referral to child welfare.

Once families have become involved with either the juvenile justice or child welfare system, hyper-vigilance increases likelihood of later contact. A parent who was reunified, if they come to the attention of the state because of child is having problems in school, may go back in. Children on probation are under scrutiny so that home situations may trigger child welfare involvement.

B. Trauma is Punished and Exacerbated

Children in foster care have trauma, and some have disabilities and mental illness. They are overprescribed psychotropic medications but not given the therapy and trauma-informed care needed to heal. Trauma and disabilities also place children at increased risk for juvenile justice involvement. All three systems simultaneously inflict trauma and psychological harm on children

- “Trauma is the result of acute or chronic exposure to physically or mentally adverse experiences and produces on-going impairment to an individual’s functioning (SAMHSA, 2012).” This might include physical, mental, or sexual abuse, neglect, domestic violence, or community violence. Disabled youth have a higher likelihood of experiencing “maltreatment” (Brown & Shormans, 2003; Gore & Janssen, 2007; Mandell, Walrath, Mareuffel, & Pinto-Martin, 2005) and sexual abuse (Bruce & Waelde, 2008)
- Placement instability – Children are cycled through different foster care placements, juvenile settings, and schools. Once a child enters the juvenile justice system, it becomes more difficult to find home placements as foster parents do not want a “bad” kid in their home. This, in turn, increases the likelihood a child will have more interaction with the criminal justice system. Also increases the likelihood

¹⁰⁴ Juvenile Law Center, *WHAT IS THE FOSTER CARE-TO-PRISON PIPELINE?* (2018), <https://jlc.org/news/what-foster-care-prison-pipeline#:~:text=The%20problem%20is%20so%20severe,two%20years%20of%20leaving%20care.&text=One%20study%20showed%20that%20more,in%20the%20juvenile%20justice%20system>.

¹⁰⁵ Foster Care 2.0, *Research & Statistics*, <http://www.fostercare2.org/ask-the-pros-2> (last visited Feb 28, 2021).

child will cycle through different schools. For a child with trauma, that means she never received the treatment she needs.

- 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 experience a loss of relationships.
- 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 worse off academically than children from the same communities. Youth in juvenile justice and child welfare have more frequent school disruption, more suspension, lower high school graduation rates, and lower college matriculation.

While in the criminal justice system, children are supposed to participate in school. Educational opportunities at secure detention facilities are inadequate. When children are released, credits may not transfer and the regular school may not want them back. They are pushed into alternative schools from which they are more likely to drop out.

Children in foster care have poor educational outcomes that are even worse for Black children. 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.¹⁰⁶ Each change results in academic delays, and children in care are unable to develop the relationships with peers and teachers, or participate in the in-school and extracurricular activities, that are so 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 know and can advocate for a child, and the college application process.¹⁰⁷ Youth who had even one less placement change per year were almost twice as likely to graduate from high school before leaving foster care.¹⁰⁸

There are intersections among special education, juvenile justice and foster care. Children in foster care are over-represented in special education. An estimated 30% to 50% of children in foster care receive special education services, compared with 13.1% among students

¹⁰⁶ E.V. Clemens & A.P. Sheesley, *Educational Stability of Colorado's Students in Foster Care: 2007-2008 to 2013-2014*, CHILDREN AND YOUTH SERVICES REVIEW 68, 193-201 (2016).

¹⁰⁷ Michelle Levy et. al., *The Educational Experience of Youth in Foster Care*, 18 J. -RISK ISSUES 11, 18 (2014).; Jim Casey Youth Opportunities Initiative, *Social Capital: Building Quality Networks for Young People in Foster Care* (2012).

¹⁰⁸ 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, 231 (2006).

overall.¹⁰⁹ Among the overall student population receiving special education services, about 5% of students qualified under the category of Emotional and Behavioral Disorders.¹¹⁰ In contrast, approximately 50% of children in foster care who are enrolled in special education have identified emotional or behavioral disorders.¹¹¹ 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 were in more restrictive settings than children in special education.¹¹² 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 26-year period on factors associated with 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.¹¹³

D. Community Level Effects

The three systems operate in these dysfunctional ways in the very same communities.

Part IV offers some community-oriented strategies to advance the move towards abolition.

- A. Service delivery must be de-linked from threat of removal or force.¹¹⁴
- B. Place-Based Strategies
 - a. There needs to be a transformative approach to prevention.
 - b. Adopt a place-based approach to the provision of services.
 - c. Leverage institutions that are strongest within a given community
 - d. Schools are a logical location of public health approaches. Because of educational inequity, this must be done simultaneously with massive investment in schools.
 - e. Take seriously the idea of housing as a prevention strategy
- C. Movements must work together/holistic approach
 - a. The movements for the abolition of the carceral state, educational equity, and abolition of foster care make similar demands for investments in community and reallocation of resources. These efforts and resulting policy reforms must be aligned.

¹⁰⁹Andrea Zetlin, Elaine MacLeod & Christina Kimm, *Beginning Teacher Challenges Instructing Students Who Are in Foster Care*, 33 REMEDIAL SPEC. EDUC. 4 (2012). .; U.S. Department of Education, 2012.

¹¹⁰ National Center for Education Statistics (2019)

¹¹¹ John Emerson & Thomas Lovitt, *The Educational Plight of Foster Children in Schools and What Can Be Done About It*, 24 REMEDIAL SPEC. EDUC. 199 (2003). ; Zeitlin et al., *supra* note 110.

¹¹² S. Geenen & L. E. Powers, *Are We Ignoring Youths with Disabilities in Foster Care? An Examination of Their School Performance*, 51 SOC. WORK 233 (2013).

¹¹³ O'Higgins et. al., *What are the factors associated with educational achievement for children in kinship or foster care: A systematic review*, 79 CHILD. YOUTH SERV. REV. 198 (2017).

¹¹⁴ Gupta-Kagan, *supra* note 9.

D. Focus on community trauma

- a. Trauma is product of racism and a symptom of structural inequality¹¹⁵
- b. Community reinvestment must deal with trauma
 - Restorative Justice
 - Trauma sensitive schools – Massachusetts Trauma and Learning Policy Initiative

E. Litigation Strategies

- a. P.P v. Compton Unified School Districts – plaintiffs included several high school students from the poor and working class Southern California municipality. As a result of the behavioral symptoms of their exposure to multiple traumatic experiences – complex traumas that included mass shootings, molestations, stabbings, and removals to foster care – all of the children had been severely disciplined by school authorities.¹¹⁶

F. Funding Streams

- Stop preferred funding for current foster care system
- Stop silo'd approach to supporting children

¹¹⁵ Troutt, *supra* note 13.

¹¹⁶ *Id.* at 647-48.