

# Educational Equality and the Dream That Never Was: The Confluence of Race-Based Institutional Harm and Adverse Childhood Experiences (ACEs) in Post-*Brown* America

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### I. INTRODUCTION

*“The worst form of inequality is to try to make unequal things equal.”*

*—Aristotle*

Interrupting intergenerational violence and trauma caused by institutional racism requires a new paradigm, one that incorporates both trauma-informed principles and draws from Civil Rights law. The historical and ongoing effects of structural racism contributes to and exacerbates the prevalence and consequences of adverse childhood experiences (ACEs), which uniquely expresses itself in the lives of children of color. When the destructive synergy of poverty and racism coalesce in early childhood, the harm to child development—particularly its impacts on physical, intellectual, and emotional development—is profound. Whereas children begin their lives with cognitive parity, the intersectionality of race, place, and trauma creates an acute burden for children of color that produces pronounced

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inequity in academic achievement, social-emotional development, and physical health.

Recognizing that personal, institutional, and structural racism have serious consequences for child development that dramatically and permanently disadvantage children of color, childhood adversity and the resulting neurobiological effects must be considered within the context of racial disparities and the policies that have produced them. In the period following *Brown v. Board of Education*, state-sanctioned racism was reconstituted in new forms of educational inequality sustained by residential segregation, disparate school funding, and the disproportionate application of zero tolerance disciplinary practices. The advent of exclusionary disciplinary practices, also referred to as “zero tolerance” polices, have transformed schools across America into pathways into the criminal justice system.<sup>1</sup> Described by the NAACP as “one of the most urgent challenges in education today,”<sup>2</sup> the school-to-prison pipeline reinforces elements of racial segregation, penalizes students of color with disproportionate ACEs, and functions to exclude them from the educational process by redirecting them into the criminal justice system. The trauma that has resulted from structural racism has subsequently been exploited as a basis to over-discipline Black and Brown students through highly punitive zero tolerance school policies, which operate to funnel predominantly minority children into the criminal justice system as a means of sustaining a racial caste system that has never been fully dismantled.

This article seeks to explore the prevalence of ACEs as a public health crisis and civil rights imperative that demands immediate and significant action. Sections one and two will examine childhood exposure to adverse experiences within the context of institutional racism, its effect on child development, and the means by which race-based trauma disadvantage children in the public education system. Section three will build upon the earlier foundational sections to deconstruct the school-to-prison pipeline as the manifestation and perpetuation of race-based adverse childhood experiences. Concluding that institutional responses to trauma-induced behaviors have disparately impacted children of color who suffer from higher rates of ACEs, the article will propose the use of a trauma-informed, social justice-based restorative paradigm as a mechanism for beginning to acknowledge the role of institutional racism in the creation of these profoundly damaging racial inequities.

## II. TRAUMA, INSTITUTIONAL RACISM, AND COGNITIVE DEVELOPMENT: THE TRIFECTA OF CHILDHOOD HARM

*“I wish I could say that racism and prejudice were only distant memories. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust . . . We must dissent because America can do better, because America has no choice but to do better.”*

—Thurgood Marshall

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1. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, *Dismantling the School-to-Prison Pipeline*, [https://www.naacpldf.org/wp-content/uploads/Dismantling\\_the\\_School\\_to\\_Prison\\_Pipeline\\_\\_Criminal-Justice\\_\\_.pdf](https://www.naacpldf.org/wp-content/uploads/Dismantling_the_School_to_Prison_Pipeline__Criminal-Justice__.pdf) [https://perma.cc/SW9N-PAK7] (last visited Aug. 1, 2020).

2. *Id.*

Institutional racism<sup>3</sup>—and the accompanying trauma that it inflicts—is a core social determinant of the health status of children, their families, and the broader communities in which they live.<sup>4</sup> Structural inequities contribute to child maltreatment and exposure to violence, resulting in persistent stress that adversely impacts child development. Childhood exposure to toxic stress, as measured by adverse childhood experiences (ACEs),<sup>5</sup> produce significant developmental consequences that can result in impaired cognitive, social, and emotional functioning. These impairments can lead to negative health outcomes and socioeconomic difficulties throughout life.

Over the past two decades, a substantial body of research has analyzed the effects of childhood trauma on learning and brain development,<sup>6</sup> social behaviors, and long-term health outcomes.<sup>7</sup> The publication of the ACEs Study by the Centers for Disease Control and Prevention (CDC) and Kaiser Permanente<sup>8</sup> in the late 1990's marked a novel understanding of the association of exposure to childhood harm and the implications for chronic, adverse health outcomes.<sup>9</sup> Children subjected to ACEs have been found to experience more significant physical and mental health problems,

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3. Institutional racism is characterized by the norms, policies, and practices that are structured into political, societal, and economic institutions and which have the net effect of imposing oppressive conditions and denying rights, opportunity, and equality to identifiable groups based on race or ethnicity. See NAT'L COUNCIL STATE EDUC. ASS'NS, ADDRESSING THE EPIDEMIC OF TRAUMA IN SCHOOLS (July 2019), <http://www.nea.org/assets/docs/NEA%20Student%20Trauma%20Report%207-31.pdf> [<https://perma.cc/64X4-29VN>].

4. Yin Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, PLOS ONE (Sept. 23, 2015), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0138511> [<https://perma.cc/AW5L-MCAY>]; see also Charles Bruner, *ACE, Place, Race, and Poverty: Building Hope for Children*, 17 ACAD. PEDIATRICS 123, 123 (2017).

5. ACEs is a term used to describe abuse, neglect, and other potentially traumatic experiences that occur to people under the age of 18. Examples of ACEs factors include exposure to domestic violence, the incarceration of a parent or guardian, child abuse, living with someone with a mental illness or substance abuse problem, socioeconomic hardship, out-of-home placement, and mistreatment due to race or ethnicity. See CTRS. DISEASE CONTROL & PREVENTION, ADVERSE CHILDHOOD EXPERIENCES (ACEs) (Nov. 5, 2019), <https://www.cdc.gov/vitalsigns/aces/index.html> [<https://perma.cc/D772-2FDP>].

6. ROBERT F. ANDA & DAVID W. BROWN, ADVERSE CHILDHOOD EXPERIENCE & POPULATION HEALTH IN WASHINGTON: THE FACE OF A CHRONIC PUBLIC HEALTH DISASTER (2010); see also HARV. U., CTR. ON DEVELOPING CHILD, <https://developingchild.harvard.edu/> [<https://perma.cc/N33R-PDAU>] (last visited Aug. 1, 2020).

7. Christina Bethell et al., *Methods to Assess Adverse Childhood Experiences of Children and Families: Towards Approaches to Promote Child Well-being in Policy and Practice*, 17 ACAD. PEDIATRICS S51 (2017) (emphasizing that “paradigm shifting neurobiological and epidemiologic findings show cumulative, cascading and multidimensional effects of trauma and stress associated with adverse childhood experiences (ACEs)”); see also Nadine Burke Harris, *How Childhood Trauma Affects Health Across a Lifetime*, TED (2014), [https://www.ted.com/talks/nadine\\_burke\\_harris\\_how\\_childhood\\_trauma\\_affects\\_health\\_across\\_a\\_lifetime/discussion?referrer=playlist-11\\_ted\\_talks\\_by\\_bright\\_wome](https://www.ted.com/talks/nadine_burke_harris_how_childhood_trauma_affects_health_across_a_lifetime/discussion?referrer=playlist-11_ted_talks_by_bright_wome) [<https://perma.cc/BTU8-TGFL>].

8. Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MED. 245 (1998).

9. Though a useful framework in evaluating the effects of childhood harm on long-term health outcomes, it should be cautioned that an overreliance on ACEs could in itself generate unintended inequitable outcomes. See Margaret Beale Spencer, *Developmental and Intersectional Insights About Diverse Children's Identity*, 71 FLA. L. REV. F. 1, 12 (2019).

increased risk of unhealthy behaviors, violence and re-victimization, higher rates of substance abuse, and premature mortality.<sup>10</sup>

The prevalence of childhood trauma and exposure to violence cannot be overstated in American society.<sup>11</sup> According to the CDC, sixty one percent of adults have had at least one ACE, with sixteen percent of the adult population having been identified as having been exposed to four or more ACEs.<sup>12</sup> It is now well-established that stress and trauma affect children's development, physical health, sense of security, and mental resiliency well into adulthood.<sup>13</sup>

Neuroscience research conclusively shows that the traumatic effects of exposure to ACEs elicits stress responses that have both immediate and long-term harmful psychological impacts.<sup>14</sup> Toxic stress from ACEs has been causally connected to chronic health issues, substance misuse, mental illness, reduced life expectancy, and socioeconomic barriers. The activation of the stress response system that results from ACEs produces elevated levels of cortisol and catecholamines (responsible for the "fight or flight" response) and can lead to impulsive behaviors, emotional dysregulation, and limited executive functioning.<sup>15</sup>

Moreover, childhood maltreatment is negatively associated with educational achievement and socioeconomic opportunities.<sup>16</sup> Adverse childhood experiences (ACEs), especially when cumulative, can result in low academic achievement, increased absenteeism, disruptive behavior, increased risk for substance misuse, emotional and conduct issues, and increased use of special education services.<sup>17</sup> Children

10. Bethell et al., *supra* note 7; Felitti et al., *supra* note 8; see generally Robert F. Anda et al., *Adverse Childhood Experiences and the Risk of Premature Mortality*, 37 AM. J. PREVENTATIVE MED. 389 (2009).

11. See David Finkelhor et al., *Children's Exposure to Violence: A Comprehensive National Survey*, JUV. JUST. BULL. 4 (Oct. 2009), <https://www.ncjrs.gov/pdffiles1/ojjdp/227744.pdf> [<https://perma.cc/Y8GP-4CG3>]; NAT'L COUNCIL STATE EDUC. ASS'NS, *supra* note 3.

12. CTRS. DISEASE CONTROL & PREVENTION, *supra* note 5; see also Bethell et al., *supra* note 7 (indicating that the most recent national, population-based data show that nearly one-half of US children have ACEs exposure).

13. Mark A. Bellis et al., *Life Course Health Consequences and Associated Annual Costs of Adverse Childhood Experiences Across Europe and North America*, 4 LANCET PUB. HEALTH 517 (2019); CHRISTOPHER BLODGETT & JOYCE DORADO, A SELECTED REVIEW OF TRAUMA-INFORMED SCHOOL PRACTICE AND ALIGNMENT WITH EDUCATIONAL PRACTICE (2016); Karen Hughes et al., *The Effect of Multiple Adverse Childhood Experiences on Health*, 2 LANCET PUB. HEALTH 356 (2017).

14. Melissa T. Merrick et al., *Vital Signs: Estimated Population of Adult Health Problems Attributable to Adverse Childhood Experiences and Implications for Prevention – 25 States, 2015-2017*, 68 MORBIDITY & MORTALITY WEEKLY REP. 999 (2019); Bruce D. Perry & Ronnie Pollard, *Homeostasis, Stress, Trauma, and Adaptation: A Neurodevelopmental View of Childhood Trauma*, 7 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 33 (1998).

15. Christopher M. Jones et al., *Identifying and Preventing Adverse Childhood Experiences: Implications for Clinical Practice*, JAMA (2019); see also CTRS. DISEASE CONTROL & PREVENTION, PREVENTING ADVERSE CHILDHOOD EXPERIENCES (ACES): LEVERAGING THE BEST AVAILABLE EVIDENCE (2019), <https://www.cdc.gov/violenceprevention/pdf/preventingACES-508.pdf> [<https://perma.cc/5D48-GNVK>] [hereinafter LEVERAGING THE BEST AVAILABLE EVIDENCE]; NAT'L COUNCIL STATE EDUC. ASS'NS, *supra* note 3.

16. CTRS. DISEASE CONTROL & PREVENTION, LEVERAGING THE BEST AVAILABLE EVIDENCE, *supra* note 16; Merrick et al., *supra* note 14; Marilyn Metzler et al., *Adverse Childhood Experiences and Life Opportunities: Shifting the Narrative*, 72 CHILDREN & YOUTH SERVS. REV. 144 (2016).

17. BLODGETT & DORADO, *supra* note 13, at 9; Jeffrey Leiter & Matthew Johnsen, *Child Maltreatment and School Performance Declines: An Event-History Analysis*, 34 AM. EDUC. RSCH. J. 563 (1997); Joseph

with two or more ACEs have been found to be nearly three times as likely as their peers with no ACEs to repeat a grade and were determined to be twice as likely to be diagnosed as having special needs.<sup>18</sup>

The consequences of ACEs, particularly for individuals who suffer multiple childhood traumas, are significant and enduring.<sup>19</sup> Particular populations, including women and racial minority groups, are at an appreciably higher risk of experiencing four or more ACEs.<sup>20</sup> The concept of complex trauma, which involves persistent exposure to multiple forms of ACEs early in life, can result in post-traumatic adaptations to biological, cognitive, and behavioral functioning.<sup>21</sup> Individuals who are exposed to complex trauma are especially susceptible to severe negative social and health outcomes later in life.<sup>22</sup> Repeated ACEs have been associated with markedly higher rates of mental illness, substance abuse, and interpersonal violence.<sup>23</sup>

The persistent effects of institutional racism and intergenerational poverty contribute to and magnify the consequences of ACEs.<sup>24</sup> Children of color experience toxic levels of chronic stress through economic disadvantage and the violence associated with poverty, in addition to the legacy and current manifestations of racism. The 2016 National Survey of Children's Health concluded that Black children are overrepresented in the population of children with ACEs.<sup>25</sup> According to the survey, over six in ten Black children experience at least one ACEs.<sup>26</sup>

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Crozier & Richard Barth, *Cognitive and Academic Functioning in Maltreated Children*, 27 CHILD. & SCHS. 197 (2005).

18. Christina Bethell et al., *Adverse Childhood Experiences: Assessing the Impact on Health and School Engagement and the Mitigating Role of Resilience*, 33 HEALTH AFF. 2106 (Dec. 2014).

19. See Hughes et al., *supra* note 13.

20. CTRS. DISEASE CONTROL & PREVENTION, *supra* note 5; see also Merrick et al., *supra* note 14.

21. Joseph Spinazzola et al., *Survey Evaluates Complex Trauma Exposure, Outcome, and Intervention Among Children and Adolescents*, 35 PSYCHIATRIC ANNALS 433 (2005); BLODGETT & DORADO, *supra* note 13; Michael De Bellis, *Developmental Traumatology: The Psychobiological Development of Maltreated Children and Its Implications for Research, Treatment, and Policy*, 13 DEV. & PSYCHOPATHOLOGY 539 (2001); Cassandra Kiseil et al., *Assessment of Complex Trauma Exposure, Responses, and Service Needs Among Children and Adolescents in Child Welfare*, 2 J. CHILD & ADOLESCENT TRAUMA 143 (2009).

22. Hughes et al., *supra* note 13; Bellis et al., *supra* note 13; Bruner, *supra* note 4; Felitti et al., *supra* note 8.

23. Hughes et al., *supra* note 13.

24. See Kenneth V. Hardy, *Healing the Hidden Wounds of Racial Trauma*, 22 RECLAIMING CHILD. & YOUTH 24 (2013); Pamela J. Sawyer et al., *Discrimination and the Stress Response: Psychological and Physiological Consequences of Anticipating Prejudice in Interethnic Interactions*, 102 AM. J. PUB. HEALTH 1020 (2012); Michael T. Schmitt et al., *The Consequences of Perceived Discrimination for Psychological Well-Being: A Meta-Analytic Review*, 140 PSYCHOL. BULL. 921 (2014); Brian D. Smedley, *The Lived Experience of Race and Its Health Consequences*, 102 AM. J. PUB. HEALTH 933 (2012); Nancy E. Dowd, *Black Boys Matter*, 45 HOFSTRA L. REV. 47 (2016); see also U.S. DEP'T EDUCATION, *2014 Civil Rights Data Collection: Data Snapshot: School Discipline* (Mar. 2014), <https://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf> [<https://perma.cc/9NUY-HQ49>].

25. Christina Bethell et al., *Issue Brief: Adverse Childhood Experiences Among US Children, Child and Adolescent Health Measurement Initiative*, JOHN HOPKINS BLOOMBERG SCH. PUB. HEALTH (Oct. 2017), [cahmi.org/projects/adverse-childhood-experiences-aces](http://cahmi.org/projects/adverse-childhood-experiences-aces) [<https://perma.cc/ZS49-9LBT>]; see also Natalie Slopen et al., *Racial Disparities in Child Adversity in the U.S.: Interactions with Family Immigration History and Income*, 50 AM. J. PREVENTIVE MED. 47 (2016).

26. Bethell et al., *supra* note 25.

Given the inequitable income distribution that has resulted from structural racism, it is not unexpected that research also suggests a strong association between income level, race, place, and the prevalence of ACEs.<sup>27</sup> As described by Dr. Charles Bruner, place is highly correlated with the prevalence of ACEs.<sup>28</sup> Data compiled from the 2000 census confirms what is anecdotally accepted by most: Poor neighborhoods are disproportionately occupied by children of color.<sup>29</sup> It is estimated that more than half of children of color live in neighborhoods where child poverty exceeds thirty percent, as compared to one in six White children.<sup>30</sup>

Racially segregated neighborhoods, which have been subjected to systematic disinvestment over generations,<sup>31</sup> experience socio-economic and physical conditions that serve to dramatically compromise childhood development.<sup>32</sup> Trauma, maltreatment, poverty, and negative environmental conditions in the earliest years of childhood produce significant adverse outcomes that can extend throughout adulthood.<sup>33</sup> Children who live in economically disadvantaged communities are exposed and conditioned at an early age to invasive security measures, including “stop and frisk” practices, metal detectors in their elementary and middle schools, and enhanced police surveillance.<sup>34</sup> These intensive, inherently re-traumatizing practices create educational settings that resemble prisons more so than schools, functioning as a mechanism for control rather than fostering a healthy educational setting. The devastating amalgamation of poverty and racism produces extreme stress that can generate

27. See NAT'L CHILD TRAUMATIC STRESS NETWORK, *Understanding the Impact of Trauma and Urban Poverty on Family Systems: Risks, Resilience and Interventions* (2010); Neal Halfon et al., *Income Inequality and the Differential Effect of Adverse Childhood Experiences in US Children*, 17 ACAD. PEDIATRICS 70 (2017); NAT'L COUNCIL STATE EDUC. ASS'NS, *supra* note 3; Melissa T. Merrick et al., *Prevalence of Adverse Childhood Experiences from the 2011-14 Behavioral Risk Factor Surveillance System in 23 States*, 172 JAMA PEDIATRICS 1038 (2018) (describing the largest demographic study of ACEs across the U.S. population to date, which found that while ACEs were universal across the adult population, Black, Hispanic and multiracial adults were significantly more likely to have ACEs than their White counterparts).

28. Bruner, *supra* note 4.

29. *Id.*; see also Deborah Povich, Brandon Roberts & Mark Mather, *Low-Income Working Families: The Racial/Ethnic Divide*, WORKING POOR FAMILIES PROJECT 2 (Winter 2014-2015); Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 554-59 (2016).

30. Bruner, *supra* note 4.

31. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); Emily Badger, *How Redlining's Racist Effects Lasted for Decades*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasting-for-decades.html> [<https://perma.cc/LP5X-Q2B8>].

32. The lack of physical and economical investment in impoverished neighborhoods should not be misconstrued as inferring that these areas are not rich in social capital.

33. Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, 7 FUTURE CHILDREN 55 (1997); Jeanne Brooks-Gunn et al., *Do Neighborhoods Influence Child and Adolescent Development?*, 99 AM. J. SOC. 353 (1993); James J. Heckman, *Skill Formation and the Economics of Investing in Disadvantaged Children*, 312 SCI. 1900, 1900 (2006).

34. See Aaron Kupchik & Geoff K. Ward, *Reproducing Social Inequality Through School Security: Effects of Race and Class on School Security Measures* (2011), <http://www.edweek.org/media/kupchikward-02security.pdf> [<https://perma.cc/Z74H-TDZ3>]; VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011).

complex trauma.<sup>35</sup> When those destructive factors coalesce in early childhood, the harm to child development—particularly its impacts on physical, intellectual, and emotional development—is profound.<sup>36</sup>

The most critical period of child development occurs between birth and age three, during which time more than a million neural connections are being formed each second.<sup>37</sup> Whereas children begin their lives with cognitive parity, the intersectionality of race, place, and trauma creates an acute burden for children of color that produces pronounced inequity in academic achievement, social-emotional development, and physical health.<sup>38</sup> Given that two-thirds of Black children are born into poverty,<sup>39</sup> the disparate educational outcomes of children of color are tragically predictable. As described by Dr. Margaret Burchinal, Senior Scientist at the Frank Porter Graham Child Development Institute:

The cognitive development of children reared in low-income families is generally characterized by average performance on standardized tests during infancy, followed by gradual declines during early and middle childhood for U.S. children and for African American children specifically.<sup>40</sup>

Unsurprisingly, children who live in impoverished communities face worse economic, health, and educational outcomes than those who reside in more affluent areas.<sup>41</sup> According to Chetty and Hendren, every year spent in a better neighborhood during childhood increases college attendance rates and earnings in adulthood, and improves proportionally to the time spent living in that area.<sup>42</sup> Additionally, mapping of parental incarceration, domestic violence, and child abuse and neglect align closely with geographic areas with high incidents of childhood adversity and environmental hazards, including heightened rates of infant mortality, lead poisoning, school behavioral disorder diagnosis, airborne pollutants, obesity, and juvenile justice involvement.<sup>43</sup>

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35. Bruner, *supra* note 4.

36. Maria Trent et al., *The Impact of Racism on Child and Adolescent Health*, 144 PEDIATRICS 1 (2019).

37. ZERO TO THREE, *Early Development & Well-Being*, [www.zerotothree.org/early-development](http://www.zerotothree.org/early-development) [<https://perma.cc/U5SD-JU36>] (last visited Aug. 1, 2020).

38. Margaret R. Burchinal et al., *Early Intervention and Mediating Processes in Cognitive Performance of Children of Low-Income African American Families*, 68 CHILD DEV. 935, 935 (1997); *see also* Bruner, *supra* note 4.

39. Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 58-59 (2012).

40. Burchinal et al., *supra* note 38.

41. Robert J. Sampson et al., *Assessing Neighborhood Effects: Social Processes and New Directions in Research*, 28 ANN. REV. SOC. 443 (2002); *see also* Tama Leventhal & Jeanne Brooks-Gunn, *The Neighborhoods They Live In: The Effects of Neighborhood Residence on Child and Adolescent Outcomes*, 126 PSYCHOL. BULL. 309 (2000); *see also* Dowd, *supra* note 24.

42. Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates*, 133 Q.J. ECONOMICS 1107 (2015); *see also* Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016).

43. Christina Bethell et al., *Adverse Childhood Experiences, Resilience and Mindfulness-Based Approaches: Common Denominator Issues for Children with Emotional, Mental or Behavioral Problems*, 25 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 139 (2016); Bruner, *supra* note 4.

That the effects of exposure to ACEs may be transmitted intergenerationally is particularly concerning.<sup>44</sup> Intergenerational continuity of ACEs may be expressed in numerous forms, including food insecurity,<sup>45</sup> maladaptive socioemotional symptoms,<sup>46</sup> and poor health.<sup>47</sup> Dubbed by some researchers as “the chain of risk,”<sup>48</sup> the intergenerational transmission of parental trauma is so potent that it has been found to impact children *in utero* and, according to some studies, may have effects on offspring even prior to conception.<sup>49</sup> Considerable research has been conducted into the effects of parental post-traumatic stress by examining behavioral difficulties and psychiatric illness in the children of trauma survivors, including Vietnam Veterans<sup>50</sup> and Holocaust survivors.<sup>51</sup> This research has been expounded upon within the context of intergenerational trauma transmission and secondary trauma in disenfranchised and marginalized communities, including African Americans<sup>52</sup> and indigenous populations.<sup>53</sup>

While the research on epigenetic inheritance of effects of trauma is instructive in capturing the magnitude of the impact of ACEs, including those stemming from

44. Hughes et al., *supra* note 13; Xiafei Wang, *Breaking the Cycle of Intergenerational Trauma* (Apr. 13, 2019) (unpublished Ph.D. dissertation, Ohio State University) (available at OhioLINK Electronic Theses and Dissertations Center); Mary Hughes & Jill Cossar, *The Relationship Between Maternal Childhood Emotional Abuse/Neglect and Parenting Outcomes: A Systematic Review*, 25 CHILD ABUSE REV. 31 (2016); Christina G. McDonnell & Kristin Valentino, *Intergenerational Effects of Childhood Trauma: Evaluating Pathways Among Maternal ACEs, Perinatal Depressive Symptoms, and Infant Outcomes*, 21 CHILD MALTREATMENT 317 (2016); Rachel Yehuda & Amy Lehrner, *Intergenerational Transmission of Trauma Effects: Putative Role of Epigenetic Mechanisms*, 17 WORLD PSYCHIATRY 243 (2018).

45. Jing Sun et al., *Childhood Adversity and Adult Reports of Food Insecurity Among Households with Children*, 50 AM. J. PREVENTIVE MED. 561 (2016).

46. McDonnell & Valentino, *supra* note 44.

47. Felice Le-Scherban et al., *Intergenerational Associations of Parent Adverse Childhood Experiences and Child Health Outcomes*, 141 PEDIATRICS 6 (2018).

48. *Id.*

49. Yehuda & Lehrner, *supra* note 44.

50. Michelle Ancharoff et al., *The Legacy of Combat Trauma: Clinical Implications of Intergenerational Transmission*, in INTERNATIONAL HANDBOOK OF MULTIGENERATIONAL LEGACIES OF TRAUMA 257 (Yael Danieli, ed. 1998); Laurie L. Harkness, *Transgenerational Transmission of War-Related Trauma*, in INTERNATIONAL HANDBOOK OF TRAUMATIC STRESS SYNDROMES 635 (John P. Wilson & Beverley Raphael, eds., 1993); Robert Rosenheck & Nathan Pramila, *Secondary Traumatization in Children of Vietnam Veterans*, 36 HOSP. COMMUNITY PSYCHIATRY 538 (1985).

51. See generally Vivian Rakoff & John Sigal, *Concentration Camp Survival: A Pilot Study of Effects on the Second Generation*, 16 CAN. PSYCHIATRIC ASS'N J. 393 (1971); Vivian Rakoff et al., *Children and Families of Concentration Camp Survivors*, 14 CANADA'S MENTAL HEALTH 24 (1967); Rachel Yehuda & Earl Giller, *Comments on the Lack of Integration Between the Holocaust and PTSD Literatures*, 5 PTSD RSCH. Q. 1 (1994); Norman Solkoff, *Children of Survivors of the Nazi Holocaust: A Critical Review of the Literature*, 62 AM. J. ORTHOPSYCHIATRY 342 (1992); Abraham Sagi-Schwartz et al., *Are Children of Holocaust Survivors Less Well-Adapted? A Meta-Analytic Investigation of Secondary Traumatization*, 16 J. TRAUMATIC STRESS 459 (2003).

52. RON EYERMAN, *CULTURAL TRAUMA: SLAVERY and the FORMATION OF AFRICAN AMERICAN IDENTITY* (2001); JOY DEGRUY, *POST TRAUMATIC SLAVE SYNDROME: AMERICA'S LEGACY OF ENDURING INJURY AND HEALING* (2005).

53. Joseph P. Gone, *Redressing First Nations Historical Trauma: Theorizing Mechanisms for Indigenous Culture as Mental Health Treatment*, 50 TRANSCULTURAL PSYCHIATRY 683 (2013); Teresa Evans-Campbell, *Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities*, 23 J. INTERPERSONAL VIOLENCE 316 (2008).

institutional racism, it is worthwhile to note that these effects can be countered by environmental enrichment and structural change.<sup>54</sup> Therefore, it is possible to disrupt the transmission of intergenerational trauma by addressing systemic racism and dismantling the policies and practices that have long sustained these trauma-inducing institutions. The following section seeks to begin this process by conducting an honest assessment of educational inequality and, more specifically, the school-to-prison pipeline as a manifestation and perpetration of race-based ACEs.

### III. EDUCATIONAL EQUALITY: THE DREAM THAT NEVER WAS

*“Negro children need neither segregated schools nor mixed schools. What they need is education.”*

—Dr. W.E.B. Du Bois<sup>55</sup>

The United States has a prolonged and persistent history of institutionalized racism that has fostered social conditions and attitudes that have created traumatic experiences for communities of color. Recognizing that personal, institutional, and structural racism have serious consequences for child development, childhood adversity and the resulting neurobiological effects must be considered within the context of racial and ethnic disparities and the policies that have produced them.<sup>56</sup> This section will provide an assessment of present-day inequities within the American educational system; including a discussion of the legacy of government-imposed racial discrimination, the legal precedent that led to such practices being deemed unconstitutional within the educational context, and the lingering effects of racist policies in influencing contemporary school disciplinary guidelines.

*De jure* racial segregation in public education formally ended in 1954 with the historic *Brown v. Board of Education*<sup>57</sup> ruling. Concluding that “separate educational facilities are inherently unequal,”<sup>58</sup> the Court unanimously overturned the long-standing legal precedent of *Plessy v. Ferguson*<sup>59</sup> that had legalized racial segregation throughout the United States. As described at length by Maureen Johnson, the *Brown* ruling was strategically timed to coincide with the appointment of Chief Justice Earl Warren:<sup>60</sup>

Overturing *Plessy* entailed surgically dismissing the rationales supporting the *Plessy* decision, including debunking the “scientific racism” by which African Americans were deemed inferior. Ultimately, when Thurgood Marshall took the podium at the Supreme Court, the social, legal, and scientific rhetoric were aligned. The myths supporting the separate-but-equal model were exposed as the false rhetoric they always were. Truth to power. In a unanimous decision, the

54. Yehuda & Lehrner, *supra* note 44.

55. W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 328 (1935) (arguing that the quality of education is of greater relevancy than whether schools are integrated).

56. *Id.*; see also Bruner, *supra* note 4.

57. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

58. *Id.* at 495.

59. *Plessy v. Ferguson*, 163 U.S. 537, 537-38 (1896).

60. See James L. Hunt, *Brown v. Board of Education After Fifty Years: Context and Synopsis*, 52 MERCER L. REV. 549, 567-68 (2001).

*Brown* Court soundly rejected the separate-but-equal doctrine and drove a legal stake through the *Plessy* opinion.<sup>61</sup>

But *Brown* failed to remedy racial segregation.<sup>62</sup> *Brown* served the country's short-term national interests, namely involving Cold War considerations, without meaningfully addressing the systemic racism inherent to the laws that it sought to repudiate.<sup>63</sup> As articulated by the late Derrick Bell, who served as Assistant Counsel for the NAACP Legal Defense Fund and was intimately involved in southern school litigation in the early 1960's, the *Brown* decision serves as a prototypical example of interest-convergence theory.<sup>64</sup> According to Bell's theory, political advances in the area of racial justice occur where the interests of Blacks and Whites converge and, more importantly, where such actions have only a nominal impact on White privilege.<sup>65</sup> Specifically, interest-convergence covenants, such as *Brown*, recognize and protect Black rights only to the degree that such advances provide a tangible and significant benefit to White political elites.<sup>66</sup> Racial injustice in itself, regardless of how egregious, is insufficient alone to justify the advancement of civil rights absent the furtherance of political or economic interests desired by the majority.<sup>67</sup> In these instances, as with the hopefulness embedded in *Brown*, relief often proves illusionary, yet is cited as evidence that systemic racial bias has been cured and rendered non-existent.<sup>68</sup>

Though recognized for its symbolic significance and influence in galvanizing the Civil Rights Movement,<sup>69</sup> *Brown* arguably achieved modest, if any progress, in fostering a more equitable education system.<sup>70</sup> Upon finding that the state-sanctioned segregation of public education violated the constitutional guarantee of equal protection under the law, the Court disappointingly deferred on the specific question of relief, ultimately delaying its ruling on an appropriate remedy until the following year in *Brown v. Board of Education (Brown II)*.<sup>71</sup>

Whereas *Brown* had been perceived as a triumphant and unequivocal denunciation of segregationist policies, *Brown II* represented a significant retrenchment of the Court's purported pledge to equality under the law.<sup>72</sup> In lieu of ordering the

61. Maureen Johnson, *Separate But (Un)Equal: Why Institutionalized Anti-Racism Is the Answer to the Never-Ending Cycle of Plessy v. Ferguson*, 52 U. RICH. L. REV. 327, 360 (2018).

62. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); see also CHARLES J. OGLETREE JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION* (2005); DERRICK BELL, *SILENT COVENANTS: BROWN VS. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004).

63. BELL, *supra* note 62, at 66, 136, 197.

64. *Id.* at 58.

65. *Id.* at 9, 49.

66. *Id.* at 49.

67. *Id.*

68. *Id.* at 56.

69. Klarman, *supra* note 62, at 364.

70. BELL, *supra* note 62, at 2, 7, 197.

71. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

72. BELL, *supra* note 62, at 18-19.

immediate desegregation of all public schools, the Court instead opted to allow district courts the broad discretion to determine and oversee compliance of its order.<sup>73</sup> Marking a dramatic regression from its early commitment to racial desegregation, *Brown II* offered no specific criteria or guidance for achieving racially equitable schools, requiring only that its ruling be accomplished “with all deliberate speed.”<sup>74</sup> Declining to offer an effective enforcement mechanism and essentially shirking its responsibility to ensure compliance with its order, the Court’s passivity in administering the school desegregation process emboldened jurisdictions resistant to desegregation to enact measures designed to thwart the intended equalizing effects of *Brown*.<sup>75</sup> The lack of a clear, articulable remedy by the Court in addressing systemic racism within the public education system permitted states and lower courts that were hostile to desegregation to actively resist compliance with *Brown*.<sup>76</sup>

With the absence of effective judicial oversight to ensure meaningful compliance with the Court’s ruling, *Brown* ushered in “transformation without real change.”<sup>77</sup> Consequently, state-sanctioned racism was refashioned in new forms of educational inequality sustained by housing segregation,<sup>78</sup> asymmetrical school funding, an increased reliance on standardized testing, and the disproportionate application of zero tolerance disciplinary practices. As described by Bell, *Brown* proved more symbolic than substantive:<sup>79</sup>

Over the decades, the *Brown* decision, like other landmark cases, has gained a life quite apart from the legal questions it was intended to settle. The passage of time has calmed both the ardor of its admirers and the ire of its detractors. Today, of little use as legal precedent, it has gained in reputation as a measure of what law and society might be. That noble image, dulled by resistance to any but minimal steps toward compliance, has transformed *Brown* into a magnificent mirage, the legal equivalent of that city on a hill to which all aspire without any serious thought that it will ever be attained.<sup>80</sup>

*Brown* not only failed to dismantle the relics of White supremacy but, more distressingly, operated to unite Southern resistance, inflame racial violence,<sup>81</sup> and

73. *Id.*

74. *Id.*; see also Klarman, *supra* note 62, at 299.

75. BELL, *supra* note 62, at 94-97.

76. *Id.*

77. Derrick Bell, *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1059 (2005) (quoting Louis Michael Seidman); see also Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 717 (1992).

78. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS I* (1993).

79. Cass R. Sunstein, *Did Brown Matter?*, NEW YORKER (2004), <https://www.newyorker.com/magazine/2004/05/03/did-brown-matter> [https://perma.cc/5SG9-BEAU]; see also Earnest N. Bracey, *Brown vs. Board of Education and the Unfulfilled Hopes for Racial and Educational Reform: A Political Analysis of Derrick Bell's Silent Covenants*, 3 INT'L J. BUS. & SOC. RSCH. 13 (2013).

80. BELL, *supra* note 62, at 4; see also DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* 156 (2002) (discussing well-intentioned but ineffective desegregation strategy of the Civil Rights era).

81. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 36-37 (2010).

ultimately spurred the modern narrative that racial barriers had been successfully dismantled, thereby enabling everyone to access a path of progress through individual ability and sheer will.<sup>82</sup> Perhaps most tragically, the re-segregation of American society has been made possible in part by the fallacy that *Brown* has, in fact, created racial equality.<sup>83</sup> The tale, as it has been so effectively told, is that those who fail to achieve the American dream do so not because of racism, structural inequities, or historical (and ongoing) oppression, but because they lack the intellect, work ethic, and gusto to succeed. The next section will expound upon the creation of this false narrative of educational equality by discussing the evolution of the public education system in the post-*Brown* era within the context of the school-to-prison pipeline, its disparate application to children of color, and the vestiges of legalized racial segregation that has allowed it to flourish.

#### IV. THE SCHOOL-TO-PRISON PIPELINE AS THE MANIFESTATION AND PERPETUATION OF RACE-BASE ADVERSE CHILDHOOD EXPERIENCES (ACEs)

*“The nature of the criminal justice system has changed. It is no longer primarily concerned with the prevention and punishment of crime, but rather with the management and control of the dispossessed.”*

—Michelle Alexander<sup>84</sup>

One of the primary pipelines of children of color into the juvenile justice system is the very institution that is intended to serve as an engine for equity: public schools.<sup>85</sup> The advent of exclusionary disciplinary practices, also referred to as “zero tolerance” policies, has transformed schools across America into pathways into the criminal justice system.<sup>86</sup> This phenomenon has become so prevalent over the past three decades that it has been coined “the school-to-prison pipeline.”<sup>87</sup> This section will discuss the advent of zero tolerance disciplinary policies as an evolutionary byproduct of racial segregation. It will examine how these policies complement other forms of institutionalized racism to exploit and reinforce trauma that allow for the maintenance of systems of race-based social inequity.

Described by the NAACP as “one of the most urgent challenges in education today,”<sup>88</sup> the school-to-prison pipeline serves to exclude students of color from the educational process, redirecting them into the criminal justice system.<sup>89</sup> The

82. BELL, *supra* note 62, at 134.

83. *Id.* at 186-187; Seidman, *supra* note 77, at 717.

84. ALEXANDER, *supra* note 81, at 183.

85. Dowd, *supra* note 24.

86. Nancy Heitzeg, *Education or Incarceration: Zero Tolerance Policies and The School To Prison Pipeline*, F. ON PUB. POL’Y (2009); see also Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned Into A Nightmare? The American Dream’s Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L & POL’Y 289, 300-09 (2005).

87. The school-to-prison pipeline is defined as a punitive system in which students are tracked out of educational institutions, primarily via zero tolerance policies, directly and/or indirectly into the juvenile and adult criminal justice systems. Heitzeg, *supra* note 86.

88. NAACP, *supra* note 1.

89. Johanna Wald & Daniel J. Losen, *Out of Sight: The Journey Through the School-to-Prison Pipeline, in INVISIBLE CHILDREN IN THE SOCIETY AND ITS SCHOOLS* 23, 25 (Sue Books ed., 2d ed. 2006).

overrepresentation of children of color receiving school disciplinary referrals cannot be adequately explained by classroom factors or behavioral demographic differences,<sup>90</sup> but rather is a reflection of implicit racial bias embedded in school disciplinary practices.<sup>91</sup>

To capture the sheer scale of the challenge, it is useful to consider data compiled and analyzed by the American Bar Association (ABA). The ABA determined that during the 2011–12 school year, 260,000 students were referred to law enforcement and 92,000 were arrested on school property.<sup>92</sup> The majority of these infractions were relatively minor and subjectively-defined offenses, such as excessive noisiness and disruptive or disrespectful behavior.<sup>93</sup> Even preschoolers are not immune from the harsh consequences of zero tolerance policies. One study found that the rate of expulsions for preschools was three times more than that of children in grades K-12.<sup>94</sup>

Ineffective and grossly inequitable, zero tolerance school disciplinary policies disproportionately harm students of color.<sup>95</sup> The emergence of the school-to-prison

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90. DANIEL J. LOSEN & JONATHAN GILLESPIE, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL, UCLA, CTR. C.R. REMEDIES, C.R. PROJECT (2012).

91. Luke Edwards & Allison Elgart, *The School to Prison Pipeline: How Implicit Bias Colors Discipline*, 1 J. EDUC. L. & POL'Y 1 (2015); Brenda Townsend, *The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions*, 66 EXCEPTIONAL CHILDREN 381 (2000); Carla Monroe, *Why are "Bad Boys" Always Black? Causes for Disproportionality in School Discipline and Recommendations for Change*, 79 CLEARING HOUSE 45 (2005).

92. SARAH E. REDFIELD & JASON P. NANCE, THE AMERICAN BAR ASSOCIATION JOINT TASK FORCE ON REVERSING THE SCHOOL-TO-PRISON PIPELINE PRELIMINARY REPORT, A.B.A. COAL. ON RACIAL & ETHNIC JUST., CRIM. JUST. SECTION & COUNCIL RACIAL & ETHNIC DIVERSITY EDUC. PIPELINE (2016), <https://pdfs.semanticscholar.org/9624/4fe633595fd676ccc77eed3c8be03bd267c6.pdf> [<https://perma.cc/BCN9-LY33>].

93. Russell J. Skiba et al., *Parsing Disciplinary Disproportionality: Contributions of Infraction, Student, and School Characteristics to Out-of-School Suspension and Expulsion*, 51 AM. EDUC. RSCH. J. 640, 644 (2014); see Thalia Gonzalez, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J. L. & EDUC. 281 (2012); see also Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 J. SCH. PSYCHOL. 455, 461 (2008). In one particularly egregious case in rural Mississippi, five African American high school students were suspended from school, had their bus privileges revoked, and arrested for felony assault, which carries a maximum sentence of five years in prison, for throwing peanuts at one another on a bus, which resulted in one inadvertently hitting the White female bus driver. The criminal charges were ultimately dropped, but all of the students subsequently dropped out of school due to the hardship of traveling 30 miles to their school without having access to bus service. KIM BROOKS ET AL., SCHOOL HOUSE HYPE: TWO YEARS LATER 17 (2000), [http://www.justicepolicy.org/uploads/justicepolicy/documents/school\\_house\\_hype.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/school_house_hype.pdf) [<https://perma.cc/FQ3K-K2YF>] (citing Harvard University, Civil Rights Project, Education Denied: The Negative Impact of Zero Tolerance Policies, Briefing for the U.S. Commission on Civil Rights (Feb. 15, 2000)).

94. WALTER S. GILLIAM, PREKINDERGARTENERS LEFT BEHIND: EXPULSION RATES IN STATE PREKINDERGARTEN SYSTEMS 6 (2005).

95. EDUC. POL'Y INNOVATION CTR., *From Exclusionary to Restorative: An Intentional, Trauma-Sensitive Approach to Interrupting Racial Disparities, Reducing Violence, Strengthening Communities, and Accelerating Student Learning* (2019), <https://www.educationminnesota.org/EDMN/media/edmn-files/advocacy/EPIC/EPIC-student-discipline-report.pdf> [<https://perma.cc/B4EF-VQGG>]; Russell Skiba et al., *Race is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85 (2011); Mary M. Mitchell, *Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals*, 102 J. EDUC. PSYCHOL. (2010); Linda M. Raffaele Mendez & Howard M. Knoff, *Who Gets Suspended From School and Why: A Demographic Analysis of Schools and Disciplinary Infractions in a Large School District*, 26 EDUC. & TREATMENT CHILDREN 30 (2003); LOSEN & GILLESPIE, *supra* note 90.

pipeline coincided with the tough-on-crime era of the 1980's, producing the doubly destructive zero tolerance school policies and harsh criminal statutes for non-violent drug-related offenses.<sup>96</sup> Zero tolerance school policies were adopted from the U.S. Customs Services Antidrug Program.<sup>97</sup> These policies were intended to emulate the concept of mandatory sentencing within the criminal justice system.<sup>98</sup>

Consistent with the effects of the War on Drugs, zero tolerance disciplinary policies proved remarkably successful at assigning deviant classifications to people of color and subsequently denying them access to the opportunities necessary to become productive members of society. School suspensions nearly doubled nationwide between 1974 and 1997, climbing from 1.7 million to 3.1 million.<sup>99</sup> During this same period, suspensions also roughly doubled for non-White children in the K-12 education system.<sup>100</sup> Under-resourced schools, located predominantly in communities of color, allowed for the ideal conditions to flourish for the adoption of exclusionary disciplinary interventions.<sup>101</sup> Predictably, the schools with low performance metrics, ineffective governance, and high student-to-teacher ratios have been documented to have the highest suspension rates.<sup>102</sup> As limited funding has been systematically reallocated to bolster school security and satisfy intensive testing requirements,<sup>103</sup> harsh disciplinary policies such as expulsion and suspension have proven

96. Between 1973 and 2009, following a period of steady decline in the U.S. prison population, the number of incarcerated Americans rose dramatically from 200,000 to 1.5 million. SENT'G PROJECT, *Fact Sheet: Trends in U.S. Corrections* (updated June 2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/UJ76-R2EF>]. More than a quarter of the world's incarcerated population was housed in American prisons, despite the U.S. population accounting for only 5% of the global population. Michelle Ye He Lee, *Yes, U.S. locks people up at a higher rate than any other country*, WASH. POST (July 7, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/> [<https://perma.cc/3PQA-QHUS>]. The unprecedented increase in the U.S. prison population over the past forty years is largely attributable to changes in arrests and sentencing related to drug-related crimes that resulted from the War on Drugs. See JEREMY TRAVIS ET AL., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES*, NAT'L RSCH. COUNCIL, COMM. ON CAUSES & CONSEQUENCES HIGH RATES INCARCERATION (2014).

97. EDUC. POL'Y INNOVATION CTR., *supra* note 95, at 24.

98. *Id.*

99. BROOKS ET AL., *supra* note 93, at 17–18 (citing Norma Cantu, Assistant Secretary of Education for Civil Rights, Statement made at the Briefing for the U.S. Commission on Civil Rights (Feb. 17, 2000)); Johanna Wald & Daniel Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 9, 10 (2003).

100. DANIEL LOSEN, *DISCIPLINE POLICES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE*, NAT'L EDUC. POL'Y CTR. 5 (2011).

101. See DRUM MAJOR INST. PUB. POL'Y, *A Look at the Impact Schools* (2005), [https://static.prisonspolicy.org/scans/impact\\_schools.pdf](https://static.prisonspolicy.org/scans/impact_schools.pdf) [<https://perma.cc/5LJ9-2V9L>] (finding that the New York City schools labeled as most dangerous are also large, severely overcrowded, chronically under-funded, and comprised disproportionately of Black students).

102. ADVOCS. CHILD. & YOUTH, *SCHOOL SUSPENSION: EFFECTS AND ALTERNATIVES 3* (2006), [https://www.opensocietyfoundations.org/uploads/118e2c5d-a6f7-4b8d-9bd4-d5936aae66bc/issuebrief\\_20060418.pdf](https://www.opensocietyfoundations.org/uploads/118e2c5d-a6f7-4b8d-9bd4-d5936aae66bc/issuebrief_20060418.pdf) [<https://perma.cc/TGR4-MY5P>].

103. The passage of the No Child Left Behind Act (NCLB) in 2001 explicitly emphasized standardized testing, creating penalties for low test scores that resulted in a heightened reliance on exclusionary policies that led to increased suspensions and expulsions. See *generally* U.S. DEP'T EDUCATION, *NCLB EXECUTIVE SUMMARY* (Jan. 7, 2002), <https://www2.ed.gov/nclb/overview/intro/execsumm.pdf> [<https://perma.cc/4N8B-7J4P>].

an expedient alternative to guidance counselors and therapeutic interventions. Consequently, since the 1970's the suspension rate for Black children has doubled, as compared to an approximate one percent increase in the suspension rate for White children during this same period.<sup>104</sup> The overreliance of punitive disciplinary referrals for children of color, who are statistically more likely to be penalized for subjectively-defined offenses,<sup>105</sup> is partially attributable to the ambiguity of zero tolerance policies in combination with Black and Brown boys being generally perceived as more threatening.<sup>106</sup>

Educational disruptions that result from expulsions and suspensions have especially devastating effects on children assigned to special needs programs, which are disproportionately comprised of children of color, Black boys in particular.<sup>107</sup> By one estimate, 36% of Black male students with disabilities were suspended at least once during the 2009–2010 academic year.<sup>108</sup> Students with disabilities are more vulnerable to dropping out of school as a result of suspension and expulsion, with more than a quarter of special need students attributing their decision to drop out in part due to discipline problems.<sup>109</sup> Moreover, the use of school suspensions and expulsions are often utilized for non-violent behavioral infractions, which is most acute within the context of special needs educational programs. According to some estimates, ninety-five percent of special education students who were removed from the classroom were disciplined for non-violent offenses.<sup>110</sup> Expectedly, these children are also overrepresented within the juvenile justice system, with one study identifying that one-third of the juvenile justice population are youth who have been diagnosed

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104. DANIEL LOSEN & TIA MARTINEZ, *OUT OF SCHOOL AND OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS*, UCLA, CTR. C.R. REMEDIES, C.R. PROJECT 1-2 (2013), <https://escholarship.org/uc/item/8pd0s08z> [<https://perma.cc/94EN-3UEQ>].

105. Cheryl Staats, *Understanding Implicit Bias: What Educators Should Know*, 39 AM. EDUCATOR 29, 31 (2005).

106. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 539-40 (2014); *see also* Duane E. Thomas & Howard Stevenson, *Gender Risks and Education: The Particular Classroom Challenges for Urban Low-Income African American Boys*, 33 REV. RSCH. EDUCATION 160, 166-67 (2009). Research on student behavior suggests that there is no evidence that children of color are more disruptive or cause more discipline problems than other demographic groups; rather, this is a direct consequence of racial discrimination. *See* LOSEN & GILLESPIE, *supra* note 90, at 40; *see also* REDFIELD & NANCE, *supra* note 92, at 49-50.

107. ADVOCS. CHILD. & YOUTH, *supra* note 102, at 3; *see also* Tyrone C. Howard et al., *Black Males, Social Imagery, and the Disruption of Pathological Identities: Implications for Research and Training*, 26 EDUC. FOUND. 87 (2012); CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE STRUCTURING LEGAL REFORM* 54 (2010); Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 HOW. L.J. 303, 326-27 (2011); Theresa Glennon, *Knocking Against the Rocks: Evaluating Institutional Practices and the African American Boy*, 5 J. HEALTH CARE L. & POL'Y 10, 11 (2002).

108. LOSEN & MARTINEZ, *supra* note 104, at 2.

109. MARY WAGNER ET AL., *YOUTH WITH DISABILITIES: HOW ARE THEY DOING? THE NATIONAL LONGITUDINAL TRANSITION STUDY OF SPECIAL EDUCATION STUDENTS*, U.S. DEP'T EDUCATION (1991), <https://files.eric.ed.gov/fulltext/ED341228.pdf> [<https://perma.cc/NUN5-7QZC>].

110. BROOKS ET AL., *supra* note 99, at 22 (citing K.A. Larson, *Redefining Troublemakers*, Speech at the Office of Special Education Training Conference (1995)).

as having special learning needs.<sup>111</sup> Such forms of implicit racial discrimination are reaffirmed by confirmation bias, an unconscious tendency to select information that confirms preexisting perceptions even when evidence exists to negate the veracity of those beliefs.<sup>112</sup>

Children who have been suspended or expelled are also at a higher risk of failing a grade,<sup>113</sup> failing to graduate from high school,<sup>114</sup> committing a crime, and becoming incarcerated as adults.<sup>115</sup> Research has consistently demonstrated that suspensions lead to students dropping out of high school,<sup>116</sup> with one study finding that high schoolers who are suspended have three times the dropout rate of their peers.<sup>117</sup> Moreover, according to the CDC, out-of-school children are more likely to use drugs and alcohol, carry a weapon, and be involved in physical altercations.<sup>118</sup> Neither society nor children benefit from an overreliance on punitive school disciplinary practices.

Furthermore, many schools have no obligation to provide alternative education or access to special education programs to students who are expelled,<sup>119</sup> thereby functionally removing these children from the public education system and dispossessing them of the opportunity to receive an education.<sup>120</sup> The deprivation of much-needed instructional time by children who have experienced ACEs has the effect of denying traumatized children with the greatest need for stability and educational opportunity of the support required to succeed academically and overcome their adversity. These children often do not return to traditional educational settings, instead languishing in alternative schools or juvenile detention centers.<sup>121</sup> Discounting the underlying systemic historical inequities that account for the well-documented “achievement gap,” the public education system has instead amplified these inequities through the criminalization of children of color.

Inevitably, the expansion of the use of suspension and expulsion as a behavioral modification technique in the treatment of traumatized students with significant

111. MARY M. QUINN ET AL., STUDENTS WITH DISABILITIES IN CORRECTIONAL FACILITIES, EDUC. RES. INFO. CTR. 2 (2001), <https://files.eric.ed.gov/fulltext/ED461958.pdf> [<https://perma.cc/CXN5-TJJM>].

112. Staats, *supra* note 105, at 33.

113. TONY FABELO ET AL., BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT, COUNCIL STATE GOV’TS JUST. CTR. 54 (2011).

114. Robert Balfanz et al., *Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade*, 5 J. APPLIED RSCH. ON CHILDREN 14 (2014).

115. LOSEN & GILLESPIE, *supra* note 90; Gale Morrison & Russell Skiba, *Predicting Violence from School Misbehavior: Promises and Perils*, 38 PSYCHOL. SCHS. 173 (2001); JUDITH KAFKA, THE HISTORY OF “ZERO TOLERANCE” IN AMERICAN PUBLIC SCHOOLING (2011).

116. Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 376 (1999).

117. Ruth B. Ekstrom, et al., *Who Drops Out of High School and Why? Findings from a National Study*, 87 TEACHERS COLLEGE REC. 356 (1986).

118. CTRS. DISEASE CONTROL & PREVENTION, *Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School: United States, 1992*, 43 MORBIDITY & MORTALITY WEEKLY REP. 129 (1994).

119. BROOKS ET AL., *supra* note 93.

120. ADVOCS. CHILD. & YOUTH, *supra* note 102, at 2.

121. NAACP, *supra* note 1.

ACEs has translated into a surge in the juvenile court system. By 1996, the juvenile justice system handled 1.8 million delinquency cases—1,600 more cases each day than in 1987.<sup>122</sup> During this period, federal data shows secure detention was nearly twice as likely for cases involving Black youth as for cases involving Whites, even after controlling for the offense.<sup>123</sup> Between 1987 and 1996, the juvenile court's involvement in formal status offenses, which prohibited running away from home, ungovernability, truancy, curfew violations, and underage drinking, more than doubled.<sup>124</sup> For Black children, the overall rate for these cases increased by a staggering ninety-five percent.<sup>125</sup>

Statistically, the criminal justice system and public education system have become virtually indistinguishable as measured by their treatment of communities of color. Though only comprising sixteen percent of the juvenile population, Black children accounted for nearly half of all juvenile arrests in 2003.<sup>126</sup> Additionally, data indicates that Black children are suspended at roughly 2.3 times the rate of White children nationally.<sup>127</sup> Research conducted by the Applied Research Center (ARC), a national policy institute, found that suspension and expulsion rates for Black students in specific geographic areas are dramatically higher than even the national data would suggest.<sup>128</sup> In Phoenix, Arizona, for example, Black students are suspended or expelled at a rate of twenty-two times that of their White peers.<sup>129</sup> Likewise, in Nashville, where the student body is forty-five percent Black, Black students comprised seventy percent of suspensions for the 2011–2012 academic year.<sup>130</sup> The rapid increase in expulsions were largely targeted at children of color, who constituted fifty-four percent of the state's expelled population but only one-fifth of the overall student population.<sup>131</sup>

The near universal implementation of harsh disciplinary policies in public schools over the past several decades precipitated the passage of state laws in nearly every jurisdiction that empowered prosecutors to exercise significant discretion in charging

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122. HOWARD N. SNYDER & MELISSA SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT*, U.S. DEP'T JUSTICE, OFF. JUV. JUST. & DELINQUENCY PREVENTION (1999).

123. *Id.*

124. *Id.*

125. *Id.*

126. HOWARD N. SNYDER, *JUVENILE ARRESTS 2003*, U.S. DEP'T JUSTICE, OFF. JUST. PROGRAMS, JUV. JUST. BULL. 5 (2005), <https://www.ncjrs.gov/pdffiles1/ojjdp/209735.pdf> [<https://perma.cc/D3QB-S3MS>]; see also NAACP, *supra* note 1.

127. Based upon data presented by Norma Cantu, former Assistant Secretary of Education for Civil Rights. BROOKS ET AL., *supra* note 93, at 17-18 (citing Norma Cantu, Assistant Secretary of Education for Civil Rights, Statement made at the Briefing for the U.S. Commission on Civil Rights (Feb. 17, 2000)).

128. REBECCA GORDAN ET AL., *FACING THE CONSEQUENCES: AN EXAMINATION OF RACIAL DISCRIMINATION IN U.S. PUBLIC SCHOOLS*, ERIC INITIATIVE, APPLIED RSCH. CTR. (2000).

129. *Id.*

130. Grace Tatter, *Talk It Out: Restorative Justice Techniques Help School Communities Rethink Approaches to Discipline*, CHALKBEAT (Feb. 16, 2015), <https://tn.chalkbeat.org/2015/2/16/21092171/talk-it-out-restorative-justice-techniques-help-school-communities-rethink-approaches-to-discipline> [<https://perma.cc/US7Z-7GP4>].

131. *Id.*

youths as adults.<sup>132</sup> By the end of the 1990's, forty-one states had enacted legislation expanding the offenses that allow children to be prosecuted as adults.<sup>133</sup> These judicial transfer "reforms," which occurred on a national scale as a mechanism to allow children to be more seamlessly integrated into the adult criminal justice system,<sup>134</sup> were synergistically supported by the "tough on crime" philosophy that justified an explosion in zero tolerance policies in the public school system during this period. In over a dozen states, prosecutors were delegated the discretion to redirect juveniles to adult courts.<sup>135</sup>

The effects of these policy changes have been far-reaching and severe. Since 1990, the incarceration of youths in adult jails has increased 208 percent.<sup>136</sup> Some estimates place the number of youths who are prosecuted as adults as high as 200,000 per year,<sup>137</sup> the vast majority of whom are charged for non-violent offenses.<sup>138</sup> These figures have logically translated into an explosion of the adult prison population, which has skyrocketed from 300,000 to over two million within the span of a generation.<sup>139</sup> The criminal justice consequences arising from the effects of the school-to-prison pipeline have created an institutionalized population of Brown and Black children who comprise the basis of a state-sponsored, race-based caste system built firmly on intergenerational trauma. Once siphoned into the criminal justice system and labeled as felons, these children and adolescents may be legally denied the right to vote,<sup>140</sup> the opportunity to pursue a college degree,<sup>141</sup> the ability to compete for employment that could provide a living wage,<sup>142</sup> and the prospect to fully engage in society as productive citizens.<sup>143</sup>

132. See, e.g., G. Larry Mays & Peter R. Gregware, *The Children's Code Reform Movement in New Mexico: The Politics of Expediency*, 18 L. & POL'Y 179, 180 (1996); Rene Sanchez & William Booth, *California Toughens Juvenile Crime Laws: Rules to Treat Young Offenders More Like Adults*, WASH. POST, (Mar. 13, 2000) <https://www.washingtonpost.com/wp-srv/WPcap/2000-03/13/009r-031300-idx.html> [<https://perma.cc/HE8A-HU8S>]; LIZ RYAN & JASON ZIEDENBERG, *THE CONSEQUENCES AREN'T MINOR*, JUST. POL'Y INST. (2007), [http://www.justicepolicy.org/images/upload/07-03\\_C4YJConsequences\\_JJ.pdf](http://www.justicepolicy.org/images/upload/07-03_C4YJConsequences_JJ.pdf) [<https://perma.cc/NU25-723S>].

133. Maya Bell, *A Child, A Crime—An Adult Punishment*, ORLANDO SENTINEL (Oct. 21, 1999), <https://www.orlandosentinel.com/news/os-xpm-1999-10-21-9910210065-story.html> [<https://perma.cc/LAH7-AY6X>] [hereinafter *A Child, A Crime—An Adult Punishment*].

134. PATRICIA TORBET ET AL., *STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME*, NAT'L CTR. JUV. JUST. 19 (1996).

135. RYAN & ZIEDENBERG, *supra* note 132, at 10.

136. CHRISTOPHER HARTNEY, *FACT SHEET: YOUTH UNDER AGE 18 IN THE ADULT CRIMINAL JUSTICE SYSTEM*, NAT'L COUNCIL ON CRIME & DELINQUENCY 3 (2006), [http://nccdglobal.org/sites/default/files/publication\\_pdf/factsheet-youth-in-adult-system.pdf](http://nccdglobal.org/sites/default/files/publication_pdf/factsheet-youth-in-adult-system.pdf) [<https://perma.cc/2DY2-W9SQ>].

137. Jennifer Woolard et al., *Juveniles Within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 INT'L J. FORENSIC MENTAL HEALTH 1, 4 (2012).

138. RYAN & ZIEDENBERG, *supra* note 132, at 6.

139. ALEXANDER, *supra* note 81, at 6.

140. Sarah Childress, *Michelle Alexander: "A System of Racial and Social Control"*, PBS FRONTLINE (Apr. 29, 2014), <https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/> [<https://perma.cc/W28D-2FWR>].

141. David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Education Damage in the Transition to Adulthood*, 86 SOC. EDUC. 36, 40-41 (2013).

142. Childress, *supra* note 140.

143. See generally ALEXANDER, *supra* note 81.

Despite reassurances from proponents of zero tolerance policies that they are necessary and effective safety measures, decades of statistical and anecdotal evidence indicate otherwise. According to the American Psychological Association's Taskforce on Zero Tolerance Policies, exclusionary disciplinary practices have not led to safer schools.<sup>144</sup> Moreover, zero tolerance and exclusionary practices have not resulted in higher levels of academic achievement, nor have they been effective at serving as a deterrent for disruptive school behaviors.<sup>145</sup> Instead, zero tolerance measures have been remarkably effective at predominantly one outcome—the largescale deprivation of the ability of children of color to access a constitutionally-guaranteed public education and, as a result, the creation of the school-to-prison pipeline.

Although zero tolerance policies and the funneling of minors into the adult correctional system have been opposed by The Council of Juvenile and Correctional Administrators<sup>146</sup> and other professional and policy organizations,<sup>147</sup> legislators continue to disingenuously tout these measures as both an effective deterrent to crime and as necessary for public safety<sup>148</sup> despite overwhelming evidence to the contrary.<sup>149</sup> Former U.S. Congressman and Florida Attorney General, Bill McCollum, an advocate for the passage of a federal law permitting federal prosecutors to try children as young as thirteen as adults, captured the sentiment of proponents of these racially disparate, harmful policies in declaring that the “small minority of kids who commit the most heinous crimes should be locked up in jail, and the key should be thrown away. We then can concentrate our resources on the kids we can reach.”<sup>150</sup>

The policies espoused and enacted by legislators such as McCollum have accomplished precisely what they are designed to effectuate: the criminalization and long-term incarceration of children and adolescents, the vast majority of whom herald from marginalized communities of color and/or suffer from mental health issues or have been diagnosed with developmental disabilities. More than half of the children under the age of fourteen who are transferred to adult prison are Black or Latino.<sup>151</sup> These children are often housed in adult criminal populations, where they are especially

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144. Cecil R. Reynolds et. al., *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 853 (2008).

145. *Id.*

146. COUNCIL JUV. CORRECTIONAL ADM'RS, *Position Paper: Waiver and Transfers* (2017), <http://cjca.net/wp-content/uploads/2018/02/waiver-and-transer-paper-March-2017-final.pdf> [<https://perma.cc/NM6T-FR9P>].

147. JUST. POL'Y INST. & NAT'L CTR. VICTIMS CRIME, SMART SAFE & FAIR: STRATEGIES TO PREVENT YOUTH VIOLENCE, HEAL VICTIMS OF CRIME AND REDUCE RACIAL INEQUALITY (2018), <http://www.justicepolicy.org/research/12222> [<https://perma.cc/D5GR-AWDX>].

148. It should be noted that some states, such as Illinois and Delaware, have begun to re-evaluate their state statutes in this area. The pace of legislative reform, however, remains far from sufficient given the severity of the issue.

149. RYAN & ZIEDENBERG, *supra* note 132.

150. Bell, *A Child, A Crime—An Adult Punishment*, *supra* note 133.

151. U.S. DEP'T JUSTICE, OFF. JUV. JUST. & DELINQUENCY PREVENTION, *Easy Access to Juvenile Court Statistics, Delinquency Cases Waived 2008-2017* (2008-2017), <https://www.ojjdp.gov/ojstatbb/ezajcs/> [<https://perma.cc/NR5N-L5PB>].

vulnerable to physical and sexual abuse, suicide, and further re-traumatization.<sup>152</sup> According to the Equal Justice Initiative, which successfully challenged mandatory life sentences without the possibility of parole for children, thirteen states have no minimum age for prosecuting children as adults.<sup>153</sup> In some documented instances, children as young as eight-years-old have been tried within the adult criminal justice system.<sup>154</sup>

For a particularly egregious example of the compounded harm that can result from the usage of zero tolerance disciplinary polices in tandem with prosecutorial waiver provisions, consider the case of 15-year-old, Anthony Laster.<sup>155</sup> Laster, a developmentally disabled nearly deaf middle-schooler was placed in a special education program shortly after the death of his mother. Laster took two dollars for lunch money from the pocket of a fellow student, which resulted in him being arrested and charged as an adult for battery and strong-armed robbery.<sup>156</sup> Laster spent nearly two months in an adult correctional facility before the public outcry over his treatment prompted the local prosecutor to ultimately drop the charges.<sup>157</sup> Notwithstanding his eventual decision not to pursue adult criminal charges against Laster, the state prosecutor remained defiant in his position, commenting in an op-ed for the local newspaper, “With all the ‘second chances’ available in this county, I make no apology for my aggressive stance in prosecuting violent juvenile crime for what it is, an adult crime committed by a juvenile.”<sup>158</sup>

But data shows us that those “second chances” exist almost exclusively for individuals who benefit from White privilege.<sup>159</sup> Within the space of educational opportunity, judicial fairness, and socially created institutional violence, Black and Brown children are chronically disadvantaged. Forced to navigate barrier upon barrier that their White counterparts do not (and often times fail to so much as recognize), the

152. Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1450-58 (2012).

153. EQUAL JUST. INITIATIVE, ALL CHILDREN ARE CHILDREN: CHALLENGING ABUSIVE PUNISHMENT OF JUVENILES 5 (2017), <https://ejj.org/wp-content/uploads/2019/10/AllChildrenAreChildren-2017-sm2.pdf> [<https://perma.cc/VCP7-6J7A>].

154. *Id.*

155. The Individuals with Disabilities Education Act (IDEA) requires every state to monitor for significant racial disparities in discipline among students with disabilities and mandates state intervention when it is determined that disparities exceed state-established thresholds. Federal scrutiny is needed to ensure that the legal requirements of the IDEA are implemented at the state level and to monitor states that may be inclined to create unreasonably high thresholds for intervention to artificially demonstrate compliance. See LOSEN & MARTINEZ, *supra* note 104.

156. PALM BEACH POST, *Special-Ed Student Being Tried As An Adult on Charge in \$2 Theft* (Nov. 4, 2019), <https://www.palmbeachpost.com/news/20191104/special-ed-student-being-tried-as-adult-on-charge-in-2-theft> [<https://perma.cc/JKC7-RGVT>] [hereinafter *Special-Ed Student Tried As Adult*].

157. Bell, *A Child, A Crime—An Adult Punishment*, *supra* note 133; see also RYAN & ZIEDENBERG, *supra* note 132.

158. See *Special-Ed Student Tried As Adult*, *supra* note 156.

159. ELIZABETH HINTON ET AL., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM, VERA INST. JUST. 1, 8 (May 3, 2018); see also Keri Blakinger, *Heroin Addiction Sent Me to Prison. White Privilege Got Me Out and to the Ivy League*, WASH. POST (Jan. 21, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/01/21/heroin-addiction-sent-me-to-prison-white-privilege-got-me-out-and-to-the-ivy-league/> [<https://perma.cc/N96P-UPZL>].

“second chances” argument reflects a false belief that *Brown* cured institutional racism and created a socially equitable playing field for all. Neither of those two things have proven true. Considering that seventy percent of students involved in arrests or judicial referrals are Black or Hispanic,<sup>160</sup> it is apparent that these systems are not intended to create opportunities for communities of color, let alone offer “second chances.” Rather, they are built to reinforce the remnants of *de jure* discriminatory policies.

For example, in every state analyzed by the Justice Policy Institute for which data was available, youths of color were found to be disproportionately represented in the adult criminal justice system by virtue of the application of judicial transfers.<sup>161</sup> Collectively, youth of color represented up to seven out of ten youth tried as adults in the jurisdictions examined by the Justice Policy Institute.<sup>162</sup> These findings are further supported by the National Council on Crime and Delinquency, whose research identified that three out of four of the 4,100 new admissions of children under the age of eighteen in 2002 were non-White.<sup>163</sup>

The increase in the incarceration of Black children stands in stark contrast with national trends that indicate that youth violence has in fact decreased,<sup>164</sup> reaching levels not seen since the 1970’s.<sup>165</sup> Moreover, the emergence of the school-to-prison pipeline as a means of redirecting non-White children into the juvenile and criminal justice systems has taken place at a time when youth arrests for serious crimes has been in decline.<sup>166</sup> Furthermore, the school districts that have experienced the most significant increase in suspensions and expulsions are in rural areas with relatively low rates of violent crimes.<sup>167</sup>

As articulated by Michelle Alexander in her 2010 book, *The New Jim Crow: Mass Incarceration in An Age of Colorblindness*, policies aimed at maintaining a racially segregated hierarchy never disappeared. Instead, these state-sanctioned practices have been replaced with a criminal justice system that maintains racial control through a new form of legalized racial discrimination:

What is completely missed in the rare public debates today about the plight of African Americans is that a huge percentage of them are not free to move up at all. It is not just that they lack opportunity, attend poor schools, or are plagued by

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160. Lizette Alvarez, *Seeing the Toll, Schools Revise Zero Tolerance*, N.Y. TIMES (Dec. 2, 2013), [https://www.nytimes.com/2013/12/03/education/seeing-the-toll-schools-revisit-zero-tolerance.html?src=xps&r=2&\[https://perma.cc/JUR6-9KAT\]](https://www.nytimes.com/2013/12/03/education/seeing-the-toll-schools-revisit-zero-tolerance.html?src=xps&r=2&[https://perma.cc/JUR6-9KAT]).

161. RYAN & ZIEDENBERG, *supra* note 132.

162. *Id.* at 12.

163. NAT’L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 3 (2007).

164. BROOKS ET AL., *supra* note 93, at 3.

165. SNYDER, *supra* note 126; *see also* BROOKS ET AL., *supra* note 93 (citing research by the Bureau of Justice Statistics, the Centers for Disease Control, the U.S. Department of Justice, and the National Center for Education Statistics that found violent crime was relatively rare in schools and not on the rise).

166. BROOKS ET AL., *supra* note 93; FBI, UNIFORM CRIME DATA, *Crime in the U.S., 1993 & 1998*, <https://ucr.fbi.gov/crime-in-the-u.s> [https://perma.cc/6246-6MPD].

167. BROOKS ET AL., *supra* note 93, at 18 (describing the differential rates in suspension and expulsion between cities and small towns).

poverty. They are barred by law from doing so. And the major institutions with which they come in contact are designed to prevent their mobility. To put the matter starkly: The current system of control permanently locks a huge percentage of the African American community out of the mainstream society and economy. The system operates through our criminal justice institutions, but it functions more like a caste system than a system of crime control. Viewed from this perspective, the so-called underclass is better understood as an undercaste—a lower caste of individuals who are permanently barred by law and custom from mainstream society. Although this new system of racialized social control purports to be color-blind, it creates and maintains racial hierarchy much as earlier systems of control did. Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.<sup>168</sup>

There is virtually no distinction in the policies that have created the criminal justice system and the school-to-prison pipeline, both of which have operated as highly effective mechanisms for the marginalization, incarceration, and dehumanization of children of color, particularly Black and Brown boys and men. There are presently more African Americans under correctional control than were enslaved in the decade preceding the Emancipation Proclamation.<sup>169</sup> What has been irrefutably established over the course of this multi-decade assault on traumatized children is that these policies have resulted in the large scale placement of children and adolescents into juvenile and adult correctional facilities without access to adequate treatment services and leaving them susceptible to further victimization and abuse.<sup>170</sup> As a consequence of these policies, the United States has the tragic distinction of having the highest incarceration rate of any country, outpacing even the world's most brutal dictatorships, including Russia, China, and Iran.<sup>171</sup> As such, the United States now imprisons a larger percentage of its racially minoritized groups than any other country in the world, incarcerating a greater percentage of its Black population than even South Africa did at the height of apartheid.<sup>172</sup>

The racial discipline gap and the resulting school-to-prison pipeline is not an incidental occurrence. Instead, it stems from a concerted set of policies intended to maintain a racial hierarchy. Historical and intergenerational trauma has created the conditions that have led to significantly higher rates of ACEs amongst children of color. The trauma that has resulted from structural racism has subsequently been systematically exploited as a basis to disproportionately discipline Black and Brown students through highly punitive zero tolerance school policies. These systems operate to funnel predominantly minority children into the criminal justice system as a means of sustaining a racial caste system that has never been fully dismantled. For

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168. ALEXANDER, *supra* note 81, at 13.

169. *Id.*

170. Wood, *supra* 152, at 1450-1458.

171. ALEXANDER, *supra* note 81, at 6; *see also* Heitzeg, *supra* note 86; *see generally* JEREMY TRAVIS ET AL., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES, NAT'L RSCH. COUNCIL, COMM. ON CAUSES & CONSEQUENCES HIGH RATES INCARCERATION (2014).

172. ALEXANDER, *supra* note 81, at 6.

there to be any possibility of a more equitable society, it will require conceding that these conditions exist—and were indeed consciously manufactured—and that there is an urgent need to confront these social injustices through the application of a robust trauma-informed, civil rights-based restorative paradigm. The following section will recommend the need for a trauma-informed, civil rights based restorative model that relies upon socially-just school disciplinary practices to promote a collective commitment to creating a system that leads to equitable opportunities and outcomes for all students.

#### V. RECOMMENDATIONS FOR A TRAUMA-INFORMED, CIVIL RIGHTS-BASED RESTORATIVE PARADIGM

*“I am no longer accepting the things I cannot change. I am changing the things I cannot accept.”*

—Angela Davis

As has been established in the preceding sections, trauma-related behavior manifests in educational settings and, tragically, is often addressed through punitive disciplinary policies rather than trauma-informed practices. Exclusionary school discipline as a standard institutional response to trauma-induced behaviors compounds existing social and economic inequities for marginalized students. Moreover, these practices also serve to rob students of educational opportunities.<sup>173</sup> The mass criminalization of children in the environment in which they are supposed to be safest—the classroom—has operated to retraumatize children of color. If there is to be meaningful recognition of the widescale harm that is perpetrated through exclusionary school discipline practices, it will require the adoption of a new trauma-informed, civil rights-based restorative paradigm. This section will be dedicated to an exploration of some of the elements that may comprise such a paradigm shift.

In recognizing the unique adaptability of racist structures, we must acknowledge that disruptive behaviors are a manifestation of ACEs that merit a trauma-informed response, not punitive action that further harm children. Creating an equitable education system and, accordingly, a more socially just society, requires that discussions of ACEs be reframed as a derivative of discriminatory institutions and as a civil rights and public health priority. Historical and intergenerational trauma has significant and tangible real-world effects on children of color, who disproportionately experience complex trauma for which they are subsequently criminalized as deviants within the public education system and, ultimately, the criminal justice system.

In recent years, certain jurisdictions have begun to re-evaluate the wisdom of their current juvenile and educational policies and practices.<sup>174</sup> In some cities, such as Philadelphia, local law enforcement and school officials have collaborated to

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173. Jillian Sharkey & Pamela Fenning, *Rationale for Designing School Contexts in Support of Proactive Discipline*, 11 J. SCH. VIOLENCE 1, 3 (2012) (referring to the racially disparate application of exclusionary discipline policies as a violation of children’s educational rights).

174. See Thalia Gonzalez et al., *Health Equity, School Discipline Reform, and Restorative Justice*, 41 J.L. MED. & ETHICS 47, 49 (2019).

systematically dismantle the school-to-prison pipeline.<sup>175</sup> In place of arresting students for relatively minor offenses, such as marijuana possession or trespassing, students are being provided with community-based prevention services. Reform efforts such as those adopted in Philadelphia are proving that student conduct challenges can be addressed effectively and humanely without compromising safety. Over the five years that the city had experimented with diversion programs and implemented measures to reduce juvenile detention and harsh penalties for non-violent infractions, the city has observed a significant reduction in juvenile arrests. During the 2018-2019 academic year, the number of juvenile arrests in Philadelphia public schools dropped to 251, roughly one-sixth the number of arrests prior to the city's reform efforts.<sup>176</sup> Other large urban areas, including Orlando, New York City, Minneapolis, and Los Angeles are considering following suit and are contemplating similar reforms.<sup>177</sup>

While it is encouraging that some school districts are re-evaluating the efficacy and wisdom of unduly harsh zero tolerance policies, these efforts are not universal or uniform.<sup>178</sup> Addressing inconsistency in school disciplinary practices, including eliminating the over-usage of suspension and expulsions for minor offenses and misbehaviors, is a much-needed first step in the enactment of long-overdue reforms. It is imperative that exclusionary discipline policies are redesigned in a manner that limits variable outcomes and minimizes the impact of implicit bias by delineating clear, reasonable, child-centered consequences.

We must additionally remain keenly aware that the absence of supportive services to assist children, their families, and their communities to address and overcome trauma generates further harm. The development of community capacity<sup>179</sup> has been proposed as a potential intervention for reducing ACEs.<sup>180</sup> Community capacity for collaboration and cross-system coordination has been demonstrated to be an effective mechanism for improving the health and well-being of communities and, most notably, reducing ACEs in young adults ages eighteen and thirty-four.<sup>181</sup>

In addition to a concerted effort to enhance community resiliency, there is also a need to infuse a violence-free ethic into our culture, starting first in our classrooms. In doing so, we must expand the use of trauma-informed practices and restorative interventions, such as Positive Behavioral Interventions and Supports (PBIS)<sup>182</sup> and Cognitive Behavioral Intervention for Trauma in Schools (CBITS). PBIS, in

175. See Zari Tarazona, *How Philadelphia Flipped: Second Chances for Youth*, NPR (Jan. 8, 2020), <https://www.npr.com/2020/01/08/781111111/how-philadelphia-flipped-second-chances-for-youth/> [<https://perma.cc/N2D8-RV3Q>].

176. *Id.*

177. *Id.*

178. ALVAREZ, *supra* note 160.

179. See Judy Hall et al., *Reducing Adverse Childhood Experiences (ACE) by Building Community Capacity: A Summary of Washington Family Policy Council Research Findings*, 40 J. PREVENTION & INTERVENTION CMTY. 325 (2012).

180. *See id.*

181. *Id.*

182. See Robert H. Horner et al., *A Randomized, Wait-List Controlled Effectiveness Trial Assessing School-Wide Positive Behavior Support in Elementary*, 11 J. POSITIVE BEHAVIOR INTERVENTIONS 133 (2009).

particular, has been championed by the U.S. Department of Education's Office of Special Education Programs as an evidence-based framework that has been shown to improve social, emotional and academic outcomes for students, including students with disabilities and those from underrepresented groups.<sup>183</sup> In West Palm Beach, Florida—which had been suspending more than a quarter of their students, the majority of whom were African American—school suspensions declined by thirty percent after the introduction of PBIS.<sup>184</sup>

The reconfiguration of disciplinary policies, however, will need to occur in tandem with an infusion of federal and state funding to better support overextended teachers by providing training in trauma-informed interventions and adequate resources to allow educators to do their work effectively. The United States spends more money to incarcerate children than to educate them, a tragic reflection of this country's prioritization of the prison industrial complex relative to our neglected national commitment to educate and empower our children.<sup>185</sup>

Moreover, in order to truly achieve racial equity in the post-*Brown* era, which has long been an elusive but not unattainable goal, we must collectively commit ourselves to creating a system that treats all people fairly and respectfully and which leads to equitable opportunities and outcomes for all.<sup>186</sup> Racial justice and social equity require more than just the absence of discrimination; they demand deliberate systems that support and sustain racial equity through proactive measures.

In place of authoritarian policy structures aimed at maintaining social control, restorative justice practices provide a unique opportunity to repair harm, engage in authentic community-building, and to establish more socially-just forms of accountability.<sup>187</sup> Research has also demonstrated that these programs are successful at

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183. See CTR. POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS, <https://www.pbis.org> [<https://perma.cc/V9MU-B2HP>] (last visited Aug. 1, 2020).

184. Edward Graham & Helen Yoshida, *School Discipline Reform Long Overdue, Experts Say*, NEA TODAY (Apr. 12, 2013, 1:52 PM), <http://neatoday.org/2013/04/12/school-discipline-reform-long-overdue-experts-say-2/> [<https://perma.cc/U259-TTZ6>].

185. The Justice Policy Institute and the National Center for Education Statistics estimate that states spend up to \$148,767 to incarcerate a youth, as compared to \$10,667 to educate a student. Moreover, other research has demonstrated that at least 30 states provided less general funding per student in 2014 for K-12 schools than before the recession, after adjusting for inflation. In 14 states the reduction exceeded 10 percent. See EDUC. POL'Y INNOVATION CTR., *supra* note 95, at 11; see also MICHAEL MITCHELL & MICHAEL LEACHMAN, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION, CTR. ON BUDGET & POL'Y PRIORITIES 1 (2014), <https://www.cbpp.org/sites/default/files/atoms/files/10-28-14sfp.pdf> [<https://perma.cc/X9WQ-WSEV>].

186. For a more complete discussion of the systemic injustices that produce educational inequalities for students of color and prevent them from reaching their full potential see JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2005) and JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (2012).

187. Jason A. Okonofua et al., *Brief Intervention to Encourage Empathic Discipline Cuts Suspension Rates in Half Among Adolescents*, 113 PROCEEDINGS NAT'L ACAD. SCI. 5221, 5221 (2016); see Thalia Gonzalez & Benjamin Cairns, *Moving Beyond Exclusion: Integrating Restorative Practices and Impacting School Culture in Denver Public Schools*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 241 (2011).

reducing recidivism and lessening victims' post-traumatic stress symptoms.<sup>188</sup> School-based restorative justice practices can effectively replace fear-based institutional responses with inclusive, mutually-respectful communities predicated on accountability and relationships. Positive school environments, supported and sustained through restorative justice practices, have been correlated with higher graduation rates, improved teacher retention, lower incidences of violence, and strong academic performance.<sup>189</sup>

Trauma-informed, restorative justice practices have been demonstrated to lead to a decrease in harmful and violent behavior,<sup>190</sup> a reduction in punitive disciplinary actions,<sup>191</sup> lower racial discipline disparities,<sup>192</sup> improved student academic achievement and connectedness,<sup>193</sup> and an overall more positive school climate.<sup>194</sup> At a minimum, the adoption of a trauma-informed, civil rights paradigm requires the following:

- More transparent data collection, in combination with stronger federal and state monitoring of data, to identify and respond to racial disparities in the implementation of school disciplinary policies.
- The imposition of limitations on exclusionary discipline, particularly the over-usage of suspension and expulsion as a punitive device, and the prohibition of law enforcement involvement for minor infractions.
- Providing educators and school administrators with sufficient training and support to create and maintain positive classroom climates.
- The reinvestment of resources directed at incarceration to therapeutic services for children and young adults.
- The establishment of uniform federal standards to support states in meeting their legal obligation for redressing racial disproportionality in discipline among students, particularly children with disabilities.
- Prioritizing the recruitment and professional development of educators and administrators from diverse backgrounds.
- Reforming accountability structures to remove incentives for schools to exclude low achievers on disciplinary grounds.
- The creation of evidence-based, trauma-informed programs to strengthen community capacity and empower parents.

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188. LAWRENCE W. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE*, SMITH INST. 4 (2007).

189. Tatter, *supra* note 130.

190. MARILYN ARMOUR, ED WHITE MIDDLE SCHOOL RESTORATIVE DISCIPLINE EVALUATION: IMPLEMENTATION AND IMPACT 2014/2015 SIXTH, SEVENTH AND EIGHTH GRADES, INST. RESTORATIVE JUST. & RESTORATIVE DIALOGUE 8 (2016); Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307 (2006).

191. Armour, *supra* note 190.

192. Anne Gregory et al., *The Promise of Restorative Practices to Transform Teacher-Student Relationships and Achieve Equity in School Discipline*, 25 J. EDUC. & PSYCHOL. CONSULTATION 1, 20-21 (2014); Cara Suvall, *Restorative Justice in Schools*, 44 HARV. C.R.-C.L. L. REV. 547, 561 (2009).

193. Gonzalez, *supra* note 93, at 318.

194. Laura Mirsky, *Safer Safer Schools: Transforming School Cultures with Restorative Practices*, INT'L INST. RESTORATIVE PRACS. F. 2 (May 20, 2003).

- The adoption of restorative justice initiatives that center on confidence-building activities for students, racial bias training for teachers, substantive community engagement, and positive discipline techniques.
- The realignment of educational values to reduce the hyper-fixation on test scores and to encourage other factors, such as graduation rates, social justice, and skill development, as an equally-valued means of measuring student success.
- The creation of high-quality, dual tutoring and mentoring programs to foster a sense of belonging and to address achievement gaps caused by systemic racism.
- Incentivizing schools to avoid exclusionary discipline measures and instead encouraging the use of alternative corrective strategies, such as restorative justice practices, loss of privileges, reflective activity, parental involvement, and written warnings.
- The development of evidence-based, skills-focused programs to promote cultural competence among teachers to reduce disproportionality in disciplinary referrals and to provide increased opportunities for student learning.

In modern day America, opportunities for upward mobility and a peaceful existence are largely limited to those born into privileged positions of power, the vast majority of whom are White.<sup>195</sup> When further compounded by institutional racism and ACEs, the prospect for the achievement of the “American dream” is fleeting, if not altogether non-existent, for many children of color. Hope for universal equity has failed to materialize.<sup>196</sup> With considerable structural change and an acknowledgment of the failures that have created persistent and socially unjust outcomes, it could be gradually repaired.

Reversing the racist trajectory that has built and sustained the pillars on which our country thrives demands humility by those who benefit from White privilege. It will also require a steadfastness to the role we must assume to correct historical wrongs. Notions of colorblindness have birthed a new Jim Crow, one that has produced the school-to-prison pipeline, and, much like with earlier immoral racist structures, must be systematically delegitimized. Through a commitment to, and the operationalization of, a new trauma-informed, social justice-oriented paradigm, it is possible to progress towards the long overdue fulfillment of the yet unrealized promise of *Brown*.

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195. PATRICK SHARKEY, NEIGHBORHOODS AND THE BLACK-WHITE MOBILITY GAP, ECON. MOBILITY PROJECT, PEW CHARITABLE TRUST (2009), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/economic\\_mobility/pewsharkeyv12pdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/economic_mobility/pewsharkeyv12pdf.pdf) [https://perma.cc/9KPC-UDW5].

196. *The Negro Family: The Case for National Action*, written in 1965 by then U.S Assistant Secretary of Labor Daniel Patrick Moynihan, foreshadowed that civil rights legislation alone was not sufficient to produce racial equality. DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965). Though deeply controversial, the *Moynihan Report* was a precursor for the contemporary discussion surrounding the urgent and ongoing need for effective policies to address economic disparities and educational inequity in order to lead to more socially just outcomes. *Id.*