

March 2022

Trauma: Community of Color Exposure to the Criminal Justice System as an Adverse Childhood Experience

andré douglas pond cummings

Todd J. Clark

Caleb Gregory Conrad

Amy Dunn Johnson

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>

 Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Fourth Amendment Commons](#), [Health Law and Policy Commons](#), [Judges Commons](#), [Juvenile Law Commons](#), and the [Law and Race Commons](#)

Recommended Citation

andré douglas pond cummings, Todd J. Clark, Caleb Gregory Conrad, and Amy Dunn Johnson, *Trauma: Community of Color Exposure to the Criminal Justice System as an Adverse Childhood Experience*, 90 U. Cin. L. Rev. (2022)

Available at: <https://scholarship.law.uc.edu/uclr/vol90/iss3/4>

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

TRAUMA: COMMUNITY OF COLOR EXPOSURE TO THE CRIMINAL JUSTICE SYSTEM AS AN ADVERSE CHILDHOOD EXPERIENCE

*Todd J. Clark**

*Caleb Gregory Conrad***

*andré douglas pond cummings****

*Amy Dunn Johnson*****

INTRODUCTION

The reality that traumatic childhood experiences are directly linked to negative health outcomes has been known and widely recognized in public health and clinical literature for more than two decades. Adverse Childhood Experiences (“ACEs”) represent the “single greatest unaddressed public health threat facing our nation today” according to Dr. Robert Block, former President of the American Academy of Pediatrics.¹

* Professor of Law, St. Thomas University College of Law; J.D., University of Pittsburgh School of Law. First, I would like to thank God for putting me in a position to write about and shed light on issues that I find compelling. Second, it has been an honor, as well as a pleasure, to work with Professor andré douglas pond cummings, Caleb Conrad, and Judge Amy Johnson. Their passion and intellectual acumen is unparalleled and I learned so much from them during this project. I would also like to thank my mother, Dora L. Clark, my father, Sherwood Hill, and my aunt, Selena Comer, for all of their love and support. Additionally, I would like to thank my son, Jordan K. Clark, as well as my nephews and nieces, for serving as part of my motivation for writing. Hopefully, my writings and work as a professor will one day inspire them to achieve their greatest potential. In addition, I would like to thank my mentors Professor andré douglas pond cummings, Professor Grace Wigal, and Professor Mary Wright for all of the time they dedicated to helping me improve as both a scholar and a law professor. Anything that I have managed to do well as a member of the academy is largely a function of their dedication and vested interest in my success.

** Assistant Attorney General for the State of Arkansas; B.A. University of Arkansas; J.D. U.A. Little Rock William H. Bowen School of Law. The views expressed in this article are those shared by me and my co-authors and do not reflect the views or opinions of the office of the Arkansas Attorney General, nor do they pertain to my work there. This article was made possible only through the passion, dedication, and knowledge of my phenomenal co-authors, Dean cummings, Prof. Clark, and Judge Johnson, along with the hard work of the *Cincinnati Law Review* editorial board. As always, I must acknowledge and profusely thank my wife, Ashley, who not only inspires this work, but whose continuous support of my passions and patience of my endless goals, dreams, and commitments allows me to engage in this process. There is so much work to do, and the tasks of enacting change and promoting reforms and progress can at times seem nearly impossible. However, it is not impossible. I am thankful that I am so often reminded, by this team of co-authors and countless others, of just how many people are doing the work and marching together towards change. My sincere hope is that this article contributes in some small way to further the conversation on the undeniable link between health and justice and that it works to highlight evidence-based improvements to the American criminal justice system that promote real equity, true community safety, and actual justice.

*** Associate Dean for Faculty Research & Development and Charles C. Baum Distinguished Professor of Law, Co-Director, Center for Racial Justice and Criminal Justice Reform, University of Arkansas at Little Rock William H. Bowen School of Law; J.D., Howard University School of Law. I am grateful to my co-authors, Caleb G. Conrad, Professor Todd Clark and Judge Amy Dunn Johnson for their

ACEs are traumatic events that occur in early childhood, which can range from abuse and neglect to experiences derived from household and community dysfunction, such as losing a caregiver, being incarcerated, or living with a household member suffering from mental illness.² The prevailing framework for addressing the ACEs crisis has been a medical model focused on after-the-fact interventions for individual survivors, rather than a model targeted at upstream, systemic issues that directly contribute to the trauma that individuals, families, and communities collectively suffer.³

More recently, literature has begun to explore the connection between trauma and race, outlining how structural violence, generational poverty, and historical trauma is often suffered both at the individual and community levels, focusing particularly on the traumas of violence and discrimination experienced by Black, indigenous, and persons of color.⁴ Such work has largely focused on improving economic opportunities for trauma-stricken communities, improving the physical/built environment, and supporting the development of healthy social-cultural environments.⁵

Largely absent from the body of work on the causes and impact of childhood trauma, however, is the exploration of how the United States

inspirational partnership on our series of articles regarding childhood trauma and the criminal justice system's part in perpetuating it and responsibility for resolving it. I am further grateful to the student editors of the *Cincinnati Law Review* for their excellent suggestions and diligent editing work. As usual, any errors within are the sole responsibility of the authors.

**** Circuit Judge, 15th Division, 6th Judicial District of Arkansas, serving Pulaski and Perry Counties. B.A., Hendrix College; J.D., U.A. Little Rock William H. Bowen School of Law. 2012 Robert Wood Johnson Community Health Leader. I am deeply grateful to my co-authors and collaborators, Prof. Todd Clark, Prof. André Cummings, and Caleb Conrad, for their vision and commitment to bringing to light the inextricable connection between health and justice. The views stated in this article are not intended as statements regarding any pending or impending litigation, nor should the content of the article be construed as any promise or pledge that I would rule in any way that would be inconsistent with the impartial exercise of my duties as a judge. Rather, this article is a call to our legal system to affirmatively work to dismantle the structures and practices within that system that perpetuate racism and trauma so that we can truly deliver justice to the public we serve.

1. Nadine Burke Harris, *How Childhood Trauma Affects Health Across a Lifetime*, TEDED (Sept. 2014), <https://ed.ted.com/lessons/eczPoVp6> (last visited Feb. 6, 2022) [hereinafter "TED TALK."].

2. Stacy Shwartz Olagundoye, *What Are Adverse Childhood Experiences (ACEs)?*, APPLIED SURVEY RES. (May 21, 2019), [<https://perma.cc/BH5R-MQ4W>]; see also Tara Haelle, *Childhood Trauma and Its Lifelong Health Effects More Prevalent Among Minorities*, NPR (Sept. 17, 2018), <https://www.npr.org/sections/health-shots/2018/09/17/648710859/childhood-trauma-and-itslifelong-health-effects-more-prevalent-among-minorities> [<https://perma.cc/M6QB-9N8X>].

3. See, e.g., AM. PUB. HEALTH ASS'N, *Policy Statement No. 201811, Addressing Law Enforcement Violence as a Public Health Issue* (Nov. 13, 2018), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2019/01/29/law-enforcement-violence>; Howard Pinderhughes, Rachel A. Davis, & Myseha Williams, *Adverse Community Experiences and Resilience: A Framework for Addressing and Preventing Community Trauma* (2016), <https://www.preventioninstitute.org/publications/adverse-community-experiences-and-resilience-framework-addressing-and-preventing>.

4. See AM. PUB. HEALTH ASS'N, *supra* note 3; Pinderhughes, Davis & Williams, *supra* note 3.

5. AM. PUB. HEALTH ASS'N, *supra* note 3; Pinderhughes, Davis & Williams, *supra* note 3.

justice system is at the epicenter of the current childhood trauma crisis.⁶ Each childhood experience described in screening instruments,⁷ which were used over the years to identify trauma, has a direct and undeniable nexus to the justice system. This nexus is evident for the abuse survivor seeking to escape her abuser through an order of protection; for the divorcing parents in a bitter custody battle; for children who land in the foster care system when their parents are incapacitated by substance abuse disorders; for those who end up with criminal justice involvement for nonviolent offenses involving mere possession of drugs; and for the Black men and women who are sentenced to longer and more harsh sentences than their white counterparts at rates that are grossly disproportionate to the racial make-up of the overall population as well as the incidence of criminal behavior among all races.⁸

Before now there has been no concerted effort to examine the role that our criminal justice system plays in actively visiting harm on children and youth of color, who experience traumatic interactions with law enforcement officers and the judiciary at alarming rates significantly greater than those experienced by non-minority children and youth.⁹ If we as a society are committed to treating ACEs as the public health crisis that they represent, then it is incumbent upon our legal system to examine where and how it is complicit in perpetuating trauma upon children of color. Additionally, the legal system must address how it should intervene—both at the individual and structural levels—to eliminate practices that are contributing to multi-generational cycles of trauma.¹⁰

6. It is, however, important to note that problem-solving courts, which began to emerge as a model in the late 1980s and early 1990s, represent early efforts to address the needs of adults and juveniles affected by trauma through court intervention, but without the benefit of ACEs research or the express goal of ameliorating the effects of trauma. See Ed Finkel, *Problem-Solving Courts Dig Deep to Acknowledge, And, Sometimes, Address Trauma*, ACES TOO HIGH NEWS (Apr. 15, 2015), <https://acestoohigh.com/2015/04/15/problem-solving-courts-dig-deep-to-acknowledge-sometimes-trauma/>. More recently, the National Infant-Toddler Court Program of the nonprofit organization of ZERO TO THREE, has been at the forefront of piloting the deployment of interdisciplinary teams, including judges and other actors in the legal system, to address the needs of young children in the child welfare system through trauma-informed interventions. *National Infant-Toddler Court Program*, ZERO TO THREE, <https://www.zerotothree.org/resources/series/national-infant-toddler-court-program> (last visited Feb. 6, 2022).

7. See *infra* notes 29-33 and accompanying text.

8. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6-7 (2010); ELIZABETH TSAI BISHOP et. al, *THE CRIM. JUST. POL'Y PROGRAM: HAR. L. SCH., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM* (Sept. 2020), <https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf>.

9. See generally Rhea W. Boyd et al., *Police, Equity, and Child Health*, 137 *PEDIATRICS* 1-3 (2016).

10. Multi-generational cycles of trauma are perpetuated in part by epigenetic changes that traumatic experiences cause within the human genome. See, e.g., Jason Lang et al., *Adverse Childhood Experiences, Epigenetics and Telomere Length Variation in Childhood and Beyond: A Systematic Review of the Literature*, 29 *EUROPEAN CHILD & ADOLESCENT PSYCHIATRY* 1329 (2020).

The legal system must affirmatively equip those with justice-system involvement to succeed and build the individual and community resilience necessary to heal those who have been stricken by system-induced trauma and its life-long negative consequences.¹¹

Our country is facing a racial reckoning, with the highly publicized extrajudicial police killings of countless Black men, women, and children. This reckoning underscores how policing and the criminal justice system routinely traumatize both the subjects of the direct encounter and children who witness and experience these killings who may be left fatherless or motherless as a result of a deadly encounter or subsequent incarceration. The Black community is further re-traumatized by the constant barrage of news accounts, now often accompanied by horrific video footage. Indeed, it is the responsibility of our justice system, as a major contributor to so-called “social determinants of health,”¹² to tackle this crisis directly. This piece purports to begin this intervention, starting with a focus on the criminal justice system.

Part I of this Article begins by providing an in-depth examination of ACEs research, including the link between high ACE scores and poor health outcomes, the short-term and long-term effects of trauma and toxic stress, and the prevalence of trauma in the Black community. Part II discusses anti-Black policing and how current law enforcement traumatizes communities of color and their children often by design. Part III describes how criminal charging, jailing, and sentencing traditions have disproportionately targeted Black men, contributing to the trauma that their children and families experience with the loss of a loved one to death or incarceration. Part IV argues that minority childhood and youth exposure to U.S. law enforcement agents and the justice system at large actually functions as an ACE for youth of color in a way that is not present for non-minority youth and, as such, should be added to the list of ACEs that are formally recognized by public health officials. Finally, Part V proposes how to reframe and reimagine policing in the United States and reform the criminal justice system so that the trauma it inflicts upon children of color and resulting racial health disparities can be significantly

11. Emerging social sciences research has begun to focus on “Positive Childhood Experiences” (“PCEs”), which have been shown to counteract the lifelong negative outcomes associated with ACEs. See, e.g., Christina Bethell et al., *Positive Childhood Experiences in Adult Mental and Relational Health in a Statewide Sample*, 173 JAMA PEDIATRICS (2019). Similar research has begun to focus on the concept of community resilience, which examines the abilities of communities to cope with immediate and long-term adversity caused by structural racism. See, e.g., Wendy Ellis et al., *Community Resilience: A Dynamic Model for Public Health 3.0*, 28 J. PUB. HEALTH MGMT & PRAC. S18 (2022). For a full discussion on PCEs and community resilience, see *infra*, Part V and accompanying notes.

12. See *infra* notes 14-15 and accompanying text.

mitigated.¹³

I. ACEs, TOXIC STRESS, AND GENERATIONAL TRAUMA IN U.S. COMMUNITIES OF COLOR

ACEs—traumatic events that occur during childhood—are considered a category of “social determinants of health,” conditions in which people are born, grow, live, work, and age that account for 30-55 percent of health outcomes.¹⁴ Economic opportunities, education, housing and work conditions, and food insecurity are examples of social determinants of health that contribute to disparities in the health of individuals and populations.¹⁵

Today, ACEs are generally placed in seven to ten categories of childhood adversities consistent with the following: (1) verbal/emotional abuse, (2) physical abuse, (3) sexual abuse, (4) neglect, (5) living with someone who abused alcohol or drugs, (6) parental separation or divorce, (7) having a mother who was treated violently, (8) living with someone who was mentally ill and/or depressed, (9) incarceration or death of a member of the household, and (10) social disadvantage, meaning economic hardship, homelessness, community violence, discrimination, and/or historical trauma.¹⁶ The overall impact of childhood trauma on an individual’s long-term health outcomes was only first considered in the mid-1990s by the now famous CDC-Kaiser Permanente ACE study.¹⁷ The study illustrated that childhood trauma and poor health outcomes are inextricably linked, paving the way for an ever-expanding body of research that established simple and irrefutable truths. First, the more trauma an individual endures as a child, the more likely it is that he or she will experience negative outcomes later in life, including an increased risk of engaging in risky behaviors, developing addictions to drugs or alcohol, contracting chronic disease, attempting suicide, or ultimately dying an earlier death. Second, people of color and of lower socioeconomic status experience more trauma resulting in toxic stress and, in turn, are more

13. We recognize that complete elimination of racial health disparities and their underlying social, political, legal, and financial inequities will not happen without dramatic, fundamental changes at all levels of federal and state government that root out structural racism in all its forms. What we propose here are ameliorative steps toward what should ultimately be the complete eradication of racial inequity.

14. WORLD HEALTH ORGANIZATION, *Social Determinants of Health*, https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1 (last visited Feb. 6, 2022).

15. *See id.*

16. Olagundoye, *supra* note 2; NADINE BURKE HARRIS, *THE DEEPEST WELL: HEALING THE LONG-TERM EFFECTS OF CHILDHOOD ADVERSITY* app. 1 (2018).

17. 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. PREV. MED. 245 (1998).

prone to harmful outcomes.¹⁸

Literature subsequent to the seminal CDC-Kaiser Permanente study has acknowledged the limitations of the ten original ACEs in understanding all of the factors associated with early childhood trauma and poor health outcomes. Areas such as poverty, discrimination, police violence, and natural disasters are emerging as additional ACEs in need of in-depth study of how they connect to childhood trauma.¹⁹ Some of this recent research has shown that Black children, as a direct result of generational complex trauma in the form of racial discrimination, experience the most ACEs of any childhood population in the U.S.—the country’s history of state-sanctioned segregation and violence has led to majority Black neighborhoods that are poorer, more violent, and less stable, and a criminal justice system that weakens Black communities through mass incarceration and the murder of Black bodies.²⁰

Section A of this Part will detail the original ACE study, its creation and its findings, and how it sparked a wide range continued research focused on the true impact of childhood trauma. Section B will provide a primer on trauma’s physiological impact on a child as well as how “toxic stress” may be attributable to negative long-term health outcomes that traumatized children experience as adults. Section C details how Black children, growing up in poor neighborhoods, experience unavoidable ACEs as a result of generational racist trauma.

A. Discovering the Hidden Link Between Childhood Trauma and Poor Adult Health: The Groundbreaking Original ACE Study

In 1985, Dr. Vince Felitti was chief of Kaiser Permanente’s Department of Preventive Medicine in San Diego and served as the head of an obesity clinic focused on bringing about dramatic weight loss through techniques that allowed patients to avoid surgery.²¹ One day, as he interviewed a patient who had regained in just six months all of the major weight she had worked for two years to lose, Dr. Felitti misspoke. Intending to ask the patient, Donna, “How old were you when you first became sexually active,” he mistakenly asked her, “How much did you

18. See generally Leila Morsy & Richard Rothstein, *Toxic Stress and Children’s Outcomes: African American Children Growing Up Poor Are at Greater Risk of Disrupted Physiological Functioning and Depressed Academic Achievement*, ECONOMIC POLICY INSTITUTE: OPPORTUNITY INSTITUTE (May 1, 2019).

19. Katharine Minaya & Denise Powell, *Healing in Place: Linking COVID-19 and Adverse Childhood Experiences*, OP-MED (June 19, 2020), https://opmed.doximity.com/articles/healing-in-place-linking-covid-19-and-adverse-childhood-experiences?_csrf_attempted=yes.

20. See generally Morsy & Rothstein, *supra* note 18.

21. HARRIS, *supra* note 16, at 31; BESEEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 144-46 (2014).

weigh when you first became sexually active?”²² Donna’s reply: “Forty pounds.”²³ Through his mistake, Dr. Felitti learned that Donna had her first sexual experience at forty pounds with her father, when she was just four years old.²⁴ Just weeks after this encounter, in a similar case of a patient’s shockingly rapid—and seemingly random—weight gain, Dr. Felitti discovered that this patient had recently attracted the flirtatious and sexual attention of a male coworker.²⁵ When he pressed the patient as to why her reaction to this attention was to go home after work and binge eat, she disclosed a lengthy incest history with her grandfather.²⁶ As Dr. Felitti started noticing this relationship between histories of abuse and obesity, he started to incorporate questions regarding past sexual abuse into his routine checkups, and the correlation became undeniable to him.²⁷ Soon, in the mid-1990s, Dr. Felitti would join forces with Dr. Robert Anda of the Centers for Disease Control and Prevention (“CDC”), and the two internal medicine physicians would publish a study that would forever alter the understanding of the relationship between childhood trauma and negative health outcomes: the ACE study.²⁸

Between 1995 and 1997, Felitti and Anda asked 25,000 consecutive patients if they would be willing to provide information about childhood events that would help improve understanding of how childhood experiences affected health—17,421 of the patients agreed.²⁹ The physicians then surveyed the willing participants through a questionnaire that asked about their history of exposure to traumatic events in childhood, indicators that Felitti and Anda dubbed “Adverse Childhood Experiences.”³⁰ These experiences, organized on the questionnaire into ten categories, included “physical, emotional, or sexual abuse; physical or emotional neglect; parental mental illness, substance dependence, incarceration; parental separation or divorce; [and] domestic violence.”³¹ The maximum ACE score of a single respondent was ten, as one point was added to a respondent’s score for each of the categories he or she experienced as a child.³² If a respondent did not endure a traumatic experience included on the questionnaire, his or her total ACE score would be zero. After collecting the results of the questionnaires, Felitti

22. HARRIS, *supra* note 16, at 31.

23. *Id.*

24. *Id.* at 31-32

25. VAN DER KOLK, *supra* note 21, at 146.

26. *Id.*

27. *Id.*

28. *Id.*; HARRIS, *supra* note 16, at 36–37; Felitti et al., *supra* note 17; Olagundoye, *supra* note 2.

29. HARRIS, *supra* note 16, at 37; VAN DER KOLK, *supra* note 21, at 147.

30. VAN DER KOLK, *supra* note 21, at 146-47.

31. *Id.*

32. HARRIS, *supra* note 16, at 37.

and Anda compared the respondents' total ACE scores to the medical records available to them. The results of the study were nothing short of "groundbreaking."³³

First, the CDC-Kaiser Permanente study found that ACEs are strikingly common. Over two-thirds, sixty-seven percent, of respondents reported having at least one ACE, and 12.6 percent reported experiencing four or more.³⁴ Second, the study found a strong dose-response relationship between ACEs and health outcomes.³⁵ "A dose-response relationship is one in which increasing levels of exposure are associated with either an increasing or decreasing risk of the outcome."³⁶ In the context of the ACE study, researchers found overwhelming evidence that increased levels of exposure to trauma in childhood heavily increased the risk of negative health outcomes later in life.³⁷ One of the more powerful aspects of the study is that its focus went beyond behavioral and mental health outcomes. It may be somewhat intuitive that those who experience childhood trauma are more likely to engage in risky behaviors in adulthood like smoking, drinking too much, or overeating, but the ACE study probed much deeper.³⁸ The study did show a dose-response relationship between childhood trauma and risky behaviors, but it also showed that respondents with an ACE score of six or above had a fifteen percent or greater chance than those with an ACE score of zero of suffering from any of the ten leading causes of death in the U.S., including heart disease and cancer.³⁹

The original ACE study thus boldly classified childhood adversity as a critical public health issue in the United States.⁴⁰ Perhaps more profound was that the study's results were not derived from a pool of low-income respondents from troubled communities who lacked basic resources to

33. Olagundoye, *supra* note 2.

34. Felitti et al., *supra* note 17; TED TALK, *supra* note 1.

35. TED TALK, *supra* note 1 (meaning the higher an individual's ACE score, the worse his or her health outcomes).

36. Sydney Pettygrove, *Dose-Response Relationship*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/science/dose-response-relationship> [<https://perma.cc/9R4X-736B>] (last visited Feb. 15, 2020).

37. TED TALK, *supra* note 1. In the years since the original ACE study, researchers have acknowledged the need for further study on qualitative and quantitative dimensions of adverse childhood experiences and what impact, if any, those may have on adult health. *See, e.g.*, Esther M. Friedman et al., *Childhood Adversities and Adult Cardiometabolic Health: Does the Quantity, Timing, and Type of Adversity Matter?*, 27 J. AGING & HEALTH 1311 (2015), <https://journals.sagepub.com/doi/abs/10.1177/0898264315580122>. For example, if two people experience the same type of ACE, does it make a difference if one person had only one or two exposures, while the other faced repeated exposure over a period of time? With regard to frequency of exposure to an ACE category, early research suggests a dose-response relationship. *Id.* at 1313-15.

38. HARRIS, *supra* note 16, at 39.

39. *Id.*; VAN DER KOLK, *supra* note 21, at 149.

40. Felitti et al., *supra* note 17.

live a healthy and fulfilling life; instead, the original ACE study respondents were solidly middle-class residents of San Diego, seventy percent of whom were white and college educated, and the pool overwhelmingly had access to excellent healthcare.⁴¹ Other than the obvious impact of revealing this hidden relationship between childhood adversity and adult health, the original ACE study sparked a movement and inspired a new body of research that would soon conduct more widespread and diverse studies. These studies would more clearly illustrate the impact of ACEs on the individual and also reveal that the most vulnerable communities suffer the most trauma.

B. The Impact of Childhood Trauma

Childhood trauma and adversity negatively impact those who experience it. However, the original ACE study shed a spotlight on what was previously unknown: there is an undeniable link between childhood adversity and what was believed to be unrelated long-term negative health outcomes. Further, the impact of a traumatic event or condition does not simply bury itself in the child, only to reemerge as a negative health outcome later in the child's life. ACEs, like all trauma, have immediate and deleterious effects on those who endure them, resulting in both short-term and long-term impacts.⁴² Children who endure consistent ACEs may experience toxic stress, which could cause lasting damage to their brains and organs and impact their health into adulthood.⁴³

1. Short-Term and Long-Term Outcomes for Traumatized Children

According to the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration ("SAMHSA"), the short-term impact of frightening or threatening events or traumatic conditions can present itself in these age-specific behaviors. *Preschool children* may cry or scream a lot, eat poorly or lose weight, and have nightmares.⁴⁴ *Elementary school children* may become anxious or fearful, feel guilt or shame, have a hard time concentrating, and have difficulty sleeping.⁴⁵ *Middle school and high school children* may feel depressed or alone, develop eating disorders or self-harming behaviors, begin abusing alcohol or drugs, or become involved with risky sexual

41. HARRIS, *supra* note 16, at 39.

42. Felitti et al., *supra* note 17.

43. HARRIS, *supra* note 16, at 54-55.

44. SAMHSA: NATIONAL CHILD TRAUMATIC STRESS INITIATIVE, *Understanding Child Trauma*, <https://www.samhsa.gov/child-trauma/understanding-child-trauma> (last visited Feb. 6, 2022).

45. *Id.*

behaviors.⁴⁶

These short-term effects can explain how trauma stunts a child's physiological and social growth and how a traumatic event or condition ultimately depresses and limits a child's cognitive, behavioral, and health outcomes both immediately and as they get older. For example, research has shown that children who had below average reading and math skills were nearly eighty percent greater for those who had experienced ACEs than for those who were otherwise similar but who had not experienced ACEs.⁴⁷ The same is true for behavioral outcomes, as kindergarten-aged children who experienced ACEs were 150 percent more likely to act younger than their age, have difficulty getting along with peers, or show clingy tendencies.⁴⁸ Finally, the research showed that children exposed to trauma became unhealthier. For example, compared to those who had not experienced ACEs, the share of children who suffered ear infections and acute respiratory infections was greater by twenty and thirty percent, respectively, eczema by sixty-seven percent, viral infections by seventy-three percent, and obesity by forty-five percent.⁴⁹

The original ACE study highlighted the significant link between childhood trauma and long-term negative health outcomes. Felitti and Anda found that individuals with an ACE score of four or more—representing 12.6 percent of respondents—were two and half times more likely to contract obstructive pulmonary disease, two and a half times more likely to contract hepatitis, four and a half times more likely to suffer from depression, and twelve times as likely to commit suicide.⁵⁰ Further, the study found that a person with an ACE score of seven or more has triple the lifetime odds of getting lung cancer and three and a half times the odds of having ischemic heart disease, which is the number one cause of death in the United States.⁵¹ Perhaps most significantly, CDC researchers have recently determined that exposure to ACEs literally shortens a person's lifespan—on average, a person with six or more ACEs died *twenty years earlier* than a person with no ACEs.⁵² Stated another way, a child who suffers six or more ACEs will live as an adult twenty fewer years than an individual who suffered zero ACEs as a child, a life expectancy that is literally twenty years shorter.⁵³ The explanation for

46. *Id.*

47. Morsy & Rothstein, *supra* note 18, at 10 (citing Manuel E. Jimenez, et al., *Adverse Experiences in Early Childhood & Kindergarten Outcomes*, PEDIATRICS 137(2) (2016)).

48. *Id.*

49. *Id.*

50. Felitti et al., *supra* note 17; TED TALK, *supra* note 1.

51. HARRIS, *supra* note 16, at 40.

52. David Brown et al, *Adverse Childhood Experiences and the Risk of Premature Mortality*, 37 AM. J. PREVENTIVE MED. 389, 389 (2009).

53. *See id.*

these results, as expressed by Dr. Bessel Van Der Kolk, author of *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*, is quite simple: “The ongoing stress on the body keeps taking its toll.”⁵⁴

2. Ongoing Stress Takes Its Toll: Toxic Stress and Complex Trauma

“Stress” is a state of mental and emotional tension, a natural response to frightening or threatening events that has evolved over a millennia.⁵⁵ Stress is the “fight or flight” sum of a cocktail of adrenaline, cortisol, and related hormones produced by the amygdala, hypothalamus, and adrenal and pituitary glands.⁵⁶ As the brain’s signals are perceived, a person’s heart starts to pound, pupils dilate, and airways and blood vessels open up so that more oxygen reaches the brain, muscles, and vital organs.⁵⁷ When a threatening or dangerous threat presents itself, this physiological response allows a person to aggressively respond to the danger or escape from it, and once the threat has passed, the body and its physiological functions can return to a normal state.⁵⁸ Dr. Nadine Burke Harris likens this normal response to what occurs in a person when encountering a bear in the woods.⁵⁹ The body’s stress response, in sharpening the senses and creating a hyper-awareness upon seeing the bear, acts to save the person’s life, a situation that the National Scientific Council on the Developing Child refers to as a “positive stress response.”⁶⁰

Virtually everyone has experienced the fight-or-flight physiological sensation known as stress. When the event or condition producing this response occurs infrequently or is less severe, the result is “tolerable stress,” a type of stress that allows the brain and organs to recover from what might otherwise be damaging effects because the event or condition is time-limited or otherwise buffered by relationships with adults or other protective factors that help the child adapt.⁶¹ Protective factors, like a stable and healthy neighborhood, school, or family conditions can help children develop healthy habits in self-regulating and responding to the emotions and other behaviors caused by traumatic events or conditions.⁶² However, when the events or conditions activating the stress response are

54. HARRIS, *supra* note 16, at 49.

55. *Id.*; see also Morsy & Rothstein, *supra* note 18, at 4; Tracey Young, *Trauma: Adoption’s Shadow*, ADOPTIVE FAMILIES ASS’N OF BC, <https://www.bcadoption.com/resources/articles/trauma-matters>.

56. Morsy & Rothstein, *supra* note 18, at 4.

57. *Id.*; HARRIS, *supra* note 16, at 49.

58. Morsy & Rothstein, *supra* note 18, at 4.

59. HARRIS, *supra* note 16, at 48.

60. *Id.* at 53-54.

61. *Id.* at 54; Morsy & Rothstein, *supra* note 18, at 5.

62. Morsy & Rothstein, *supra* note 18, at 5.

markedly frightening or threatening—particularly when they are sustained or frequently repeated, and there are no adequate protective factors to act as buffers—a child’s stress response can become dysregulated, or “toxic,” causing lasting damage to the child’s brain and organs.⁶³ The Economic Policy Institute (“EPI”) lists the following examples of events or conditions that can produce toxic stress: (1) abuse of all kinds, (2) incarceration, (3) witnessing domestic violence, (4) physical/emotional neglect, (5) family financial hardship, (6) homelessness, (7) neighborhood violence, (8) discrimination, (9) parental divorce or separation, (10) foster care, (11) victim of crime, and (12) death of a family member.⁶⁴ These examples are nearly word-for-word recitations of the recognized categories of ACEs. Simply stated, ACEs cause toxic stress in children.

In completing Dr. Harris’s analogy, she sees the difference between tolerable stress and toxic stress in that tolerable stress is represented by infrequently encountering the bear in the woods, whereas toxic stress is what happens when one lives with the bear.⁶⁵

C. The ACE of Social Disadvantage

“Social Disadvantage” is a widely recognized category of ACEs that seeks to encapsulate the trauma and adversity produced by economic hardship, community violence, discrimination, and historical trauma.⁶⁶ Within this category, two of the leading factors that increase the likelihood of traumatic childhood experiences are poverty and racial discrimination.⁶⁷ After all, a child whose home life is defined by consistent hunger, significant violence, and abject scarcity experiences never-ending feelings of heightened fear and terror, leading to inevitable toxic stress.⁶⁸ Recent research of ACEs—and the populations more likely to experience them—have shown that Black children are more likely to face frightening and traumatic experiences and thus are left to deal with the aftermath of negative effects on their cognitive, behavior, and health outcomes. This is a logical conclusion from the statistics: children living in poverty are more likely to experience trauma, and in 2019, Black Americans had the highest poverty rate in the United States, 18.8 percent,

63. *Id.* at 4; HARRIS, *supra* note 16, at 54.

64. Morsy & Rothstein, *supra* note 18, at 5.

65. HARRIS, *supra* note 16, at 52.

66. Olagundoye, *supra* note 2.

67. Morsy & Rothstein, *supra* note 18, at 8.

68. Danna Bodenheimer, *Real World Clinical Blog: Poverty as Trauma, Social Work as Cure*, THE NEW SOCIAL WORKER, <https://www.socialworker.com/feature-articles/real-world-clinical-sw/poverty-as-trauma-social-work-as-cure/> (last visited Feb. 6, 2022).

compared to just 7.3 percent of non-Hispanic whites.⁶⁹ However, admitting the statistical truth that Black children in the United States are the group more prone to trauma is only the first step in fully understanding and confronting the ugly truth—*Black children experience trauma because it is traumatic to be raised as a Black person in the United States.*

1. The Prevalence of Trauma in the Black Community

A November 2018 study published in *JAMA Pediatrics* found that “[t]hose identifying as Black or Latino and those with less than a high school education or an annual income below \$15,000 were more likely to have more ACEs” and reported that 61 percent of Black, non-Hispanic children experienced at least one ACE.⁷⁰ Further, a 2019 report published by the EPI found that Black children were forty-five percent more likely than white children to have been exposed to one frightening or threatening experience, twenty-nine percent more likely to have been exposed to two frightening or threatening experiences, and twenty-one percent more likely to have been exposed to three or more such experiences.⁷¹ These statistics reflect the intersection between income and race: “Since children from low-income families are more likely to experience frightening or threatening events, and since African American families fall disproportionately lower on the income distribution than white families, it is more likely that Black children will experience such events.”⁷²

2. The Trauma of Growing Up Black in America

Oppression and racial discrimination are constant and pervasive factors that infiltrate nearly every aspect of Black children’s lives, from their home environment to their school’s disciplinary system,⁷³ from their nutritional diet to their relationship with caregivers, and from their ultimate educational and financial attainment to their interactions with

69. JOHN CREAMER, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020).

70. Haelle, *supra* note 2; Vanessa Sacks & David Murphey, *The Prevalence of Adverse Childhood Experiences, Nationally, by State, and by Race and Ethnicity*, CHILD TRENDS (Feb. 12, 2018), <https://www.childtrends.org/publications/prevalence-adverse-childhood-experiences-nationally-state-race-ethnicity/> (explaining that in most regions across the U.S., the prevalence of ACEs is highest among Black non-Hispanic children).

71. Morsy & Rothstein, *supra* note 18, at 9.

72. *Id.*; see also Madeline St. Amour, *What Happens Before College Matters*, INSIDE HIGHER ED. (Oct. 20, 2020), <https://www.insidehighered.com/news/2020/10/20/Black-students-need-changes-policies-and-structures-beyond-higher-education>.

73. See Sacks & Murphey, *supra* note 70.

law enforcement. Black children—particularly Black children living in poverty—are forced to “spend less time learning about the world around them and more time struggling to survive within it.”⁷⁴ And herein lies the ultimate problem. It must be acknowledged that for decades—for generations—Black children have been forced to grow up in communities where traumatic experiences are often considered “normal,”⁷⁵ where ACEs are not to be avoided or protected against but instead mark a day in the life of Black America. Author and activist K-Rahn Vallantine likens low-income neighborhoods and inner-city communities to a literal war zone:

Furthermore, it’s important to note that, unfortunately, unlike the traumatized war vet, some of these young people never leave the battlefield. Their urban war zone is not in a foreign land, thousands of miles away. Their war zone is not a place they get deployed to for a temporary tour of duty. For these kids, the war zone encompasses a place they call *home*. And *home* is a place where many of them are taught to strive to make it out before it kills them. For these young residents, the response is not *post*-traumatic, because they continue to experience traumatic events day after day.⁷⁶

Trauma is inextricably intertwined with poverty. Children growing up in poverty are disproportionately exposed to adverse social and physical environments, often resulting in frequent and severe traumas.⁷⁷ Low-income neighborhoods often lack adequate social and municipal services, possess higher crime rates, and are unable to provide safe playgrounds and other opportunities for children to explore, socialize, and grow.⁷⁸ What’s more, poor neighborhoods tend to stay poor because housing is highly unstable, the local schools are described as “dropout factories,” and the landscape is blotted with waste sites, landfills, incinerators, and other environmental hazards.⁷⁹ Children who grow up poor are more likely to grow up in fractured and unstable home environments and are often raised by single parents who lack adequate resources, stable employment opportunities, and emotional responsiveness necessary to

74. ERIC JENSEN, TEACHING WITH POVERTY IN MIND: WHAT BEING POOR DOES TO KIDS’ BRAINS AND WHAT SCHOOLS CAN DO ABOUT IT 8 (2009); *see also* Morsy & Rothstein, *supra* note 18, at 14 (although cited current research is unable to isolate the independent effects of variables of racial discrimination, poverty, unstable housing, or residential segregation on toxic stress, it is suggested that each is a contributing factor).

75. K-RAHN VALLATINE, BEYOND THE CRACK GENERATION: SURVIVING A TRAUMA ORGANIZED CULTURE 47 (2018).

76. *Id.* at 47–48.

77. Sacks & Murphey, *supra* note 70; Haelle, *supra* note 2; JENSEN, *supra* note 74, at 37.

78. JENSEN, *supra* note 74, at 8.

79. THOMAS P. ABT, BLEEDING OUT: THE DEVASTATING CONSEQUENCES OF URBAN VIOLENCE—AND A BOLD NEW PLAN FOR PEACE IN THE STREETS 18 (2019).

provide a safe and fulfilling household.⁸⁰ Further, urban poverty passes from generation to generation, as parents are unable to provide their children with the opportunities they lacked, often having to focus on supporting themselves to get through the day instead of lending support.⁸¹ In his book *Stuck in Place*, sociologist Patrick Sharkey showed that 70 percent of African Americans living in the nation's poorest neighborhoods today are from families who lived in those same communities in the 1960s. "The American ghetto," Sharkey concluded, "appears to be inherited."⁸²

Many neighborhoods of concentrated poverty are disproportionately Black. Richard Rothstein's renowned work, *The Color of Law*, details that this is no accident, as such residential racial segregation is the direct result of a history of deliberate federal, state, and local practices.⁸³ As a consequence of this state-sanctioned discrimination, along with deindustrialization and out-migration, poor Black Americans live in neighborhoods far more segregated and disadvantaged than those occupied by similarly situated whites.⁸⁴ Additionally, such residential racial discrimination dilutes the protective factors that can safeguard children from developing a toxic stress response, as there is little to no access to healthcare, ineffective public transportation, and an utter disparity in employment opportunities.⁸⁵

Concentrated poverty causes violence and violence perpetuates concentrated poverty.⁸⁶ It is not that segregation causes violence directly, but it produces communities of concentrated poverty and disadvantage where violence thrives.⁸⁷ This community violence is a source of constant stress for residents of these neighborhoods, as the fear that threats of violence create is debilitating to already-struggling people and places. In fact, the anxiety associated with the looming, omnipresent threat of violence against themselves or a loved one can lead residents of such neighborhoods to adopt risky behaviors that result in further destabilization and trauma, leading to increased ACE scores for the

80. *Id.*

81. *Id.*

82. *Id.* at 19; PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL Equality* (Chicago: University of Chicago Press, 2013), Kindle edition, chap. 1.

83. Morsy & Rothstein, *supra* note 18, at 15; *see generally* RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

84. ABT, *supra* note 79, at 20.

85. Morsy & Rothstein, *supra* note 18, at 15.

86. ABT, *supra* note 79, at 18-24.

87. Thomas P. Abt, *Towards a Framework for Preventing Community Violence Among Youth*, 22 *PSYCHOL., HEALTH AND MED.* 266, 266-85 (2017).

children and youth living within the confines of the neighborhood.⁸⁸

Many of the phenomena that cause toxic stress in these segregated communities of color are recognized as such, from the pervasive poverty and violence that plague residents' daily lives to the increased levels of addiction and domestic violence that plague those communities at large. However, another more understated constant source of toxic stress in the lives of children growing up in Black and urban communities across the nation is the hyper presence of police officers in their daily lives.⁸⁹ For some, the hyper presence of police is akin to living with the bear. The next Part will distill why constant police presence in Black communities can and should be characterized as toxic stress.

II. ANTI-BLACK POLICING IN THE UNITED STATES⁹⁰

When considering the ACE of “social disadvantage,” one commonly ignored cause of toxic stress threatening communities of color is the hyper police presence and harm that law enforcement inflicts upon those communities.⁹¹ In a study published by Harvard in June 2020, Black Americans are more than three times more likely to be killed during an encounter with law enforcement than similarly situated white Americans.⁹² Police officers were far more likely to kill Black Americans who were unarmed.⁹³ These statistics, while alarming, are nothing new as “police forces from incipency were created to manage, control and intimidate black bodies.”⁹⁴

State-sponsored killing of unarmed Black men, women, and children

88. ABT, *supra* note 79, at 21-22.

89. See andré douglas pond cummings, *Reforming Policing*, 10 DREXEL L. REV. 573 (2018) (describing the anti-Black culture of police departments throughout the United States) [hereinafter “cummings, *Reforming Policing*.”]

90. This section draws from themes originally explored in andré douglas pond cummings, *Reforming Policing*, 10 DREXEL L. REV. 573 (2018) and andré douglas pond cummings & Steven A. Ramirez, *Roadmap for Antiracism: Unwind the War on Drugs Now*, 96 TULANE L. REV. (forthcoming 2022) [hereinafter “cummings & Ramirez, *Roadmap for Antiracism*”].

91. See generally cummings & Ramirez, *Roadmap for Antiracism*, *supra* note 90 (cataloguing all of the ways that law enforcement has harmed and discriminated against people of color, their families and their communities).

92. Gabriel L. Schwartz & Jaquelyn L. Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013-2017*, DEP'T SOC. & BEHAV. SCIS, HARVARD T.H. CHAN SCH. PUB. HEALTH, June 24, 2020, at 5, 16.

93. Jon Swaine, Oliver Laughland and Jamiles Lartey, *Black Americans killed by police twice as likely to be unarmed as white people*, GUARDIAN, June 1, 2015, <https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>.

94. See Todd J. Clark, Caleb Gregory Conrad, andré douglas pond cummings, & Amy Dunn Johnson, *Meek Mill's Trauma: Brutal Policing as an Adverse Childhood Experience*, 33 ST. THOMAS L. REV. 158, 171 (2021).

is a deeply rooted historic tradition in the United States.⁹⁵ Not only are police officers killing unarmed Black men and women at alarming rates today, but they are also killing Black children.⁹⁶

In 2021, Chicago Police Officer Eric Stillman shot and killed thirteen-year-old Adam Toledo who, after a police chase, raised his arms in surrender as ordered by Officer Stillman.⁹⁷ Less than one second after Toledo's surrender, Officer Stillman cut the thirteen-year-old down.⁹⁸ Toledo, a Latinx teenager had been running from the police when he was ordered to stop and turn and purportedly dropped a firearm behind a fence before complying with the officer's orders. Doing so—complying—ended Toledo's young life.⁹⁹ Also in 2021, the City of Fresno, California reached a \$4.9 million settlement with the family of Isiah Murrietta-Golding, an unarmed sixteen-year-old, who had been killed by a Fresno police officer who shot the Latinx teenager in the back of the head while Murrietta-Golding was fleeing.¹⁰⁰ In both instances, young brown children were fleeing from police officers in major U.S. cities, and in both instances, the officers acted as Prosecutor, Judge, and Executioner in shooting and killing children.

Tamir Rice was just twelve-years-old when he was shot and killed by

95. See andré douglas pond cummings, “*Lord Forgive Me, But He Tried to Kill Me*”: *Proposing Solutions to the United States’ Most Vexing Racial Challenges*, 23 WASH. & LEE J. C.R. & SOC. JUST. 3, 8–22 (2016) [hereinafter cummings, *Lord Forgive Me But He Tried to Kill Me*] (describing police killing of unarmed Black men, mass incarceration, and violent homicide deaths in the African American community as the three most pressing racial tragedies confronting U.S. politicians, citizens, law enforcement agencies, officers, policymakers, and lawyers); see also *Taking Cover: How Cops Escape Discipline For Shootings In Suburban Chicago*, WBEZ, <https://interactive.wbez.org/taking-cover> (last visited Jun. 20, 2020) (chronicling investigative reports that uncover suburban police forces outside Chicago, IL, engaging in common citizen shootings where officer discipline is non-existent, including the following stories: “113 Suburban Cop Shootings, Zero Discipline,” “Deadly Force Policies Ignored in Suburban Chicago,” and “The Revolving Door: Troubled Officers Get Frequent Career Chances”).

96. See *infra* notes 100 – 104 and accompany text.

97. See Kiara Alfonseca, *What We Know About the Fatal Police Shooting of 13-Year-Old Adam Toledo*, ABC NEWS, April 16, 2021, <https://abcnews.go.com/US/fatal-police-shooting-13-year-adam-toledo/story?id=77115626> (“The fatal police shooting of 13-year-old Adam Toledo was captured on newly released body camera footage, along with witness and surveillance video. Chicago Police Officer Eric Stillman has been identified in the original case incident report as the officer who fatally shot the teen on March 29 in the Little Village neighborhood. Toledo's death sparked protests among the community which is demanding change from the Chicago Police Department and Mayor Lori Lightfoot.”).

98. *Id.*

99. *Id.*

100. See Thaddeus Miller, *Fresno Settles Lawsuit in Police Killing of Unarmed Teen. Second Settlement This Month*, FRESNO BEE, April 25, 2021, <https://www.msn.com/en-us/news/crime/fresno-settles-lawsuit-in-police-killing-of-unarmed-teen-second-settlement-this-month/ar-BB1g148v> (“The city of Fresno has reached a \$4.9 million tentative settlement with the family of an unarmed teenager killed when an officer shot him in the back of the head, Councilmember Miguel Arias said Saturday. The city has faced a lawsuit for about three years after it was filed by the family of 16-year-old Isiah Murrietta-Golding, who was killed as he fled from police on April 16, 2017.”).

Cleveland Police Officer Timothy Loehmann.¹⁰¹ Tamir Rice was shot dead within two seconds of the police cruiser arriving at the park where the twelve-year-old had been playing in 2014.¹⁰² Officer Loehmann, at the time he shot and killed young Tamir Rice, had recently been terminated by the Independence Missouri Police Department after he was found “unfit to be a police officer.”¹⁰³ Still, Loehmann was recycled by the Cleveland Police where he unilaterally sentenced an innocent twelve-year-old Black child to death.

In 2020, Sheriff Deputy Jafet Santiago-Miranda killed sixteen-year-old Angelo Crooms and eighteen-year-old Sincere Pierce, both teenage African American males who were driving slowly away from Santiago-Miranda and his partner Carson Hendren.¹⁰⁴ Family members reported that Crooms and Pierce had just left their home when the two Florida sheriffs began following them claiming that they were investigating a grand theft auto claim.¹⁰⁵ The truth was, Crooms and Pierce were not driving a stolen car, and unlike Santiago-Miranda’s justification for killing the two teenagers, the boys were not driving the car with malicious intent toward the two sheriffs.¹⁰⁶ Instead, Deputy Santiago-Miranda bestowed upon himself the role of Prosecutor, Judge, and Executioner in killing two teenage boys for the “crime” of not immediately stopping the vehicle when originally ordered (without evidence that the boys even heard the commands or committed any underlying crime).¹⁰⁷

These examples show that before and since the summer of George Floyd protests in 2020, law enforcement has continued unabatedly killing unarmed Black children and men. In 2020, Casey Goodson, a twenty-three year old African American male was shot dead at his doorway in Columbus, Ohio. He was holding a bag of Subway sandwiches he had purchased for his five-year old brother and seventy-two year old grandmother who watched in horror as he fell through the front door of his home pierced with four bullets fired by SWAT Deputy Jason Meade, a white male seventeen-year veteran of the Franklin County Sheriff’s

101. See Ashley Fantz et al., *Tamir Rice Shooting: No Charges for Officers*, CNN (Dec. 28, 2015), <https://www.cnn.com/2015/12/28/us/tamir-rice-shooting/index.html>.

102. See *Tamir Rice: Police Release Video of 12-Year-Old’s Fatal Shooting* – Video, GUARDIAN (Nov. 26, 2014), <https://www.theguardian.com/us-news/video/2014/nov/26/cleveland-video-tamir-rice-shooting-police>.

103. See Colin Dwyer, *Officer Who Killed Tamir Rice Fired for Rule Violations on Job Application*, NPR (May 30, 2017), <https://www.npr.org/sections/thetwo-way/2017/05/30/530733542/officer-who-killed-tamir-rice-fired-for-rule-violations-on-job-application>.

104. See Johnny Diaz & Michael Levenson, *Fatal Shooting of 2 Black Teenagers by Florida Deputy Is Under Investigation*, N.Y. TIMES, Nov. 22, 2020, <https://www.nytimes.com/2020/11/22/us/angelo-crooms-benjamin-crump-video.html>.

105. See *id.*

106. See *id.*

107. See *id.*

Office who was assigned to a U.S. Marshal's office fugitive task force.¹⁰⁸ Casey Goodson had no criminal record and was not a target of the U.S. Marshal's task force.¹⁰⁹ Rather, he was a good-natured, hard-working son, brother, and grandson who allegedly waved a handgun outside his car window while driving, drawing the attention of SWAT Deputy Meade. Goodson, who according to his family, possessed an active conceal carry license, purportedly pointed his firearm at Deputy Meade, but the truth of that claim will never be known, as the Franklin County Sheriff's do not require body-cams, and there were no known eyewitnesses to the police killing of Casey Goodson.¹¹⁰

The trauma and toxic stress that the police force upon communities of color by killing unarmed Black men, women, and children continues uninterrupted in the U.S. In 2022, the tense relationship between law enforcement and the African American community seems tattered beyond repair. Conservative Black writer John McWhorter described this tattering in discussing the O.J. Simpson verdict twenty years later.¹¹¹ McWhorter wrote, "What I found when I spoke with people after the Simpson verdict, though, and have found since with numbing regularity, is that what prevents real racial conciliation and understanding in America is the poisonous relations between blacks and the police."¹¹²

McWhorter continued:

Racism is experienced in many ways, but as Ellis Cose has put it, '[r]age does not flow from dry numerical analyses of discrimination or from professional prospects projected on a statistician's screen.' Talk to most black people about racism and you need only count the seconds before the cops come up.¹¹³

As McWhorter makes clear, nearly every Black American has experienced a toxic encounter with the police.¹¹⁴ This is because policing in America is rooted in anti-Blackness and controlling the movement and freedom of Black bodies.¹¹⁵ This culture and history developed from the slave-era practice of pursuing and capturing runaway slaves supported by

108. See Danae King, *Ohio authorities, victim's family share conflicting stories after fatal shooting of 23-year-old Black man Casey Goodson*, USA TODAY, Dec. 6, 2020, <https://www.usatoday.com/story/news/nation/2020/12/06/casey-goodson-ohio-shooting-black-man-conflicting-stories-columbus/3851332001/>.

109. *See id.*

110. *See id.*

111. See John McWhorter, *What O.J. Simpson Taught Me About Being Black*, N.Y. TIMES (Feb. 3, 2016), <https://www.nytimes.com/2016/02/04/opinion/what-oj-simpson-taught-me-about-being-black.html>.

112. *Id.*

113. *Id.*

114. *See id.*

115. See cummings, *Reforming Policing*, *supra* note 89.

southern U.S. politicians who were seeking to control the newly freed Black bodies following the Civil War.¹¹⁶ This history is acutely embedded in the fabric of law enforcement agencies and the psyche of law enforcement officers across the nation.¹¹⁷

“[T]he literature clearly establishes that a legally sanctioned law enforcement system existed in America . . . for the express purpose of controlling the slave population The similarities between the slave patrols and modern American policing are . . . salient Hence, the slave patrol should be considered a forerunner of modern American law enforcement.”¹¹⁸ Thus, the tragic police killings of Adam Toledo, George Floyd, Sincere Pierce, Breonna Taylor, Casey Goodson, and Angelo Crooms uphold the anti-black tradition of police killing and control from slavery through today. Abundant evidence of this historic tradition and culture are in plain view through the police slayings of Rayshard Brooks, Eric Garner, Tamir Rice, Miriam Carey, Philando Castille, Michael Brown, Freddie Gray, Samuel DuBose, Alton Sterling, Laquan McDonald, Walter Scott, Oscar Grant, Sean Bell, and so many others.¹¹⁹

To fully understand policing in the United States, one must recognize the critical evidence that most police agencies began as slave patrols.¹²⁰ A second critical historical truth is that controlling and exploiting Black bodies was literally written into the United States Constitution, which has animated legislators’ thinking and lawmaking since the early days of this nation.¹²¹ The Fugitive Slave Clause found in Article IV, Section 2 of the Constitution, states:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.¹²²

Further, as a compromise allocating congressional representation based

116. See KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* 32 (2d ed., 2009); ALEXANDER, *supra* note 8, at 4–8, 13 (2010); AMY FARRELL & DONNA M. BISHOP, *RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM* 83–107 (Michael J. Lynch et al. eds., 2008); John S. Goldkamp, *Minorities as Victims of Police Shootings: Interpretations of Racial Disproportionality and Police Use of Deadly Force*, 2 *JUST. SYS. J.* 169, 169–73 (1976).

117. See *supra* note 102 and accompanying text; see also PATRISSE KHAN-CULLORS & ASHA BANDELE, *WHEN THEY CALL YOU A TERRORIST: A BLACK LIVES MATTER MEMOIR* 186, 226–29 (2017).

118. VICTOR E. KAPPELER & LARRY K. GAINES, *COMMUNITY POLICING: A CONTEMPORARY PERSPECTIVE* 58–59 (2009) (citing a 2006 paper by Turner, Giacompassi & Vandiver).

119. See Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, *L.A. TIMES* (Jul. 12, 2016), <http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html>.

120. See KAPPELER & GAINES, *supra* note 118.

121. See TA-NEHISI COATES, *WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY* 223–81 (2017).

122. U.S. CONST. art. IV, § 2.

on population, Article I, Section 2 provided that enslaved Black individuals were to be counted as three-fifths of a person for purposes of populace representation: “Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . excluding Indians not taxed, three fifths of all other Persons.”¹²³ Thus, slavery, anti-Black racism, and discrimination is baked into the founding documents of the nation. As written, the U.S. Constitution dehumanizes Black Americans and entrenches their criminality. Thus, the same ruthless treatment that attended the policing of runaway slaves and terrorization that attended the lynching of freed Black males in our nation’s history informs and inspires U.S. law enforcement policing of Black males and children of color today.¹²⁴ A 2016 United Nations Working Group found that U.S. “[c]ontemporary police killings and the *trauma* it creates are reminiscent of the racial terror lynching of the past.”¹²⁵

The enthrallment with and fanatical desire to control the movement and freedom of Black bodies continues today as law enforcement agencies across the nation track this well-worn tradition of concomitant fascination coupled with vicious control.¹²⁶ The coherent ordering of U.S. history is anchored in exploiting and brutalizing Black bodies.¹²⁷ Any person or argument that rejects or counters this anchoring coherence is often met with swift condemnation and repulsion.¹²⁸ The continuing police killings of Adam Toledo, Isiah Murrieta-Golding, Angelo Crooms, Sincere Pierce, Casey Goodson, George Floyd, Rayshard Brooks, Breonna Taylor, as well as the near execution of Jacob Blake and brutal beating of Rickia Boyd, exemplify American policing’s continuing anti-Black orientation and foundational anchoring policy of ferocious control of Black bodies.¹²⁹

123. See U.S. CONST. art. I, § 2.

124. See e.g., John McWhorter, *supra* note 111; Diaz & Levenson, *supra* note 104.

125. *Statement to the Media by the United Nations’ Working Group of Experts on People of African Descent, on the Conclusion of its Official Visit to USA, 19-29 January 2016*, U.N. HUM. RTS. OFF. OF HIGH COMMISSIONER (Jan. 29, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17000> (emphasis added).

126. See Tryon P. Woods, “*Sexual Poetic Justice*”: *Hip Hop, Antiblack Desire, and Legal Narratives*, in *HIP HOP AND THE LAW* 125, 125–26 (Pamela Bridgewater, andré douglas pond cummings & Donald F. Tibbs eds., 2015).

127. See *id.* at 125.

128. See *id.* at 126.

129. See Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (Jul. 12, 2016), <http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmstory.html> (describing the police killing of each of the unarmed Black men named); Jordan Freiman & Justin Bey, *Police in Wisconsin Shoot Black Man in Back Multiple Times*,

The same anti-Black ethos and history that inspired constitutional dehumanization and the eras of slavery, Jim Crow, and lynching run directly through to the twenty-first century police reactions to George Floyd allegedly using a counterfeit \$20 dollar bill, Rayshard Brooks falling asleep in a Wendy's drive thru, or Sincere Pierce and Angelo Crooms allegedly driving a stolen car. That an alleged small counterfeit bill, falling asleep in a fast-food drive thru, or driving a stolen car would lead to violent death at the hands of U.S. law enforcement forcefully instructs as to the continuing enthrallment, distress, fascination, and anti-Blackness that pervades current law enforcement officers and agencies throughout America. American policing has evolved from deep-seated roots in slave patrols and lynching through today's killing of unarmed Black men, women, and children for insignificant violations. U.S. policing is culturally, legally, and historically infected with a disease. Reforming policing so infected will require recognition and acknowledgment of the anti-Black history and culture that continues to permeate policing today.¹³⁰

In addition to the continuing anti-Blackness that pervades policing today, communities of color have been further assaulted with additional community trauma brought on by both the War on Drugs and subsequent evisceration of Fourth Amendment search and seizure protections. The War on Drugs, declared by President Richard Nixon, nationalized and weaponized by President Ronald Reagan, and super charged by President Bill Clinton, is now roundly considered not just an epic failure but a war declared primarily on communities of color.¹³¹

President Reagan startled his own advisors, as well as the country, when in the 1980s he prioritized drug enforcement as one major focus within his presidency.¹³² When Reagan declared his War on Drugs, only two percent of U.S. citizens believed that drug use and abuse was the most important national problem.¹³³ At Reagan's announcement, law enforcement nationwide did not share the President's drug prioritization enthusiasm, so Reagan decided to incentivize police departments with the promise of federal cash payments, including military-style weaponry and

Sparking Protests (Aug. 25, 2020) <https://www.cbsnews.com/news/jacob-blake-kenosha-shooting-wisconsin-police-black-man-protesters-gather/>.

130. See cummings, *Reforming Policing*, *supra* note 89.

131. See generally cummings & Ramirez, *Roadmap for Antiracism*, *supra* note 90 (describing the War on Drugs as an epic failure and all-out assault on Black and brown communities).

132. See *id.*, at 13; see also IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 433-36 (2017) (describing how Ronald Reagan's War on Drugs disproportionately targeted Black youth reporting that "[i]n 1996, when two-thirds of the crack users were White or Latina/o, 84.5 percent of the defendants convicted of crack possession were Black.").

133. Adam Clymer, *Public Found Ready to Sacrifice in Drug Fight*, *NY TIMES* (Sept. 2, 1986), <https://www.nytimes.com/1986/09/02/us/public-found-ready-to-sacrifice-in-drug-fight.html>.; KENDI, *supra* note 132, at 433-34.

forfeiture laws, as rewards for departments that would make drug enforcement its top priority.¹³⁴ Reagan's solution to uncooperative local law enforcement agencies resisting prioritizing the War on Drugs was "massive bribe(s) offered to state and local law enforcement by the federal government."¹³⁵ From this ensuing flood of federal largesse, paramilitary weaponry began flowing freely into state and municipal police departments effectively setting military tanks, battering rams, flashbang grenades, helicopters, bazookas, and assault weaponry upon poor communities of color across the United States.¹³⁶ Evidence of this free flowing distribution of military weaponry onto U.S. city streets is exemplified by former police chief Nick Pastore of New Haven, Connecticut who stated "I was offered tanks, bazookas, anything I wanted."¹³⁷

With law enforcement incentives newly focused on the drug war, local police forces gave the drug war priority over more proven police practices like community engagement and de-escalation. This drug war focus ushered in an era that included a startling eschewing of honest police work as departments began adopting military-style S.W.A.T. team takedowns of its own citizens in communities of color, often propelled by bad information provided by drug-addled informants and unreliable snitches.¹³⁸ The War on Drugs simply bastardized an already corrupted and racially-biased policing culture in the United States.¹³⁹

In sum, President Nixon, President Reagan, and President Clinton conceptualized and initiated a race-based war of police terrorization upon communities of color throughout the nation, upon their own most vulnerable citizens.¹⁴⁰

In addition, the War on Drugs effectively gutted the vital Fourth

134. See cummings & Ramirez, *Roadmap for Antiracism*, *supra* note 90; see also ALEXANDER, *supra* note 8, at 73-75; KENDI, *supra* note 132, at 435-38.

135. ALEXANDER, *supra* note 8, at 73.

136. See ALEX S. VITALE, *THE END OF POLICING* 10-11 (2017); see also ALEXANDER, *supra* note 8 at 74-80; cummings, *Reforming Policing*, *supra* note 89, at 622-26; Timothy Egan, *Soldiers of the Drug War Remain on Duty*, N.Y. TIMES (Mar. 1, 1999), <https://www.nytimes.com/1999/03/01/us/soldiers-of-the-drug-war-remain-on-duty.html> ("Encouraged by Federal grants, surplus equipment handed out by the military and seizure laws that allow police departments to keep much of what their special units take in raids, the Kevlar-helmeted brigades have grown dramatically, even in the face of plummeting crime figures."). *The War Comes Home: The Excessive Militarization of American Policing*, ACLU (June 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

137. ALEXANDER, *supra* note 8, at 74.

138. See VITALE, *supra* note 136, at 134-40; see also ALEXANDER, *supra* note 8, at 74-80.

139. See cummings & Ramirez, *Roadmap for Antiracism*, *supra* note 90; VITALE, *supra* note 136, at 137-40; ALEXANDER, *supra* note 8, at 74-76; cummings, *Reforming Policing*, *supra* note 89, at 622-24.

140. See generally andré douglas pond cummings & Steven A. Ramirez, *The Racist Roots of the War on Drugs*, 44 *UA LITTLE ROCK L. REV.* (forthcoming 2022) (describing the racist roots of the War on Drugs and how each President, Nixon, Reagan and Clinton, engaged in race baiting politics in initiating and supporting the drug war) [hereinafter cummings & Ramirez, *The Racist Roots of the War on Drugs*].

Amendment constitutional protections against illegal search and seizures.¹⁴¹ Corrupted and now co-opted law enforcement agencies increasingly seized American residents in a new but now never-ending quest to discover illegal drugs, almost exclusively in poor and urban communities while concomitantly trampling on traditional rights against illegal searches, sending case after case to the federal courts, which chipped away relentlessly at Fourth Amendment protections.¹⁴² Again and again, police officers searched citizens without warrant or probable cause, scouring for illicit contraband and drugs driven feverishly by forfeiture laws and their new “incentives.”¹⁴³ Time and again, these officers would tread upon Fourth Amendment protections which would thereafter be challenged as illegal by defense lawyers.¹⁴⁴

These hyper-aggressive searches began finding comfort and acceptance by the nation’s highest court.¹⁴⁵ For example, *California v. Acevedo* approved a police officer’s warrantless search of a package locked in the trunk of a motorist traveling on the open highway.¹⁴⁶ *Florida v. Bostick* permitted police to conduct *suspicionless* sweeps for drugs of individuals traveling the country openly on buses or trains in interstate travel.¹⁴⁷ *Whren v. United States* stamped Supreme Court imprimatur upon pretextual stops by police hunting for drugs (i.e., police officers initiate a traffic stop for a minor violation as pretext and thereafter seek consent to search the vehicle for contraband and drugs).¹⁴⁸ *Ohio v.*

141. See ALEXANDER, *supra* note 8, at 73-80; see also Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment through the “War on” Paradigm*, 15 J. GENDER RACE & JUST. 47, 61-68 (2012) (detailing the erosion of Fourth Amendment protections through the federal courts based on drug stops and searches); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1452 (1993) (concluding that the war on drugs endangers “our Bill of Rights and our political freedom.”).

142. See Tibbs, *supra* note 141, at 61, 65 (“The legal formula ‘Young + Black + Male’ is routinely equated with ‘reasonable suspicion’—authorizing state-sponsored unconstitutional stops, searches, questioning, and seizures of thousands of African American males every year. . . . In the decades since *Terry* [v. *Ohio*], however, the standard for reasonable suspicion has reached new lows. The steady lowering of the threshold of evidence required to satisfy *Terry*’s reasonable suspicion standard means that Fourth Amendment privacy rights have all but dissipated.”).

143. See generally andré douglas pond cummings, *Just Another Gang: “When Cops Are Crooks Who Can You Trust?”*, 41 HOW. L. J. 383 (1998) (describing the rise of the “Warrior Mentality” or “Siege Mentality” that permeated police departments at that time).

144. See cummings & Ramirez, *Roadmap for Antiracism*, *supra* note 90; ALEXANDER, *supra* note 8, at 74-80.

145. See ALEXANDER, *supra* note 8, at 74-80

146. *California v. Acevedo*, 500 U.S. 565 (1991) (overturning long-held precedent requiring a warrant to search a container within an automobile).

147. *Florida v. Bostick*, 501 U.S. 429 (1991) (holding that overturned a Florida Supreme Court rule that held consensual searches of passengers on buses were always unreasonable under the Fourth Amendment).

148. *Whren v. United States*, 517 U.S. 806 (1996) (holding that any traffic offense committed by a driver amounts to a legitimate legal basis for a stop).

Robinette rejected a state sponsored requirement that police reveal to motorists that they are free to leave before requesting consent to search a vehicle for illicit drugs.¹⁴⁹ *Atwater v. City of Lago Vista* allowed law enforcement to arrest individuals for misdemeanors after a refusal to consent to a vehicle search.¹⁵⁰ *Illinois v. Caballes* determined that a police dog's sniffing of a vehicle or luggage for drugs does not constitute a "search" that would qualify for Fourth Amendment protections.¹⁵¹ Each of these Supreme Court decisions ruthlessly diminished Fourth Amendment search and seizure barriers. These new Supreme Court precedents were rooted in a racist drug war and served to anchor law enforcement in chasing illegal drugs, no matter the minimal quantity or relative danger of the drug. The War on Drugs in a literal sense eviscerated the Fourth Amendment.¹⁵² And this evisceration was borne by and large by Black Americans.

Based on this perverting influence of federal prioritization and militarization, law enforcement across the U.S. experienced scandal after scandal all attributable to the War on Drugs.¹⁵³ These police scandals continue today.¹⁵⁴ As noted by one scholar, "It is impossible to fully

149. *Ohio v. Robinette*, 519 U.S. 33 (1996) (holding that the Fourth Amendment does not require police officers to inform a motorist at the end of a traffic stop that they are free to go before seeking permission to search the vehicle).

150. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that a motorist's Fourth Amendment rights are not violated when the subject is arrested for driving without a seatbelt, a misdemeanor punishable only by a fine).

151. *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that the Fourth Amendment is not violated when the use of a drug-sniffing police dog during a routine traffic stop does not unreasonably prolong the length of the stop).

152. See John Adams, Massachusetts Declaration of Rights – Article 14, MASSACHUSETTS LAW UPDATES (Jan. 14, 2019), <https://blog.mass.gov/masslawlib/legal-history/massachusetts-declaration-of-rights-article-14/> ("Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation."); see also VA. CONST. of 1776 art. 1, §10 ("That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.").

153. See The Times Editorial Board, *Editorial: Ghosts of Rampart Are Hovering over LAPD's Latest Gang Scandal*, L.A. TIMES (Jan. 21, 2020), <https://www.latimes.com/opinion/story/2020-01-21/ghost-rampart-lapd-gang-scandal> (describing the 1990s LAPD Rampart Scandal where elite "gang unit" officers were found guilty of planting evidence, stealing drugs, and beating suspects, leading to more than 3000 cases being overturned); see also FREE MEEK (Amazon Studios 2019) (detailing the Philadelphia Police Department manufacturing drug evidence against rapper Meek Mill leading to jail time and numerous probation and parole revocations until the corruption was exposed); VITALE, *supra* note 136, at 137 ("Most of the major police scandals of the last fifty years have had their roots in the prohibition of drugs. The Rampart Scandal in Los Angeles involved officers abusing their authority and engaging in brutality toward drug dealers . . . and eventually involved the stealing of drugs from evidence rooms and selling it on the streets.").

154. See VITALE, *supra* note 136, at 137 (identifying both the corrupt "Dirty Thirty" police precinct in Harlem, uncovered by the Mollen Commission and the "Prince of the City" book and movie detailing

catalog the abuses of authority, thefts, bribes, and drug sales committed by U.S. police every day in the War on Drugs.”¹⁵⁵ These corrupting abuses occurred nearly without exception in police precincts “serving” urban and poor communities of color.

The racist War on Drugs, obviously, was never waged on Wall Street, in suburban America, or upon fraternity and sorority houses on idyllic college campuses across the country—places where documented use of illicit drugs is obvious and notorious.¹⁵⁶ Instead, the War on Drugs was focused strategically and purposefully on poor communities of color.¹⁵⁷ The prospect of battering rams, military tanks, helicopters, and SWAT

corrupt narcotics detectives in NYC); *see also* David Ovalle, *Ex-Miami-Dade Lieutenant Gets 10 Years Prison for Helping Cocaine Ring*, MIAMI HERALD (Dec. 2, 2015), <https://www.miamiherald.com/news/local/crime/article47627235.html#!> (“The disgraced ex-cop worked for a group of smugglers who had for years illegally imported drugs in shipping containers containing bananas from Ecuador and the Dominican Republic. . . . In a federal complaint, agents also said Mata helped plan the execution of two rival drug dealers, even proposing that his “contacts” could dress up like cops and pull over the men before killing them”); Carmen George, *Fresno Deputy Police Chief Arrested in Federal Drug Investigation*, FRESNO BEE, (Mar. 27, 2015), <https://www.fresnobee.com/news/local/crime/article19643307.html> (“Fresno Deputy Police Chief Keith Foster was among six people arrested Thursday on federal drug charges, including conspiracy to distribute oxycodone, heroin and marijuana. Foster, 51, who oversaw patrol operations for the department’s four districts, was arrested for conspiracy to distribute and/or possess with the intent to distribute oxycodone, heroin and marijuana.”); Kevin Connolly, *Former Titusville Police Officer Gets 10 Years in Prison in DEA Coke Sting*, ORLANDO SENTINEL (Mar. 31, 2015), <https://www.orlandosentinel.com/news/breaking-news/os-richard-irizarry-prison-cocaine-cop-20150331-story.html> (“Richard Irizarry, 45, a former Titusville police officer, was found guilty in January of attempting to help distribute one kilogram of cocaine and using a cellular telephone to commit a drug-trafficking offense, the U.S. Attorney’s Office said. . . . Once, federal prosecutors allege, Irizarry looked up a license plate in a confidential database and told the informant the plate belonged to an undercover DEA car.”).

155. VITALE, *supra* note 136, at 137.

156. *See Wall Street Millennials Living Fast and Hard*, BARRON’S (Mar. 9, 2017, 1:15 PM), <https://www.barrons.com/articles/wall-street-millennials-living-fast-and-hard-1489083342> (Wall Street therapist Jonathan Alpert notes, “In an effort to cope with job stress and self imposed pressure, these Type A’s are working murderous hours while relying on prescription medication and—primarily among the men—street drugs, such as cocaine and crystal meth, to help them focus and reach peak job performance”); *see also* Linette Lopez & Mike Nudelman, *Drug Use on Wall Street—the History*, BUS. INSIDER (Jan. 14, 2014), <http://www.businessinsider.com/drug-use-on-wall-street—the-history-2014-1>. For a Hollywood take on rampant drug use amongst the financial elite, *see generally* THE WOLF OF WALL STREET (Paramount Pictures 2013). Regarding drug use on college campuses, *see Marijuana Use at Historic Highs Among College-Age Adults*, NAT’L INST. ON DRUG ABUSE, (Sept. 13, 2019), <https://www.drugabuse.gov/news-events/news-releases/2019/09/marijuana-use-at-historic-highs-among-college-age-adults> (“The survey shows that past-year use of marijuana is similar for college students and their non-college peers at about 43%, representing an approximate 7% five-year increase for college students with rates for both groups at historic highs over the past 35 years.”); *Drugs Commonly Abused by College Students*, DUALDIAGNOSIS.ORG, <https://www.dualdiagnosis.org/drugaddiction/college-drug-abuse/> (last visited Nov. 1, 2020); Donna Leinwand, *College Drug Use, Binge Drinking Rises*, USA TODAY (Mar. 15, 2007), http://usatoday30.usatoday.com/news/nation/2007-03-15-college-drug-use_N.htm (“Nearly half of America’s 5.4 million full-time college students abuse drugs or drink alcohol on binges at least once a month, according to a new study that portrays substance and alcohol abuse as an increasingly urgent problem on campuses across the nation.”).

157. *See* cummings & Ramirez, *The Racist Roots of the War on Drugs*, *supra* note 159; *see also* ALEXANDER, *supra* note 8, at 121 (“[W]hen police go looking for drugs, they look in the ‘hood.’”).

teams in body armor raining down on the Financial District, Broadway, or the Upper East Side in New York City stalking cocaine or upon tranquil college campus fraternity/sorority houses scavenging for marijuana, is unimaginable.¹⁵⁸ Yet, in urban communities of color, military style tanks, helicopters, battering rams, flashbang grenades, and SWAT tactical teams became a constant presence throughout the nation as the drug war raged and was waged on the nation's city streets. This is so, as noted by one scholar, because waging the War on Drugs upon college campuses or Wall Street would have been "political suicide."¹⁵⁹

In summation, law enforcement agencies across the United States continue to be diseased by an anti-Black orientation and culture. Police killings of Black Americans continue at alarming rates, including the killing of Black children, and has not ebbed since the national and international protests of the summer of 2020 in response to the killings of George Floyd and Breonna Taylor. The anti-Black culture and tradition of policing informed and infused the racist epic failure of the War on Drugs, which has filled our nation's prisons with Black men and women but not stemmed the use or flow of drugs into the United States by any measure.¹⁶⁰ The War on Drugs with its maniacal pursuit of low-level drug dealers in communities of color has eviscerated the Fourth Amendment's formerly staunch protections against illegal searches and seizures. In each aspect of law enforcement behavior detailed above, police officers have traumatized Black Americans in pernicious ways. Much of this police-inflicted trauma is visited upon Black children. Simply, in far too many instances, when a Black child interfaces with U.S. law enforcement, they are delivered a traumatic blow—just one additional instance of toxic stress. And this comes from law enforcement agencies that are charged to protect, not traumatize, the citizens, including the children, they serve.

It is not just law enforcement officers that traumatize Black children and youth. Interfacing with the judicial system at large further traumatizes Black families and their children. Examples of childhood trauma are replete when examining directly how the United States criminal justice system interacts with Black Americans.

158. See cummings, *Reforming Policing*, *supra* note 88, at 625 ("Drug use and its prevalence permeates Wall Street culture and colleges across the country just like it does in Baltimore, Compton, and the west and south sides of Chicago. So, why have there never been SWAT raids in Skokie, Evanston, Hermosa Beach, Ocean City, Westwood, or Cambridge? Why do Wall Street traders, surfers in Huntington Beach, and fraternity boys and sorority girls receive a get-out-of-jail-free card when it comes to using and selling drugs?").

159. See ALEXANDER, *supra* note 7, at 121 ("Tactics that would be political suicide in an upscale, white suburb are not even newsworthy in poor Black and brown communities.").

160. See cummings & Ramirez, *The Racist Roots of the War on Drugs*, *supra* note 140.

III. ANTI-BLACK CHARGING, JAILING, AND SENTENCING TRADITIONS IN THE UNITED STATES

Anti-Black charging, jailing, and sentencing traditions in the United States have an insidious history that evolved to create a criminal justice system that is wholly inequitable and unjust. This Part will explore the history of Black people in America regarding these processes. However, before taking a look at the historical context of these processes, it is imperative to consider the present. In sum, the current American criminal justice system is overwhelmingly averse to Black people in the United States. At each level of the criminal justice process, Black men and women are disadvantaged. From the initial policing stage, as noted in Part II, Black people are wrongfully targeted and over-policed, resulting in higher incidents of arrest, incarceration, and familial and community trauma. This reality begins the vicious cycle that continues to plague Black Americans. Once arrested, Black people experience additional damaging effects during the critical charging and plea-bargaining stages. For example, in relation to charging, Black people are charged for crimes at a much higher rate than whites, often for identical conduct.¹⁶¹ Additionally, Black people typically receive significantly less favorable outcomes during the plea deal process.¹⁶² This last reality is

161. See Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System is Racist. Here's the Proof.*, WASHINGTON POST (last updated Jun. 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#Prison>; see also Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L. J. 2, 7 (2013) (finding that the Black and white sentencing gap may have more to do with prosecutorial discretion instead of judicial discretion. More specifically, after controlling for pre-charge case characteristics, federal prosecutors were almost “twice as likely to bring a charge against a Black defendant,” than one against a white defendant accused of a similar crime); Matthew S. Crow & Kathrine A. Johnson, *Race, Ethnicity, and Habitual Offender Sentencing: A Multilevel Analysis of Individual and Contextual Threat*, 19 CRIM. JUST. POL’Y REV. J. 63, 73 (2008) (finding that a Black defendant is twenty-eight percent more likely to be charged as a habitual offender than a white defendant with a similar criminal record. In addition, the authors affirm that criminal defendants who commit violent crimes are more likely to experience a greater level of habitualization. This finding served as a contributing factor for the disparity in habitualization between white and Black people because Black people are more frequently charged with violent crimes).

162. See LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, PLEA & CHARGE BARGAINING 1 (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> (providing research regarding plea deals that indicates that Black people are overwhelmingly less likely to receive a reduced charge than whites); see also Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191 (2018) (showing a comprehensive data set of criminal cases from the Wisconsin Circuit Courts, that determined that “[w]hite defendants are 25 percent more likely than Black defendants to have their most serious initial charge dropped or reduced to a less severe charge.” In regard to misdemeanors, whites were 75 percent more likely to have their charges completely dismissed or in circumstances where they were convicted, it was for crimes for which there was no incarceration); see also Gene Demby, *Study Reveals Worse Outcomes for Black and Latino Defendants*, NPR (July 17, 2014, 10:44 AM), <https://www.npr.org/sections/codeswitch/2014/07/17/332075947/study-reveals-worse-outcomes-for-black-and-latino-defendants> (determining that after evaluating more than 220,000 criminal cases from the Manhattan District

particularly troubling considering that ninety to ninety-five percent of all criminal cases are resolved via the plea-bargaining process.¹⁶³ Both of these practices are often attributable to the reality that the prosecutorial bar lacks sufficient diversity¹⁶⁴ and presumably, adequate trauma-informed training.

The criminal justice system's emphasis on personal discretion also plays a significant role in the traumatization of Black families. The American criminal justice system is often characterized as a system of laws, but it might be more accurately described as laws that are mediated by a system of discretion.¹⁶⁵ More specifically, there is an immense amount of personal discretion granted to actors on numerous levels of the criminal justice system, from police officers on the street to prosecutors throughout the charging and sentencing process. In fact, prosecutors, and prosecutors alone, "decide whether [criminal defendants] enter the door and what happens to them if and when they do."¹⁶⁶ For example, after considering a defendant's behavior, and the accompanying set of facts, prosecutors have the discretion to determine what charges, and often how many charges, the defendant will face. Additionally, the prosecutor's discretion to decide whether the defendant will face charges at all is arguably even more powerful.¹⁶⁷ Even more troubling is the reality that these charging decisions are made behind closed doors, without a requirement that prosecutors provide any reason or insight into why a particular decision was made in a case.¹⁶⁸ Some commentators refer to this phenomenon as the prosecutor's "black box," because these life altering decisions about a person's freedom and livelihood are made behind closed doors without any real accountability to the defendant, community, or public at large.¹⁶⁹ In fact, because there is little to no data

Attorney's Office and controlling for various factors that might influence the outcomes, researchers found that Black defendants were nineteen percent more likely than whites to be offered plea deals that included jail or prison time).

163. See DEVERS, *supra* note 162 (according to research published by the Bureau of Justice Assistance "the majority of research on race and sentencing outcomes shows that black people are less likely than whites to receive reduced pleas," or reduced charges).

164. See *Justice for All: Who Prosecutes in America?*, REFLECTIVE DEMOCRACY CAMPAIGN (July 2015), <https://wholeads.us/research/justice-for-all-report-elected-prosecutors/> (according to a study from the Reflective Democracy Campaign, based on 2014 data, ninety-five percent of elected prosecutors were white).

165. See Ezra Klein, *Why Prosecutors, Not Cops, Are the Keys to The Criminal Justice System*, VOX CONVERSATIONS (Aug. 22, 2017, 1:19:22), <https://radiopublic.com/Ezra/s1!5c51d>.

166. See ANGELA J. DAVIS ET AL., *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 178 (2017).

167. See *Prosecutorial Discretion*, CHASING JUSTICE (Jun. 23, 2020), <https://www.chasingjusticepodcast.com/episodes/episode-3-prosecutorial-discretion>.

168. See Klein, *supra* note 165.

169. JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 134 (2017).

regarding their decisions, few if any researchers are able to conduct meaningful studies on prosecutors.¹⁷⁰ This lack of prosecutorial accountability, in effect, relieves prosecutors of the responsibility of explaining charging practices that have historically and continue to undeniably impact people of color in a disproportionate manner.

The data that does exist is clear: whether done consciously or not, prosecutors charge Black men more often and with more serious charges than whites.¹⁷¹

A 2017 study by the United States Sentencing Commission (USSC) found that Black men who commit the same crimes as white men receive federal prison sentences that, on average, are nearly 20 percent longer.¹⁷² Similarly, a 2014 University of Michigan Law School study revealed that, all other factors being equal, “Black offenders were 75 percent more likely to face a charge carrying a mandatory minimum sentence than a white offender who committed the same crime.”¹⁷³ This alarming racial disparity is also found in a prosecutor’s discretion to drop or decrease charges. A study conducted by Carols Berdejo at the University of Loyola Law School in 2017 found that white defendants in Wisconsin were twenty-five percent more likely than Black defendants to have their criminal charges dropped or reduced to less serious crimes, a phenomenon also found in San Francisco in a study commissioned by the jurisdiction’s district attorney.¹⁷⁴

Even after their initial charging decisions, prosecutors also enjoy virtually unregulated discretion in the plea-bargaining process. This process is when prosecutors attempt to make deals with defendants to resolve cases without going to trial.¹⁷⁵ At first glance, this process may appear advantageous to both the prosecution and defendant, as the prosecution avoids losing altogether and the defendant, theoretically, avoids a more serious punishment that could be handed down at trial.¹⁷⁶ However, in practice, the plea negotiation process is incredibly one-sided and ultimately results in an overwhelming number of defendants pleading guilty to crimes they did not commit. Like charging decisions, prosecutors

170. *Id.*

171. See Christopher Ingraham, *Black Men Sentenced to More Time for Committing Exact Same Crime as a White Person*, WASHINGTON POST (Nov. 16, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white-person-study-finds/>.

172. *Id.*

173. *Id.*

174. See Timothy Williams, *Black People Are Charged at a Higher Rate Than Whites. What if Prosecutors Didn’t Know Their Race?*, N.Y. TIMES (Jun. 12, 2019), <https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html>.

175. DAVIS ET AL., *supra* note 166, at 181.

176. *Id.*

engage in plea negotiations behind closed doors and hold all of the cards. This discretion is so powerful that a prosecutor is neither required to extend a plea offer at all nor justify the contents of the offer to the defendant or defense counsel.¹⁷⁷ As a part of a plea offer, prosecutors often stack charges, meaning they charge a defendant with multiple crimes stemming from the same set of behavior. This tactic incentivizes defendants to plea in an attempt to avoid the harsher sentence they would suffer if found guilty of all the charges “stacked” together.¹⁷⁸ Prosecutors can engage in charge stacking because state legislatures have provided prosecutors with a growing array of overlapping charges from which to select.¹⁷⁹ For example, New York has approximately twenty-three assault offenses, many of which overlap.¹⁸⁰ Although it is possible for prosecutors to use this discretion to be more lenient on a criminal defendant, there is virtually no limit to how prosecutors may use the myriad of charges available to them to threaten the same criminal defendant into a plea of guilty. The landmark 1978 Supreme Court case *Bordenkircher v. Hayes* is a prime example. In that case, Paul Hayes wrote a fraudulent check in Kentucky, a crime for which the sentence was routinely two to ten years in prison. However, because of his criminal history, Hayes qualified for a now-repealed repeat offender enhancement that carried a life sentence. In the plea negotiation process, the prosecutor told Hayes that, if he pled guilty, he would recommend a sentence of just five years, but if Hayes insisted on a trial, the prosecutor would move forward with the repeat felon enhancement and seek the life sentence.¹⁸¹ Hayes refused the deal and, when he was found guilty at trial, received a life sentence.¹⁸² Hayes appealed the sentence, arguing that his due process rights were violated by the great disparity between the offered sentence and the coercive threat. The Court disagreed, and a dangerous precedent was set.¹⁸³ This immense amount of prosecutorial leverage in plea negotiations leads to more than ninety percent of criminal cases ending in a plea bargain,¹⁸⁴ and some studies suggest the real number may be nearly

177. *Id.*

178. *Id.*

179. See PFAFF, *supra* note 169, at 130-131.

180. *Id.* at 131.

181. *Id.* at 131-32.

182. *Id.*

183. *Id.*

184. See Terry Gross, ‘Charged’ Explains How Prosecutors and Plea Bargains Drive Mass Incarceration, NPR.ORG (Apr. 10, 2019, 1:46 PM), <https://www.npr.org/2019/04/10/711654831/charged-explains-how-prosecutors-and-plea-bargains-drive-mass-incarceration>.

ninety-five percent.¹⁸⁵

This number, however, is inconsistent with how many criminal defendants are actually guilty of the crime or crimes charged. Although the exact number of defendants who plead guilty is difficult to quantify, a study conducted in Houston, Texas, found that in a three year period, 133 defendants later exonerated when their drug tests were retested had each pled guilty to the charge for which they were exonerated.¹⁸⁶

The statistics regarding jailing and sentencing are equally discouraging. They detail a troubling pattern: Black people serve longer sentences than whites for committing the same or similar crimes.¹⁸⁷ This

185. THOMAS COHEN & TRACY KYCKELHAHN, BUREAU OF JUST. STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, 1 (2010), <https://bjs.ojp.gov/content/pub/pdf/fdluc06.pdf>.

186. See Samuel R. Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 776 (2017).

187. See Ellis P. Monk, *The Color of Punishment: African Americans, Skin Tone, and the Criminal Justice System*, 42 ETHNIC & RACIAL STUD. 1593 (2018) (finding that the darker the skin of the criminal defendant, the greater disparity the person experiences in dealing with the criminal justice system. Moreover, “disparities in policing and punishment within the Black population along the colour continuum are often comparable to or even exceed disparities between Blacks and whites as a whole.”); see also Ingraham, *supra* note 170 (according to the United States Sentencing Commission (“USSC”), “Black men who commit the same crimes as white men receive federal prison sentences that are, on average, nearly 20 percent longer.”); U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Mar. 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf (finding that “Black offenders were convicted of a firearms offense carrying a mandatory minimum more often than any other racial group” and that Black offenders were sentenced to longer sentences than whites); Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, 11 AM. ECON. ASS’N. 160, 160 (2019) (finding that “that Republican-appointed judges sentence black defendants to 3.0 more months than similar non-blacks,” for committing similar crimes); Jennifer L. Hochschild, *The Skin Color Paradox and the American Racial Order*, (finding that darker skin leads to greater disadvantage).

The Hochschild study evaluated approximately 67,000 first-time male felons and grouped the Black felons into three categories, dark, medium, and light. After controlling for various variables, the study found that, on average, Black defendants received sentences that were more than a year (378 days) longer than the average for whites. More specifically, however, light skin Black defendants only had sentences that were three-and-a-half months longer than whites, medium Black defendants approximately one year longer, and dark skin Black defendants received sentences that were approximately one and a half years longer. *Id.*; see also Traci Burch, *Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing*, 12 J. EMPIRICAL LEGAL STUD. 395, 395 (2015) (evaluating first-time felons, researchers found that “while medium- and dark-skinned black defendants receive sentences that are about 4.8 percent higher than those of whites, lighter-skinned black defendants receive sentences that are not statistically significantly different from those of whites.”); Jeree Michele Thomas & Mel Wilson, *The Color of Youth Transferred to the Adult Criminal Justice System: Policy & Practice Recommendations*, SOC. JUST. BRIEF (2008), http://cfyj.org/images/pdf/Social_Justice_Brief_Youth_Transfers.Revised_copy_09-18-2018.pdf (showing that although Black youths only make up 14 percent of the youth population, they account for 53 percent of the minors transferred to adult court for offenses against persons, even though white and Black youths make up nearly an equal percentage of youth charged with such offenses).

consistent theme of discrimination also plays out in the context of bail,¹⁸⁸ pretrial detentions,¹⁸⁹ and parole decisions.¹⁹⁰ What is clear from the data is that wherever discretion exists in the criminal justice process, Black people are consistently treated more adversely than whites and suffer far greater consequences. At every phase of the criminal justice process, Black people experience discrimination.¹⁹¹ This reality is not new to the criminal justice system—the historical context of charging Black people in America is riddled with examples of overzealous and racist prosecutorial misconduct.

For example, in 1906, Ed Johnson was charged with raping a white

188. See Flozell Daniels, Jr. et al., *From Bondage to Bail Bonds: Putting a Price on Freedom in New Orleans*, VERA INST. OF JUST. (May 14, 2018) <https://perma.cc/YQ27-2BJX> (demonstrating that Black people incarcerated in New Orleans are more likely to be required to pay bail as well as pay a higher bail, and Black people are more likely to remain incarcerated prior to trial solely because they are less likely to be able to afford bail); see also David Arnold, Will Dobbie, & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1885, abstract (2018) (evaluating the bail practices in Miami and Philadelphia, this study found that “bail judges are racially biased against black defendants, with substantially more racial bias among both inexperienced and part-time judges.” We find suggestive evidence that this racial bias is driven by bail judges relying on inaccurate stereotypes that exaggerate the relative danger of releasing Black defendants.); Jonah B. Gelbach & Shawn D. Bushway, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model*, (National Science Foundation, Working Paper No. SES0718955) (2011), <https://www.law.upenn.edu/live/files/1142-gelbachbailracialdiscriminationpdf> (showing a study of five counties in the U.S. found that Black people received higher bail than whites. Specifically, \$7,000 higher bail for violent crimes, \$13,000 for drug crimes, and \$10,000 for public order-based crimes).

189. See Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, PRISON POL’Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ (according to the Prison Policy Initiative, “in large urban areas, Black felony defendants are over 25% more likely than white defendants to be held pretrial.” At the national level, Black men are 50 percent more likely to be detained than white defendants); see also Besiki L. Kutatedladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County – Technical Report*, VERA INST. OF JUST. (Jan. 31, 2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf> (showing a 2014 study from the Vera Institute of Justice finding that Black people are more likely to be detained before trial than whites.) Surprisingly, Black people were also more likely to have their charges dismissed. While the 2014 study did not specifically explain the basis for this phenomenon, it is likely attributable to the fact that they were wrongfully arrested from the start. This reality reinforces the notion that Black people are discriminately treated throughout the criminal justice process.

190. See Beth M. Huebner & Timothy S. Bynum, *The Role of Race and Ethnicity in Parole Decision*, 46 NAT’L CRIM. JUST. REFERENCE SERV. 907, 908 (2008) (showing a 2008 study of parole board decisions found that “black offenders spent a longer time in prison awaiting parole compared with white offenders.”); see also Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016) <https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html>. (reporting a disparity in the likelihood that Black people are released after their first parole hearing. Specifically, 1 in 6 Black people were released, whereas 1 in 4 white people were released).

191. See Jerry Iannelli, *Miami’s Justice System Widely Discriminates Against Blacks*, ACLU Rep. Warns, MIAMI NEW TIMES (July 19, 2018, 11:00 AM), <https://www.miaminewtimes.com/new889andemi-justice-system-discriminates-against-blacks-aclu-data-shows-10540037> (reporting that Black people experienced “2.2 times greater rates of arrest, 2.3 times greater rates of pretrial detention, 2.5 times greater rates of conviction, and 2.5 times greater rates of incarceration.”).

woman in Chattanooga, Tennessee.¹⁹² According to the victim, she was attacked and raped while she was walking home. During the attack, she lost consciousness and as a result could not remember many of the details from the attack other than the fact that the perpetrator was Black, approached her from behind, and wrapped a leather strap around her neck. Shortly after the local newspaper provided a reward of \$375 for information about the possible perpetrator, a white man came forward identifying Mr. Johnson as the rapist. The man allegedly observed Mr. Johnson holding a leather strap at a location in close proximity to the attack on the same night the victim was raped. Because of the outrage of the whites in the local community, and because of threats to lynch Johnson, the prosecutor quickly charged and tried Johnson. The court appointed him three white lawyers, two of whom had no criminal trial experience. At the conclusion of his trial, an all-white jury sentenced him to death. Shockingly, after the jury's verdict, Johnson's lawyers declined to appeal the case. In a cowardly and selfishly motivated letter directed at the local community, one of Johnson's attorneys made a plea for sympathy for himself and the other two defense attorneys because of the tribulations and stresses they endured during the trial.¹⁹³ He also wrote that he and the other lawyers agreed that Mr. Johnson should not appeal because even if Mr. Johnson was innocent, an appeal would inflame the community resulting in his death by an angry mob. Such an attack, according to the lawyer, could possibly result in the deaths of other innocent parties in the jail. Therefore, since Mr. Johnson was going to die regardless of their course of action, it made more sense to dispense with the appeal.¹⁹⁴ Ultimately, two Black lawyers agreed to handle Mr. Johnson's case; however, while they were working on his appeal, he was

192. See LLOYD CHIASSON, JR., *ILLUSIVE SHADOWS: JUSTICE, MEDIA, AND SOCIALLY SIGNIFICANT AMERICAN TRIALS*, 63-67 (2003).

193. See Douglas O. Linder, *ED Sentenced to Die on March 13*, *FAMOUS TRIALS*, <https://famous-trials.com/sheriffshipp/1089-sentenced> (last visited Jan. 21, 2021).

194. *Id.*

I cannot leave my fellow-citizens ignorant of what occurred on yesterday. If any lawyer for a prisoner and any twelve jurors trying a prisoner should have the sympathy for the people, that sympathy should be freely given to the jurors and the defendant's attorneys in this case. What we have suffered: the mental strain we have been under; the weight of the burden of the responsibility upon us cannot be told. The horror and awfulness of the last few days are things I hope never again to be called on to endure.... The case was reviewed; and our duty and the rights of the defendant were discussed. The most careful reflection was given to the horrible crime charged against the defendant, and the fact that a jury had, upon their oath, fixed that crime on the accused man. We discussed the recent mob uprising and the state of unrest in the community. It was the judgment of all present that the life of the defendant, even if the wrong man, could not be saved that an appeal would so inflame the public that the jail would be attacked, and perhaps other prisoners executed by violence. *Id.*

lynched in his jail cell by an angry mob of racist whites.¹⁹⁵ Ed Johnson's case provides a vivid illustration of how the charging process in America has historically targeted Black people in a manner that prevents them from receiving constitutionally protected justice.

The next narrative provides a more recent example in America of discriminatory charging, reaffirming the historical pattern of mistreatment. Infamously known as the Jena Six, six Black teenagers from Jena, Louisiana were charged with attempted second-degree murder after a physical confrontation with a white student. The confrontation was precipitated by rising racial tensions in the community. After the confrontation, the student was treated by the local hospital and was released with only minor injuries. The charges were ultimately reduced from attempted second-degree murder to aggravated second-degree battery and conspiracy to commit aggravated second-degree battery. The initial charge of attempted-second degree murder was dropped because it could not be substantiated based on the facts of the case. Because Louisiana criminal law required the use of a weapon to establish a crime as "aggravated," the prosecutor argued that the shoes worn by one of the Jena Six, used to kick the injured student, was a dangerous weapon.¹⁹⁶ Ultimately, only one of the Jena Six went to trial. He was convicted; however, the conviction was set aside, and he plead guilty to second-degree battery and received an 18-month sentence. The remaining five members of the Jena Six accepted plea deals that gave them seven days of probation and a \$500 fine.¹⁹⁷

195. See Hans Sherrer, *Wrongly Convicted Database Record*, FOREJUSTICE.ORG, <http://www.forejustice.org/db/Johnson--Ed-.html> (last visited Mar. 3, 2021).

The sheriff who arrested him sent the normal staff home and left one employee to oversee the jail. "Wrongly convicted by an all-white jury in February 1906 of raping a white woman in Chattanooga, Tennessee. The woman was raped, but she did not positively identify Ed Johnson. Consequently, Johnson's conviction was apparently based on the racial outrage at the mere accusation he had raped a white woman. Johnson was sentenced to death, After Johnson's conviction was affirmed by the Tennessee Supreme Court, he filed a writ of habeas corpus in federal court. After it was denied he filed a writ of certiorari with the United States Supreme Court, on the basis that his trial did not conform with due process of law. The Supreme Court accepted Johnson's case for review and issued a stay. The county sheriff and judge did nothing to diffuse local outrage at what was viewed as meddling by the Supreme Court. A large mob seized Johnson from the county jail on March 19, 1906 and lynched him. Johnson's last words from the bridge where he was lynched are credited as being, "God Bless you all. I am an innocent man." On February 25, 2000, Johnson's conviction was posthumously set aside and his death sentence was vacated by Hamilton County Criminal Judge Doug Meyer on the basis there.

196. See Donald F. Tibbs & Tryon P. Woods, *The Jena Six and Black Punishment: Law and Raw Life in The Domain of Nonexistence*, 7 SEATTLE J. SOC. JUST. 235, 236 (2008).

197. See *Plea Agreement Reached in Jena Six Case*, SOUTHERN POVERTY LAW CENTER (June 26, 2009), <https://www.splcenter.org/news/2009/06/26/plea-agreement-reached-jena-six-case>.

While some might opine that justice ultimately prevailed, the trauma of the charges continued to impact the Jena Six as well as their families. Defining harm solely in the context of whether “justice” is served from a procedural perspective often distorts and fails to take account of the trauma induced by the process. For example, Richard Thompson Ford, a highly regarded Stanford law professor and critical race theorist, responded to a question during a 2011 NPR interview about his previous comment that the Jena Six were the wrong poster children for a Civil Rights movement; he remarked that while the charges were excessive, “[t]hey were later dropped or reduced. And so the legal system basically worked.”¹⁹⁸ While Professor Thompson clearly understands the delicate issues of racial inequality and injustice, given his comprehensive record of scholarship in these areas,¹⁹⁹ his comment highlights the importance of expanding the way in which we view the traumatic impacts of the criminal justice system. Regardless of the legal outcome, the trauma experienced by Black defendants extends far beyond the courtroom. In thinking about the negative encounters that Black people experience with the criminal justice system as “traumas,” it is much easier to appreciate the full scope of the personal, familial, and communal impact of the criminal justice interface. Any interaction with the justice system, even for a misdemeanor or arrest without conviction, can have devastating consequences for the individual. More than sixty percent of formerly incarcerated individuals remain unemployed one year after being released, and those who do find jobs make forty percent less in pay annually.²⁰⁰ Research shows that a criminal record of any sort—including arrest without conviction—reduced the likelihood of a job offer by almost fifty percent.²⁰¹ The impact is substantially larger for Black job applicants.²⁰²

Again, Black people experience the same injustice in the context of jailing and sentencing. The following narratives detailing Kalief Browder

198. See *Race, Violence...Justice? Looking Back at Jena 6*, NPR (Aug. 30, 2011), <https://www.npr.org/2011/08/30/140058680/race-violence-justice-looking-back-at-jena-6> (demonstrating Professor Ford’s primary point was that the charges were excessive; however, in his opinion, the Jena Six were not the ideal defendants for establishing a civil rights movement given his position that the assault on the white student was “fairly” severe).

199. *Id.*

200. See Gary Painter, *How Even a Casual Brush with the Law Can Permanently Mar a Young Man’s Life – Especially if He’s Black*, PBS (Oct. 21, 2020, 3:49 PM), <https://www.pbs.org/newshour/nation/how-even-a-casual-brush-with-the-law-can-permanently-mar-a-young-mans-life-especially-if-hes-black>.

201. See Devah Pager, Bruce Western, & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, ANNALS OF THE AM. ACAD. OF POLITICAL & SOC. SCI. (May 2009), https://scholar.harvard.edu/files/pager/files/annals_sequencing_disadvantage.pdf.

202. See Painter, *supra* note 200.

and Wayne Bryant's experiences, as well as the comparison of Brock Turner's case to Corey Batey's case, prove this reality.

Kalief Browder's story illustrates the vicious manner in which some Black defendants are treated in jailing and sentencing scenarios. Kalief was arrested when he was only sixteen years old for allegedly stealing a backpack. Although he was arrested, he was never convicted of any crime. Because his family did not have the financial resources to post bail, Kalief was sent to Rikers Island where he spent three years as an inmate, two of which were served in solitary confinement. Kalief was ultimately released by the judge presiding over his case when it was clear that one of the key witnesses against Kalief was unavailable. Throughout his time in jail, Kalief consistently refused any plea deal requiring his admission of guilt and maintained his innocence. After his release, Kalief provided a vivid account of his time at Rikers. On several occasions he attempted to kill himself while imprisoned due to the stress of prison. He was also physically attacked by other inmates and correctional officers who were charged with protecting him. In two very disturbing videos, Kalief's accounts of his experiences at Rikers Island were verified. In the first video, an officer struck and violently attempted to slam Kalief to the ground without any provocation. In the second video, Kalief was attacked by approximately fifteen inmates after he was transferred to a gang unit within the jail. Kalief was not a member of the gang and quickly became a target. In the video, Kalief was punched and kicked numerous times. An officer attempted to intervene, but the attack lasted for several minutes because of the sheer number of attackers.²⁰³

Once Kalief was released from Rikers, he continued to struggle with the trauma of his experience. In fact, he attempted to kill himself several times, and on June 6, 2015, he was pronounced dead after he hung himself outside his bedroom at his mother's home. Prior to Kalief's imprisonment, he had no history of any mental instability.²⁰⁴

An excerpt from an essay drafted by renowned Grammy- and Oscar-winning singer and songwriter John Legend summarizes the tragedy of Kalief's experience, whose trauma precipitated his suicide:

New York failed Kalief. The list of things that went wrong in his case begins with his first encounter with the NYPD, whose practice of targeting black teens is well documented. The idea that being accused of stealing a backpack would lead to his arrest and detention would be absurd if it weren't actually tragic. He should not have been tried as an adult, or had prosecutors, defenders, and judges so overwhelmed with cases that he waited three years for trial, violating his constitutional right to swift justice.

203. See Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Sep. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law>.

204. *Id.*

He should not have been held in an adult jail where he would spend 700 to 800 days of those three years in solitary confinement. He should not have spent one day being abused by guards or the others incarcerated there.²⁰⁵

Wayne Bryant's case details another compelling example of the manner in which racism permeates the American criminal justice system to unreasonably traumatize Black people. In 1997, Wayne Bryant was sentenced to life imprisonment by a Louisiana court for attempting, and failing, to steal a pair of hedge clippers.²⁰⁶ Bryant's sentence was justified by what are known as habitual offender statutes, sometimes referred to as "three strikes" laws.²⁰⁷ These statutes provide that each additional felony a defendant commits warrants a harsher sentence than what the felony would require alone. After the third felony (or "strike"), most statutes provide that the defendant is subject to a life sentence. These laws are a relic of failed "tough on crime" policies, which have had devastating consequences for Black families and communities across the country.²⁰⁸ These laws are racist as well as ineffective and unnecessary from a public safety perspective.²⁰⁹ "The majority (64 percent) of people serving time in Louisiana prisons under the law are there for nonviolent crimes, and Black people represent nearly 80 percent of those convicted as habitual offenders."²¹⁰

Bryant's life sentence was validated based on this concept. Prior to his life sentence in 1997, "Bryant was convicted in 1979 for attempted armed robbery, in 1987 for possession of stolen things," in "1989 for attempted forgery of a check worth \$150," and "in 1989 for simple burglary of an inhabited dwelling."²¹¹

In August of 2020, Bryant filed a writ of certiorari requesting that the Louisiana Supreme Court review his sentence. The court denied his request by a five-to-one decision. The lone dissenting judge, Supreme Court Chief Justice Bernette Johnson opined that habitual offender

205. John Legend, *John Legend: New York Failed Kalief Browder*, N.Y. VULTURE (Jun. 12, 2015), <https://www.vulture.com/2015/06/john-legend-new-york-failed-kalief-browder.html>.

206. See Alanah Odoms Hebert, *The Law That Sent a Man to Prison for Life for Stealing a Pair of Hedge Clippers – and What Prosecutors Can do About It*, ACLU (Oct. 2, 2020), <https://www.iaaclu.org/en/news/law-sent-man-prison-life-stealing-pair-hedge-clippers-and-what-prosecutors-can-do-about-it>.

207. *Id.*

208. See Amir Vera & Rebekah Riess, *Black Man Serving Life Sentence for Stealing Hedge Clippers Granted Parole in Louisiana*, CNN (Oct. 16, 2020, 8:24 PM), <https://www.cnn.com/2020/10/16/us/louisiana-supreme-court-fair-wayne-bryant-parole-trnd/index.html>.

209. See Shannon Hurd, *Removing Nonviolent Offenses from Habitual Offender Statute*, LA. FOR PRISON ALTERNATIVES, <https://www.prisonreformla.com/stories/removenonviolentoffenses> (last visited Mar. 3, 2021).

210. See Hebert, *supra* note 206.

211. See Vera & Riess, *supra* note 208.

statutes are nothing more than a modern attempt to reenact “pig laws.”²¹² Pig Laws replaced the Black Codes that were in existence after the Civil War.²¹³ The primary purpose of these laws was to continue Black enslavement.²¹⁴ These laws accomplished this objective by setting extreme sentences for petty crimes that were largely attributable to Black people.²¹⁵ For primarily minor crimes, Wayne Bryant has been sentenced to life in prison.

More recently, two separate cases, one involving Brock Turner and another involving Corey Batey, epitomize the manner in which Black people have historically suffered unjust and unequal sentencing in America relative to their white counterparts. Turner, a former white student at Stanford University, was convicted “of the intent to commit rape of an intoxicated/unconscious person, penetration of an intoxicated person and penetration of an unconscious person.”²¹⁶ Turner was arrested after two students noticed Turner “thrusting toward a body on the ground near a dumpster.” The two students approached Turner and realized that the body on the ground was a woman who laid unconscious. Immediately, one of the students asked if everything was “all right.” At that point, Turner attempted to flee. Once he moved, the students realized that the woman’s dress was pulled up exposing her genitals. Fortunately, Turner was unable to flee because one of the students tripped him and detained him until the police arrived. Turner plead not guilty to the charges and claimed that he fondled the woman but did not rape her. Turner was ultimately convicted on all three charges. The prosecutors on the case recommended that Turner serve six years in jail, but Judge Aaron Persky instead sentenced Turner to six months in jail. Outlining the factors that influenced his decision, Judge Persky remarked that “[a] prison sentence would have a severe impact on him. I think he will not be a danger to others.”²¹⁷ In 2018, voters, outraged by the Judge Persky’s decision, successfully executed a recall of his seat on the bench,²¹⁸ the first recall in California since 1932.²¹⁹ Approximately one year later,

212. See Hebert, *supra* note 206.

213. *Id.*

214. *Id.*

215. See *State v. Bryant*, 300 So. 3d 392, 394 (La. 2020).

216. See Ashley Fantz, *Outrage Over 6-Month Sentence for Brock Turner in Stanford Rape Case*, CNN (Jun. 7, 2016, 8:45 AM), <https://www.cnn.com/2016/06/06/us/sexual-assault-brock-turner-stanford/index.html>.

217. See Richard Gonzales, *Sentence in Stanford Sexual Assault Case Sparks Outrage*, NAT’L PUB. RADIO (Jun. 6, 2016, 9:33 PM), <https://www.npr.org/sections/thetwo-way/2016/06/06/481010919/california-rape-case-sentence-sparks-outrage>

218. See *California Judge Recalled for Sentence in Sexual Assault Case*, 132 HARV. L. REV. 1369, 1373 (2019).

219. *Id.*

220. See Elizabeth Flock, *Sexual Assault Victim Chanel Miller’s New Book Indicts Her Attacker* –

Chanel Miller, the actual victim who was identified as Emily Doe during the trial, identified herself, detailed her experience, and shared her perspectives about the negative way that women are often victimized in her book *Know my Name*.²²⁰

In an almost identical situation, Corey Batey, a former Black student at Vanderbilt, was sentenced to fifteen years after he was convicted of “aggravated rape, facilitation of aggravated rape, two counts of attempted aggravated rape and three counts of aggravated sexual battery.”²²¹ Batey and several of his teammates gang-raped an unconscious woman.²²² The assault was caught on several surveillance cameras as well as recorded on the phones of several of the perpetrators.²²³ This evidence was critical in establishing the defendant’s guilt.

Turner and Batey engaged in almost identical criminal misconduct yet received drastically different sentences—six months for Turner compared to fifteen years for Batey. It is undisputed that the charges as well as the state law under which each defendant was charged were different. Such differences could account for some variation in the way Turner and Batey were sentenced; however, the gross disparity in the actual sentences, and the rhetoric used by the judges, evinces the possibility that the sentencing disparities were attributable to a racially biased criminal justice system. Because of the similarities in the cases as well as the fact that both defendants were sentenced in the same year, these cases were the subject of much debate and dialogue. There was substantial public outcry as a result of the gross disparity in sentencing.²²⁴

Even more recently, Niagara County Court Judge Matthew J. Murphy III sentenced 20-year-old Christopher Belter to eight years’ probation after Belter pled guilty to felony charges that included third-degree rape and attempted first-degree sexual abuse.²²⁵ Judge Murphy, who admitted to both praying and agonizing over the case, claimed that “a sentence that

And the System, WASHINGTON POST (Sept. 23, 2019), <https://perma.cc/LD35-8Z3S>.

221. See Stacey Barchenger, *Cory Batey Sentenced to 15 Years in Vanderbilt Rape Case*, USA TODAY (July 15, 2016, 12:16 PM), <https://www.usatoday.com/story/news/nation-now/2016/07/15/vanderbilt-rape-case-cory-batey-sentenced-15-years/87130600/>.

222. *Id.*

223. The Tennessean, *Vanderbilt Rape Case: Timeline of Events*, TENNESSEAN (June 15, 2017), <https://www.tennessean.com/story/news/crime/2015/06/23/vanderbilt-rape-case-timeline-of-investigation-and-case/29183041/>.

224. See Barchenger, *supra* note 221.

225. Timothy Bella, *Man Who Sexually Assaulted 4 Teenagers Gets No Prison Time. ‘Incarceration Isn’t Appropriate,’ Judge Says*, WASHINGTON POST (Nov. 17, 2021), <https://www.washingtonpost.com/nation/2021/11/17/newyork-christopher-belter-rape-probation/>.

involves incarceration or partial incarceration isn't appropriate."²²⁶ Belter's crimes: raping and sexually assaulting four teenage girls during parties at his parents' home. Most strikingly, Judge Murphy's decision to impose probation came after Belter had admitted to multiple violations of the interim probation on which he was placed in 2019, a status that he received as the result of a deal with prosecutors that ultimately reduced charges of first-degree rape, third-degree rape, and sexual abuse for the assaults.²²⁷ An attorney for one of the victims bluntly stated, "If Chris Belter was not a white defendant from a rich and influential family, in my experience...he would surely have been sentenced to prison."²²⁸

The examples of the two different legal systems in the U.S. abound. However, if one seeks to concisely illustrate the American legal system's passivism, sympathy, and ultimate protection of white actors in a white system, there is no better example than how those who participated in the attempted insurrection of the U.S. Capitol Building on January 6, 2021, were treated in courtrooms across the country. On January 6, 2021, in one of the most stunning visual moments in American history, a mob of violent rioters stormed the U.S. Capitol for the purpose of overturning the results of the 2020 presidential election in favor of the defeated incumbent Donald Trump.²²⁹ Rioters used weapons during the assault, some of which were retrieved after the fact, including a baseball bat, a fire extinguisher, a wooden club, a spear, a flag pole, bear spray, mace, stolen police shields, a stun gun, and knives.²³⁰ The violent riot resulted in deaths both during and immediately after the attack. Of the 727 people arrested and charged with crimes for their role in the atrocity, 75 have been charged with entering a restricted area with a deadly or dangerous weapon, including assaulting police officers with a deadly or dangerous weapon.²³¹

Surely the American legal system would make an example of the members of the violent attack who targeted American democracy at its core, assaulted law enforcement officers tasked with protecting the nation's Capitol, and threatened to kill elected officials. But that would not be the case for this group of white rioters. In fact, on January 6, 2022, one year after the attack, only 71 of the 727 people arrested for storming

226. *Id.*

227. *Id.*

228. *Id.*

229. Glenn Kessler, *The Jan. 6 Attack on the Capitol: A Guide to What We Now Know*, WASHINGTON POST (Jan. 6, 2022), <https://www.washingtonpost.com/politics/2022/01/06/january-6-attack-capitol-guide-what-we-now-know/>.

230. *Id.*

231. *Id.*

the U.S. Capitol had received criminal sentences.²³² Of those 71, only 31 defendants were sentenced to periods of incarceration, with an average prison sentence of 45 days.²³³ Although an additional 18 rioters have been sentenced to some form of home detention, most defendants received favorable sentences that included merely fines, community service, and for low-level misdemeanor offenses, just probation, even in cases where the defendant was violent or threatened violence.²³⁴ For example, Dawn Bancroft, a woman who said she had hoped to shoot House Speaker Nancy Pelosi “in the friggin’ brain” during the attack, pled guilty to a single misdemeanor charge of parading, demonstrating, or picketing in a capitol building.²³⁵ Gracy Dawn Courtright, a 23-year-old woman who entered the Capitol and stole property, and who after the attack posted a photo to social media with the caption “INFAMY IS JUST AS GOOD AS FAME,” was sentenced to one month in prison, 60 hours of community service, and \$500 in restitution.²³⁶ An Ohio couple, Brandon and Stephanie Miller, who entered the Capitol through a broken window during the riot, received less than three weeks in jail and a period of home confinement.²³⁷ This sentence was beyond what prosecutors had recommended to the court. Even for the most serious crimes that were committed during the riot, the sentences are just as underwhelming. Robert Palmer, a 54-year-old Floridian, assaulted Capitol police officers with wooden boards and a fire extinguisher during the mayhem.²³⁸ Palmer received a sentence of 63 months’ imprisonment.²³⁹

Evidence of the continuing anti-Black bias in charging, bail-setting, policing, and sentencing is apparent in the Obama administration Department of Justice investigations conducted into the police departments of several cities including Ferguson, Missouri, New Orleans, Louisiana, and Baltimore, Maryland. At the conclusion of these broad investigations, the Department of Justice published a report detailing its findings and providing guidance on how to best rectify the issues identified. The issues rooted out by the Department of Justice were

232. Nik Popli & Julia Zorthian, *What Happened to Jan. 6 Insurrectionists Arrested in the Year Since the Capitol Riot*, TIME (Jan. 6, 2022), <https://time.com/6133336/jan-6-capitol-riot-arrests-sentences/>.

233. *Id.*

234. *Id.*

235. Jordan Williams, *Woman Who Said She Hoped to Shoot Pelosi on Jan. 6 Pleads Guilty to Misdemeanor*, THE HILL (Sept. 29, 2021), <https://perma.cc/JWF3-H44J>.

236. See Popli & Zorthian, *supra* note 232.

237. Joseph Choi, *Judge Beyond Prosecutors’ Request with Sentence for Jan. 6 Couple*, THE HILL (Dec. 16, 2021), <https://perma.cc/AE65-6T4A>.

238. See Popli & Zorthian, *supra* note 232.

239. See Colleen Long, *Toughest Sentence Yet for Any Capitol Rioter: Over 5 Years*, ABC NEWS (Dec. 17, 2021), <https://perma.cc/5DKH-6Q9J>.

plentiful. In Ferguson, the DOJ concluded that 67 percent of African Americans in the city accounting for 93 percent of 2012-2014 arrests stemmed from “unlawful bias,” rather than Black people committing more crime.²⁴⁰ In its investigation into the New Orleans Police Department, the DOJ found reasonable cause to believe New Orleans police officers engaged in unconstitutional conduct and violations of federal law in several areas, including use of excessive force, unconstitutional stops, searches and arrests, and biased policing based on race.²⁴¹ The DOJ similarly found that the police department in Baltimore employed strategies subjecting African Americans to disproportionate rates of stops, searches, and arrests and engaged in “a pattern or practice of serious violations of the U.S. Constitution and federal law that ha[d] disproportionately harmed Baltimore’s African American community and eroded the public’s trust in the police.”²⁴²

These findings did not go unanswered in several instances where positive steps toward change were implemented. Perhaps the best documented was the EPIC program implemented in New Orleans after the Department of Justice’s report was published.²⁴³

Again, at each level of the criminal justice process, Black people are disadvantaged. History has continued to repeat and reinforce this vicious cycle. One hope for change is through the current Black Lives Matter movement. While the data highlighted in this Part validate the reality of a deeply rooted racism and an unbalanced, discriminatory administration of justice, these statistics alone have not effectuated meaningful change. In light of this, these statistics have proven to be valuable weapons in fueling BLM. It is this movement, which has assumed the role of a modern day Civil Rights Movement, that has the greatest capacity to effectuate meaningful change in our criminal justice system.

IV. POLICING AND THE CRIMINAL JUSTICE SYSTEM AS AN ADVERSE CHILDHOOD EXPERIENCE FOR AFRICAN AMERICAN CHILDREN

As Parts I–III of this Article make clear, communities of color in America are—and have always been—subject to a multitude of

240. See Mark Berman & Wesley Lowery, *The 12 Key Highlights from the DOJ’s Scathing Ferguson Report*, THE WASHINGTON POST (Mar. 4, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/the-12-key-highlights-from-the-doj-s-scathing-ferguson-report/>.

241. See *Dept. of Justice Releases Investigative Findings Involving New Orleans Police Dept.*, U.S. DEPT. OF JUST. (Mar. 17, 2011), <https://www.justice.gov/opa/pr/department-justice-releases-investigative-findings-involving-new-orleans-police-department>.

242. See *Dept. of Justice Releases Investigative Findings Involving Baltimore Police Dept.*, U.S. DEPT. OF JUST. (Aug. 10, 2016) <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department>.

243. For more discussion on the EPIC program, see *infra* Part V.B.

experiences that unmistakably fall squarely into the long-recognized realm of social disadvantage. From laws and policies that have created racially segregated neighborhoods and concomitant disparities in educational and economic opportunities, to the over-policing of Black bodies, to the increased likelihood of dying or suffering serious injury at the hands of law enforcement, to the gross overrepresentation of Black men and women in our carceral system, it is an undeniable reality that toxic stress is a feature of living in America as a Black person.

Also evident is the fact that our criminal justice system—through anti-Black policing, charging, bail, and sentencing—actively and needlessly perpetuates trauma, to the grave detriment of communities of color, most especially children and youth. This Part examines emerging public health research, which specifically acknowledges the link between anti-Black policing and criminal justice involvement and poor health outcomes for the individuals who experience them and argues that *minority childhood and adolescent exposure to aggressive policing and the criminal justice system are, in fact, Adverse Childhood Experiences that are actively contributing to an avoidable public health crisis within communities of color.*

A. *Childhood and Adolescent Exposure to Aggressive Policing*

Only within the last few years has clinical literature around ACEs begun to recognize the link between policing or criminal legal system involvement and negative health outcomes—usually under the category of “social disadvantage.”²⁴⁴ At the same time, there is a growing acknowledgment that communities of color are disproportionately exposed both to law enforcement and, therefore, violent police encounters.²⁴⁵ Further complicating matters is the well-established practice of solving such societal ills as mental illness, homelessness, and substance use disorders by criminalizing them, rather than addressing them through public health measures.²⁴⁶ The result is a self-perpetuating

244. See Boyd, Ellison, & Horn, *supra* note 9 (showing a few recent publications do connect police interactions and criminal justice involvement with increased anxiety and other negative mental health outcomes); Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2322 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4232139/>; Catherine D.P. Duarte et al., *Policy Determinants of Inequitable Exposure to the Criminal Legal System and Their Health Consequences Among Young People*, 110 AM. J. PUB. HEALTH S43, S45 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6987944/#bib8>; Ram Sundaresh et al., *Exposure to the U.S. Criminal Legal System and Well-Being: A 2018 Cross-Sectional Study*, 110 AM. J. PUB. HEALTH S116 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6987921/>.

245. See, e.g., Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L. J. 1479, 1483-84 (2016).

246. See *Addressing Law Enforcement Violence as a Public Health Issue*, Policy Statement No. 201811, AMERICAN PUBLIC HEALTH ASSOCIATION (Nov. 13, 2018), <https://www.apha.org/policies-and->

cycle that overproduces negative health outcomes which place disadvantaged communities at higher risk for over-policing and violent police encounters.

A number of factors specifically place Black Americans at heightened risk of exposure to aggressive, even violent, encounters with police. First are the social stereotypes that associate Blackness with danger and violence, creating implicit biases that become self-reinforcing for police officers.²⁴⁷ The resulting “perceived criminality” is a recognized driver of racial profiling.²⁴⁸ Second, frequent police contact increases the likelihood of arrest, which increases the likelihood that the officer may use force. Third, repeated exposure to police increases the potential for incarceration or other forms of criminal justice involvement. Fourth, more frequent police encounters expose Black men in particular to violence-producing insecurities where officers perceive threats to their authority or, in the case of male officers, to their masculinity. Fifth and finally, Black experiences with law enforcement as an ongoing feature of life may increase the likelihood of resisting police authority, asserting rights, or even fleeing in fear.²⁴⁹

A 2016 article published in *Pediatrics* discussed three specific types of police exposure that negatively impact children and adolescents of color: (1) exposure to racial profiling, (2) exposure to police violence, and (3) exposure to caregiver encounters with police.²⁵⁰ The authors of that article assert that symptoms of anxiety and trauma occur with greater frequency among young men who report frequent encounters with police, and the cumulative impact of such encounters “may lead to adverse adult health outcomes.”²⁵¹ Likewise, youth who are not subject to police violence but who nevertheless witness it often subsequently experience symptoms of Post-Traumatic Stress Disorder (“PTSD”), substance use disorders, poorer school performance, depression, worse health, and more frequent school disciplinary actions.²⁵² The third area of exposure deals with caregiver encounters with police that may or may not be directly witnessed and which create tragic fallout for families whose loved one is

advocacy/public-health-policy-statements/policy-database/2019/01/29/law-enforcement-violence [hereinafter, “Addressing Law Enforcement Violence”].

247. Carbado, *supra* note 245, at 1509-10. The more police officers interact with Black individuals in policing encounters that pose a perceived threat, the more the perceived threat gets reinforced—a phenomenon that one scholar calls a “stereotype entrenchment effect.” *Id.* at 1510.

248. See Boyd, Ellison, & Horn, *supra* note 9, at 2.

249. Carbado, *supra* note 245, at 1510-11.

250. Boyd, Ellison, & Horn, *supra* note 9, at 2. Notably, the article focuses its recommendations on interventions for clinicians, researchers, and community advocates to consider—not police or other actors within the criminal justice system.

251. *Id.*

252. *Id.* Not coincidentally, these outcomes are the same outcomes reported for individuals who experience traumatic experiences that are currently categorized as ACEs.

killed, injured, or incarcerated as a result of a police encounter. Without the affected caregiver's social and economic support, the family and community both suffer from the void created by that caregiver's absence.²⁵³ Section B of this Part discusses in greater detail the particular fallout associated with caregiver incarceration.

More recent research asserts that policing, as it is currently constituted, poses a much more direct threat to the lifelong health of communities of color.²⁵⁴ Direct, intrusive police encounters for Black and Hispanic youth begin at shockingly young ages—as young as eight—when children are developmentally primed for frightening law enforcement encounters to cause health-harming toxic stress.²⁵⁵ Even indirect, or “vicarious” encounters with law enforcement can negatively affect the health of those who experience their own personal vulnerability to police violence *by simply knowing someone who has been stopped*.²⁵⁶ The early age at which minority youth encounter police, combined with the developmental significance of adverse experiences that happen during youth, strongly support the assertion that minority encounters with police are and should be considered an ACE.²⁵⁷

These are not numbers or abstractions; these are real people whose trauma generates unimaginable suffering. When a police officer shoots a young Black man in the back, his death is an ACE for his teenage sister and brothers. When a police officer forcefully holds his knee to the neck of an unarmed Black man who begs for his mother as his life slips away, Black children are watching the horrifying video footage on the news and on social media, and those children experience an ACE by seeing someone who looks like them die at the hands of police. We have all seen it. When Officer Jeronimo Yanez of the St. Anthony, Minnesota Police Department, shot and killed Philando Castile—a Black man legally in possession of a firearm—during a routine traffic stop, Castile's girlfriend's four-year-old daughter was in the backseat.²⁵⁸ When Rickia Young unwittingly drove through an intersection near the scene of West

253. *Id.*

254. Amanda Geller, *Youth-Police Contact: Burdens and Inequities in an Adverse Childhood Experience, 2014-2017*, 111 AM J. PUB. HEALTH 1300 (2021), <https://ajph.apha.org/publications/doi/full/10.2105/AJPH.2021.306259>.

255. *Id.* at 1301, 1303.

256. *Id.* at 1301; see also Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 THE LANCET 304 (2018).

257. Geller, *supra* note 254, at 1300. Geller argues that police contact “warrant[s] consideration” as an ACE. We agree and further argue that the legal system must also recognize and address its own contributions and work with the public health community to implement evidence-based interventions to eliminate the trauma that it inflicts.

258. Mitch Smith, *Philando Castile's Girlfriend, Diamond Reynolds, Reaches \$800,000 Settlement*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/us/philando-castile-diamond-reynolds-settlement.html>.

Philadelphia police shooting that had happened just hours earlier, her two-year-old son witnessed police pulling Young and her sixteen-year-old nephew out of the car and beating them as he was taken by police and separated from his family for hours.²⁵⁹ Young reports that her toddler now bites his nails and pulls at his hair, and when asked about police, he bangs his fists and repeats what he heard officers yell that night: “Open door” and “f—cking door!”²⁶⁰

Far too often, children are themselves the very target—not just of intrusive police encounters but deadly ones. There are countless examples of non-lethal police violence involving Black children as young as six, nine, and ten who are handcuffed, pepper-sprayed, and body slammed.²⁶¹ But Tamir Rice was just twelve years old when he died at the hands of Officer Timothy Loehmann for playing in a park.²⁶² LaQuan McDonald was only seventeen years old when police shot him sixteen times as he walked away from the squad car.²⁶³ Angelo Crooms was just sixteen and Sincere Pierce was eighteen years old when Sheriff Deputy Jafet Santiago-Miranda shot and killed them just blocks from their homes.²⁶⁴

Being a victim of this violence and directly witnessing this violence is traumatic, in the classic sense of the term. But what about the trauma of living in a nation where this type of violence is happening to innocent people because they simply look like you? A recent study sponsored by the University of Pennsylvania found indications that exposure to nationally publicized police killings of unarmed Black Americans in the United States has a population-level impact on the mental health of African Americans.²⁶⁵ The study, entitled *Police Killings and Their Spillover Effects on the Mental Health of Black Americans*, found that exposure to such incidents may contribute to 1.7 additional poor mental health days per person per year, meaning a total of 55 million poor mental health days per person every year among Black Americans across the

259. Anna Orso, *He Was Petrified*, PHILADELPHIA INQUIRER (Dec. 3, 2020), <https://www.inquirer.com/news/a/walter-wallace-protests-philadelphia-police-brutality-suv-20201203.html>.

260. *Id.*

261. See, e.g., Nicquel Terry Ellis, *Black Girls Are Often Treated Like Adults in Police Encounters, Experts Say, Rochester Is Just One Example*, CNN, <https://www.cnn.com/2021/02/12/us/black-girls-dehumanized-rochester-police-incident/index.html> (last visited Feb. 5, 2022).

262. Shaila Dewan & Richard A. Opiel, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N. Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html>; See *supra* notes 101-103 and accompanying text.

263. Mitch Smith, *Chicago on Edge as Officer Who Shot Laquan McDonald 16 Times Faces Trial*, N. Y. TIMES (Sep. 4, 2018), <https://www.nytimes.com/2018/09/04/us/laquan-mcdonald-van-dyke.html>.

264. See Diaz & Levenson, *supra* note 104.

265. Jacob Bor et al., *supra* note 256.

United States.²⁶⁶

The link between childhood trauma for Black youth and police exposure—whether directly experienced, witnessed firsthand, or witnessed through social media and news accounts—is obvious. The consequences of such exposure—which compound poor health outcomes by creating achievement gaps in school,²⁶⁷ greater likelihood of school disciplinary action,²⁶⁸ and even increased risk of excess contact with the justice system²⁶⁹—are so serious that they cannot be overlooked if any meaningful progress is to be made in addressing the enormous human toll and costly health disparities that they create for Black individuals, families, and communities. Police exposure within communities of color involving children and youth must be assessed as and treated as adverse childhood experiences, and justice system participants—from police, to prosecutors, to public defenders, to judges—must assume a significant role in addressing them. This is not a problem that the healthcare sector can or should shoulder alone.

When it comes to caregiver encounters with police, encounters that result in that caregiver's incarceration—the only aspect of police exposure that has been considered an ACE since the outset of Felitti and Anda's groundbreaking study—deserves stand-alone consideration because of the sheer scale of incarceration of Black people in America. This next Section discusses the epidemic of mass incarceration as a major contributor to childhood trauma.

B. Criminal Justice System Involvement and Mass Incarceration

The U.S. incarcerates significantly more people than any other country in the world, locking up nearly 700 people for every 100,000 residents.²⁷⁰ Even individual states incarcerate more individuals per capita than entire other countries,²⁷¹ despite similar rates of criminality.²⁷² This epidemic of mass incarceration is a well-documented reality of modern American life and not one that has been occasioned by a concomitant rise in crime.

266. *Id.*; Tasha Williams, *Research Shows Entire Black Communities Suffer Trauma After Police Shootings*, YES! MAGAZINE (Aug. 3, 2018), <https://www.yesmagazine.org/health-happiness/2018/08/03/research-shows-entire-black-communities-suffer-trauma-after-police-shootings>.

267. Boyd, Ellison & Horn, *supra* note 129, at 2.

268. *Id.*

269. See Gloria Huei-Jong Graf, et al., *Adverse Childhood Experiences and Justice System Contact: A Systematic Review*, 147 PEDIATRICS 1, 2 (2021).

270. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POLICY INITIATIVE (June 2018), <https://www.prisonpolicy.org/graphs/2018.html>.

271. *Id.*

272. See *Crime Rate by Country 2022*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/country-rankings/crime-rate-by-country> (last visited Mar. 22, 2022).

Rather, it has been driven largely by the so-called “War on Drugs” waged by federal and state governments beginning in the 1970s and increasingly punitive sentences for various violent and non-violent offenses, including harsh mandatory minimum sentences for victimless drug crimes.²⁷³

As Michelle Alexander argues in her seminal book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, the phenomenon of mass incarceration—which was largely effectuated by the War on Drugs—is the result of intentional policies designed to serve as a new form of racial subjugation and social control of Black Americans in the wake of the demise of Jim Crow laws.²⁷⁴ It should be no surprise, then, that Black people are significantly overrepresented in prison populations such that the disparities cannot be explained away by racial disparities in the commission of crimes. Indeed, there is no plausible explanation for these disparities other than the perpetuation of racist stereotypes and racist policies at all levels of our criminal justice system.²⁷⁵

The reality of mass incarceration and its racial dimensions has not, to date, been factored into the sheer impact it has had on the innocent children who have been significantly disadvantaged as a result. The original CDC-Kaiser Permanente study identified parental incarceration as one of the ten primary adverse childhood experiences that leads to reduced life expectancy and worse health outcomes in adulthood. Parental incarceration is perhaps one of the most stigmatizing and damaging ACEs, in part because of its disproportionate impact on families of color and families living in poverty.²⁷⁶ Yet little research is focused on the “differential and contextual impacts of incarceration”—namely, incarceration in jail versus prison, incarceration of mothers versus fathers, frequency of incarceration, and federal versus state experiences with incarceration.²⁷⁷

We do know, however, that parental incarceration effectively creates a landslide of trauma for entire families. When children lose a parent to incarceration, they are not only deprived of a parent’s presence and love, they lose access to essential resources, including that parent’s financial

273. Leila Morsy & Richard Rothstein, *Mass Incarceration and Children’s Outcomes*, ECON. POL’Y INST. 1, 7 (2016) [hereinafter Morsy & Rothstein, *Mass Incarceration*.]

274. See generally ALEXANDER, *supra* note 8.

275. See Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>; see also Morsy & Rothstein, *Mass Incarceration*, *supra* note 273.

276. Andrew Axelson & Samantha Boch, *A Hidden Epidemic: Parental Incarceration and What to Do When It Affects Your Patients*, PEDIATRICS NATIONWIDE (Sept. 18, 2019), <https://pediatricsnationwide.org/2019/09/18/a-hidden-epidemic-parental-incarceration-and-what-to-do-when-it-affects-your-patients/>.

277. *Id.*

support.²⁷⁸ They are also at increased risk for suffering from depression, PTSD, anxiety, asthma, and migraines.²⁷⁹ Alarming, children of incarcerated parents also suffer three times as many additional ACEs, compounding the harm that they are already suffering.²⁸⁰ Such deprivation is particularly cruel when imprisonment serves no meaningful rehabilitative purpose.²⁸¹

Once released from prison, formerly incarcerated persons face state supervision, which is a significant ongoing contributor to re-arrest for technical violations. The resulting “badge of inferiority” that follows past offenders who have paid their debt to society imposes an effective life sentence, creating lifelong barriers to obtaining employment, housing, federal cash assistance, student loans, credit, food stamps, voting access, and community stability.²⁸²

It is also important to recognize the role that ACEs play in placing children and youth who experience trauma at greater risk for subsequent criminal justice involvement.²⁸³ Studies on the incidence of ACEs among adult incarcerated populations support the heartbreaking reality of a cruel, self-perpetuating intergenerational cycle of trauma and incarceration.²⁸⁴ “If having an incarcerated parent was classified as a chronic health condition,” say researchers Andrew Axelson and Samantha Boch, “it would be the second most prevalent chronic condition for children under the age of 18 in the United States.”²⁸⁵ The appalling disparities in the policing, arrest, and incarceration of persons of color discussed in Parts II and III—which are a central feature of the epidemic of mass incarceration—inflict massively disproportionate trauma on Black children, their families, and their communities.

The obvious role that mass incarceration plays in traumatizing entire communities of color must be factored into considerations of how this particular ACE is permanently devastating the health and life opportunities of minorities at a scale that almost certainly accounts for

278. *See id.*; *see also* Morsy & Rothstein, *Mass Incarceration*, *supra* note 273.

279. Boyd, Ellison & Horn, *supra* note 9, at 2.

280. Axelson & Boch, *supra* note 276.

281. Morsy & Rothstein, *Mass Incarceration*, *supra* note 273, at 13.

282. ALEXANDER, *supra* note 8, at 142-43; Boyd, Ellison & Horn, *supra* note 9, at 2; Graf et al., *supra* note 269, at 2.

283. Morsy & Rothstein, *Mass Incarceration*, *supra* note 273, at 6; *see also* Graf et al., *supra* note 269, at 4-5.

284. *See* Morsy & Rothstein, *Mass Incarceration*, *supra* note 273, at 12; Kat Ford et al., *Understanding the Prevalence of Adverse Childhood Experiences (ACEs) in a Male Offender Population in Wales: The Prisoner ACE Survey*, PUBLIC HEALTH WALES (2019), <https://phw.nhs.wales/files/aces/the-prisoner-ace-survey/>.

285. Axelson & Boch, *supra* note 276.

significant racial disparities at a population health level.²⁸⁶ Mass incarceration is nothing short of a stand-alone public health crisis, deserving the immediate attention of health care professionals, policy makers, and justice system actors, who should reform our criminal justice system to eliminate the racial bias that has allowed our carceral state to serve a functional role of racial subjugation. Incarceration as a tool for dispensing justice and rehabilitating offenders who engage in serious crimes should be used only when it is the least restrictive option available to protect society, and even then, should be done in a manner that eliminates racial bias, addresses underlying trauma that is rampant in prison populations, and maximizes opportunities for successful reentry by eliminating barriers to obtaining employment, housing, and other support that is essential for full participation in society.

To that end, it is incumbent upon justice system actors to undertake affirmative work, with the input and direction of public health experts, to reform the practices and structures within the justice system that are contributing to and causing ACEs and the resulting poor health outcomes. Following are a few solutions and reforms that the authors pose as a starting point.

V. PROPOSING SOLUTIONS AND REFORMS

A necessary and emerging body of clinical research now recognizes that a causal link exists between the policing of communities of color and toxic stress, both for adults and for the children who are either exposed or are the direct subjects of the encounters, as detailed above.²⁸⁷ Similarly, the research linking ACEs with higher risk of justice system involvement

286. See Annie Gjelsvik et al., *Adverse Childhood Events: Incarceration of Household Members and Health-Related Quality of Life in Adulthood*, 25 J. HEALTH CARE FOR POOR & UNDERSERVED 1169 (2014), <https://muse.jhu.edu/article/552192> (“Our study provides additional evidence that the epidemic of incarceration in the U.S. is one mechanism by which health disparities are perpetuated.”) Mos Def poignantly describes the impact of this disparity in *Mathematics*, from his debut album *Black on Both Sides*:

Stiffer stipulations attached to each sentence
 Budget cutbacks but increased police presence
 And even if you get out of prison still living
 Join the other five million under state supervision
 This is business, no faces just lines and statistics
 From your phone, your zip code, to SSI digits
 The system break man child and women into figures
 Two columns for who is, and who ain't ni**as
 Numbers is hardly real and they never have feelings
 But you push too hard, even numbers got limits
 Why did one straw break the camel's back? Here's the secret
 The million other straws underneath it, it's all mathematics

MOS DEF, *Mathematics*, on BLACK ON BOTH SIDES (Rawkus 1999).

287. See *supra* Section IV.B.

and the traumatic outcomes for incarcerated individuals, their families, and the community, is expanding. As a social determinant of health outcomes, trauma cannot be prevented or fully addressed by the medical community alone. Indeed, if the ACEs crisis is to be addressed and mitigated, the legal system must now play a key role in developing, researching, and implementing interventions to prevent trauma and build resilience for children and their communities that have experienced trauma. To that end, we urge the following approaches: (1) recognizing justice system exposure experienced by minority youth as an ACE, (2) reforming policing, (3) ending mass incarceration and unwinding the war on drugs, and (4) implementing judicial reform and training.

A. Researching and Recognizing Justice System Exposure Experienced by Black Youth as an Adverse Childhood Experience

Given the emerging empirical clinical research supporting a clear connection between criminal justice system exposure to Black children and youth, police exposure within communities of color involving children and youth should be considered ACEs worthy of funding and further study. The CDC's 2019 report, *Preventing Adverse Childhood Experiences (ACEs): Leveraging the Best Available Evidence*, which is full of reliable and well-researched best practices to reduce ACEs, leaves a glaring and inexcusable omission—the impact of structural racism in our nation's criminal justice system and the over policing practices that disproportionately and continuously traumatize people and communities of color.²⁸⁸ In fact, the word “police,” or the phrase “law enforcement” used to refer to the police, appear zero times in the report.²⁸⁹ The terms “mass incarceration” and “criminal justice” are not mentioned at all, and “systemic racism” appears a total of one time on page 7, not in a section detailing preventative measures. In a similar fashion, a 2018 report by the bipartisan National Conference of State Legislatures (NCLS) fails to recognize criminal justice and policing practices as direct causes of ACEs in communities of color. The report, entitled *Preventing and Mitigating the Effects of Adverse Childhood Experiences*, offers policy strategies for state legislators to consider that might build resilience for families, help parents reduce stress, and increase screening for ACEs.²⁹⁰

288. U.S. CENTERS FOR DISEASE CONTROL & PREVENTION, PREVENTING ADVERSE CHILDHOOD EXPERIENCES (ACEs): LEVERAGING THE BEST AVAILABLE EVIDENCE, <https://www.cdc.gov/violenceprevention/pdf/preventingACES.pdf> (last visited Mar. 3, 2021) [hereinafter “LEVERAGING THE BEST AVAILABLE EVIDENCE”].

289. *Id.*

290. Amber Bellazaire, *Preventing and Mitigating the Effects of Adverse Childhood Experiences*, NAT'L CONF. STATE LEGIS. (Aug. 2018).

These reports represent a failure of both of these entities in two primary ways. First, several of the proffered preventative strategies cannot be successful when systemic racism and the inequities in the criminal justice system and policing apparatuses are not first recognized, confronted, and eradicated. For example, any focus on enhancing parenting skills or supporting parents through the changing of social norms is meaningless if the parent of a child is incarcerated or was critically injured or killed at the hands of police. Similarly, working to build positive relationships within a community is futile if the community has a deep distrust of law enforcement, and any laws barring corporal punishment in schools is meaningless if the student who would benefit from the change is gunned down by police officers while playing in a park near his home. Second, the denial to recognize exposure to police interactions and encounters with the criminal justice system as an ACE for Black children is a failure because it is done so in the face of overwhelming evidence that suggests otherwise, especially in the case of the CDC report with the title claiming it is “leveraging the best evidence.”

The research and requisite empirical evidence needed to substantiate the claim that the criminal justice system and policing practices pose an ACE for Black children has been gathered primarily by non-profit organizations and academic institutions at the state and local level. In 2015, Justin Feldman of the *Harvard Public Health Review* wrote, “Policing is a critically important, but under-acknowledged determinant of health inequities.”²⁹¹ Feldman not only cited the 344,000 people in the U.S. against whom the police had used physical force or the 100,000 emergency room visits that such police force had prompted in 2013 but also pointed to the lesser-known health impact of policing practices, including the research indicating that stop-and-frisk programs induce post-traumatic stress in their Black and brown targets.²⁹² Feldman called on public health professionals to reshape the narrative surrounding police violence and other law enforcement practices that continuously harm the public’s health and deepen racial inequities.

In the same year as Feldman’s call to action, and on the heels of the deaths of Michael Brown, Eric Garner, Freddie Gray, Rekia Boyd, and Walter Scott, numerous health groups and organizations took the step in declaring that policing is linked to public health. The American Academy of Family Physicians endorsed community policing and stated that excessive police force “poses a serious ongoing public health issue that disproportionately affects minority communities;” the American Public Health Association released a statement recognizing that “police brutality

291. Justin Feldman, *Public Health and the Policing of Black Lives*, 7 HARV. PUB. HEALTH REV. 1 (2015).

292. *Id.*

and excessive use of force are widely reported and have disproportionate impact on people of color,” and there is significant morbidity and mortality associated with such events; the National Association of County and City Health Officials urged local health departments to frame “discriminatory police violence and the threat of violence in all communities as a public health issue associated with a legacy of social, economic, and racial injustice in urgent need of both a nationwide and local public health and community response.”²⁹³

As of the date of this publication, a bill is pending in Congress that will “support research and programmatic efforts that will build on previous research on the effects of adverse childhood experiences.”²⁹⁴ Filed by Rep. Lucy McBath (D - GA), a previous version of the bill died in Congress.²⁹⁵ Given the enormity of the public health crises that ACEs present and the associated costs to families, communities, and our health care system, bills like H.R. 7689 should be given top priority, and funding should be provided to fully research the impact of ACEs and interventions that can ameliorate the disparate and tragic long-term health outcomes that such trauma produces.

B. Reforming Policing

Police brutality and law enforcement traumatization of minority communities seems at times intractable and inevitable in today’s environment. Because law enforcement in the United States traces its evolution back to slave catchers and anti-Black control of freed Black bodies, rooting discrimination and race hatred out of American policing may appear unattainable. Still, in a nation that promises in its founding documents that “all” people are created equal, battling for equality and humane policing seems a mandatory call for those that believe in that equal promise. This call feels all the more mandatory when recognizing that American policing literally traumatizes Black children and families in ways that impact their future health outcomes and life expectancy.

When contemplating a rooting out of discrimination and anti-Blackness in U.S. law enforcement, glimmers of hope are available in cities where community problem-oriented policing has taken hold and significantly reduced crime, harassment, and police brutality against

293. Human Impact Partners, *Stress on the Streets (SOS): Race, Policing, Health, and Increasing Trust not Trauma*, 30 (Dec. 2015), https://humanimpact.org/wp-content/uploads/2017/09/FULL-REPORT_FINAL.pdf.

294. Improving Data Collection for Adverse Childhood Experiences Act, H.R. 7689, 116th Cong. (2nd Sess. 2020), at 1, <https://www.congress.gov/bill/116th-congress/house-bill/7689/text>.

295. *H.R. 7689 (116th): Improving Data Collection for Adverse Childhood Experiences Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr7689> (last visited March 12, 2021).

minority residents. Further hope can be seen in hundreds of other cities across the U.S. where a citizen complaint authority has been created or, similarly, citizen police oversight boards have been created, some with subpoena and discipline power, to review police action and provide oversight and direction to police chiefs.²⁹⁶ While evidence is mixed as to their effectiveness, a citizen complaint authority or similar citizen oversight board offers a community the opportunity to reform policing in concert with community norms and expectations.²⁹⁷

One example of this community-wide policing reform is in New Orleans' EPIC program, an acronym for "Ethical Policing is Courageous."²⁹⁸ EPIC's reforms are important because it is currently among the only programs developed to address police misconduct that has resulted in outcome data.²⁹⁹ Simply, EPIC is a peer intervention program that works to educate, empower, and support police officers through training aimed at reducing the use of excessive force and promoting high-quality ethical policing.³⁰⁰ The New Orleans Police Department recognizes EPIC as an "officer survival program, a community safety program, and a job satisfaction program."³⁰¹ The

296. See cummings, *Reforming Policing*, *supra* note 89, at 626-27; Alana Semuels, *How to Fix a Broken Police Department: Reforms Were Slow to Take Hold in Cincinnati, but When They Did, They Drove Down Crime While Also Reducing Arrests*, THE ATLANTIC (May 28, 2015), <https://www.theatlantic.com/politics/archive/2015/05/cincinnati-police-reform/393797/> (detailing the police transformation that has taken place in Cincinnati since 2008); see generally J.B. Wogan, *The New, More Powerful Wave of Civilian Oversight of Police*, GOVERNING (Feb. 27, 2017), <http://www.governing.com/topics/public-justice-safety/gov-police-civilian-oversight-oakland-seattle.html> ("In Oakland, Calif., police will soon answer to civilians newly entrusted with the power to discipline officers and fire the chief. Last November, the city's residents voted to create a civilian-run commission with a level of authority over law enforcement that is rare in this country.").

297. See Wogan, *supra* note 296 ("In its present form, civilian oversight usually doesn't guarantee a meaningful check on police. Some places only have a passive agency that receives and reviews citizen complaints but has little independence or authority over the police department. Others have an auditor that can proactively investigate and make public recommendations about systemic issues. But regardless of their structure, most commissions can't force the department to adopt their advice."); Charles Blain, *What Does Actual Police Reform Look Like? More Training and More Oversight*, THE HILL (July 5, 2017, 2:20 PM), <http://thehill.com/blogs/pundits-blog/crime/340699-what-does-actual-police-reform-look-like-more-training-and-more> ("Out of 18,000 police departments in the country, only about 200 have an independent or civilian oversight board. Most major cities have one to review civilian complaints against officers and recommend disciplinary actions to administration officials or the chief, but not all are provided the same scope or authority. Independent oversight boards are valuable, public trust in the outcome of investigations on officer-involved shootings directly impacts the community's response. All too often internal investigations result in justification for a shooting and communities are left feeling as though justice was not served.").

298. NEW ORLEANS POLICE DEPARTMENT, ETHICAL POLICING IS COURAGEOUS, <http://epic.nola.gov/home/> (last visited March 12, 2021).

299. Elizabeth Thompson & Joan Kaufman, *Prevention, Intervention, and Policy Strategies to Reduce the Individual and Societal Costs Associated with Adverse Childhood Experiences (ACEs) for Children in Baltimore City*, ABELL FOUNDATION 12 (Dec. 2019).

300. NEW ORLEANS POLICE DEPARTMENT, *supra* note 298.

301. *Id.*

outcome data that the EPIC program has produced, like the data produced in the original ACEs study, is shocking. After training its officers in the EPIC program, the NOPD saw a 93 percent drop in the use of serious force, a 34 percent increase in positive interactions between police and those in the community, fewer complaints against officers, and a drop in the city's homicide rate to a 47-year low.³⁰² In fact, EPIC has been so successful in New Orleans that observers in other cities are calling for its implementation in their own police departments.³⁰³

Additional courage may be taken when considering that numerous police academies across the nation employ a cultural bias training program that challenges new hires to confront their own biases while learning about the history of racism and discrimination against people of color in U.S. policing. Various use of force type projects being adopted across the country suggest that if police forces will adopt careful policies in connection with using a gun against the citizens they are charged to protect, then significant reduction in citizen and police injury is attainable. If police training is fundamentally reformed in police academies across the country, requiring de-escalation and Hierarchy of Force training, then perhaps a new day may come where police officers are trained to cool down tense situations instead of adding fuel, which is often the case, to already heated scenarios.³⁰⁴

If there is a new found political will to value and preserve human life above all else, then reforming policing in the United States is imaginable. Reform efforts must focus both on who is hired to become police and how those new recruits are trained to police their communities. Both hiring and training must change drastically. A further reform must focus on changing the retention policies of national police departments that close the revolving door of failed police officers finding new law enforcement jobs after engaging in unfit and even deplorable conduct. This revolving door must be forever locked. We can also change the law as a primary reform effort, reframing “use of deadly force” away from the “fear for life” standard and toward a standard of valuing human life above all else.³⁰⁵ Finally, police agencies across the nation must accept and embrace demilitarization. Tanks, battering rams, flashbang grenades, tear gas, and military-style raids must become a thing of the past. Without doubt, military style policing through its siege mentality is antithetical to community based problem-oriented policing.³⁰⁶

302. Thompson & Kaufman, *supra* note 299, at 12.

303. *Id.* at 25.

304. See cummings, *Reforming Policing*, *supra* note 89, at 627.

305. See cummings, *Lord Forgive Me But He Tried to Kill Me*, *supra* note 95.

306. See cummings, *supra* note 89; see also Megan Quattlebaum et al., *Principles of Procedurally Just Policing*, THE JUST. COLLABORATORY AT YALE L. SCH. (Jan. 2018),

If in fact these reform efforts are adopted, then it is possible that the anti-Black foundation that continues to actualize American policing can be rooted out and a new, humane policing model can emerge.

C. *Ending Mass Incarceration*

Much has been written about the epidemic of mass incarceration in the U.S. Specifically, researchers have focused on the numerous forces that created it and now uphold it as an institution and the enormity of the effort that would realistically be required to dismantle it. Further, they have discussed ways to replace it with a system of criminal justice that eliminates its primary function as an instrument of racial subjugation and accomplishes the ultimate goals of dispensing justice through evidence-based interventions that rehabilitate offenders and actually reduce crime and recidivism.³⁰⁷ Such an effort would necessarily be broad in scope and involve action on the parts of a variety of fronts. As such, any comprehensive discussion of the overarching goal of ending mass incarceration is beyond the scope of this Article. Instead, we intend to highlight the most pressing actions that our legal system must take in order to make a meaningful contribution toward addressing what is perhaps the most pressing public health crisis of our time. As a starting point, the authors recommend (1) unwinding the War on Drugs, (2) mitigating ACEs through prosecutorial discretion, (3) reducing re-incarceration for technical violations of parole and probation, (4) expanding problem-solving courts as a means of addressing underlying mental illness and substance abuse problems, and (5) eliminating the churn of low-level misdemeanor cycles of court debt.

1. Unwinding the War On Drugs

The War on Drugs has crushed communities of color across the U.S. to the tune of hundreds of billions of dollars per year and millions of citizens of color locked up. The War on Drugs failed to reduce drug abuse or the harm from drug abuse. The War on Drugs inspired police brutality and incentivized gang violence. The War on Drugs unleashed a torrent of ruthless military style policing on poor urban citizens. The War on Drugs wasted trillions in government funds. Consequently, no obvious economic harm or loss would result from ending this “war,” and many

https://law.yale.edu/sites/default/files/area/center/justice/principles_of_procedurally_just_policing_report.pdf; CAMPAIGN ZERO, <https://www.joincampaignzero.org/#vision> (last visited Feb. 6, 2022).

307. See, e.g., ALEXANDER, *supra* note 8; *Ending Mass Incarceration: Ideas From Today's Leaders*, BRENNAN CENTER FOR JUSTICE (Inimai Chettiar & Priya Raghavan, eds., 2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_EndingMassIncarceration_2.pdf.

benefits would arise from diverting the trillions spent on drug war prohibition to productive investment in those decimated communities. Ending the War on Drugs can free resources to assist the victims of the racist “war” in rebuilding their lives. Critically, the colossal scale of the harm caused by the War on Drugs means that any anti-racist goals must begin with unwinding its abysmal impact.³⁰⁸

Defederalization and delegation of regulatory power to the states to determine the best means of controlling drug abuse and addiction is the best means of achieving the end of drug prohibition and ending the War on Drugs. Currently, the federal government imposes a one-size-fits-all solution to drug abuse when state specific experimentation likely will yield the optimal approach given each state jurisdiction’s cultural norms and preferences. A new age of regulatory and legal innovation must displace the draconian War on Drugs with all its annihilation of human potential. State and municipal drug regulation competition will test each jurisdiction’s approach to ending the War on Drugs through experimentation that will likely include drug decriminalization, marijuana legalization, health care treatment options, and with tax revenues, new commercial opportunities with social justice in the balance.³⁰⁹

Unwinding the harm from the War on Drugs poses the best opportunity for social justice progress in the United States precisely because of the disparate impact of the War on Drugs on communities of color. Ending the racist War on Drugs potentially closes the through line that runs from slavery to convict leasing and black codes to Jim Crow to lynching to mass incarceration and ultimately offers an unbiased justice system, once and for all. This effort funds itself. Pursuit of this goal to end the War on Drugs involves neither racially disparate impact nor a racial classification. Expungement, community reinvestment, treatment instead of incarceration, community policing instead of subsidized brutality, could operate to fundamentally break-down the nation’s gnawing racial hierarchy. Immediately ending and unwinding the War on Drugs therefore must be a first step in mitigating the trauma that envelopes communities of color throughout the nation.³¹⁰

2. Mitigating ACEs Through Prosecutorial Discretion

American prosecutors have been described by experts as “the most powerful officials in the criminal justice system, bar none.”³¹¹ This power

308. See cummings & Ramirez, *Roadmap for Antiracism*, *supra* note 90, Part IV.

309. See *id.*

310. See *id.*

311. POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 178 (Angela J. Davis ed., 2017).

manifests itself in the form of prosecutorial discretion, a term used to describe the autonomy prosecutors have in the charging decisions and plea negotiation process regarding criminal defendants, as carefully described above.³¹² Prosecutors could be instrumental in reforming the criminal justice system and transforming it into a system that promotes public trust, strengthens families, and reduces crime, thus resulting in less ACEs, if they use their vast discretion provided to them in a manner that promotes a more holistic view of community safety. Prosecutors, through their tremendous degree of discretion, can use the power granted to them in the criminal justice system to make decisions and implement policies that work to reduce the prevalence and impact of ACEs in communities of color by becoming more transparent and accountable to the community, incentivizing prosecutors who make holistic decisions that reflect community safety, and implementing policies through an ACEs lens.

Prosecutors can unilaterally decide to make their offices more transparent. Kim Foxx, State's Attorney for Cook County, Illinois (Chicago), is known for saying, "You can't fix what you can't measure," promoting the idea that transparency in prosecutorial data leads to a higher degree of prosecutorial accountability.³¹³ Foxx acted on this premise in the spring of 2018 when, in an unprecedented move, she released seven years of data on felony cases, urging those in her office, field experts, and the public to analyze and criticize the information.³¹⁴ The data clearly showed that prosecutors in Foxx's office were wasting resources by overcharging for non-violent felonies like small-dollar shoplifting. This prosecutorial transparency led to prosecutorial action, as Foxx used this data to implement a policy that stopped her office's prosecution of the charge of shoplifting for amounts less than \$1,000.³¹⁵ As a guest on *Chasing Justice*, a podcast on criminal justice reform, Foxx explained that the State of Illinois's low threshold of what constituted felony shoplifting—a mere \$300—amounted to the most recommended charge for prosecution in Cook County (disregarding drug cases).³¹⁶ In a year where Cook County had 760 murders and more than 4,000 people shot, Foxx stated that she could not justify to her constituents the amount of resources her office was diverting to minor shoplifting cases when such violence was wreaking havoc in the streets.³¹⁷ This policy, derived from

312. See *supra* Part III.

313. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

314. *Id.*

315. *Prosecutorial Discretion*, CHASING JUSTICE, *supra* note 167.

316. *Id.*

317. *Id.*

the principle of transparency, helped decrease Chicago's prison population, as the drop in twenty-five percent was driven in part by the release of those being detained for small dollar shoplifting.³¹⁸ Prosecutors who embrace transparency and accountability will be in a much better position to make decisions dictated by data, leading to more beneficial outcomes for the community at large.

Prosecutors have the unique ability to transform the very definition of what law and order, safety, and justice mean for a community. Prosecutors are charged with ensuring that the criminal justice system protects the rights of all involved—victims, communities, and defendants.³¹⁹ Prosecutors can make decisions and implement policies that do not seek punitive justice and focus solely on the number of convictions but instead seek to build and sustain communities, protect victims, families, children, and defendants, and ensure that the outcome in every case is as equitable and just as practicable. For example, in an attempt to root out and overturn wrongful convictions, prosecutors' offices in numerous jurisdictions have established independent review boards and conviction integrity units (CIUs), which are divisions within prosecutors' offices that review older cases and identify and remedy wrongful convictions.³²⁰ As of July 2020, the work of sixty such units in twenty states and the District of Columbia have collectively been responsible for more than 400 exonerations since 2002.³²¹ This culture shift can be as simple as an office rewarding its assistant prosecutors that do not bring cases they ought not bring and those who exercise sound judgment and discretion in the advancement of community safety.³²²

This shift in prosecutorial culture and priorities is being led in large part by newly elected progressive prosecutors that are themselves the victims of childhood adversity. Chesa Boudin, the new district attorney for San Francisco, grew up with both of his parents incarcerated for their role in a botched heist of an armored car that left two police officers and the truck driver dead.³²³ In his brief tenure as district attorney to date, Boudin has implemented several policies aimed at decreasing the amount of incarcerated San Franciscans, such as refusing to charge or prosecute cases that are based solely on the testimony of police officers who have a

318. *Id.*

319. Joyce White Vance, *Want to Reform the Criminal Justice System? Focus on Prosecutors*, TIME (July 7, 2020), <https://time.com/5863783/prosecutors-criminal-justice-reform/>.

320. *Id.*

321. *Id.*

322. *Prosecutorial Discretion*, CHASING JUSTICE, *supra* note 166.

323. Allan Smith, *Parents Guilty of Murder and Raised by Radicals, Chesa Boudin Is San Francisco's Next District Attorney*, NBC NEWS (Dec. 16, 2019), <https://www.nbcnews.com/politics/elections/parents-guilty-murder-raised-radicals-chesa-boudin-san-francisco-s-n1101071>.

record that includes serious allegations of misconduct.³²⁴ Rachael Rollins, district attorney for Suffolk County, Massachusetts (Boston) since 2019, grew up with two of her siblings incarcerated.³²⁵ Her first day on the job, Rollins issued a “do not prosecute list” of fifteen types of offenses such as trespassing, shoplifting, and drug possession. Rollins has also created and invested in diversion programs as an alternative to incarceration to effectively decriminalize poverty, addiction, and mental illness.³²⁶ Kim Foxx is a survivor of sexual assault and abuse that occurred when she was just four and seven years old.³²⁷ As Cook County’s elected prosecutor, Foxx worked to lobby to pass a new law that allows evidence after a rape to be collected at health clinics in addition to emergency rooms, arguing that sexual assault survivors may not go to an emergency room after an attack because of the threat of getting sick.³²⁸ Foxx’s office also brought on a Labrador Retriever named Hatty as a facility dog to comfort and ease the anxiety of child survivors of sexual assault and domestic violence.³²⁹ Foxx believes that her experience, her trauma, makes her a more compassionate, responsive, and effective prosecutor: “When you have that lived experience, and you get power and opportunity to do something about it, that you can’t shrug [that responsibility] off.”³³⁰

Prosecutors using the powerful discretion imbued in them in an anti-racist and intentional way can literally change the way the criminal justice system works and begin to mitigate the trauma that this system has historically inflicted upon Black children and families.

3. Reducing Re-Incarceration for Technical Violations of Parole and Probation

Parole, which is the early release of an inmate subject to compliance with certain conditions, and probation, which is a non-prison sentence that similarly applies conditions, were once thought to be mechanisms for

324. Vance, *supra* note 319.

325. Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, THE GUARDIAN (July 23, 2019), <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty>.

326. *Id.*

327. Wendell Hutson, *Kim Foxx Seeks A Second Term to Continue Fighting For Equal Justice For All*, CHICAGO DEFENDER (Mar. 12, 2020), <https://chicagodefender.com/kim-foxx-seeks-a-second-term-to-continue-fighting-for-equal-justice-for-all/>.

328. Chuck Goudie et al., *Coronavirus Illinois: Sexual Assault Survivors Seeking Justice During the COVID-19 Pandemic Now Have More Options*, ABC CHICAGO 7 NEWS (June 11, 2020), <https://abc7chicago.com/coronavirus-covid-19-sexual-assault-illinois/6243728/>.

329. State’s Attorney Kim Foxx, *To Tackle Violence, It Is Vital that We Reckon with Race*, CHICAGO SUN TIMES (Dec. 7, 2020), <https://chicago.suntimes.com/2020/12/7/22160123/kim-foxx-institutional-racism-system-racism-chicago-violence-states-attorneys-office>.

330. *Prosecutorial Discretion*, CHASING JUSTICE, *supra* note 167, at 33:48.

reducing prison populations and helping those formerly incarcerated to succeed. Instead, researchers have found that these strategies have the absolute opposite effect.³³¹ Nearly one in four new prison admissions nationally are attributable to violations of supervision conditions, often contributing significantly to high recidivism rates.³³²

Re-arresting formerly incarcerated persons for technical violations does nothing to rehabilitate that person or to ensure public safety. Why send someone back to prison for failing to get a job when they are unable to find any employer who will hire an applicant with a criminal record? Why arrest someone dealing with an after-hours family emergency with violating a curfew? Such arrests are costly for states, which spend nearly \$2.8 billion annually to deal with technical violation supervision.³³³ Finally, children of those who are re-arrested for technical violations are forced to endure one or more additional periods of traumatic separation from a parent, compounding the loss that they have already endured.³³⁴ Such trauma surely has costly consequences for those children who are again deprived of the support and connection of the incarcerated parent.

States should reform their laws to eliminate incarceration as a consequence for technical violations and instead redirect resources to evidence-based programs for ex-offenders that (1) support education, employment, and housing; (2) provide comprehensive substance abuse treatment and mental health services; and, (3) shift the burden of paying supervision-related costs from the ex-offender to the state. These investments are almost surely less expensive than the ultimate cost of re-incarcerating individuals and addressing the costs of trauma-related healthcare.

4. Expanding Problem-Solving Courts as a Means of Addressing Underlying Mental Illness and Substance Abuse Problems

Problem-solving courts, which first emerged in the mid-1990s before the science of ACEs emerged, divert defendants convicted of crimes to rehabilitation-oriented programs, rather than putting them in prison. Such

331. See *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets*, COUNCIL OF ST. GOV. JUST. CTR. (June 18, 2019), <https://csgjusticecenter.org/publications/confined-costly/>. These conditions typically include missing appointments with probation or parole officers, failing drug tests, missing curfews, and failing to obtain employment. *Id.* See also Carrie Pettus-Davis & Stephanie Kennedy, *Going Back to Jail Without Committing a Crime: Early Findings from a Multi-State Trial*, INSTIT. FOR JUST. RSCH. AND DEV. – FLA. ST. UNIV., at 3 (Feb. 2020), https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/Going_Back_to_Jail.pdf.

332. See *Confined and Costly*, *supra* note 331, at 1.; Pettus-Davis & Kennedy, *supra* note 330.

333. See *Confined and Costly*, *supra* note 331, at 1.

334. Pettus-Davis & Kennedy, *supra* note 331, at 15.

courts typically consist of a team that includes a judge, attorneys, and clinical professionals who work with the defendant to develop a case plan with therapeutic elements that address the root cause of the behavior that landed the defendant in the criminal justice system.³³⁵ These courts typically address such issues as substance abuse, mental illness, domestic violence, homelessness, and prostitution.³³⁶

Problem-solving courts have been shown to be effective in reducing recidivism, particularly when they incorporate trauma-informed practices into their operation.³³⁷ Such practices may include respectfully communicating with the defendant in a way that doesn't invoke victim-blaming, providing explanations about how the hearing will go, and allowing a party to approach the bench when providing information about sensitive issues.³³⁸

Problem-solving courts have already gained widespread acceptance around the U.S., with more than 3,000 actively operating.³³⁹ The authors recommend putting additional resources into expanding problem-solving courts as a means of diverting criminal defendants from incarceration and ensuring that all court teams in these courts receive training in trauma-informed practices. The National Center for State Courts maintains a repository of best practices and other information helpful to the establishment and expansion of this model.³⁴⁰

5. Eliminating the Churn of Low-Level Misdemeanor Cycles of Court Debt

When imprisonment is substituted for evidence-based interventions designed to address the root causes of poverty, mental illness, substance abuse, racial bias, and other social disadvantages, the result is a revolving door of repeated stints of incarceration with no intervention for the

335. See Finkel, *supra* note 6.

336. *Id.*

337. See *id.*

338. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (SAMHSA), ESSENTIAL COMPONENTS OF TRAUMA-INFORMED JUDICIAL PRACTICE (2013), https://www.nasmhpd.org/sites/default/files/DRAFT_Essential_Components_of_Trauma_Informed_Judicial_Practice.pdf.

339. Paul A. Haskins, *Problem-Solving Courts: Fighting Crime by Treating the Offender*, 281 NAT'L INST. JUST. J. 1, 1 (Sept. 26, 2019), <https://nij.ojp.gov/topics/articles/problem-solving-courts-fighting-crime-treating-offender>.

340. *Problem-Solving Courts*, NATIONAL CENTER FOR STATE COURTS, <https://www.ncsc.org/services-and-experts/areas-of-expertise/problem-solving-courts> (last visited Feb. 6, 2022).

underlying cause.³⁴¹ A 2019 report from the Lawyers Committee for Civil Rights Under Law indicates that people of color, as well as those who are poor or disabled, are disproportionately impacted by court costs, fines and fees associated with minor misdemeanor offenses.³⁴² “Legal financial obligations (LFOs),” as these financial obligations are often called, often relegate impoverished debtors to a life sentence of debt.³⁴³

The U.S. Department of Justice Investigation into municipal court practices in Ferguson, Missouri, following the fatal police shooting of Michael Brown in 2014 found that there were 32,975 outstanding arrest warrants for mostly low-level misdemeanor traffic violations in a city with a population of only 21,135.³⁴⁴ The practice of imposing such fines and fees—and at rates that disproportionately impact minority populations—has been a widespread practice across the country.³⁴⁵ Funds generated from the imposition of LFOs are often utilized to fund correction system costs and municipal budgets.³⁴⁶

Because LFOs often serve to punish poverty, without any meaningful impact on public safety, the authors recommend that the imposition of LFOs as a form of punishment be accompanied by ability-to-pay assessments for affected defendants and that states affirmatively work to restructure state budgets so that courts do not rely on revenue from fines, fees, and costs to fund their operations. The current reliance of so many court systems across the country on revenues generated by the imposition of LFOs creates inherent conflicts of interest for courts and should therefore be divorced from budgetary considerations and incorporated into state budgets so courts do not have to rely on revenues generated by court activity to operate.

341. Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems*, PRISON POLICY INITIATIVE (Aug. 2019), <https://www.prisonpolicy.org/reports/repeatarrests.html>.

342. Myesha Braden et al., *Too Poor to Pay: How Arkansas’s Offender-Funded Justice System Drives Poverty & Mass Incarceration*, LAWYERS’ COMM. FOR CIV. RTS. UNDER L. 23-24 (Mar. 20, 2019), available at <https://perma.cc/UPP6-HQVJ>.

343. Alana Semuels, *The Fines and Fees That Keep Former Prisoners Poor*, THE ATLANTIC (July 5, 2016), <https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026/>.

344. Joseph Shapiro, *In Ferguson, Court Fines and Fees Fuel Anger* (Aug 25, 2014), NPR: All Things Considered, <https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger>.

345. *Id.*; see also RACIALLY CHARGED: AMERICA’S MISDEMEANOR PROBLEM (Brave New Films, 2021).

346. Semuels, *supra* note 343; see also Braden et al., *supra* note 342, at 4.

D. Judicial Reform and Training, Including Adding ACE Instruction as Sentencing Mitigation

Approximately twenty-five years ago, Judge Michael L. Howard and Robin R. Tener wrote one of the first scholarly articles applying ACE research to the criminal justice system in the context of juveniles.³⁴⁷ Thus, the idea that we advance here is not a novel idea in a general sense; however, it is novel to a certain extent. We argue that judges recognize that the Black experience with law enforcement is an ACE which should have a meaningful impact on how judges exercise discretion in the judicial process toward Black defendants. In 2014, the American Bar Association (“ABA”) adopted a specific Policy on Trauma-Informed Advocacy for Children and Youth that provides an instructional foundation for how to re-conceptualize the judiciary in regard to dealing with Black defendants. In summary, this policy provided that:

Trauma-informed systems of care recognize the issue of children’s trauma and seek to mitigate it through evidence-based practices. It is crucial for lawyers and judges who work with children and youth to be aware of trauma and trauma-informed practices. Law school clinics, continuing legal education programs and training, trauma-informed court initiatives, child welfare and juvenile justice initiatives, and cross-systems collaborations are promising approaches to raising awareness about trauma and its impact on children and youth. A trauma-informed approach should also include awareness of secondary trauma and its impact on attorneys and judges who interact with traumatized children and youth.³⁴⁸

As a first step, it is imperative to educate the judiciary about the reality that the Black experience with law enforcement is, in fact, an ACE. By educating judges about this reality, trauma-informed judges are created who can approach and administer justice to Black defendants from a more informed vantage. Training trauma-informed judges has the capacity to (1) inspire meaningful modifications to the court system to encourage a more just legal experience for Black defendants, and (2) encourage judges to adopt solution-oriented approaches to administering justice to avoid traditional approaches that further traumatize ACE-experiencing Black defendants. By making judges aware, they can think collaboratively about how to promote greater levels of fairness in the court experience for Black defendants.

Additionally, consistent with the research cited in this Article detailing

347. See Cynthia G. Hawkins & Taylor Scribner, *Serving-Up the ACE: Understanding Adverse Childhood Experiences (“ACE”) in Dependency Adoption Through the Lens of Social Science*, 54 U. MICH. J. L. REFORM CAVEAT 1 (2020).

348. See *ABA Policy on Trauma-Informed Advocacy for Children & Youth*, AMERICAN BAR ASS’N 15 (Feb. 10, 2014), https://www.americanbar.org/content/dam/aba/administrative/child_law/ABA%20Policy%20on%20Trauma-Informed%20Advocacy.authcheckdam.pdf.

how Black defendants receive more severe sentences than their white counterparts, another way to balance this disparity is by providing for an ACE jury instruction or modification in state and federal sentencing guidelines, to allow juries and/or judges to impose lesser sentences for Black defendants that have had previous negative experiences with law enforcement. Providing such an instruction or sentencing modification could effectively balance the unequal sentencing experiences that Black defendants encounter in the criminal justice system. These changes in the judiciary have the capacity to offer a viable solution to at least some of the inequality Black defendants experience. More importantly, the position we advance has a strong foundation given the overwhelming support of a trauma-centered approach in dealing with juveniles.

CONCLUSION

Clinicians are just beginning to recognize the role that criminal justice involvement, through police encounters and mass incarceration, plays in generating negative health outcomes for individuals and communities of color. The clear connection between the pervasiveness of these encounters, the lasting trauma that they inflict, and the associated racial disparities in health outcomes is nothing short of a public health crisis that demands our immediate attention. Police encounters affecting Black children and adolescents should be recognized as an Adverse Childhood Experience. Black defendants interfacing with the criminal justice system and all of its attendant inequities should be recognized as an Adverse Childhood Experience.

While the origins of the research into the connections between police encounters, criminal justice system exposure, and negative health have been clinical, the root causes of this trauma lie far beyond the reach of health care professionals. Its status within the legal system necessitates that actors within the legal system—from police to prosecuting attorneys and public defenders to judges—understand their role and affirmatively work, with the benefit of evidence-based research, to eliminate the childhood traumas that the legal system and its criminal justice system create.