

## TRAUMA INFORMED JUVENILE JUSTICE

Samantha Buckingham\*

### JOAN'S STORY<sup>1</sup>

*At thirteen-years-old, Joan was all of 4'6" and weighed eighty-five pounds soaking wet. One day, while on the way home from school, Joan walked up and hit a woman in public. She did this again and again. Each time, she hit a different woman and then left. Joan was arrested and charged with multiple counts of misdemeanor and felony assaults in juvenile delinquency court. I became Joan's public defender.*

*Joan was born in extreme poverty to an alcoholic, crack-addicted mother. Joan was addicted to crack at birth and experienced withdrawal in her first breaths of life. Joan's mother had struggled due to her own mental health issues, abuse she had suffered, poverty, and addictions. Joan's father, a frequent philanderer, was in and out of her mother's and Joan's life. Both of Joan's parents had contact with the criminal justice system. Joan was exposed to extreme violence and abuse in her early life. She saw and heard her mother being raped. She saw her mother maliciously burned. She saw her mother running naked through the streets in her neighborhood. Joan's peers frequently taunted her about her mother's behavior. Joan lived in a neighborhood plagued by violence.<sup>2</sup> At ten-years-old, Joan was left*

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1. At the end of the day, the criminal justice system impacts real people. Joan's story is one I will share to humanize what would otherwise be abstract policy arguments. Although Joan is not her real name, every detail of this story is real and unchanged.

2. See MICHELLE EVANS-CHASE, ADDRESSING TRAUMA AND PSYCHOSOCIAL DEVELOPMENT IN JUVENILE JUSTICE-INVOLVED YOUTH: A SYNTHESIS OF THE DEVELOPMENTAL NEUROSCIENCE, JUVENILE JUSTICE, AND TRAUMA LITERATURE 747 (2014) (warning that "as a youth experiences repeated victimizations and/or exposures to violence," their chances of justice system involvement due to self-protective behavior increases "exponentially"); THE INT'L JUSTICE PROJECT, THE IMPACT AND IMPLICATIONS OF TRAUMA AND ABUSE 3 (2002) (noting that seventy-five percent of children studied in areas with a high concentration of poverty and correspondingly high rates of crime had witnessed a murder, robbery, stabbing or shooting while thirty-nine percent had witnessed a stabbing or shooting, and almost twenty-five percent had witnessed someone being killed. Overall, forty-five percent of the youth studied witnessed more than one violent crime). For a description of the type of regular

*alone for several weeks to care for several younger siblings, including one sibling who was developmentally disabled. Early childhood records indicated that Joan came to school without adequate clothing and was hungry. Joan was a child who should have been identified as a neglected child by the dependency system as well as a child in need of special education services due to her emotional needs, but she was not.*

*Joan had behavior problems in school.<sup>3</sup> She was excluded from school by the age of thirteen and sent to a public school that was a dumping ground for problem youth.<sup>4</sup>*

*In the opinion of a psychiatrist who evaluated Joan, she hit the women because she was angry with her mother for abandoning her. Joan herself was unaware of this connection and unable to express her anger in any other way.*

*Ten years later, Joan would acknowledge for the first time in her life that she was repeatedly raped from the ages of six to twelve by her father's best friend. The rapes occurred with both her parents' knowledge and frequently in her parents' bed while her parents were present, a revelation which provides insight into the extent and depth of Joan's anger at thirteen.*

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violence to which children are exposed, see NPR's "This American Life" two-part series on Harper High School in Chicago. Harper High had twenty-seven current or former students shot, eight of whom were killed, in 2012. See 487: *Harper High School, Part One*, THIS AMERICAN LIFE (Feb. 15, 2013), <http://www.thisamericanlife.org/radio-archives/episode/487/harper-high-school-part-one>. Part two of the series points out that most murders in Chicago happen in public places like parks and streets. In 2011, eighty-two percent of murders were in public. Many of the teens at Harper High School say that they personally have seen someone being shot. See 488: *Harper High School, Part Two*, THIS AMERICAN LIFE, (Feb. 22, 2013), <http://www.thisamericanlife.org/radio-archives/episode/488/harper-high-school-part-two>.

3. See KRISTINE BUFFINGTON, CARLY B. DIERKHISING & SHAWN C. MARSH, THE NAT'L CHILD TRAUMATIC STRESS NETWORK, TEN THINGS EVERY JUVENILE COURT JUDGE SHOULD KNOW ABOUT TRAUMA AND DELINQUENCY 7 (2010), [http://www.ncjfcj.org/sites/default/files/trauma%20bulletin\\_1.pdf](http://www.ncjfcj.org/sites/default/files/trauma%20bulletin_1.pdf) (discussing how traumatic experiences can impact a child's school performance).

4. Children who present behavior problems are frequently expelled, subjected to out of school suspensions, or forced to transfer to another school, usually a continuation school or a special school for children with behavior problems. Ghettoizing children who experience difficulties in school and preventing them from receiving the same access to education as other children with fewer challenges has a negative stigmatizing impact. Indeed, research has shown that segregating children with antisocial peers can increase antisocial behavior. David Osher et al., *How Can We Improve School Discipline?*, 39 EDUC. RESEARCHER 48, 48 (2010). Ironically, in Washington, D.C., the 'alternative' school for the suspended, expelled, or disciplinarily transferred students is called "CHOICE Academy." *Alternative High Schools*, DISTRICT OF COLUMBIA PUBLIC SCHOOLS (Nov. 20, 2013), <http://dcps.dc.gov/alternatives>. The NAACP has said of the School-to-Prison Pipeline that "the punitive and overzealous tools and approaches of the modern criminal justice system have seeped into our schools, serving to remove children from mainstream educational environments and funnel them onto a one-way path toward prison . . ." Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, FORUM ON PUBLIC POLICY 1 (2009), <http://files.eric.ed.gov/fulltext/EJ870076.pdf>; see Samantha Buckingham, *A Tale of Two Systems: How Schools and the Juvenile Justice System Are Failing Kids*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 179 (2013) for a discussion of the school-to-prison pipeline and the specific problem of ghettoized schools for students who, like Joan, present with behavior problems.

*Joan re-offended at age sixteen and was charged in adult criminal court.<sup>5</sup> A much older man threatened Joan with a weapon. An undiagnosed and untreated post-traumatic stress disorder (“PTSD”) sufferer, Joan was triggered by the threat—a traumatic reminder—and responded violently. As a result of this offense, sixteen-year-old Joan was incarcerated in an adult facility and was locked in a cell for twenty-three hours a day, ostensibly for her own protection because she was the only child.<sup>6</sup> Corrections staff sprayed sixteen-year-old Joan in the eyes with pepper spray as a means of control.<sup>7</sup> The corrections officers who were charged with Joan’s care were not specially trained in dealing with children, the population of children charged as adults, trauma sufferers, or the mentally ill.<sup>8</sup>*

*Joan reported that she felt as though solitary confinement was being used to punish her. She felt that time passed extremely slowly.<sup>9</sup> Joan felt hopeless and scared.<sup>10</sup> Joan hoarded medication she received and attempted suicide.<sup>11</sup> During her incarceration, a defense expert diagnosed Joan with bipolar disorder and*

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5. Children prosecuted in Washington D.C. could face charges in adult criminal court for specific enumerated offenses. D.C. Code §16-2301(3) (2016) (excluding from the jurisdiction of the Family Division, through definition of the term “child,” persons under eighteen but sixteen or older charged with specified offenses); see also Joshua T. Rose, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes On Juvenile Justice*, 41 BRANDEIS L. J. 977, 993 (2003) (“[J]uveniles adjudicated in the adult system . . . are more likely to suffer the terrible consequences of being incarcerated in adult facilities . . .”). Recently, a number of jurisdictions have begun to raise the age of juvenile transfer to adult court. For instance, in Illinois, Governor Quinn signed HB 2404 into law on July 8, 2013. The law amended the Illinois Juvenile Court of 1987 to raise the age of juvenile court jurisdiction from seventeen to eighteen. In other jurisdictions, like the states of New York and North Carolina, the age of adult court jurisdiction is sixteen years of age for all offenders, regardless of the severity of the charge. After previous efforts to raise the age of adult court jurisdiction in New York had failed, the Governor’s Commission on Youth, Public Safety & Justice recommended in January 2016 that the state raise the age to eighteen. See Gary Gately, *Gov. Cuomo Commish: New York State Should Raise the Age to 18*, JUVENILE JUSTICE INFORMATION EXCHANGE (Jan. 19, 2015), <http://jjie.org/gov-cuomo-commish-new-york-state-should-raise-the-age-to-18/108242>.

6. See Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons*, 38 J AM. ACAD. PSYCHIATRY & L. 104, 104–08 (2010) for a discussion of how solitary confinement is inappropriate for anyone with mental health issues.

7. Joan was housed in an adult facility. Even at juvenile facilities, correction staff employ harsh means of control. See NELL BERNSTEIN, *BURNING DOWN THE HOUSE* 92–93 (2014) (noting that, according to an investigation at one juvenile facility, 272 youth were sprayed with chemical weapons, such as pepper spray, by corrections officers in the course of just one month at a single facility, averaging ten children per day at one facility).

8. See *id.* at 96 (referencing interview with Vincent Schiraldi, former head of Washington D.C.’s Department of Youth and Rehabilitative Services, who described “staff malaise and depression” as pervasive when describing the Oak Hill juvenile detention facility and stated that Oak Hill “reeked of apathy”); see JESSICA FEIERMAN & LAUREN FINE, *JUVENILE LAW CTR., TRAUMA & RESILIENCE: A NEW LOOK AT LEGAL ADVOCACY FOR YOUTH IN THE JUVENILE JUSTICE & CHILD WELFARE SYSTEMS* 29 (2014), <http://www.jlc.org/resources/publications/trauma-and-resilience> (recommending that staff receive trauma training).

9. See JAMES AUSTIN ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT* 25 (2000), <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf> (“What may be acceptable as punishment for adults may be unacceptable for children. Children have a very different perception of time (five minutes may seem like an eternity), and their capacity to cope with sensory deprivation is limited.”).

10. See BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 4 (discussing how already traumatized children subjected to solitary confinement may feel “powerless, worthless, fearful and alone”).

chronic PTSD.<sup>12</sup> Joan remained incarcerated until she was in her mid-twenties<sup>13</sup>.

At no point during Joan's juvenile or criminal court supervision and not in all the many years of her incarceration was she afforded specialized trauma-specific therapy.<sup>14</sup> Joan was released from prison in her mid-twenties without the tools and skills she needed to navigate the basics of life. At times, Joan has been suicidal, expressing that she would rather die than go back to any government facilities because they only harm instead of help. Joan experienced many obstacles to continuing her education and getting a job with a criminal record. Joan has been homeless, has lived on and off with the same issue-ridden mother, and, due to poverty, has consistently lived in dangerous neighborhoods in which she has seen shootings and has been robbed at gunpoint. At times Joan feels overwhelmed, unable to cope with life's daily challenges, and she has misinterpreted the positive intentions behind the actions of those around her.

#### INTRODUCTION

Joan suffered from multiple exposures to trauma, also called adverse childhood experiences, including sexual abuse, neglect, abandonment, poverty, exposure to violence in her home, parental incarceration, and exposure to violence in her community.<sup>15</sup> Though many of Joan's traumatic experiences were known, the full extent of her exposure to trauma was never identified while a child in both the juvenile and adult criminal justice systems. Without proper identification and with limited treatment options, Joan was never afforded the interventions and protections we would hope she could receive at an early age. Instead she was transferred

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11. For a discussion of how solitary confinement can exacerbate mental health conditions, see Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report*, U.N. Doc. A/66/268 (Aug. 5, 2011) [hereinafter *Interim Report*], at 15-17. For a discussion of the increased incidence of suicide amongst juveniles see Metzner & Fellner, *supra* note 6, at 105 ("Suicides occur disproportionately more often in segregation units than elsewhere in prison."); AUSTIN ET AL., *supra* note 9, at 7-8 ("Research has shown that juveniles in adult facilities are at much greater risk of harm than youth housed in adult facilities. The suicide rate for juveniles held in jails is five times the rate in the general youth population and eight times the rate for adolescents in juvenile detention facilities.") (citation omitted); see also BERNSTEIN, *supra* note 7, at 131 (quoting the American Academy of Child and Adolescent Psychiatry's 2012 policy statement: "the potential psychiatric consequences of prolonged solitary confinement are well recognized and include depression, anxiety and psychosis. Due to their developmental vulnerability, juvenile offenders are at particular risk of such adverse reactions. Furthermore, the majority of suicides in juvenile correctional facilities occur when the individual is isolated or in solitary confinement."); see *id.* at 133-34 (noting examples across the U.S. of the prevalence and practice of juvenile solitary confinement).

12. Though Joan had experimented with some substances, she adamantly refused to touch crack because of her experience growing up with a crack-addicted mother.

13. This is also a story about resources and access to justice. I was a public defender at PDS, a well-resourced office with caseload limits that enabled attorneys to visit clients regularly, develop relationships, have consistency of representation, and meet the force of the allegations against her with unparalleled access to investigative, psychological, and other advocacy resources.

14. Joan did receive medication.

15. EVANS-CHASE, *supra* note 2, at 745.

to adult court and repeatedly incarcerated, experiences which only added to the trauma she experienced.

When, at thirteen-years-old, Joan hit the unknown woman, her behavior was a manifestation of the childhood trauma she experienced. It was a cry for help. Yet the juvenile justice system did not respond with assistance. She was blamed and found culpable. Her trauma was never fully understood. As a result, neither the prosecution nor the court could consider her trauma as a mitigating factor to reduce or nullify her responsibility for the hitting. In the opening statement at Joan's trial, the prosecutor described Joan as a "depraved soul." The prosecutor got it dead wrong. Instead of being a lost cause at just thirteen-years-old, Joan's offending was an indication that she was traumatized and provided an opportunity for intervention that could have set her on the path to recovery and rehabilitation.

Youth is a period of tremendous opportunity for learning, growth, and transformation. The brain's plasticity—its ability to change in response to experience—is at its peak during adolescence, a period that is currently defined as spanning from twelve through the mid-twenties.<sup>16</sup> Joan's story is a cautionary tale. It demonstrates both the consequences of missed opportunity to promote pro-social development with appropriate treatment, and the high stakes for community safety when child trauma sufferers are not afforded the care they deserve. Children in the juvenile justice system suffer from trauma at extremely high rates. A recent study found that ninety-three percent of youth in an urban detention facility had experienced at least one traumatic experience in the past year, and more than half of those youth reported "witnessing violence as the precipitating trauma."<sup>17</sup> The prevalence of trauma for youth in the juvenile system requires a critique of contemporary system responses. A trauma-informed system of care engages young people and families with histories of trauma by recognizing their trauma symptoms and appreciating the significance of trauma in their lives. A trauma-informed approach to juvenile justice is one which takes into account the traumatic experiences youth have endured when responding to their behavior, recognizing reduced culpability when trauma is an underlying cause of a child's offending, and promoting resiliency for youth and families.

Trauma is frequently an underlying cause of offending behavior.<sup>18</sup> A traumatic experience is one that threatens a person's life, safety, and well-being, overwhelm-

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16. LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE*, 5, 8–11 (2014) (referring to adolescence as the period between ten to twenty-five years of age and explaining how adolescence rivals ages zero to three in peak neuroplasticity).

17. KAREN M. ABRAM ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *PTSD, TRAUMA, AND COMORBID PSYCHIATRIC DISORDERS IN DETAINED YOUTH 10–12* (2013), <http://www.ojjdp.gov/pubs/239603.pdf>.

18. See THE INT'L JUSTICE PROJECT, *supra* note 2, at 1 (stating that the causal link between abuse, trauma, and the commission of a violent act should be offered in mitigation to provide information to explain how the crime came to be committed); see also BERKELEY CTR. FOR CRIMINAL JUSTICE, *GENDER RESPONSIVENESS AND EQUITY IN CALIFORNIA'S JUVENILE JUSTICE SYSTEM* 5 (2010), [https://www.law.berkeley.edu/img/Gender\\_Responsiveness\\_](https://www.law.berkeley.edu/img/Gender_Responsiveness_)

ing the sufferer's ability to cope.<sup>19</sup> Trauma ranges in types and can include being the victim of physical or sexual abuse, observing violence perpetrated against someone close, experiencing a deprivation of needs, witnessing community violence, to something as commonplace as being involved in a car accident.<sup>20</sup> Trauma may result from a single event or from repeated exposures to multiple types of trauma. Some common symptoms of trauma exposure are nightmares, flashbacks, the inability to cope, hyper-arousal, misinterpretation of cues, over-reaction, self-harm, fight or flight, and disassociation. Trauma exposures may lead to the development of PTSD, chronic trauma, or complex trauma.<sup>21</sup>

Without proper identification and treatment, trauma sufferers, like Joan, can be ticking time bombs bound to respond to triggers and to misinterpret events, sometimes responding violently, even to mundane events in their daily lives.<sup>22</sup> The prevalence of trauma exposure amongst juvenile justice system involved youth creates an imperative to respond. If endowed with trauma-informed reforms, the juvenile justice system would be poised to identify and appropriately respond to the many traumatized children who come to its attention early enough to make a difference.

The good news is that when trauma is identified and treated with appropriate trauma-specific methods, childhood trauma sufferers can heal, overcome their trauma, and grow in positive ways. Trauma-informed reforms should capitalize on the resilience children possess.<sup>23</sup> Traumatic disorders are not new; however, contemporary understanding of disorders and co-existing mental health conditions

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and\_Equity.pdf ("Physical, sexual, and emotional abuse inflicted on adolescent and pre-adolescent females can lead them to act out their psychological trauma criminally. Prior victimization appears to be linked to subsequent violent behavior in girls.") (internal citations omitted).

19. BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 3.

20. See Eric Holder, Attorney General, Attorney General Eric Holder Speaks at Defending Childhood Task Force Public Meeting (Nov. 29, 2011), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-defending-childhood-task-force-public-meeting>. During his remarks, Eric Holder stated that:

In 2009, . . . the Justice Department released findings from the National Survey on Children Exposed to Violence—the most comprehensive survey, to date, on the extent of violence, crime, and abuse in children's lives. Research showed that the majority of our kids—more than 60 percent of them—have been exposed to violence, crime, and abuse. These patterns of violence can take many forms—from pushing, hitting, and bullying, to witnessing or experiencing gun, knife, gang, domestic, or sexual violence. And they aren't limited to any one region, community, or demographic group. Exposure can happen at home, in the streets, during school, or on the Internet . . .

*Id.*

21. See *infra* Section I.

22. See generally KATHLEEN J. MOROZ, VT. AGENCY OF HUMAN SERVS., THE EFFECTS OF PSYCHOLOGICAL TRAUMA ON CHILDREN AND ADOLESCENTS 4–8 (2005), [http://mentalhealth.vermont.gov/sites/dmh/files/report/cafu/DMH-CAFU\\_Psychological\\_Trauma\\_Moroz.pdf](http://mentalhealth.vermont.gov/sites/dmh/files/report/cafu/DMH-CAFU_Psychological_Trauma_Moroz.pdf) (describing the hyperarousal/hypervigilance that leads traumatized individuals to violence).

23. FEIERMAN & FINE, *supra* note 8, at 4.

has recently become much more sophisticated and nuanced.<sup>24</sup> In recent years, there have been many innovations in trauma-focused treatment.<sup>25</sup> Unfortunately, the juvenile justice system has not caught up with the contemporary understanding of trauma's impact on offending and the latest best practices for treatment of trauma. Specifically, the juvenile justice system fails to accurately identify trauma and often employs counter-productive responses to juvenile offending, such as removal from the home, programming and treatment that is general rather than trauma-specific, and the over-use of detention.

Poor youth of color are the children who suffer the greatest from the current failure to incorporate a trauma-focused response in the juvenile justice system. The unique vulnerabilities of youth of color receive special attention in this Article, examining the particulars of their trauma exposure and over-representation at each stage of the juvenile justice system.<sup>26</sup> Nowhere is the harsh treatment of poor youth of color more salient than when examining rates of incarceration. Although youth of color represent only one-third of the general population of adolescents in the U.S., they are two-thirds of the adolescent population incarcerated in state and local facilities throughout the country.<sup>27</sup> With African American youth, their disproportionate entanglement with the justice system compared to their representation in the overall population is the most profound.<sup>28</sup> In this way, the treatment of minority youth parallels a larger trend within the U.S. of incarcerating minority adults at disproportionately high rates.<sup>29</sup>

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24. Interview with Doctor Stephanie Marcy, PhD, Psychologist and Assistant Professor of Pediatrics, Children's Hospital Los Angeles (January 28, 2015).

25. *Id.*

26. See generally ANNIE E. CASSIE FOUND., RACE MATTERS: UNEQUAL OPPORTUNITIES FOR JUVENILE JUSTICE (2006), <http://www.aecf.org/resources/race-matters-unequal-opportunities-for-juvenile-justice/>; EILEEN POE YAMAGATA & MICHAEL A. JONES, NATIONAL COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM 37 (2007), [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/justice-for-some.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf).

27. ANNIE E. CASSIE FOUND., *supra* note 26, at 3; see also BERNSTEIN, *supra* note 7, at 59 (noting that while youth of color are thirty-eight percent of the youthful population in the U.S., they are seventy-two percent of the children who are incarcerated).

28. See generally YAMAGATA & JONES, *supra* note 26.

29. The American criminal justice system treats offenders of different races and socio-economic statuses differently. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 209–48 (2010). Perhaps one of the bleakest statistics is that one in three Black men in America today are under some form of court supervision—whether that is incarceration in prison or jail, probation or parole. *Id.* at 9; see PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008), [http://www.pewtrusts.org/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/onein100pdf.pdf](http://www.pewtrusts.org/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf). For instance, one in nine black males between the ages of twenty and thirty-four is incarcerated, and one in every fifteen black males aged eighteen or older is in prison or jail. *Id.* at 6–7. In 2009, 40% of the male inmates in state and federal prison or local jail were black, and 21% were Hispanic. HEATHER C. WEST, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES, 20 tbl. 17 (2010), <http://www.bjs.gov/content/pub/pdf/pim09st.pdf>. In addition, 61% of Hispanics and 49% of blacks in the United States are likely to be low-income. *Id.*

Reliance on incarceration does not meet the needs of youth offenders who have suffered trauma. Indeed, it exacerbates trauma and is counterproductive to long-term community safety goals.<sup>30</sup> This Article argues that in the youthful offender context, reflexive reliance on incarceration should be replaced by a trauma-informed approach to achieving justice. Trauma-based reforms must be fashioned with a special eye towards protecting, rather than exacerbating, the unique vulnerability to overly harsh punishment that plagues youth of color due to inherent racial bias.<sup>31</sup>

A contemporary understanding of trauma must permeate the juvenile justice system through its framework, inform the mindset of all of its participants, and drive all reforms. This Article proposes four trauma-informed reforms: (1) create a presumption of trauma, (2) mandate trauma identification of youth in the juvenile justice system, (3) implement trauma-informed procedures, and (4) utilize trauma-informed dispositions, which will dramatically reduce our over-reliance upon incarceration in favor of safe-settings in the community. The benefit to a trauma-informed approach is long-term community safety and a significant reduction of the current population of juvenile inmates.<sup>32</sup>

In Section I, this Article examines the intersection of childhood trauma and offending. The experience of trauma, and childhood trauma in particular, is pervasive amongst the population of children in the juvenile system. Section II situates trauma within the developmental framework youth.<sup>33</sup> The Supreme Court has held that advancements in science informing how young people behave and why this science must have an impact in our treatment of youth in our juvenile and criminal courts. Section III explains how current justice system interventions fail to identify and constructively respond to trauma sufferers. Section IV sets out principles for trauma-informed justice reform. In particular, the prevalence of trauma exposure in the juvenile justice population calls for a presumption of trauma suffering. This Article will raise and address some challenges to trauma-

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30. Incarceration itself is a traumatic event and should be avoided. *See generally* SUE BURRELL, THE NAT'L CHILD TRAUMATIC STRESS NETWORK, TRAUMA AND THE ENVIRONMENT OF CARE IN JUVENILE INSTITUTIONS (2013), [http://www.njjn.org/uploads/digital-library/NCTSN\\_trauma-and-environment-of-juvenile-care-institutions\\_Sue-Burrell\\_September-2013.pdf](http://www.njjn.org/uploads/digital-library/NCTSN_trauma-and-environment-of-juvenile-care-institutions_Sue-Burrell_September-2013.pdf).

31. Incarceration is not responsive to developmental science, it does not promote rehabilitation, and it is costly. Samantha Buckingham, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 815 (2013); FEIERMAN & FINE, *supra* note 8, at 1 (discussing the importance of squarely addressing racial biases in the context of trauma because of the risk of "incorrectly implying that youth of color are system-involved because of family problems rather than system biases").

32. CARLOS A. CUEVAS ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION CHILDREN'S EXPOSURE TO VIOLENCE AND THE INTERSECTION BETWEEN DELINQUENCY AND VICTIMIZATION (2013), <http://www.ojjdp.gov/pubs/240555.pdf>.

33. The category of youthful offenders who are the focus of this Article includes those under the age of eighteen, regardless of whether their cases are processed in the juvenile or adult criminal justice system. While it is beyond the scope of this Article, a trauma-informed approach to the adult criminal justice system would have incredibly positive opportunities for growth and rehabilitation of emerging adults.



informed reforms, including how to educate players in the system, accurately identify trauma, and reallocate resources.

## I. CHILDHOOD TRAUMA AND YOUTHFUL OFFENDING

*“When you recognize from the bench a lifetime of trauma in the delinquent acts of a teenager, you have become part of the solution.”*

— Eric Holder, former Attorney General and former judge<sup>34</sup>

### A. What is Trauma

#### 1. Trauma Defined

Trauma is an experience that threatens a person’s life, safety, or well-being, overwhelming the ability to cope.<sup>35</sup> Childhood exposures to trauma can cause changes in a child’s brain and body, including the over-production of stress hormones, the impeding of neural pathway maturation, and the experience of traumatic or toxic stress on the body.<sup>36</sup> Studies show that child abuse leads children to process social information dysfunctionally.<sup>37</sup> These social processing difficulties, such as heightened threat sensitivity, encountered by children who are abused, have a neural link.<sup>38</sup> Furthermore, economically disadvantaged children are more likely to suffer the stress of exposure to community and family violence and poverty, contributing to maladaptive development and social functioning.<sup>39</sup>

Trauma is experienced uniquely by each individual based on personal strengths and susceptibilities. The experience of trauma is also impacted by age, gender, racial and cultural identity, and developmental stage.<sup>40</sup> In response to a traumatic event, a child may develop symptoms and one or more trauma-related conditions. These conditions are labeled because each diagnosis is used to describe the behavioral manifestations of the sufferer’s traumatic exposure and form the basis for treatment recommendations. In addition to causing trauma disorders, trauma experiences also increase the likelihood of a co-existing mental health condition.<sup>41</sup>

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34. BERNSTEIN, *supra* note 7, at 166 (quoting Eric Holder’s comments at a task force for defending children in Baltimore in November 2011).

35. BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 3.

36. NAT’L CTR. FOR MENTAL HEALTH PROMOTION & YOUTH VIOLENCE PREVENTION, CHILDHOOD TRAUMA AND ITS EFFECT ON HEALTHY DEVELOPMENT 3 (2012); FEIERMAN & FINE, *supra* note 8, at 3–4.

37. See generally Kenneth A. Dodge et al., *Social Information-Processing Patterns Partially Mediate the Effect of Early Physical Abuse on Later Conduct Problems*, 104 J. ABNORMAL PSYCHOL. 632–43 (1995).

38. Eaman J. McRory et al., *Heightened Neural Reactivity to Threat in Child Victims of Violence*, 21 CURRENT BIOLOGY R947-R448 (2011) (explaining that when children who have been exposed to violence are shown images of angry faces, those children experience neural changes revealing heightened sensitivity or over-response to the perceived threat. Indeed, prolonged exposure to violence and danger “recalibrates the neural responsiveness”).

39. Dodge et al., *supra* note 37, at 633.

40. See generally FEIERMAN & FINE, *supra* note 8.

41. See generally ABRAM ET AL., *supra* note 17.

Perhaps the most well-known trauma condition is PTSD. PTSD is a disorder that occurs after exposure to even just one acute trauma and is characterized by a hyper-aroused state of fear usually lasting more than six months.<sup>42</sup> An acute trauma is a single traumatic event, and an acute trauma may range from experiences such as being in a car accident to observing a shooting.<sup>43</sup> Not all acute traumas are followed by PTSD; the response will depend on the individual and will vary with the age and developmental stage of children. Some individuals who have experienced an acute trauma will suffer from Acute Stress Disorder, which is limited in duration to a short time after the event.<sup>44</sup> The traumatic event precipitating Acute Stress Disorder or PTSD can be one that is directly experienced, witnessed, or learned about because it happened to a friend or family member.<sup>45</sup>

PTSD is associated with hypervigilance, an abnormally enhanced state of arousal, over-reaction to stimuli, and a constant attentiveness to potential threats in the sufferer's environment.<sup>46</sup> Those suffering from PTSD may respond violently with little or no provocation.<sup>47</sup> Sufferers may experience a lack of trust in authority figures as well as themselves, they may be avoidant, and they may be self-destructive, prone to self-harm and extreme risk-taking.<sup>48</sup> PTSD sufferers experience clinically cognizable distress in their social relationships, work, and other areas of life resulting in an inability to cope.<sup>49</sup> When provided with a traumatic reminder—"any person, situation, sensation, feeling or thing that reminds the [sufferer] of a traumatic event"—the sufferer may flashback to the same intense and disturbing feelings that characterized his or her original experience of the trauma.<sup>50</sup>

When exposed to trauma in multiple facets of life, there is an increased risk for both chronic trauma and complex trauma. Chronic trauma occurs when several and often different types of trauma impact a child—such as domestic violence in the home, a car accident, community violence, and longstanding emotional and/or physical abuse and neglect.<sup>51</sup> Complex trauma is a term that refers to the exposure to chronic trauma and the immediate manifestations of that long-term exposure to repeated trauma.<sup>52</sup>

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42. *Id.* at 2; BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 3; NAT'L JUVENILE DEFENDER CTR., WHAT JUVENILE DEFENDERS SHOULD KNOW ABOUT THE DSM-5 7 (2014), <http://njdc.info/wp-content/uploads/2014/07/NJDC-DSM-5-FINAL.pdf>.

43. BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 3.

44. NAT'L JUVENILE DEFENDER CTR., *supra* note 42, at 8.

45. *Id.* at 7.

46. BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 3–4; NAT'L JUVENILE DEFENDER CTR., *supra* note 42, at 7.

47. NAT'L JUVENILE DEFENDER CTR., *supra* note 42, at 7.

48. *Id.*

49. *Id.*

50. BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 3.

51. *Id.*

52. *Id.*

For youth of color and other vulnerable youth from marginalized groups, experiencing racism can itself be a form of stress.<sup>53</sup> In popular culture, youth are bombarded with images that youth of color are prone to violence and anti-social behavior.<sup>54</sup> Youth of color are over-represented at every stage of the juvenile justice system.<sup>55</sup> Young black males with learning disabilities are the most likely children to be suspended from school, expelled, and referred to delinquency court for the prosecution of school-based behavior.<sup>56</sup> When youth see that they are a part of a group that is disproportionately punished, whether its exclusion from school, arrest, or detention, they feel that unfairness and it threatens their positive sense of what they can achieve.<sup>57</sup> The impacts of structural racism are apparent to children in marginalized communities.<sup>58</sup> When youth see that people of color are entangled

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53. JOHN RICH ET AL., DREXEL UNIV. CTR. FOR NONVIOLENCE AND SOCIAL JUSTICE, HEALING THE HURT: TRAUMA-INFORMED APPROACHES TO THE HEALTH OF BOYS AND YOUNG MEN OF COLOR 4 (2009), [http://www.issueab.org/resource/healing\\_the\\_hurt\\_trauma\\_informed\\_approaches\\_to\\_the\\_health\\_of\\_boys\\_and\\_young\\_men\\_of\\_color](http://www.issueab.org/resource/healing_the_hurt_trauma_informed_approaches_to_the_health_of_boys_and_young_men_of_color) (describing the “exposure to discrimination, racism, oppression, and poverty” that impacts young men of color as an “insidious” form of trauma); THE NAT’L CHILD TRAUMATIC STRESS NETWORK, PRELIMINARY ADAPTATIONS FOR WORKING WITH TRAUMATIZED LATINO/HISPANIC CHILDREN AND THEIR FAMILIES 4 (2007), [http://www.nctsn.org/nctsn\\_assets/pdfs/culture\\_and\\_trauma\\_brief\\_v2n3\\_LatinoHispanicChildren.pdf](http://www.nctsn.org/nctsn_assets/pdfs/culture_and_trauma_brief_v2n3_LatinoHispanicChildren.pdf) (describing the need to assess youth of color for trauma suffering due to racism); see also FEIERMAN & FINE, *supra* note 8, at 12.

54. Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 419–20 (2013) (“Pervasive stereotypes suggest that youth of color are prone to violence and crime, are not in school, are unwilling to work, and are likely to be incarcerated at some point in their lives.”); Tamar Birkhead, *Towards a Theory of Procedural Justice For Juveniles*, 57 BUFF. L. REV. 1447, 1498 (2009) (discussing the image of the juvenile super-predator). There are a plethora of images on television and in the news of blacks as criminals. Blacks are four times as likely as whites to be seen in mugshots. Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, F. ON PUBLIC POLICY 3 (2009), <http://files.eric.ed.gov/fulltext/EJ870076.pdf>. See generally Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 887 (2004).

55. ANNIE E. CASEY FOUND., *supra* note 26, at 3.

56. See David Osher, Darren Woodruff & Anthony E. Sims, *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, in RACIAL INEQUITY IN SPECIAL EDUCATION 93, 97 (Daniel J. Losen & Gary Orfield eds., 2002). Nationwide, twelve percent of students have recognized disabilities, and of those students, nineteen percent are African American boys. DEP’T OF EDUCATION OFFICE FOR CIVIL RIGHTS, DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>. Further, African American students are three times more likely to be suspended or expelled than white students. *Id.* at 3.

57. See CLAUDE M. STEELE, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 52–53 (2010) (explaining that a stereotype threat, or stigma pressure, is a force that causes an individual to worry about conforming to expected negative norms for an aspect of one’s social identity); see also BERNSTEIN, *supra* note 7, at 67 (quoting incarcerated children who responded to questions about how they believed others saw them using terms like “‘dirtbag,’ ‘fuckup,’ ‘lazy,’ ‘worthless,’ ‘lower than the low’”).

58. Crime rates are usually higher in economically depressed areas. See Paul A. Jargowsky, Scott A. Desmond & Robert D. Crutchfield, *Suburban Sprawl, Race, and Juvenile Justice*, in OUR CHILDREN, THEIR CHILDREN 167–201 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds. 2005). Poverty and racial segregation co-exist because of structural forces. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 83–114 (1998). When entire neighborhoods are associated with crime and incarceration, residents have more barriers to employment and reduced economic opportunity. Dorothy Roberts notes that this experience affirms the three main harms of mass incarceration to Black

and punished by the juvenile and criminal justice systems at a higher rate than their white peers, those children come to believe that the justice system is not fair, dis-incentivizing them to follow laws in the future.<sup>59</sup>

While children in all communities experience trauma, some traumatic experiences are more or less common along color lines.<sup>60</sup> For example, white youth are at higher risk for suicide and alcohol abuse, while both African American and Latino youth are much more likely to witness a shooting, bombing, or riot.<sup>61</sup> Latino youth are twice as likely as both white and African American youth to suffer a traumatic loss, neglect, or experience violence in their community.<sup>62</sup> African American youth are more likely than any other group to be victims of homicide.<sup>63</sup>

Even for offenses committed at greater frequencies by white youth, children of color still enter the juvenile justice system at disproportionately high rates in relation to their percentage of the general population.<sup>64</sup> Children often enter the delinquency system from poor performing public schools and with a history of child welfare system involvement.<sup>65</sup> In this way, the shortcomings and failures of public systems are funneling children into the delinquency and adult criminal systems. Even where rates and types of behavior are similar across racial lines, children and families of color, especially those of lower socio-economic status, are most likely to come under the control of public systems of supervision, such as the departments of child welfare and mental health.<sup>66</sup> When children become involved in state systems of care, the involvement alone can be a sufficiently traumatizing experience, especially when children are separated from their loved ones.<sup>67</sup> In the context of the school-to-prison pipeline, experts contend that unconscious bias and racism are strong factors contributing to the overly harsh application of exclusion-

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communities: damage to social networks, distortion of social norms, and destruction of social citizenship, leaving the community members disenfranchised and unable to contest unjust policies. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1294, 1300 (2004).

59. Birkhead, *supra* note 54, at 1478 (stating that “unfair treatment triggers negative reactions, anger, and defiance of the law’s norms”); David R. Arredondo, *Child Development, Children’s Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL’Y REV. 13, 27 (2003); *see also* Henning, *supra* note 54, at 453 (noting that individual and community dissatisfaction with procedural justice can lead to both cynicism and disrespect for the law, and harsh punishments seem to have the opposite effect of that intended, particularly when it comes to poor communities of color who are disproportionately impacted).

60. FEIERMAN & FINE, *supra* note 8, at 5.

61. *Id.* at 12.

62. ROBERT L. LISTENBEE, JR. ET AL., REPORT OF THE ATTORNEY GENERAL’S TASKFORCE ON CHILDREN EXPOSED TO VIOLENCE 180 (2012), <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>.

63. FEIERMAN & FINE, *supra* note 8, at 5 n.23.

64. ANNIE E. CASSIE FOUND., *supra* note 26, at 9.

65. *See* Hui Huang, Joseph P. Ryan, & Denise Herz, *The Journey of Dually-Involved Youth: The Description and Prediction of Rereporting and Recidivism*, 34 CHILDREN & YOUTH SERVICES REV. 254, 254 (2012).

66. YAMAGATA & JONES, *supra* note 26, at 37; FEIERMAN & FINE, *supra* note 8, at 5, n.34.

67. FEIERMAN & FINE, *supra* note 8, at 12.

ary sanctions to marginalized students.<sup>68</sup> In the context of child welfare system involvement, experts warn that disproportionate rates of child removal from families and communities of color raise concerns about race and class bias.<sup>69</sup>

## 2. *Co-existence of Trauma and Other Conditions, Disorders, and Syndromes*

Individuals suffering from trauma exposure present with symptoms associated with a number of psychiatric conditions, disorders, and syndromes that can co-exist with the trauma diagnosis itself. Amongst PTSD sufferers in juvenile detention, one study found that about four-fifths had at least one additional disorder.<sup>70</sup> Those who suffer with co-existing conditions are at risk for misdiagnosis of the underlying traumatic condition that has presented as a disorder. For instance, trauma may be incorrectly and incompletely diagnosed as depression, attention deficit hyperactivity disorder (“ADHD”), oppositional defiant disorder (“ODD”), conduct disorder, generalized anxiety disorder, separation anxiety disorder, or reactive attachment disorder when in fact it is much more complex.<sup>71</sup> In addition, trauma sufferers tend to have lower IQs, more learning disabilities, and an increased chance of developing depression, substance abuse disorders, and posttraumatic stress disorder than youth who have not experienced childhood trauma.<sup>72</sup> Effective assessment and diagnosis is critical.<sup>73</sup> Evidence-based assessment tools can distinguish accurately between (1) youth who experience trauma *in addition to* co-existing psychiatric conditions, disorders, and syndromes *and* (2) youth who experience conditions, disorders, and syndromes *without* the presence of underlying trauma. Additionally, the co-existence of PTSD with other psychiatric conditions has been shown to have an adverse impact on treatment and the prospect for recovery from PTSD.<sup>74</sup>

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68. Eric S. Hall & Zorka Karanxha, *School Today, Jail Tomorrow: The Impact of Zero Tolerance on the Over-Representation of Minority Youth in the Juvenile System*, 4 POWER PLAY 1, 4–5 (2012), [http://www.emich.edu/coe/powerplay/documents/vol\\_04/no\\_01/ppj\\_vol\\_04\\_no\\_01\\_hall\\_karanxha.pdf](http://www.emich.edu/coe/powerplay/documents/vol_04/no_01/ppj_vol_04_no_01_hall_karanxha.pdf). “Emerging professional opinion, qualitative research findings, and a substantive empirical literature from social psychology suggest that the disproportionate discipline of students of color may be due to lack of teacher preparation in classroom management, lack of training in culturally competent practices, or racial stereotypes.” American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?*, 63 AM. PSYCHOLOGIST 852, 854 (2008) (internal citations omitted), <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

69. FEIERMAN & FINE, *supra* note 8, at 11–12.

70. ABRAM ET AL., *supra* note 17, at 2.

71. ALEXANDRA COOK ET AL., THE NAT’L CHILD TRAUMATIC STRESS NETWORK, COMPLEX TRAUMA IN CHILDREN AND ADOLESCENTS 6 (2003), [http://www.nctsn.org/nctsn\\_assets/pdfs/edu\\_materials/ComplexTrauma\\_All.pdf](http://www.nctsn.org/nctsn_assets/pdfs/edu_materials/ComplexTrauma_All.pdf).

72. ERICA J. ADAMS, JUSTICE POLICY INST., HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 2 (2010), [http://www.justicepolicy.org/images/upload/10-07\\_REP\\_HealingInvisibleWounds\\_JJ-PS.pdf](http://www.justicepolicy.org/images/upload/10-07_REP_HealingInvisibleWounds_JJ-PS.pdf).

73. PATRICIA K. KERIG, THE NAT’L CHILD TRAUMATIC STRESS NETWORK, TRAUMA-INFORMED ASSESSMENT AND INTERVENTION 1 (2013), [http://www.njcn.org/uploads/digital-library/NCTSN\\_Trauma-informed-assessment-intervention\\_Patricia-Kerig\\_September-2013.pdf](http://www.njcn.org/uploads/digital-library/NCTSN_Trauma-informed-assessment-intervention_Patricia-Kerig_September-2013.pdf).

74. ABRAM ET AL., *supra* note 17, at 2.

## B. Trauma and Youthful Offending

### 1. Pervasiveness of Trauma

The statistics about childhood trauma are particularly salient: while 34% of all children in the U.S. report experiencing at least one traumatic event, between 75%–93% of children entering the juvenile justice system report that they have experienced at least one traumatic event.<sup>75</sup> Rates of PTSD in juvenile justice-involved youth are comparable to the PTSD rates of soldiers returning from deployment in Iraq.<sup>76</sup> There are higher rates of PTSD among females than there are among males.<sup>77</sup> PTSD is also more prevalent among racial and ethnic minorities in the United States.<sup>78</sup> The Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (“DSM-V”) explains that risk factors for PTSD are often found in court-involved youth.<sup>79</sup> Indeed, being abused or neglected increases the likelihood of arrest as a juvenile by 59% and as an adult by 28% and for a violent crime by 30%.<sup>80</sup>

In a study of nearly 2,000 youth arrested and detained in Cook County, Chicago over a three-year period, the Northwestern Juvenile Project found that 92.5% of participating youth had experienced at least one trauma, and 84% had experienced more than one trauma.<sup>81</sup> The most frequently experienced traumas among this population were witnessing violence (seeing or hearing someone get badly hurt or killed), having been personally threatened with a weapon, and being in a situation where they thought that they or someone close to them was going to be badly hurt or die.<sup>82</sup> Overall, more than one in ten children held in detention had PTSD in the year prior to the study interview.<sup>83</sup>

Three times as many youth in the justice system experience chronic trauma in their childhood as compared to statistics for all youth in the general public.<sup>84</sup> Youth

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75. ADAMS, *supra* note 72, at 2; ANGELA WEIS, JOHN HOWARD INST., INCARCERATED YOUTH & CHILDHOOD TRAUMA at 1, <http://www.thejha.org/trauma> (last visited Mar. 22, 2016). Further, when adults are studied, those who have been exposed to trauma constitute upwards of 93% of criminal offender population.

76. JENNIFER MELTZER WOLPAW & JULIAN D. FORD, NAT’L CHILD TRAUMATIC STRESS NETWORK, ASSESSING EXPOSURE TO PSYCHOLOGICAL TRAUMA AND POST-TRAUMATIC STRESS IN JUVENILE JUSTICE POPULATION 3 (2004), [http://www.nctsnet.org/sites/default/files/assets/pdfs/assessing\\_trauma\\_in\\_jj\\_population.pdf](http://www.nctsnet.org/sites/default/files/assets/pdfs/assessing_trauma_in_jj_population.pdf); Bob Roehr, *High Rate of PTSD in Returning Iraq War Veterans*, MEDSCAPE (Nov. 6, 2007), [www.medscape.com/viewarticle/56540](http://www.medscape.com/viewarticle/56540).

77. NAT’L JUVENILE DEFENDER CTR., *supra* note 42, at 7.

78. *Id.*

79. *Id.*

80. ROBERT FRANKS, CONN. CTR. FOR EFFECTIVE PRACTICE, BUILDING A TRAUMA-INFORMED SYSTEM OF CARE FOR CHILDREN IN CONNECTICUT 11 (2013), [http://www.governor.ct.gov/malloy/lib/malloy/SHAC\\_Doc\\_2013.04.26\\_Franks\\_presentation.pdf](http://www.governor.ct.gov/malloy/lib/malloy/SHAC_Doc_2013.04.26_Franks_presentation.pdf).

81. ABRAM ET AL., *supra* note 17, at 5–6.

82. *Id.*

83. *Id.*

84. *Id.* The resultant combined prevalence estimate of 35% for complex trauma history is about three times higher than the 10–13% estimates of polyvictimization from epidemiological study of children and adolescents.

in juvenile detention fall into two complex trauma subgroups: (1) those who report some combination of sexual or physical abuse or family violence (about twenty percent of the number of those suffering from complex trauma) and (2) those who experience emotional abuse and family violence but not physical or sexual abuse (about fifteen percent).<sup>85</sup>

The prevalence of types of abuse and responses to traumatic experiences differ across genders and amongst LBGQT youth. LBGQT youth are more likely than straight youth to suffer homelessness, rejection and abuse by their families (biological and foster alike), and victimization at school, often related to their sexual identities.<sup>86</sup> Studies have also found that girls are more likely to have experienced higher rates of physical neglect as well as physical, sexual, and emotional abuse.<sup>87</sup> In a study of the traumatic experiences of incarcerated girls, forty percent were raped or sodomized or both (on average, beginning at age thirteen) and a third had been molested or fondled (on average, at age five).<sup>88</sup> Twenty-five percent of girls had been shot or stabbed and almost half of the girls had been beaten or burned.<sup>89</sup> When girls are arrested for violent crimes, their offenses often involve family members and intimates, and are frequently related to the experience of domestic violence.<sup>90</sup> Girls in the delinquency system have disproportionately presented with a history of child welfare system involvement,<sup>91</sup> making the funneling effect of the child welfare system to the juvenile justice system even more pronounced for girls than it is for boys. When boys had been sexually assaulted, they were more than twice as likely to engage in delinquency.<sup>92</sup>

Girls and boys experience and respond to traumatic experiences differently. For instance, girls often internalize their pain, engaging in self-mutilation and turning to substance abuse to cope.<sup>93</sup> There are higher rates of PTSD among girls than there are among boys.<sup>94</sup> When children are sexually abused, girls are more likely to develop anxiety and affective disorders such as major depression, while boys are likely to respond to sexual abuse with disruptive behavioral disorders, attention

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85. A hierarchical cluster analysis of a large representative sample of youth in juvenile justice system is available at: <http://njdc.info/wp-content/uploads/2013/12/Complex-Trauma-and-Aggression-in-Secure-Juvenile-Justice-Settings.pdf> (last visited April 11, 2016).

86. FEIERMAN & FINE, *supra* note 8, at 14 nn.123–124.

87. BERKELEY CTR. FOR CRIMINAL JUSTICE, *supra* note 18, at 5.

88. BERNSTEIN, *supra* note 7, at 158.

89. *Id.*

90. BERKELEY CTR. FOR CRIMINAL JUSTICE, *supra* note 18, at 7–8. In addition, girls aggressive behavior in response to trauma is not a good predictor or indicator of future offending. *Id.* at 5.

91. FEIERMAN & FINE, *supra* note 8, at 13 n.99. Further, upon entry to the child welfare system, the rate girls suffer child sexual abuse is 2.3 that of sexual abuse suffered by boys. FEIERMAN & FINE, *supra* note 8, at 14 n.120.

92. FRANKS, *supra* note 80, at 10 (describing that in a survey of youth forty-seven percent of sexually assaulted boys reported engaging in delinquent acts, compared with only seventeen percent of those not sexually assaulted).

93. FEIERMAN & FINE, *supra* note 8, at 13 n.107.

94. NAT'L JUVENILE DEFENDER CTR., *supra* note 42, at 7.

hyperactivity disorder (“ADHD”), and substance abuse.<sup>95</sup>

The majority of youth involved in the juvenile justice system suffer from diagnosable mental health conditions.<sup>96</sup> The Northwestern study revealed that among youth who do *not* suffer from PTSD, 64% had at least one type of psychiatric condition, while among youth with PTSD, 93% suffered from a co-existing psychiatric condition, 54% possessed two or more co-existing conditions, and 11% had all four of the co-existing conditions studied.<sup>97</sup>

### 2. *Cause and Effect: Relationship of Trauma to Offense*

Just as trauma can be misperceived for another mental health condition, trauma may also go unrecognized when it presents as offending. Often, behavioral responses to trauma “resemble the common delinquent behaviors seen in youth referred to the justice system and are therefore under-identified as posttraumatic symptoms.”<sup>98</sup> Joan’s series of female-directed assaults as a thirteen-year-old girl and her overreaction to the man who threatened her at sixteen-years-old are both excellent examples of how untreated childhood trauma may manifest as offending behavior. Children reacting out of trauma, including children who overreact due to misperceived threats, may be mistakenly viewed as aggressive persons, just as Joan was misunderstood by the prosecutor in her juvenile case.<sup>99</sup> These children are at greater risk for court involvement, for failure under supervision, and for school failure. They may be misperceived by probation officers, attorneys, and judges alike as apathetic, thoughtless, or even sociopathic when in fact they are in pain.

### 3. *Specific Examples*

Joan’s story illustrates two time periods where untreated trauma led to offending. First, when she was thirteen, Joan hit random women. Later, when she was sixteen, her untreated trauma caused her to over-respond to a threat from an older man. Joan was repeatedly raped in her childhood and throughout her early adolescence. Joan was also neglected in more than one way by the parents who allowed the rapes to occur, abandoned, excluded from school, subjected to violence in her neighborhood as well as in her home, and lived in devastating poverty.

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95. FEIERMAN & FINE, *supra* note 8, at 13 (citing to internal source at footnote 109).

96. Sixty-five to seventy percent of youth involved in the juvenile justice system suffer from diagnosable mental health disorders. KATLEEN R. SKOWYRA & JOSEPH J. COCOZZA, NAT’L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, BLUEPRINT FOR CHANGE 1 (2007), [http://www.ncmhjj.com/wp-content/uploads/2013/07/2007\\_Blueprint-for-Change-Full-Report.pdf](http://www.ncmhjj.com/wp-content/uploads/2013/07/2007_Blueprint-for-Change-Full-Report.pdf).

97. ABRAM ET AL., *supra* note 17, at 5–6.

98. ADAMS, *supra* note 72, at 4.

99. WEIS, *supra* note 75, at 1.



Research informs us that physical, sexual, and emotional abuse in girls during childhood and adolescence can cause them to react criminally to their trauma.<sup>100</sup> Those suffering from PTSD or another disorder such as chronic trauma, complex trauma, or acute trauma, experience hypervigilance. When trauma sufferers, such as Joan, are exposed to a traumatic reminder, they may react violently, misperceiving a threat. Their brains' threat recognition and fight or flight response may have been recalibrated from enduring abuse and exposure to violence.<sup>101</sup> When Joan encountered the threat from the much older man, she was triggered and overreacted to that threat, a classic example of hypervigilance. These reactions were a combination of her unique and untreated traumatic symptomology and her adolescent impulsivity in heated moments without time for calm reflection.

In another example, fifteen-year-old Marvin suffered from severe ADHD and anxiety, and had grown up in a home where he experienced domestic violence, parental incarceration, and neighborhood violence.<sup>102</sup> Due to ADHD, Marvin exhibited difficulties with executive function from a young age, including poor planning, self-inhibition, and impulse control. One day, on his way home from school, another youth attacked and beat Marvin without provocation. Marvin felt unsafe. A few weeks later, Marvin started carrying a knife with him for his protection. Marvin got in trouble for bringing that knife with him to school, one of several cases for which Marvin had been taken to juvenile court.<sup>103</sup>

A psychologist who evaluated Marvin later determined that he was suffering from trauma symptoms after the attack and at the time when he brought the knife to school. Indeed, traumatized children who feel that they are not safe and experience that their family can do nothing to protect them are likely to engage in self-protective behavior, such as joining a gang or carrying a weapon, increasing the chance of delinquency system involvement.<sup>104</sup> Further, trauma impacts school performance. When children are overstimulated by misperceived threats or, like Marvin, feel overwhelmed by feelings of fear, they may not be able to focus on their schoolwork or on reasoned decision-making because of the distraction.<sup>105</sup>

Marvin's case demonstrates the complexities that exist when addressing the underlying causes of youthful offending. Marvin's decision-making abilities were impaired, born of fear and anxiety, and the product of his limited ability, due to

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100. BERKELEY CTR. FOR CRIMINAL JUSTICE, *supra* note 18, at 7.

101. See Eaman J. McRory et al., *supra* note 38; see also Elizabeth Thompson Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOLOGICAL BULLETIN 539, 557 (2002) (referencing how abused children who perceive threats or hostility in the intentions of another will respond aggressively).

102. I have changed Marvin's name to protect his identity, but the details of his story are accurate.

103. See Henning, *supra* note 54, at 403 (explaining that a surge in low and mid-level offenses filed in juvenile court is attributable to schools referrals).

104. EVANS-CHASE, *supra* note 2, at 747 (warning that "youth who feel that their family cannot keep them safe in their community or school are likely to join a gang or carry a weapon to feel safe"); see also BURRELL, *supra* note 30, at 1.

105. WEIS, *supra* note 75, at 1.

ADHD, adolescence, and trauma symptoms, to consider carefully all the consequences of his actions before taking the knife with him to school.<sup>106</sup> It is difficult to tease out the role that frequent exposure to trauma in early childhood and the role that trauma from the precipitating attack played in producing and/or exacerbating his ADHD symptoms and adolescent immaturity. What is clear is that Marvin was neurologically prone to act impulsively without planning ahead, and, thus, prone to making bad decisions without considering consequences. The juvenile justice system fails if it does not discover and then take into consideration the combination of factors that led to Marvin's poor decision to bring a knife to school.

Gang membership, while not an offense in and of itself, is a risk factor for a youth's involvement in the juvenile justice system.<sup>107</sup> Many youth who have experienced trauma turn to gangs for a sense of community and belonging.<sup>108</sup> Indeed, gang-involved youth have been found to experience PTSD at more than twice the rate of other youth.<sup>109</sup> For young people traumatized by neighborhood violence or police brutality, gangs may offer safety and protection. For those experiencing ostracism and neglect, gangs may offer acceptance and connection. Young people experiencing symptoms of trauma exposure and who have untreated PTSD may have strong feelings of anger and fear.<sup>110</sup> Without treatment and without the personal and familial coping mechanisms, those young people unable to manage their strong emotions often blame the difficult feelings of anger and fear on others.<sup>111</sup> Traumatized youth experience difficulty in school for the same reasons they experience difficulty everywhere, compounding their sense of failure and hopelessness.<sup>112</sup> Gangs appeal to young trauma sufferers because they may offer a sense of success, support, belonging, and, at times, even an outlet for negative expectations of others and the world around them.<sup>113</sup>

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106. Brief for the Am. Med. Ass'n et al., as Amici Curiae in Support of Neither Party at 13, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646, No. 10-9647), 2012 WL 121237; see L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 *NEUROSCIENCE & BIOBEHAVIORAL REVS.* 417, 423 (2000) (arguing that adolescents may perform worse in stressful situations based upon scientific studies); Marjolein Luman et al., *Decision-making in ADHD: Sensitive to Frequency But Blind to the Magnitude of the Penalty?*, 49 *J. OF CHILD PSYCHIATRY AND PSYCHOL.*, 712 *passim* (2008) (discussing the role that ADHD plays in a child's decision-making).

107. EVANS-CHASE, *supra* note 2, at 747.

108. THE NAT'L CHILD TRAUMATIC STRESS NETWORK, *TRAUMA IN THE LIVES OF GANG-INVOLVED YOUTH: TIPS FOR VOLUNTEERS AND COMMUNITY ORGANIZATIONS 2* (2009), [http://www.nctsn.org/sites/default/files/assets/pdfs/trauma\\_and\\_gang\\_involved\\_youth.pdf](http://www.nctsn.org/sites/default/files/assets/pdfs/trauma_and_gang_involved_youth.pdf); BURRELL, *supra* note 30, at 1.

109. THE NAT'L CHILD TRAUMATIC STRESS NETWORK, *supra* note 108, at 2.

110. *Id.* at 3.

111. *Id.*

112. See BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 7 (discussing how traumatic experiences can impact a child's school performance).

113. THE NAT'L CHILD TRAUMATIC STRESS NETWORK, *supra* note 108, at 3.

## II. SITUATING TRAUMA WITHIN THE DEVELOPMENTAL FRAMEWORK OF YOUTH

The Supreme Court has repeatedly recognized the science which distinguishes youthful offenders—children and emerging adults—from mature adults.<sup>114</sup> The Court has consistently emphasized the tremendous capacity youthful offenders have to learn, change, and grow.<sup>115</sup> The Court has found that children are “categorically” different from adults, rendering them less culpable and necessitating a different approach to sentencing them.<sup>116</sup> The Court has repeatedly stressed the need for individualized sentencing hearings that take into account the mitigating factors of youth.<sup>117</sup> The Supreme Court recently pronounced that the watershed right of children to have mitigation due to youth considered when facing extreme sentences is retroactive.<sup>118</sup> Further, the science embraced by the Supreme Court does not limit these lessons to only children or adolescents, it extends the lessons to emerging adults into their mid-twenties who have developing brains and will benefit tremendously from opportunities to grow and learn.<sup>119</sup> That children are different has also justified the Court’s common sense, age-conscious approach to analyzing the level of restraint on a young person subjected to custodial interrogation.<sup>120</sup>

Youth generally differ from adults in three respects—these are the mitigating factors of youth. First, youth are less mature than adults.<sup>121</sup> They are impetuous, impulsive, and fail to consider the consequences of their actions before they act.<sup>122</sup>

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114. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 732–33 (2016); *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2026–27 (2010); *Roper v. Simmons*, 543 U.S. 551, 553, 569 (2005).

115. See, e.g., *Miller*, 132 S. Ct. at 2464–65; *Graham*, 130 S. Ct. at 2027; *Roper*, 543 U.S. at 570.

116. *Miller*, 132 S. Ct. at 2464; *Graham*, 130 S. Ct. at 2016; *Roper*, 543 U.S. at 571.

117. *Miller*, 132 S. Ct. at 2469.

118. *Montgomery*, 136 S. Ct. at 732–33.

119. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 152 (2009) (“Developmental neuroscience consistently indicates that structural brain maturation is incomplete at age eighteen. Though estimates vary, many scientists have opined that structural maturation is not complete until the mid-twenties.”); B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 65 (2008) (discussing the increased risk taking and impulsive behavior among young adolescents due to underdeveloped parts of the brain).

120. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2400–01 (2011).

121. Brief for the Am. Psychological Ass’n et al., as Amici Curiae Supporting Petitioners at 8–9, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412, No. 08-7621), 2009 WL 2236778; see Emily Buss, *Rethinking the Connection between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 495 (2009) (reviewing ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (2008) (stating that adolescents are psychosocially immature which makes them lack the ability to control their emotions and more likely to be attracted to risky behavior)).

122. Brief for the Am. Med. Ass’n et al., as Amici Curiae in Support of Neither Party, *supra* note 106, at 6–7; Brief for the Am. Psychological Ass’n et al., as Amici Curiae Supporting Petitioners, *supra* note 121, at 11 (discussing a study showing adolescents weigh risks and rewards differently than adults and therefore are more likely to engage in risky behavior); Spear, *supra* note 106, at 421–23 (arguing adolescents are greater risk takers and discussing studies supporting the theory); Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 343–44 (1992) (stating that reckless behavior is a normative part of adolescent actions).

When youth do consider the future implications of a course of action, they do not accurately weigh pros and cons.<sup>123</sup> Instead, young people tend to minimize or underestimate the potential of dangerous, risky, and negative consequences while simultaneously overestimating potential rewards, especially peer recognition.<sup>124</sup> Not only are youth impulsive generally, neuroscience has shown that for those youth who have suffered trauma, brain structures that regulate emotion, behavior, and impulsivity are less developed and function irregularly.<sup>125</sup>

Second, young people are particularly susceptible to pressure.<sup>126</sup> Youth are vulnerable to psychological harm and they do not have control over their environment.<sup>127</sup> When youthful susceptibility to pressure is understood in the context of trauma exposure, we see that trauma is just the type of psychological harm that the Supreme Court has described as mitigating the culpability of youthful offenders.<sup>128</sup> Additionally, the limited decision-making abilities of youth are even more impaired in response to stress and peer pressure.<sup>129</sup> Poverty impedes positive development.<sup>130</sup> Children who have been victims of repeated trauma, chronic stress, toxic stress, abuse, and neglect may act out themselves to have a sense of control over the chaos and violence that they have come to expect will

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123. Brief for the Am. Psychological Ass'n et al., as Amici Curiae Supporting Petitioners, *supra* note 121, at 8–9, 11–12; see also Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193, 204 (2010) (discussing study showing that adolescents are less able to weigh choices and make better decisions).

124. Brief for the Am. Med. Ass'n et al., as Amici Curiae in Support of Neither Party, *supra* note 106, at 6–7, 12; Brief for the Am. Psychological Ass'n et al., as Amici Curiae Supporting Petitioners, *supra* note 121, at 8–9; see ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 40–41 (2008) (explaining cognitive control and discussing a study showing adolescents have less cognitive control and instead choose immediate rewards); see also Buss, *supra* note 121, at 4 (stating that adolescents are psychosocially immature which makes them lack the ability to control their emotions and more likely to be attracted to risky behavior); Lucy C. Ferguson, *The Implications of Developmental Cognitive Research on “Evolving Standards of Decency” and the Imposition of the Death Penalty on Juveniles*, 54 AM. U. L. REV. 441, 457 (2004) (stating that adolescents are more “susceptib[le] to peer influence when making decisions and conducting cost-benefit analyses, lack realistic risk- assessment abilities, and are not as future-oriented as are adults”).

125. WEIS, *supra* note 75, at 1.

126. Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOL. 625, 626–34 (2005) (discussing study finding that peer influence has a much greater effect on the risky behavior of adolescents and young adults than it does on mature adults).

127. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (“[J]uveniles have less control, or less experience with control, over their own environment.”).

128. *Roper*, 543 U.S. at 570 (“Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”).

129. Brief for the Am. Med. Ass'n et al., as Amici Curiae in Support of Neither Party, *supra* note 106, at 13; see Spear, *supra* note 106, at 423 (arguing that adolescents may perform worse in stressful situations based upon scientific studies).

130. PAUL A. JARGOWSKY, CENTURY FOUND., RUTGERS CTR. FOR URBAN RESEARCH & EDUC., *CONCENTRATION OF POVERTY IN THE NEW MILLENNIUM* 23 (2013), [https://tcf.org/assets/downloads/Concentration\\_of\\_Poverty\\_in\\_the\\_New\\_Millennium.pdf](https://tcf.org/assets/downloads/Concentration_of_Poverty_in_the_New_Millennium.pdf) (“Children with a high proportion of poor neighbors have more behavioral problems, lower self-esteem, and more symptoms of depression.”).

naturally occur.<sup>131</sup> Chronic traumatic stress causes youth to develop an oversensitive warning system which means that youth genuinely feel threatened and overreact in situations where they have misperceived threats.<sup>132</sup>

Third, young people possess the potential to change and grow.<sup>133</sup> They have the capacity to learn from their mistakes.<sup>134</sup> As their immature brains develop, youth acquire greater capabilities to improve good decision-making and planning, and need feedback and support to help them learn from their mistakes to improve in the future.<sup>135</sup> As trauma sufferers, youth demonstrate resiliency—an ability to thrive in the face of adversities caused by traumatic events.<sup>136</sup> Youthful offenders' brains can heal and repair from the damage of trauma with appropriate and timely treatment.<sup>137</sup> The younger a sufferer is when trauma is identified and treated, the greater the brain's ability to recover.<sup>138</sup>

The Court's recognition that youthful offenders are more vulnerable to environmental stressors and pressures<sup>139</sup>—the second mitigating factor of youth—has implications for a trauma-informed response to offending. Trauma provides mitigation for culpability. Children cannot extricate themselves from a brutal and dysfunctional environment.<sup>140</sup> The court system should not hold children accountable for offending that was a reaction to past traumatic events—as with Joan's hitting of the random women—in the same way courts would hold responsible a child who acts volitionally and without a background of trauma. That children cannot remove themselves from an environment where they have experienced trauma must serve to mitigate their culpability and inform their care. Child

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131. See WEIS, *supra* note 75, at 1; Henry R. Cellini, *Child Abuse, Neglect, and Delinquency: The Neurological Link*, 55 JUV. & FAM. CT. J. 1, 7 (2004) (describing how children who have been victims of chronic trauma in their lives, for instance growing up amidst abuse and violence, may seek to provoke violence so as to have some control over the chaos of their lives); JAMES GARBARINO, *LOST BOYS: WHY OUR SONS TURN VIOLENT AND HOW WE CAN SAVE THEM* 80–82 (1999).

132. WEIS, *supra* note 75, at 1.

133. *Roper v. Simmons*, 543 U.S. 551, 570 (2005); see generally FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* (1982) (proposing that the best response to juvenile crime is to let adolescents grow up and grow out of it).

134. See, e.g., Brief for the Am. Psychological Ass'n et al., as Amici Curiae Supporting Petitioners, *supra* note 121, at 9–10; *Miller v. Alabama*, 132 S. Ct. 2455, 2455 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2011 (2010); *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

135. Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 60–61 (2009).

136. BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 11.

137. EVA J. KLAIN & AMANDA R. WHITE, ABA CTR. ON CHILDREN & THE LAW, *IMPLEMENTING TRAUMA-INFORMED PRACTICES IN CHILD WELFARE* 3–5 (2013), <http://childwelfareparc.org/wp-content/uploads/2013/11/Implementing-Trauma-Informed-Practices.pdf>.

138. See Mary Johnson, *Is Providing Trauma-Informed Care for Kids as Easy as Changing the Lens?*, NAT'L COUNCIL FOR BEHAVIORAL HEALTH (Jan. 7, 2016), <https://www.thenationalcouncil.org/conference-365/2016/01/07/is-providing-trauma-informed-care-for-kids-as-easy-as-changing-the-lens/> (discussing the importance of early intervention and the negative consequences of not addressing a child's trauma as early as possible).

139. *Roper*, 543 U.S. at 569.

140. See *id.* at 169.

offenders ought to have their individual mitigating circumstances—such as exposure to trauma, lack of treatment for trauma, and traumatic reactions that correspond with their offending behavior—taken into account when understanding their true responsibility and fashioning a response to their offending. Further, youthful offenders are particularly poised to reform when provided appropriate opportunities for trauma-specific therapeutic intervention.<sup>141</sup>

An understanding that trauma is environmental factor to be avoided leads to the conclusion that incarceration is an inappropriate response to all youthful trauma sufferers who have offended<sup>142</sup>. Incarceration compounds the destructive impact of trauma on a youthful offender<sup>143</sup> rendering it a counter-productive response. Youth of color are at greater risk of facing the trauma of incarceration because they are more likely than their white peers to be incarcerated, even for the same behavior.<sup>144</sup> While most youth are able to recover from trauma, about fifty percent of youth in the juvenile justice system do not recover and instead suffer the effects of chronic and lasting trauma-related impairments.<sup>145</sup> The areas of the brain where emotion and behavior are regulated are quite sensitive to emotional and physical stress.<sup>146</sup> The characteristics of the environment where trauma sufferers spend their time will have an enormous impact on their ability to recovery. An environment that is safe and nurturing—rather than austere, rigid, and unsafe—will best promote recovery and growth for youthful trauma sufferers.<sup>147</sup>

With youthful offenders, the criminal justice system can and must focus on offering opportunities for redemption, purposeful growth, and rehabilitation. In the third mitigating factor of youth the Supreme Court recognizes that children have personalities that are more “transitory” and less “fixed.”<sup>148</sup> Since the decisions in *Roper*, *Graham*, and *Miller*, contemporary understanding of the length of adolescence and the plasticity of the youthful brain has served to highlight the enormity of the opportunity for redemption recognized by the Court.<sup>149</sup> Youthful offenders are the ones with the greatest capacity to learn from their experiences, biologically heal, and incorporate changes in their behavior in the future. Indeed, the plasticity of the brain, or its ability to change and adapt based on various stimuli, is critical to brain development.<sup>150</sup> Throughout the period of emerging adulthood, youth have a

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141. See KLAIN & WHITE, *supra* note 137, at 3–5; Johnson, *supra* note 138.

142. LISTENBEE ET AL., *supra* note 62, at 179 (describing that detention should be a “last resort”).

143. See generally BURRELL, *supra* note 30.

144. See FEIERMAN & FINE, *supra* note 8, at 40 nn.75–76.

145. WEIS, *supra* note 75, at 1–2.

146. *Id.* at 1.

147. BURRELL, *supra* note 30, at 6.

148. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

149. STEINBERG, *supra* note 16, at 8–11 (referring to adolescence as the period between ten and twenty-five years of age and explaining how adolescence rivals ages zero to three in peak neuroplasticity).

150. WEIS, *supra* note 75, at 1.

heightened ability to grow in response to learning opportunities.<sup>151</sup> Youth between the ages of twelve and eighteen experience a wave of plasticity that rivals the period of brain development from ages zero to three, meaning that during this period their brains are most able to adapt and develop new patterns of thought and behavior which will lead to lifelong success.<sup>152</sup> During this time period, while youth are experiencing development in their thinking and planning skills, and their brains are at the peak of plasticity, youth will grow when they have an opportunity to make decisions on matters important to them, reflect upon the impact of those decisions, and learn from the feedback and support of caring adults.<sup>153</sup>

An individualized response to youthful offenders requires that the court system discover and consider the trauma experienced by youth when crafting sentences and services. The stakes are high: if the justice system does not deal constructively with youthful victims of trauma, the trauma will persist in being a major crimeogenic risk factor in the lives of those offenders.<sup>154</sup> Because the risk for arrest, charging, detention, adjudication, and waiver to adult court is greater for youth of color, the potential for trauma-informed reforms to impact those vulnerable youth in particular is significant.<sup>155</sup> Additionally, trauma can be transmitted to later generations if it goes untreated.<sup>156</sup>

### III. TRADITIONAL JUSTICE SYSTEM RESPONSES TO TRAUMA FAIL

*“Many youth in the justice system appear angry, defiant, or indifferent, but actually they are fearful, depressed, and lonely . . . . When the justice system responds with punishment, these children may be pushed further into the juvenile and criminal justice systems and permanently lost to their families and society.”*

—Report of the Attorney General’s National Task Force on Children Exposed to Violence<sup>157</sup>

#### A. Traditional Responses to Youthful Offending

The juvenile justice system’s framework is not currently designed to discern the panoply of traumatic exposures underlying a child’s problematic behavior. The system was not established with the previously enumerated mitigating factors of

151. STEINBERG, *supra* note 16, at 45.

152. *Id.* at 8–11.

153. BUSS, *supra* note 135, at 60–61.

154. Indeed, suffering from childhood abuse or neglect increases the likelihood of arrest as a juvenile by 59% percent, as an adult by 28%, and for a violent crime, generally, by 30%. This data is according to one study that looked at more than 1500 cases over time. *Impact of Child Abuse and Maltreatment on Delinquency, Arrest, and Victimization*, NAT’L INSTITUTE OF JUSTICE, <http://www.nij.gov/topics/crime/child-abuse/Pages/impact-on-arrest-victimization.aspx> (last updated Mar. 14, 2011).

155. ANNIE E. CASEY FOUND., *supra* note 26, at 3.

156. See CATHY S. WIDOM & MICHAEL G. MAXFIELD, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, RESEARCH IN BRIEF: AN UPDATE ON THE “CYCLE OF VIOLENCE” 1 (2001), <https://www.ncjrs.gov/pdffiles1/nij/184894.pdf>.

157. LISTENBEE ET AL., *supra* note 62, at 172–73.

youth as its guidepost and has struggled to find ways of incorporating these fundamental principles into a pre-existing system.<sup>158</sup> Furthermore, the outlook of the players in the juvenile justice system, with its adult-like focus on traditional culpability and punishment, is an obstacle to fully realizing the opportunity to acknowledge the experience of childhood trauma and respond appropriately. Currently, the juvenile justice system fails to accurately identify trauma and often employs counter-productive responses to juvenile offending, such as removal from the home, programming and treatment that is general rather than trauma-specific, and over-use of detention.<sup>159</sup>

All over the U.S. today, children are arrested by police and processed through juvenile courts. Once arrested, if released to family, a child will receive a citation with a date to appear in court. Depending on the rules in the particular jurisdiction and the timing of the arrest, a child who is initially detained upon arrest may spend anywhere from overnight to a few nights in a detention facility before appearing in court. The first court appearance is an arraignment. If a child is detained, this is the first opportunity an attorney will have to argue for the child's release (either because the prosecution cannot establish that there is probable cause for the child's arrest for this offense or because there are compelling circumstances for release due to social factors).<sup>160</sup> The case will proceed quickly or slowly depending on whether the child is detained pre-trial or remains in the community, the jurisdictional requirements and patterns of practice, and the nature of the charges (i.e., more serious cases such as transfer cases or homicides take longer at this stage and children in those more serious cases usually remain detained pre-trial).<sup>161</sup>

There are provisions for some children to receive some supervision by probation without having to admit involvement or be found involved in the offense.<sup>162</sup> In some jurisdictions, like in California, as a matter of practice, plea bargain and disposition (the juvenile phrase referring to sentencing) are combined. In other jurisdictions, like in Washington D.C., plea bargaining may involve limits on what the prosecution or defense will advocate for as an appropriate disposition, yet both parties will present arguments to the judge and the judge will decide on the

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158. For instance, effective January 1, 2016, eleven years after the mitigating factors of youth were announced in *Roper*, California's legislature, through Senate Bill 382, amended CAL. PENAL CODE § 1170.17 and CAL. WELF. & INST. CODE § 707 by adding language incorporating the developmental immaturity of adolescence to its transfer criteria on a discretionary basis. See S.B. 382, 2015–2016 Leg., Reg. Sess. (Cal. 2015).

159. See FEIERMAN & FINE, *supra* note 8, at 14–15, 32–35.

160. See, e.g., *In re William M.*, 473 P.2d 737 (Cal. 1970); *In re Dennis H.*, 19 Cal. App. 3d 350 (Cal. Ct. App. 1971).

161. See Buckingham, *supra* note 4, at 184–85 (discussing how, based on a sample of cases handled by the Juvenile Justice Clinic at Loyola Law School, the average time for non-detained delinquency cases in Los Angeles to proceed from arrest to arraignment is several months and how on average cases proceed in court for several months before being resolved).

162. See, e.g., CAL. WELF. & INST. CODE § 654 (West 2015) (providing for informal probation supervision of a youth for six months to a year and for dismissal upon completion of probation without the child having to admit to the offense).



appropriate disposition (or sentence) after a hearing. There is usually an opportunity for the probation department to make a recommendation of a disposition in the case after having reviewed the youth's history, and, when possible, met with the youth and his/her family.

The timing of these probation department recommendations to the court vary across jurisdictions. If a child has been found involved at a trial or admitted involvement in a plea, and the judge determines that out-of-home placement is necessary for the child, the child will be held at a secure confined facility (incarceration) or someplace akin to a child welfare group home, sometimes called a placement. If the child had been detained before the resolution of the charges, s/he child will leave a juvenile hall and be sent to another secure facility of incarceration, sometimes euphemistically called a camp. Just as in the adult penal system, there may be maximum security facilities for "more serious" juvenile offenders.<sup>163</sup> Judicial oversight once a child is serving time in a juvenile facility is extremely limited.

Statistics reveal that poor youth of color, the most vulnerable among us, face the greatest likelihood of being incarcerated at every possible opportunity. Counter-intuitively, children are incarcerated for offenses that are often far from serious; indeed, property offenses are the most common offenses for which children are incarcerated.<sup>164</sup> Only eleven percent of incarcerated children are there for what on paper constitutes a very serious offense: kidnapping, murder, or rape.<sup>165</sup> The phrase "disproportionate minority confinement" describes the end result of the many ways in which systems of juvenile and criminal justice respond to youth of color throughout every stage from arrest to disposition.<sup>166</sup> Latino youth are more than twice as likely as a white peer who committed the exact same offense to be initially detained, and African American youth are 4.5 times more likely than their white peers to be detained.<sup>167</sup> Even as first time offenders, African American youth with no delinquency history whatsoever are more than four times as likely to be incarcerated than white youth who have similar backgrounds.<sup>168</sup> Further, African American youth represent only 16% of the general population of youth, while they represent 38% of youth who are placed out of home in facilities, 35% of youth

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163. See, e.g., CAL. WELF. & INST. CODE § 607 (West 2015). In California, the Department of Juvenile Justice ("DJJ"), formerly the California Youth Authority ("CYA") can house a juvenile offender into their adulthood and up to twenty-four years of age.

164. BERNSTEIN, *supra* note 7, at 53 (referencing results of a survey of youth who are incarcerated).

165. *Id.* (and explaining at page 334 how this number may be misleading because it is from a survey of youth and more than half of those youth were with peers when committing their offense so these numbers reflect multiple children who are incarcerated for the same offense and some of them may have had roles like the lookout rather than the trigger person).

166. See JAMES BELL & LAURA JOHN RIDOLFI, THE W. HAWOOD BURNS INST., ADORATION OF THE QUESTION 2 (2008), <http://www.burnsinstitute.org/wp-content/uploads/2013/12/Adoration-of-the-Question.pdf> (discussing disproportionate minority confinement).

167. BERNSTEIN, *supra* note 7, at 60.

168. *Id.*

waived to adult criminal court, and 58% of youth who are newly admitted to adult prisons and jails.<sup>169</sup>

### B. *The Juvenile Justice System Fails to Appreciate Trauma*

Today's American juvenile justice system is the product of three distinct approaches to the treatment of children,<sup>170</sup> approaches that have never been fully reconciled nor fluidly incorporated. The first approach, recognizing that children are different from adults and in need of care and guidance, is that of the progressives, or child savers, who founded separate juvenile courts, and shaped the juvenile system from about 1900–1967.<sup>171</sup> The progressive approach sought to protect children from the harshness of adult criminal prosecution, focused on the rehabilitative ideal of the juvenile system rather than on culpability, and created confidentiality in juvenile proceedings to protect children.<sup>172</sup> Unfortunately, with lack of transparency in juvenile court, the treatment afforded children was shielded from oversight.

In 1967, the landmark Supreme Court decision, *In re Gault*, criticized juvenile court as a “kangaroo court,” which left children susceptible to harsh punishment based on scant evidence of what often amounted to very minor offenses.<sup>173</sup> *Gault* ushered in a new era of reform focused on infusing juvenile court with a rights-based, procedural justice approach.<sup>174</sup> Reforms ensured that children accused of offenses enjoyed the right to an attorney, the protection of the burden of proof on the prosecution to prove charges beyond a reasonable doubt, and the right to parental notification of charges, stopping shy of affording children the right to a jury trial.<sup>175</sup> Rehabilitation remained the main focus of the juvenile justice

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169. YAMAGATA & JONES, *supra* note 26.

170. See Martin Guggenheim, Graham v. Florida and a Juvenile's Right to Age Appropriate Sentencing, 47 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 457, 457, 464–74, 487 (2012) (summarizing two distinct eras in juvenile justice while arguing that *Graham* ushers in a third).

171. See *id.* at 464–66. For a more complete discussion of the Progressive movement and the drawbacks of the children-are-different approach, see Robin Walker Sterling, “Children Are Different”: Implicit Bias, Rehabilitation, and the “New” Juvenile Jurisprudence, 46 LOY. L.A. L. REV. 1019 (2013). For a discussion of how the child saver movement impacted African American children, see GEOFF K. WARD, THE BLACK CHILD SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE (2012).

172. See Guggenheim, *supra* note 170, at 465 (quoting Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909) (“[Progressives] believed that society’s role was not to ascertain whether the child was ‘guilty’ or ‘innocent,’ but ‘What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.’”)).

173. *In re Gault*, 387 U.S. 1, 28 (1967).

174. *Id.* at 61 (Black, J., concurring).

175. For a discussion of rights, see *Gault*, 387 U.S. at 12–58. *In re Winship*, 397 U.S. 358, 360 (1970), affords children the right to have the charges brought against them by the State proven beyond a reasonable doubt. Except for the right to have a jury trial, which the Court denied children in *McKeiver v. Pennsylvania*, 403 U.S. 528, 528 (1971), the due process cases that followed *Gault* gave children the same rights as adults. For a discussion of the failure to afford juveniles with a jury trial and its resulting impact on disproportionate minority confinement, see Robin Walker Sterling, *Fundamental Fairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 647–76 (2013).

system,<sup>176</sup> though its aim was compromised by the adultification of children, with trends making it easier to try young people in adult court and subjecting them to the harsh punishments of the criminal system.<sup>177</sup> Fueled by the racially charged image of the juvenile super-predator permeating public perceptions of young black males in the 1980s and 1990s,<sup>178</sup> one of the failures of this second approach was an increase in the use of juvenile incarceration. This trend had a particularly strident impact on youth of color, who bore the brunt of adult court waivers and transfers, and became the most likely to face incarceration.

The third approach to juvenile justice, based in both science and common sense, is ongoing and was outlined in Section II of this Article. Equipped with knowledge of the neurobiological immaturity and developmental deficiencies young people possess, there has been a slight scaling back on the availability for young people of the harshest of consequences, like the death penalty and life without the possibility of parole.<sup>179</sup> Yet, the newfound knowledge of development that spurred the Supreme Court to recognize the reduced culpability of children has not been incorporated into the day-to-day on-the-ground operations of the existing juvenile justice system. There are a plethora of opportunities to apply a developmental perspective to every transaction in juvenile court, from contact with police, to making the procedures in the courtroom accessible to the children the courts aim to serve and to the charging and plea decision phases. The difficulty of incorporating a developmental framework into the juvenile system over the last ten years is a harbinger of the difficulty of layering on the science of trauma. Trauma-informed juvenile justice is a critical facet of what should be a developmental foundation to the juvenile justice system.

From a trauma-informed perspective, the juvenile justice system currently fails in four significant ways: (1) it fails to accurately identify trauma exposures youth have had, (2) it fails to incorporate a contemporary understanding of trauma and its effects into legally significant transactions, particularly into its assessment of culpability, (3) it fails to provide modern trauma-specific interventions, and (4) it fails to employ trauma-sensitive dispositions and by the over-use of incarceration. These failures create a missed opportunity to promote pro-social development and set a child on the path to lifelong success in mainstream society.

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176. Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1119, n.57 (2009) (discussing state statutes across the U.S. which announce rehabilitation as an objective of juvenile court).

177. See MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 252–54 (2005); see also Guggenheim, *supra* note 170, at 473 (“[L]egislatures in nearly every state . . . broaden[ed] juvenile transfer to adult court, by lowering age or offense thresholds, moving away from individual and toward categorical handling, and shifting authority from judges to prosecutors.”); Buss, *supra* note 135, at 33 (“The public enthusiasm for this get-tough trend was captured in the refrain ‘adult time for adult crime.’” (citations omitted)).

178. See Henning, *supra* note 176, at 1113 (discussing juvenile super-predator image).

179. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (recognizing that the death penalty is the most severe punishment, only appropriate for the extremely culpable offenders who commit the most serious crimes); *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2026, 2034 (2010).

One of the biggest obstacles to be overcome is the mindset of the institutional players in the juvenile system. The prosecutor in Joan's case who said that fourteen-year-old Joan had a "depraved soul" because she struck random women missed the point entirely. Joan's behavior was a cry for help. The juvenile court should have said to Joan, "what's wrong?" The juvenile justice system was uniquely poised to take a closer look at her seemingly random acts of violence and uncover extreme childhood trauma.

Unfortunately, the players in the juvenile system may not arrive in those courts with a background in, or even an interest in, children. The prosecutors and defenders in the juvenile system are often just rotating through juvenile court as they move along the ranks of their offices. Prosecutors, defenders, and judges alike do not receive the necessary training to understand the role adolescent development, trauma, disabilities, structural racism, and poverty play in a child's behavior, making it hard to achieve the rehabilitative ideal of juvenile court. This structure is what produced a prosecutor who could look at Joan's case and say that she had a "depraved soul." The mindset that the juvenile court is a place to identify the most dangerous budding criminals and discard them has been repeatedly debunked by the science of adolescent development. Yet, it continues to exist in juvenile courts across the land. Such an orientation to juvenile court results in an inaccurate view of a child's suffering, a misapprehension of the root causes behind a child's offending, and a missed opportunity to employ the most effective treatment modalities available to rehabilitate the child.

### *1. The Failures of the Juvenile System to Account for Trauma*

#### *a. Failure to Identify Trauma Early*

Both the early identification of childhood trauma and the immediate intervention with a trauma-specific treatment are critical to the effective rehabilitation of children who commit offenses. Identification is not only necessary to ensure proper treatment, it is also a critical prerequisite to understanding and appreciating a child's true legal responsibility for the offense charged. Because the extent and importance of trauma is not understood by the players in the juvenile system, the main focus remains on moving cases through the stages of the established process, preventing attention to trauma identification and the harnessing of trauma as a *mitigator*. Without an accurate identification of trauma indicators, a child cannot receive appropriate treatment, will be punished more harshly, and the system's intervention will ultimately miss an opportunity to promote growth, often backfiring significantly, as it did with Joan, leading to future offending. Thus, the first challenge is figuring out a way to identify their suffering and the unique ways that trauma has impacted each individual.

The stakes are high if trauma is not accurately identified and constructively treated as early as possible in the juvenile justice system. Failure to treat trauma as soon possible implicates brain development issues, substance abuse issues, relation-

ship issues, the reliance on destructive coping mechanisms such as hypervigilance, and early mortality.<sup>180</sup> Untreated trauma may lead to further behavior problems and delinquency.<sup>181</sup> In fact, research reveals that 83.8% of individuals convicted of killing someone suffered severe physical and emotional abuse and 32.2% were sexually violated as children.<sup>182</sup>

The juvenile justice system, endowed with trauma-informed reforms, is particularly well poised to provide early identification and treatment of trauma suffering youth who come to its attention, furthering its core goal of rehabilitating the youth in its care.<sup>183</sup>

*b. Failure to Appreciate the Nullification or Mitigation of Culpability of Trauma-Suffering Child Offenders*

From a developmental perspective alone, children are less culpable than adults.<sup>184</sup> When this already diminished culpability is filtered through a trauma-informed lens, there is an additional layer of mitigation to consider. That there is a connection between a traumatized child's unique limitations and experience—particularly physical, sexual, and emotional abuse, neglect, abandonment, exposure to violence—and her or his capacity and culpability seems as commonsensical as Justice Kennedy's proclamation in *Roper v. Simmons* about what "any parent knows"<sup>185</sup> and Justice Sotomayor's statement in *J.D.B. v. North Carolina* that a child's age is "a fact that generates commonsense conclusions about behavior and perception."<sup>186</sup>

Trauma should inform every aspect of how the juvenile justice system responds to children who come to its attention.<sup>187</sup> Trauma has implications for a determination of a child's competency to stand trial, capacity or ability to appreciate the wrongfulness of his or her actions, transfer or waiver to adult court, understanding of their rights when the state is exacting a confession,<sup>188</sup> legal determination of culpability (including the availability of imperfect self-defense and insanity),<sup>189</sup> diversionary opportunities available at any stage, case dismissal, and disposition.

Under-identification of trauma makes its use in key decisions in juvenile cases happenstance. Unless a defense attorney uncovers a trauma history through client

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180. BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 6.

181. *Id.*

182. THE INT'L JUSTICE PROJECT, *supra* note 2.

183. See Henning, *supra* note 176, at 1118–19.

184. Scholar Emily Buss argues for a decoupling of culpability and "'full' (adult-style) punishment." Buss, *supra* note 135, at 47.

185. *Roper v. Simmons*, 543 U.S. 551, 569 (2005); see *Miller v. Alabama*, 132 S. Ct. 2455, 2483 (2012).

186. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2013) (internal quotation omitted).

187. This includes how the police treat children, though police practices are not the focus of this Article.

188. See FEIERMAN & FINE, *supra* note 8, at 26.

189. Culpability should impact charging decisions, plea negotiations, determinations of involvement by a judge at a trial, and again at disposition.

interviews, family interviews, or a social history produced by the probation department or child welfare system, information about trauma is unknown and cannot be utilized to push for leniency. Even when a defender knows about childhood trauma, the advocate may fear using the information owing to the real danger that it will be used to punish the child more harshly.<sup>190</sup> Further, there is no official mechanism today for trauma-focused perspectives to inform the legal determination of culpability, or the assessment of responsibility and blameworthiness. Without both an accurate identification of trauma and a mechanism to ensure it is considered, *and considered as a mitigator*, it is only with happenstance, speculation, and random extensions of grace and mercy that trauma impacts charging decisions, plea negotiations, determinations of involvement by a judge at a trial, understanding of mental state requirements and defenses, the availability of diversionary opportunities, case dismissal, and disposition.

*c. Failure to Employ Trauma Specific Therapies*

This failure flows in part from the failure to identify trauma. If trauma is not identified, it cannot be treated appropriately. Additionally, while the juvenile justice system frequently requires youth on probation and who are incarcerated to participate in counseling, not all counseling is equally as effective at treating trauma. Juvenile courts, uninformed about trauma-specific therapies, order generic counseling. Not only is there limited information about the benefits of trauma-specific treatments, these treatments are not currently available at the rates they need to be in order to be accessible to children in the juvenile system.<sup>191</sup> The trauma-specific therapy provided must be evidence-based, meaning the therapist must remain faithful to the design that was created using statistically and clinically meaningful studies to measure the effectiveness of various practices.<sup>192</sup> These effective practices take place in school, in the community, and at home.<sup>193</sup>

Trauma-focused cognitive behavioral treatment (“TFCBT”) is one such effective treatment for many types of trauma including PTSD and addresses trauma-

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190. See FEIERMAN & FINE, *supra* note 8, at 20.

191. See *id.* at 23, 28–29 (discussing how lack of availability or cost of treatment should not be a barrier to the state’s requirement to provide treatment in the context of the child welfare system). Performing trauma-specific therapies is emotionally taxing for therapist providers for precisely the same reason they are so effective—they take the suffering person back through a traumatic experience in excruciating detail. Therapists must be trained and receive support for any vicarious trauma they are vulnerable to experience as they treat patients. Maintaining an environment of care for providers is essential to reducing, treating vicarious trauma as well as to increasing resilience. See *Creating Trauma-Informed Systems*, THE NAT’L CHILD TRAUMATIC STRESS NETWORK, <http://www.nctsn.org/resources/topics/creating-trauma-informed-systems> (last visited Apr. 14, 2016). Further, some treatments are not available to children accused of delinquency because government funding presumes “pure” victims of violence, when in fact, many trauma sufferers are both victims and perpetrators of some offense.

192. Arredondo, *supra* note 59, at 22; Henning, *supra* note 54, at 451–52 (discussing developmentally sound and evidence-based practices successful at fostering youth responsibility).

193. Arredondo, *supra* note 59, at 22 (“[V]irtually all effective evidence-based practices occur in the community and the home.”) (emphasis omitted).

related symptoms like behavior disruption, anxiety, and depression. The intervention components of the TF-CBT model include: psycho-education about trauma and the ways in which it can impact an individual, relaxation, expression and regulation of feelings, cognitive coping and reframing of the events to correct inaccurate attributions about cause and responsibility, gradual exposure to the traumatic memories and events, and completion of a trauma narrative. It is designed to reduce children's negative emotional and behavioral responses to traumatic events, and correct misattributions and maladaptive beliefs about the trauma. TF-CBT helps patients to locate trauma triggers, and helps the traumatized patient and her family to make meaning of reactions and behaviors. There is strong evidence supporting its efficacy even over other types of child-centered treatments.<sup>194</sup> The structured therapy includes a unique component of "exposure" therapy, an approach of gradually exposing the patient to the trauma material while guiding and teaching her methods of relaxation to reduce subjective experience of anxiety as she confronts the traumatic memories. TF-CBT has been proven to be highly effective in treating trauma for patients ages three to eighteen.<sup>195</sup> It has also been found to be particularly effective at treating grief-related trauma.<sup>196</sup> While TF-CBT is a new technique that has experienced a high success rate, many therapists are not familiar enough with it to provide such services.<sup>197</sup>

There are several types of exposure therapy. Eye Movement Desensitization and Reprocessing for Children and Adolescents ("EMDR") is currently the highest standard for trauma treatment for patients ages two to seventeen. The treatment involves discussing the traumatic event(s) sequentially while being asked to examine sensations, beliefs, and emotions about the event. This conversational treatment is also paired with an external stimulus, most often therapist directed bilateral eye movement or hand-tapping. It is also available for adults, though empirical support is not strong in adults.<sup>198</sup> The most recent development in

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194. See Judith A. Cohen et al., *A Multi-Site, Randomized Controlled Trial for Children with Sexual Abuse-Related PTSD Symptoms*, 43 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY, 393, 393-402 (2004).

195. Judith Cohen, *Trauma-Focused Cognitive-Behavioral Therapy (TF-CBT)*, CAL. EVIDENCE-BASED CLEARINGHOUSE FOR CHILD WELFARE, <http://www.cebc4cw.org/program/trauma-focused-cognitive-behavioral-therapy/> (last updated June 2015).

196. *Id.* Grief and Abuse focused trauma is sometimes abbreviated as "AF-CBT". M. A. DE ARELLANO ET AL., THE NAT'L CHILD TRAUMATIC STRESS NETWORK, TRAUMA-INFORMED INTERVENTIONS: CLINICAL AND RESEARCH EVIDENCE AND CULTURE-SPECIFIC INFORMATION PROJECT 23 (2008), [http://nctsn.org/nctsn\\_assets/pdfs/CCG\\_Book.pdf](http://nctsn.org/nctsn_assets/pdfs/CCG_Book.pdf); see also *Evidence Based Treatments for Childhood Trauma*, 95 VA. CHILD PROTECTION NEWSL. 3 (2012), <http://psychweb.cisat.jmu.edu/graysojh/pdfs/Volume95.pdf>.

197. Interview with Dr. Stephanie Marcy, Ph.D., Psychologist & Assistant Professor of Pediatrics, Children's Hospital Los Angeles (January 28, 2015).

198. Robbie Dunton, *Eye Movement Desensitization and Reprocessing for Children and Adolescents*, CAL. EVIDENCE-BASED CLEARINGHOUSE FOR CHILD WELFARE, <http://www.cebc4cw.org/program/eye-movement-desensitization-and-reprocessing/> (last updated Dec. 2015); Michelle E. Van Etten & Steven Taylor, *Comparative Efficacy of Treatments for Post-traumatic Stress Disorder: A Meta-Analysis*, 5 CLINICAL PSYCHOL. & PSYCHOTHERAPY 126, 141 (1998) (finding EMDR to be most effective treatment in their meta-analysis of sixty-one treatment outcome trials).

trauma exposure therapy treatment is a therapy called Rapid Resolution Therapy (“RRT”) and it is being used by the Army.

*d. Failure to Use Safe Settings, and the Overuse of Incarceration*

The juvenile justice system currently punishes youth in ways that traumatize them. Indeed, the system is premised on a faulty adult conception of specific deterrence as a useful aim of punishment—specifically that the unpleasantness of arrest, the coercive and shaming nature of being made to appear in court, and the austerity of detention will deter the youth being punished from breaking the law again. Deterrence is not an effective strategy with youthful offenders because they fail to appreciate negative long-term consequences and poorly weigh costs and benefits.<sup>199</sup>

Effective services must be provided in safe settings.<sup>200</sup> Evidence-based treatments should take place in school, in the community, and at home.<sup>201</sup> Even if effective treatments were provided in juvenile incarceration, the effectiveness of the treatment would be compromised if not eviscerated due to the setting in which it was provided.<sup>202</sup> The most developmentally appropriate setting is one which promotes stimulation and avoids harm that could damage a plastic brain.<sup>203</sup>

*i. Incarceration is Generally Inappropriate for Youthful Offenders*

Incarceration of youthful offenders is particularly problematic because offenders will serve substantial time in prison during their formative years and then reenter mainstream society ill-prepared for a successful life. Further, incarceration simply does not work very well to achieve any goal other than short-term incapacitation from the larger community outside the facility, especially with youthful offenders. Incarceration exacerbates trauma. Incarceration instills rather

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199. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1012 (2003) (discussing how even if youth are aware of negative consequences such as incarceration they are unlikely to factor them into their decision of whether or not to commit an offense).

200. BURRELL, *supra* note 30, at 6 (discussing the importance of “creating an environment in which everyone feels safe, supported, respected, and engaged”).

201. Arredondo, *supra* note 59, at 22 (“[V]irtually all effective evidence-based practices occur in the community and the home.”); see also JESSICA FEIERMAN, KACEY MORDECAI & ROBERT G. SCHWARTZ, JUVENILE LAW CTR., TEN STRATEGIES TO REDUCE JUVENILE LENGTH OF STAY (2015), [http://www.jlc.org/sites/default/files/publication\\_pdfs/LengthofStayStrategiesFinal.pdf](http://www.jlc.org/sites/default/files/publication_pdfs/LengthofStayStrategiesFinal.pdf).

202. See *cf.* STEINBERG, *supra* note 16, at 85 (discussing the importance of the settings where adolescents spend their time). While it is true that some therapies have been designed to deliver to children in the juvenile justice system and even those who are incarcerated, this Article argues that delivery inside an unsafe and trauma-inducing setting that is the juvenile prison in America today is inappropriate to treat traumatized children. For more information on trauma-informed treatments provided to incarcerated children, see KERIG, *supra* note 73.

203. See STEINBERG, *supra* note 16, at 45 (discussing how from a developmental perspective during times of great plasticity the brain is particularly vulnerable to harm making it important to provide opportunities to stimulate and challenge the brain as it is protected from unfavorable experiences).



than resolves fight or flight responses and can expose children to additional trauma.<sup>204</sup> It also increases the risk of ongoing traumatic stress while incarcerated.<sup>205</sup> Youthful offenders are at a time in their lives when they are still biologically maturing. Developmentally, they are ripe for the impact of their environment and learning opportunities. Incarceration is not a developmentally appropriate sentence for youthful offenders.<sup>206</sup> The deprivation and lack of stimulation associated with the time spent incarcerated hinders rather than promotes a youthful offender's development.<sup>207</sup>

The harm of incarceration has a particularly harsh impact on poor youth of color because they face higher rates of incarceration across all offense types. Youth of color are held in secure facilities at rates up to four and a half times that of their representation in the community.<sup>208</sup> Indeed, African American youth are five times as likely as white youth to be incarcerated.<sup>209</sup> Overall, nearly three out of four youth who first became incarcerated were youth of color, with the most disproportionately high population of new admits being young black males.<sup>210</sup>

Further, youth of color are more likely to be transferred to adult criminal court, where the risk of harm to children is especially high.<sup>211</sup> In the context of waiver cases like Joan's, one study revealed that 82% of waivers to adult court involved minority youth, with African American boys representing over half of those transferred.<sup>212</sup> When, like in Joan's case, decisions to transfer are unilaterally made by prosecutors without a hearing to determine the propriety of adult criminal prosecution, waiver is an area ripe for racial bias.<sup>213</sup> Latino youth are 43% more

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204. See *c.f.* MOROZ, *supra* note 22, at 5–6 (discussing fight or flight responses and difficulties regulating behavior).

205. WEIS, *supra* note 75, at 1.

206. See Robert Johnson & Chris Miller, *An Eighth Amendment Analysis of Juvenile Life Without Parole: Extending Graham to All Juvenile Offenders*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 101, 109 (2012).

207. See Cellini, *supra* note 131, at 6 (“The neural pathways strengthened in an abusive or neglectful environment are those that will prepare the child to cope in that negative environment, which necessarily curtails their ability to function in a positive environment.”).

208. BERNSTEIN, *supra* note 7, at 59.

209. *Id.*

210. YAMAGATA & JONES, *supra* note 26, at 34.

211. *Id.* (further referencing how provisions of the Juvenile Delinquency Prevention Act requiring that children who are incarcerated be separated from adults by “sight and sound” do not apply when children are transferred to adult court). Federal sight and sound regulations are pursuant to 18 U.S.C. § 5035.

212. ANNIE E. CASSIE FOUND., *supra* note 26.

213. *Id.* In Joan's case, Children prosecuted in Washington D.C. could face charges in adult criminal court for specific enumerated offenses. D.C. Code § 16-2301(3) (2016) (excluding from the jurisdiction of the Family Division, through definition of the term “child,” persons under eighteen but sixteen or older charged with specified offenses). When, in D.C., the prosecution wishes to transfer fifteen- to eighteen-year-olds to adult criminal court, those children are entitled to a hearing under D.C. Code § 16-2307 (2016). There are no enumerated factors statutorily deemed relevant to the “direct file” decision, a decision that is made solely by the Office of the United States Attorney without any judicial review. See also *State v. Mohi*, 901 P.2d 991, 1002–03 (Utah 1995) (regarding the evils of “unguided” prosecutorial discretion and the absence of a “rational connection between the legislature's objective of balancing the need of children with public protection” and the prosecutors’

likely than their white peers to wind up transferred to adult criminal court.<sup>214</sup> African American youth, while only 17% of community, are 62% of those children transferred to adult court.<sup>215</sup>

*ii. Features of Juvenile Incarceration Which Fail to Account for Trauma*

At best, the physical environment in juvenile facilities is austere, cold, and institutional rather than nurturing, supportive, and warm.<sup>216</sup> Facilities of juvenile incarceration have poor access to education and mental health resources. At worst, conditions of confinement include abuse, sexual assault, and solitary confinement. Mistreatment and abuse are far from unusual experiences for youth who are incarcerated.<sup>217</sup> Research has found that more than half of youth in juvenile camps and juvenile halls reported that staff used force unnecessarily and twenty-two percent of youth said they feared being attacked by staff.<sup>218</sup> Further, youth fear attacks from their peers in detention.<sup>219</sup> When children of marginalized racial and ethnic groups are in juvenile facilities with a mixed-race population, there may be instances of cross-racial and/or ethnic aggression.<sup>220</sup>

Sadly, drugs are readily available to youth who are incarcerated, and corrections staff are often the ones responsible for introducing drugs into the facility.<sup>221</sup> Perhaps worst of all, sexual abuse is a reality of incarceration. One recent survey found that twelve percent of children incarcerated in juvenile facilities had been

“total discretion in deciding which members of a potential class of juvenile offenders to single out for adult treatment”); *Hughes v. State*, 653 A.2d 241 (Del. 1994) (direct file provision was struck down on basis of due process and equal protection).

214. BERNSTEIN, *supra* note 7, at 60.

215. *Id.*

216. As Burrell noted:

The clanging metal doors; paucity of natural light; modular plastic furniture bolted to the floor; cramped cement spaces offered for recreation; scratched metal mirrors; concrete slab beds; stripped isolation rooms; and sterile sleeping cells all contribute to an unfriendly, surreal environment for youth at a critically vulnerable point in their lives.

BURRELL, *supra* note 30, at 5.

217. For a sample of abuses incarcerated youth have suffered across the U.S. while housed in juvenile facilities, see BERNSTEIN, *supra* note 7, at 83–84; see also Rebecca Davis O’Brien, *Violence is Down but Still Rampant at Juvenile Detention Facilities*, WALL STREET J. (May 31, 2015), <http://www.wsj.com/articles/violence-is-down-but-still-rampant-1433120947> (describing both a particular case where a corrections officer was criminally charged for his attack on a child under his care and the general state of violence in New York juvenile facilities. In particular, between 2011 and May 2015, the New York agency that runs the juvenile facilities has fired or suspended seven corrections staff for offenses such as failure to report abuse and use of excessive force against a youth).

218. BERNSTEIN, *supra* note 7, at 83.

219. *Id.* (discussing how a quarter of youth feared attack from a peer youth incarcerated alongside him/her); see O’Brien, *supra* note 217 (describing how, in 2014, there were about 350 fights between children who were housed at secure juvenile facilities in New York City).

220. See LISTENBEE ET AL., *supra* note 62, at 180.

221. See BERNSTEIN, *supra* note 7, at 96.

sexually abused within one year (and, in some facilities, the frequency of sexual abuse was reported to be as high as thirty percent within a year).<sup>222</sup> Unfortunately, children who have been abused prior to their incarceration are targeted for sexual abuse.<sup>223</sup> Indeed, twenty-five percent of children who had previously been sexually abused suffered from sexual abuse while incarcerated and sixty-five percent of those who had been previously sexually assaulted while incarcerated at another facility were sexually abused at their next facility.<sup>224</sup> When children are the victims of sexual abuse, they seek to avoid the reality of their experiences, which often means they “detach physically and psychologically . . . as a way of escaping overwhelmingly intense feelings of fear, horror, rage, and shame.”<sup>225</sup> To say incarceration for these youth exacerbates their previous experiences of trauma is not nearly enough of an indictment.

Some youth experience even greater risk of re-traumatization while incarcerated because of dangerous practices used during their incarceration and vulnerabilities due to their very identities. Despite controversy and critique, many juvenile facilities employ solitary confinement as a means of controlling the youth in their care.<sup>226</sup> The use of seclusion can be re-traumatizing to youth.<sup>227</sup> Most facilities fail to consider the special needs of LGBTQ youth in their care.<sup>228</sup> Without appropriate training for staff, these vulnerable and marginalized youth, dealing with sexuality and gender identity issues, are at great risk of abuse, harassment, ostracism, and seclusion in solitary confinement, all of which only serve to exacerbate trauma.<sup>229</sup> For girls in secure facilities, the mere presence of male correctional staff may be traumatizing.<sup>230</sup>

Some jurisdictions house children prosecuted criminally in adult facilities. Children like Joan who are housed with adults face some of the greatest harms they

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222. *Id.* at 104.

223. *Id.* at 106.

224. *Id.* at 106.

225. LISTENBEE ET AL., *supra* note 62, at 31.

226. As in Joan’s case, some facilities justify the use of seclusion because it is needed to separate vulnerable youth and protect them. For a full discussion on problems with the solitary confinement of youth, see Tamar Birkhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1 (2015).

227. WEIS, *supra* note 75, at 1; BURRELL, *supra* note 30, at 4 (describing how use of force, isolation, solitary confinement, and suicide smocks are practices which can “vividly reawaken painful feelings of being powerless, worthless, fearful, and alone” in already traumatized youth).

228. SHANNAN WILBER ET AL., CHILD WELFARE LEAGUE OF AM., CWLA BEST PRACTICE GUIDELINES, SERVING LBGT YOUTH IN OUT-OF-HOME CARE 4–6 (2006), <http://familyproject.sfsu.edu/sites/sites7.sfsu.edu.familyproject/files/bestpracticeslgbtyouth.pdf>.

229. *Id.* Further, one study of LBGTQ youth, who were housed at an unlocked out-of-home placement, found that seventy-eight of the children ran away from their placements due to harassment or assault on the basis of gender and sexual identity. *Id.* at 6.

230. WEIS, *supra* note 75, at 1; *see also* BERNSTEIN, *supra* note 7, at 159 (discussing how girls were strip searched in full view of male staff even when researchers were present observing conditions in one juvenile facility studied).

can encounter as a result of their incarceration in adult facilities.<sup>231</sup> The suicide rate of children in adult jails is five times the rate in the general youth population and eight times that of children in juvenile detention centers.<sup>232</sup> Forty-seven percent of children in adult facilities have suffered violent victimization in the care of that facility.<sup>233</sup> In addition, sexual assault is five times more likely for children in an adult facility than in a juvenile one.<sup>234</sup> Suffering a beating at the hands of staff is twice as likely for children in an adult facility than in a juvenile one.<sup>235</sup> A child in an adult facility is fifty percent more likely to be attacked with a weapon as compared to a child in a juvenile facility.<sup>236</sup>

These problems are endemic to our current system of incarceration. Studies on conditions of confinement provide transparency, which helps to understand the pervasive and massive extent of problems with incarceration. Employing incarceration with children especially is counter-productive to the goals of rehabilitation and community safety. This understanding must guide reform efforts to drive the elimination of incarceration as we know it today.

### *C. A Child's Experience of Juvenile Justice System Failures*

When the juvenile system fails to identify a child's very real trauma, fails to take an accurate view of the child's culpability, and responds with punishment instead of consequence and treatment combined, the child feels the system is unfair.<sup>237</sup> This feeling of unfairness compromises the child's perception of what is known as procedural justice and dis-incentivizes future law-abiding behavior. The Attorney General's National Taskforce on Children Exposed to Violence observed:

Children exposed to violence, who desperately need help, often end up alienated. Instead of responding in ways that repair the damage done to them by trauma and violence, the frequent response of communities, caregivers, and peers is to reject and ostracize these children, pushing them further into

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231. Children incarcerated in adult facilities are at a greater risk of harm in adult facilities than *both* their adult inmates in the same facilities and their juvenile counterparts in juvenile facilities. *See generally* AUSTIN ET AL., *supra* note 9. For additional context, see also MALCOLM C. YOUNG & JENNI GAINSBOROUGH, *THE SENTENCING PROJECT, PROSECUTING JUVENILES IN ADULT COURT: AN ASSESSMENT OF TRENDS AND CONSEQUENCES 6-7* (2000), <http://www.prisonpolicy.org/scans/sp/juvenile.pdf> (discussing the problems juveniles face in adult prisons).

232. AUSTIN, *supra* note 9, at 7-8.; *see also* YOUNG & GAINSBOROUGH, *supra* note 231, at 6 (comparing the suicide rates of children in different facilities).

233. AUSTIN, *supra* note 9, at 6; *see also* YOUNG & GAINSBOROUGH, *supra* note 231, at 8 (compared with thirty-seven percent of youth in juvenile detention centers).

234. AUSTIN, *supra* note 9, at 8; *see also* YOUNG & GAINSBOROUGH, *supra* note 231, at 6 (stating that someone is five times more likely to be sexually assaulted in an adult facility).

235. AUSTIN, *supra* note 9, at 8; *see also* YOUNG & GAINSBOROUGH, *supra* note 231, at 6 (describing that someone is twice as likely to be beaten by staff in an adult facility).

236. AUSTIN, *supra* note 9, at 8; *see also* YOUNG & GAINSBOROUGH, *supra* note 231, at 6 (noting that someone is fifty percent more likely to be attacked with a weapon in an adult facility).

237. *See* LISTENBEE ET AL., *supra* note 62, at 173 (explaining what happens when the system responds with punishment).

negative behaviors. Often the children become isolated from and lost to the families, schools, and neighborhoods and end up in multiple unsuccessful out-of-home placements and, ultimately, in correctional institutions.<sup>238</sup>

In Joan's case, the juvenile system communicated that she was accountable for her behavior, but not that the adults who harmed her were responsible for their own behavior. The system was not fair to Joan when it failed to recognize her behavior was the result of abuse and trauma she had suffered. Society has a responsibility to respond to underlying trauma suffered by offenders. The State has special responsibilities to care for and nurture *all* children.<sup>239</sup> There is no way to know which children are beyond redemption and which will outgrow their offending behavior. Responding to child offenders with a developmentally and trauma-informed approach will have the greatest potential for interrupting even violent offending and rehabilitating them.

When a young person in the community has suffered traumatizing experiences, the State has a responsibility to intervene and offer services.<sup>240</sup> Failure to address the trauma children have suffered is a "violation of our social contract with youth."<sup>241</sup> Furthermore, the juvenile system has a responsibility to youth to promote their growth into law-abiding and mature adults.<sup>242</sup> The courts' lack of action to protect children from danger, and lack of treatment for their trauma, can delegitimize the justice system in the eyes of youth, engendering disregard for laws and adults as unfair because they respond with punishment and not protection.<sup>243</sup> This impact is compounded for youth of color, who are already marginalized in society and may receive the message that they are not worthy of protection when the justice system fails to address the trauma they have suffered.<sup>244</sup>

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238. *Id.* at 172.

239. *See, e.g., In re Marilyn H.*, 851 P.2d 826, 833 (Cal. 1993) ("[T]he welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect.").

240. In the context of juvenile dependency, California's caselaw expounds on this responsibility stating that "the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect." *Id.* Further, "California's dependency statutes fulfill this duty by authorizing juvenile court intervention to protect children who are at substantial risk of suffering physical or emotional harm." *In re Joseph B.*, 49 Cal. Rptr. 2d 900, 906 (Cal. Ct. App. 1996).

241. *See* BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 6 (describing how disregard for rules set by adults might result from abuse by adults).

242. *See In re Gault*, 387 U.S. 1, 26 (1967) (referencing the importance of adhering to principles of due process to a youth's perception of fairness and buy-in to his or her own rehabilitation, a notion advanced in the work of sociologists Wheeler and Cottrell, Jr., *JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL* 33 (1966)); *see also* Birkhead, *supra* note 54, at 16 (discussing the same).

243. *See* BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 6 (discussing how negative punishment does little to help).

244. *See* Arredondo, *supra* note 59, at 27 (discussing different parental attitudes); *see also* Buckingham, *supra* note 4, at 203–04 (discussing how, in the context of the school-to-prison pipeline, youth of color are doubly punished are sent the message that laws are unfairly applied to them, disincentivizing them to follow the law).

In response to inappropriate services, a child may drop out of treatment.<sup>245</sup> This is especially true when the services are culturally insensitive.<sup>246</sup> Policymakers recommend that the system will be most effective if in those instances it can examine the race, ethnic, cultural trauma, and fear at the root and respond by helping children to cope with the stress of this trauma.<sup>247</sup>

#### IV. TRAUMA INFORMED JUSTICE

##### A. *Framework: Guiding Principles to Drive Reform*

Trauma-informed justice incorporates an understanding that trauma is pervasive amongst children in the juvenile system. A contemporary understanding of trauma must permeate the juvenile justice system through its framework, inform the mindset of all of its participants, and drive all reforms, taking trauma into account from the street to the courtroom and beyond. It is *critical* that trauma be used only ever *as a mitigator* for every transaction assessing culpability. A trauma-informed approach to juvenile justice embraces the societal responsibility to treat sufferers, focuses on early identification and intervention, presumes trauma exposure in its procedures and processes, utilizes evidence-based trauma-specific therapies, provides an appropriate safe setting for therapeutic interventions, and avoids incarceration. Further, a trauma-informed response must be individualized, culturally sensitive, and needs-based. Each child experiences trauma uniquely based on their personal resources, community, gender, familial resources, cultural norms, and the cumulative impact of other experiences. This Article proposes a framework for reforms to provide an opportunity to nurture and heal youth. The benefit to a trauma-informed approach is promotion of rehabilitation, long-term community safety, and a severe reduction of the current population of incarcerated children.<sup>248</sup>

Trauma-informed juvenile justice embraces society's responsibility to respond to the underlying trauma suffered by children who present as offenders. The state has special responsibilities to care for and nurture children.<sup>249</sup> Unfortunately, the first sign of trauma, as Joan's story illustrates, may be contact with the juvenile delinquency system. Children in the dependency system have often experienced the same trauma due to abuse and neglect as the children in the delinquency system, and those children are often viewed differently—as pure victims. Too often the state's failure to provide abused and neglected children appropriate treatment has left those children vulnerable to juvenile justice system involvement. This Article argues that the recognition of both trauma's pervasiveness and

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245. FEIERMAN & FINE, *supra* note 8, at 28.

246. LISTENBEE ET AL., *supra* note 62, at 180.

247. *Id.*

248. See BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 6 (discussing the risks of imposing only negative consequences).

249. See, e.g., *In re Marilyn H.*, 851 P.2d 826, 833 (Cal. 1993) (“[T]he welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect.”).

trauma's strong link to offending endows the state with a heavy responsibility to respond carefully to these traumatized children when they arrive at juvenile delinquency court. The justice system must be reformed to ferret out the underlying cause of the trauma so that it may be constructively addressed. Children in the juvenile justice system are deserving of individualized trauma-focused response to their offending, particularly when the state fails to intervene or provide appropriate services when they are younger.

Juvenile court has a mandate to rehabilitate.<sup>250</sup> Based on that principle, some courts have found a substantive due process right belonging to children who are detained and under the state's care to appropriate services and treatment.<sup>251</sup> Basing its findings on this due process right, in one New York case, the court said: "the conditions of placement may not be punitive nor exclusively designed to incapacitate, but must include treatment and rehabilitation consistent with the needs and best interests of the juvenile."<sup>252</sup> This means children have a substantive due process right to appropriate, trauma-informed care, regardless of the cost or current availability.<sup>253</sup> This right to treatment belongs to children even if children are at first antagonistic to treatment, the state must persist in providing appropriate, trauma-informed care and must not house youth in a way that traumatizes them further.<sup>254</sup>

### *B. Specific Trauma Informed Reforms*

This Article proposes four trauma-informed reforms: (1) create a presumption of trauma, (2) mandate trauma identification of youth in the juvenile justice system, (3) implement trauma-informed procedures, and (4) utilize trauma-informed dispositions, which will dramatically reduce our over-reliance upon incarceration in favor of safe-settings in a youth's community.

#### *1. Create a Presumption of Trauma*

Even though the system is currently not functioning to encourage trauma identification, the juvenile justice system is the ideal place to identify trauma

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250. Recognizing the rehabilitative purpose of juvenile courts, some scholars have argued that due process concerns demand a different approach to the sentencing of young people. For an example of the codification of rehabilitative purpose, see CAL. WELF. & INST. CODE § 202 (West 2015). For a discussion of a juvenile due process rights see Guggenheim, *supra* note 170, at 499 (stating that juveniles have a due process right to differential treatment by the justice system, and, in particular, they have a due process right to individualized and age-appropriate sentencing); *see also* Henning, *supra* note 176, at 1119 n.57 (stating that states have made a commitment to rehabilitation through state statutes).

251. FEIERMAN & FINE, *supra* note 8, at 27 (referencing *In re Johnny S.*, a New York family court case where the judge found a substantive due process right); *see also id.* at 30 (referencing *In re Tameka M.*, a Pennsylvania case originating out of the child welfare system, and supporting an argument that the state bears this responsibility to the child regardless of funding constraints).

252. *Id.* at 27 (referencing *In re Johnny S.*).

253. *See id.* at 27–31 (discussing policy recommendations).

254. *See id.* (discussing policy recommendations).

sufferers. Child offenders are more appropriately viewed from a trauma-focused lens as sufferers, the most vulnerable and marginalized individuals in our society.<sup>255</sup> Through this lens, many offenses will be more accurately perceived as expressing a cry for help to which society has an obligation to respond pro-actively and compassionately.<sup>256</sup> The staggering evidence of trauma experienced by children before entering the juvenile justice system requires the establishment of a presumption of a child's trauma history.

The creation of a presumption of trauma requires legislative action. The codification of a presumption of trauma is necessary to establish that trauma must only be used as a *mitigator*, never as an aggravator.<sup>257</sup> The presumption of trauma should inform all decisions in every child's case unless it can be established that there is no trauma.<sup>258</sup> There is some precedent for the use of trauma as a *mitigator* in sentencing decisions. Some federal circuits have recognized "youthful lack of guidance" as a factor in favor of justifying a downward departure.<sup>259</sup>

## 2. Mandate the Identification of Trauma

The juvenile justice system must be charged with identifying trauma-suffering children who come to its attention. There are distinct benefits to the early identification of trauma and treatment. Many evidence-based treatments have proven success rates with trauma sufferers.<sup>260</sup> The best antidote to trauma is early intervention<sup>261</sup> and targeted treatment as soon as possible.<sup>262</sup> An understanding of the different types of trauma, the extent of repeated trauma, and the effectiveness of new treatments is dynamic and evolving. What is certain, however, is that effective, individualized treatment can heal trauma sufferers.<sup>263</sup> Further, early

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255. Robert L. Listenbee, *Message from Robert L. Listenbee on HHS Guidance Related to Trauma-Informed Screening, Assessment, and Evidence-Based Practices in Child-Serving Settings to Improve Child Well-Being* (2013), [http://www.ojjdp.gov/news/speeches/130802\\_Listenbee.pdf](http://www.ojjdp.gov/news/speeches/130802_Listenbee.pdf).

256. See BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 6 (describing the cumulative effect of trauma).

257. The risk that trauma will be perceived as an aggravator is real. See FEIERMAN & FINE, *supra* note 8, at 23. Furthermore, youth, a factor which should always be mitigating, has been used as an aggravator. For instance, the sentencing court in *Roper v. Simmons*, which determined that a child should receive the death penalty, entertained arguments from the prosecution that his age was an aggravating factor. *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

258. A presumption of trauma might be codified similarly to the presumption of incapacity. See, e.g., CAL. PENAL CODE § 26 (West 2015) (discussing classes of people who cannot commit crimes); see also *In re Gladys R.*, 464 P.2d 127 (Cal. 1970) (holding juvenile courts should consider whether a child appreciates wrongfulness). The presumption that children under fourteen are not able to appreciate the wrongfulness of their conduct can only be overcome by the prosecution if it can establish, by clear and convincing evidence, that the child in fact did appreciate the wrongfulness of the specific act alleged. See *In re Manuel L.*, 865 P.2d 718, 722–24 (Cal. 1994) (discussing rebutting the presumption).

259. FEIERMAN & FINE, *supra* note 8, at 24 (D.C. Circuit and the Ninth Circuit both recognize "youthful lack of guidance").

260. See *supra* notes 192–97 and accompanying text.

261. ADAMS, *supra* note 72, at 9.

262. BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 5.

263. KLAIN & WHITE, *supra* note 137, at 3–5.



identification and targeted treatment is critical because youth are particularly ripe for recovery and growth when they are still undergoing important biological developments.<sup>264</sup> Early identification also facilitates the use of trauma in legally significant decisions in the course of a case.

### 3. *Trauma-Informed Procedures*

Trauma-informed principles must permeate each legally significant phase of a delinquency proceeding where traumatic childhood experiences are relevant. Trauma has implications for a determination of a child's competency, capacity, transfer or waiver to adult court, understanding of their rights when the state is exacting a confession,<sup>265</sup> determination of culpability,<sup>266</sup> diversion from prosecution, and disposition. When the legislature enacts a presumption of trauma it will impact each decision point. Further, prosecutor standards should include the use of information about underlying childhood trauma as mitigation, as should judicial bench guides. When the presumption of trauma and its place as *a mitigator* is codified, defenders zealously fighting on behalf of their child clients will have the opportunity and obligation to explain trauma, using it as a vehicle for dismissals, reducing charges, and preventing dispositions which risk the harm of incarceration.

Though at present no legal protections specifically include trauma as a factor, there are some special protections for all children, which are particularly relevant to trauma-exposed children. They include requirements that children in delinquency court are competent and have the capacity to understand the wrongfulness of their actions. With regard to competency, an accused must be able to understand the nature of the proceedings as well as to assist and communicate with counsel.<sup>267</sup> California recognizes that, in juvenile delinquency proceedings, a child's age and

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264. See Buss, *supra* note 135, at 39 (citing Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens through the Twenties*, 55 AM. PSYCHOL. 469, 474–75 (2000) (describing a distinct developmental phase of “emerging adulthood,” from eighteen to twenty-five, during which much identity formation occurs and certain high-risk behaviors are at their peak)); see also Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop,”* 64 AM. PSYCHOL. 583, 590–91 figs. 1 & 2 (2009) (presenting research findings suggesting that, while cognitive maturation levels off by approximately sixteen, psychosocial maturation, which affects individuals' impulse control and sensation-seeking behavior, as well as their ability to resist peer pressure and consider future consequences, continues through the twenties); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 152 (2009) (“Developmental neuroscience consistently indicates that structural brain maturation is incomplete at age eighteen. Though estimates vary, many scientists have opined that structural maturation is not complete until the mid-twenties.”). Steinberg defines “psycho-social maturation” as involving (1) sensation-seeking; (2) capacity to resist peer pressure; and (3) future orientation. Steinberg et al., *supra* note 264, at 588–89.

265. See FEIERMAN & FINE, *supra* note 8, at 26 (discussing how and why trauma should be considered in the voluntariness of a confession).

266. Culpability should impact charging decisions, plea negotiations, determinations of involvement by a judge at a trial, and again at disposition.

267. See *Dusky v. United States*, 362 U.S. 402, 402 (1960). California's juvenile provision for competency states that a child is incompetent to stand trial:

stage of development are essential to an examination of competency and acknowledges that a child may be incompetent based on his developmental immaturity.<sup>268</sup> Children who have suffered trauma are more likely to have difficulty achieving competency.<sup>269</sup> Legislation should add to competency protections that trauma exposure is presumed and that trauma must be a factor impacting any assessment of a child's competency. Competency inquiries are distinct yet related to the determination of capacity to understand wrongfulness of one's actions.

With regard to capacity, trauma has implications for a child's ability to have developed and incorporated society's values. Studies have found that when a child suffers physical abuse, the abuse interrupts a child's ability to internalize society's moral values.<sup>270</sup> Across the U.S., delinquency courts protect children with a rebuttable presumption that those under a certain age (in California that age is fourteen) do not have the capacity to understand the wrongfulness of their conduct.<sup>271</sup> The presumption that children under fourteen do not appreciate the wrongfulness of their conduct can only be overcome if the prosecution establishes by clear and convincing evidence that the child in fact did appreciate the wrongfulness of the specific act alleged.<sup>272</sup> California law affirms this "fundamental protection to children" and establishes that there is a deeply imbedded presumption in favor of a child's incapacity.<sup>273</sup> Indeed, common law had historically established that children between ages of seven to fourteen were incapable of committing criminal acts absent a showing that the particular child had the required age and experience to appreciate the wrongfulness of the specific act.<sup>274</sup>

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[I]f he or she lacks sufficient and present ability to consult with counsel and to assist in preparing his or her defense with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding, of the nature of the charges or proceedings against him or her.

CAL. WELFARE AND INST. CODE § 709(a) (West 2015).

268. See *In re Timothy J.*, 150 Cal. App. 4th 847 (Cal. Ct. App. 2007) (where two children, aged eleven and twelve, both older than Joseph H. was at the time of his conduct, based their claims to incompetency on their developmental immaturity).

269. Children may have difficulty trusting adults, they may be emotionally and psychologically fragile, they may have co-existing disorders like ADHD, depression, and/or anxiety, all of which interfere with their ability to work with an attorney on their behalf.

270. Elizabeth Thompson Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOL. BULL. No. 4, 539-579 (2002); see Lawrence Kohlberg & Richard H. Hersh, *Moral Development: A Review of the Theory*, 16 THEORY INTO PRACT. 53, 54 (1977) (referencing that there is general evidence that extreme trauma could disrupt normal moral development).

271. See, e.g., CAL. PENAL CODE § 26 (West 2015). As in the matter of *Gladys R.*, capacity issues frequently arise when children do not understand inappropriate or unwanted touching. This has particular implications for children who have been molested and/or inappropriately exposed to sexually sophisticated behavior of adults. *In re Gladys R.*, 1 Cal. 3d 855 (Cal. 1970). Further, in the context of establishing capacity pursuant to § 26, California courts have repeatedly acknowledged that the closer in age to fourteen a child is, the more likely it is that the child may appreciate the wrongfulness of his actions. *People v. Cottone*, 57 Cal. 4th 269, 303 (Cal. 2013); *In re Cindy E.*, 83 Cal. App. 3d 393 (Ct. App. 1978).

272. CAL. PENAL CODE § 26 (West 2015); *In re Gladys R.*, 1 Cal. 3d 855, 863 (Cal. 1970).

273. See *In re Gladys R.*, 1 Cal. 3d at 863 (discussing the legislative intent behind § 26).

274. *Id.* (internal citations omitted).

Understanding that trauma is pervasive in the juvenile justice population and is frequently a contributing factor to, if not the direct cause of, delinquent behavior, must fundamentally change the juvenile justice system's conceptions of culpability at its core. For this reason, perceptions of responsibility, blame, and mental state must all be re-evaluated. The state bears some level of responsibility when it fails to intervene and protect children who are suffering. An abject failure to intervene leaves traumatized children vulnerable to offending. Equipped with a more sophisticated view of trauma, prosecutors, defenders, and judges alike will see that, in some cases, trauma should vitiate *mens rea*, thereby nullifying, or at least mitigating, the charges against a youth. This reasoning borrows from an applicable concept in disability and education law—when a child misbehaves in school, she cannot be punished if the behavior was a manifestation of her disability.<sup>275</sup> Indeed, pursuant to the Americans with Disabilities Act, trauma has been conceptualized by some as a disability that public schools are required to address.<sup>276</sup>

Prosecutors should have standards which advise them to look for trauma as an underlying cause, ask for information about trauma, and decline to file charges in either juvenile and/or adult court.<sup>277</sup> Defenders have ethical obligations to zealously fight for their clients and diligently advocate for their clients' liberty at all times.<sup>278</sup> Prosecutors should be encouraged to dismiss cases where trauma is an underlying cause, as it was for Joan and Marvin. Children in those cases should receive services, though those services may be best provided by the department of mental health and do not require the involvement of the juvenile court. When a child is ushered through the delinquency system in the name of providing that child services, the child is stigmatized. This impedes the formation and preservation of a positive self-identity due to the blaming and negative aspects of delinquency prosecution and adjudication.<sup>279</sup>

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275. Under the 1997 amendments to the IDEA, school personnel seeking to exclude a child for discipline reasons must first determine whether the behavior in question was a manifestation of the child's disability. 20 U.S.C. § 1415(k) (2015). The IEP team, which includes parents and other qualified personnel, makes the disability manifestation determination. *Id.*

276. *Peter P. v. Compton Unified School District* is a class action lawsuit on behalf of school children as well as teachers in Compton, California asserting that the children in Compton public schools are entitled to trauma education and services. A copy of the complaint is available at: <http://www.publiccounsel.org/tools/assets/files/0644.pdf> (last visited April 11, 2016).

277. The National District Attorney's Association should add trauma consideration and lack of prior trauma-specific treatment to their list of charging standards. See NAT'L DIST. ATTYS ASS'N, NATIONAL PROSECUTION STANDARDS § 4-11, at 64–67 (2010); Henning, *supra* note 54, at 437–38.

278. See MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.3, 1.3 cmt. (AM. BAR ASS'N 2010).

279. See Carl S. Taylor, *Growing Up Behind Bars: Confinement, Youth Development, and Crime*, 3 J. OKLA. CRIM. JUST. RES. CONSORTIUM 1, 10 (1996). Taylor notes that:

Once a youth has been categorized as a delinquent, often a self-fulfilling prophecy is set in motion. Unable to break free of the stigma, he may begin to structure his identity around this label. The effect is frequently future criminal behavior, diminished employment and educational opportunities, and the receipt of a new label—one of society's 'undesirables.'

When prosecutors will not dismiss a case in the face of mitigating trauma evidence, defenders should ask the judge to grant a dismissal.<sup>280</sup> Judges should have specific instructions in bench guides to advise them when and where trauma may be relevant to a decision about culpability or disposition.<sup>281</sup> Where trauma may not be the direct cause, but an underlying mitigating factor, for instance in cases where children who are fearful join a gang and commit an offense as a part of their gang involvement, prosecutors should be open to plea agreements which offer children reduced culpability and offer the child a chance to address the case with minimal court involvement and no permanent record.<sup>282</sup>

Far too often in juvenile court, the attorneys and judges look for ways to adjudicate a child just to be able to afford that child services they believe the child needs.<sup>283</sup> This practice must come to a halt. Developmental science has informed us that when children feel they are being unfairly held accountable, it actually serves as a dis-incentive for them to follow the law in the future. When the court system acknowledges and accurately accounts for trauma in assessing culpability, children will experience increased perceptions of fairness and interconnectedness in society,<sup>284</sup> thereby promoting community safety.<sup>285</sup> When the court does bring a child under its jurisdiction because there is a legitimate basis upon which to determine the child's involvement, disposition should utilize services that help, regardless of ease of availability and cost of services to the state. The court must be

*Id.*

As youth progress through the stages of the justice system, the impact of labeling on them is amplified. Studies have found that the impact of appearing in court is associated with higher levels of future delinquency. Indeed, whenever a label is applied publicly, an individual is more likely to experience an impact on his or her identity. Stephanie A. Wiley & Finn-Aage Esbensen, *The Effect of Police Contact: Does Official Intervention Result in Deviance Amplification*, CRIME & DELINQ. 1, 4–6, 17–18 (2013) (internal citations omitted) (discussing in addition public degradation ceremonies which further lead to increased involvement with deviant peers and social exclusion).

280. *See, e.g.*, CAL. WELFARE AND INST. CODE § 782 (West 2015) (providing that any interested party may address the juvenile court on the child's behalf at any time to request a dismissal of the case in the interests of justice).

281. For an example of a judicial bench guide see, e.g., CAL. JUDGES BENCHGUIDES, CUSTODY AND VISITATION (2004), <http://thesociologycenter.com/EvidenceBooks/Bench%20Guides%20SmallFile.pdf>.

282. Many jurisdictions have opportunities for children to automatically receive dismissals and have their records sealed after a period of minimal supervision. *See, e.g.*, CAL. WELFARE AND INST. CODE §§ 654, 790, 725 (West 2015).

283. *See* Sterling, *supra* note 171, at 619 (discussing the initial purpose of the child savers not to focus on guilt or innocence but rather on providing services to promote the child's best interest).

284. BUFFINGTON, DIERKHISING & MARSH, *supra* note 3, at 6.

285. An overwhelming number of criminal cases are resolved with guilty pleas. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (Justice Kennedy writing for the Court noting that in federal courts, ninety-seven percent of convictions are the result of guilty pleas, while in state court ninety-four percent of convictions result from guilty pleas). *See generally* MARC MAUER & THE SENTENCING PROJECT, RACE TO INCARCERATE (1999) (discussing increasing incarceration rates of U.S. prisons). America imprisons one percent of its adult population. *See* PEW CTR. ON THE STATES, *supra* note 29, at 5.

vigilant in ensuring that the services it employs are trauma-specific, evidence-based, and faithful to the design of the services.

#### 4. *Utilize Trauma-Informed and Age Aware Dispositions*

Appropriate services must be developmentally sound and committed to address the individual root cause of trauma with treatment to serve rehabilitation goals and promote community safety. Treatment and services afforded children in the delinquency system must be individualized and culturally appropriate.<sup>286</sup> There are all different types of traumatic experiences, some more commonly experienced by particular groups. Responses to trauma are impacted in part by individual attributes and resources as well as by community resources and cultural norms around reacting to traumatic experiences.<sup>287</sup> There are frequently differences in processing trauma, especially along gender lines. Trauma-informed services cannot be one size fits all and must be uniquely tailored to each individual child's experiences, responses, needs, as well as cultural, racial, ethnic, gender, and sexual identity. Though it is beyond the scope of this Article's proposed reforms, in addition to services provided by the juvenile justice system, public health agencies must provide better services earlier, *before* kids wind up in juvenile delinquency system whenever possible.<sup>288</sup>

Avoiding incarceration is critical to achieving trauma-informed juvenile justice. Incarceration of youthful offenders is particularly problematic because these offenders will serve substantial time in prison during their formative years and then reenter mainstream society ill-prepared for a successful life. Put simply, incarceration does not work well, especially with youthful offenders. Incarceration is not a developmentally appropriate sentence for youthful offenders, nor is it a trauma-informed sentence.<sup>289</sup> The deprivation and lack of stimulation associated with the time spent incarcerated will hinder rather than promote a youthful offender's development.<sup>290</sup> Further, incarceration is also not an appropriate setting to deliver trauma-specific treatment. The presumption of trauma should incorporate a presumption that incarceration is not an appropriate space for treatment for traumatized children in need of rehabilitation.

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286. LISTENBEE ET AL., *supra* note 62, at 179; *see also* FEIERMAN & FINE, *supra* note 8, at 13–14.

287. LISTENBEE ET AL., *supra* note 62, at 179–80.

288. KEEP THE PROMISE COALITION, JUVENILE JUSTICE AND MENTAL HEALTH FACT SHEET 2 (2014), [http://www.ctkeepthepromise.org/uploads/Juvenile\\_Justice\\_and\\_Mental\\_Health\\_factsheet.pdf](http://www.ctkeepthepromise.org/uploads/Juvenile_Justice_and_Mental_Health_factsheet.pdf).

289. Johnson & Miller, *supra* note 206, at 109.

290. *See* Cellini, *supra* note 131, at 6 (“The neural pathways strengthened in an abusive or neglectful environment are those that will prepare the child to cope in that negative environment, which necessarily curtails their ability to function in a positive environment.”).

### C. *Realizing Reform*

To achieve the over-arching trauma-informed reforms, the establishment of a presumption of trauma as mitigation will not be sufficient in and of itself. Reform must also be accomplished and promoted through education of all the juvenile justice system players on the role of neuroscience, developmental psychology, and trauma in juvenile offending, updating prosecutorial responsibilities to add consideration of trauma and development, and infusing current police, probation, facility, and courtroom procedures with trauma-informed and developmentally sound methods. Every person who encounters a child in the juvenile justice system needs to be better equipped to understand development and trauma with the goal of being able to spot trauma, understand how it mitigates, respond appropriately to get treatment, and guard against re-traumatization. Education should be aimed in part at debunking any myths about race and trauma that harm youth of color. Law school clinics, defenders, and mental health professionals are fundamental to providing education both systemically and on a case-by-case basis to hold the system players accountable.

Proceedings in juvenile court should reflect both developmental science and the latest research on trauma. Given the prevalence of trauma suffering amongst children entering the juvenile justice system, all interactions with children and families should be developmentally sound and should account for the strong likelihood that the child has experienced trauma. As a practical matter, interactions with all players and the children they serve should be strength-based to empower child and family, recognizing that the way the system players interact with the children in their care has a powerful impact on their prosocial and healthy development.<sup>291</sup> An appreciation of a child and her family's traumatic experiences must be respected in courtroom interactions and by all system players. Specifically, dialogues in court must be responsive, strength-based, and geared to promote healing (i.e. not "depraved soul"). A trauma-focused method of interacting with children and families builds upon developmentally sound procedures which promote education, growth, and perception of fairness—resulting in rehabilitation and more law-abiding behavior.<sup>292</sup> Trauma-informed and developmentally sound procedures provide choices to children and families whenever possible.<sup>293</sup> Such procedures would hold the players in the system accountable to the latest research

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291. See FEIERMAN & FINE, *supra* note 8, at 20 (describing the importance of strength-based dialogues with trauma sufferers); see also Emily Buss, *The Developmental Stakes of Youth Participation in American Juvenile Court*, in PROMOTING THE PARTICIPATION RIGHT OF CHILDREN ACROSS THE GLOBE: FROM SOCIAL EXCLUSION TO CHILD-INCLUSIVE POLICIES (Tali Gal & Benedetta Duramy eds., 2015) (discussing the importance of developmentally sound procedures to interact with children, promoting their growth as individuals).

292. See Buss, *supra* note 291.

293. See FEIERMAN & FINE, *supra* note 8, at 10 (noting in particular how essential choices are for girls who have been traumatized to promote their empowerment).

on adolescence and trauma and bring the daily interactions in line with the core value of rehabilitation.

#### *D. Strengths of a Trauma-Informed Approach*

When trauma is accurately identified, appropriate responses to trauma will ensure proper diagnosis and treatment, avoiding over and improper use of medication.<sup>294</sup> When trauma-specific treatments are utilized, and delivered effectively in safe spaces,<sup>295</sup> they are wildly more responsive and effective at treating trauma. The U.S. spends, on average, just over \$400 a day to incarcerate a young person, or \$146,302 per year.<sup>296</sup> Given the extreme high cost of juvenile incarceration, reducing incarceration in favor of treatment in the community, should yield money-savings and promote long-term reduction in crime.<sup>297</sup> A trauma-informed approach is smart because it capitalizes on the developmental potential for growth of adolescents.

#### *E. Addressing Challenges to Trauma-Informed Juvenile Justice*

##### *1. Implementation: System Coordination and Allocation of Resources*

Mental health systems will have to coordinate services more closely than ever before with the juvenile justice system players, police, corrections, and probation. Coordination between systems has proven difficult, especially in large metropolitan areas.<sup>298</sup> More therapists will need to be trained in trauma-focused evidence-based practices. Due to the risk of vicarious trauma for therapists performing these highly-effective treatments, additional supports for providers will need to be in place.<sup>299</sup> There are currently limitations to funding for trauma-specific treatment for children in the juvenile justice system so laws may need to be reformed to acknowledge the reality that children can simultaneously be victims of exposure to violence and considered offenders.<sup>300</sup> There may be an initial investment required

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294. *See id.*

295. *See* BURRELL, *supra* note 30.

296. FEIERMAN, MORDECAI & SCHWARTZ, *supra* note 201, at 2.

297. *See* JUSTICE POLICY INST., STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION (2014), [http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker\\_shock\\_final\\_v2.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf).

298. *See* LOS ANGELES COUNTY JUVENILE PROBATION OUTCOMES STUDY 140–141 (2015), <http://www.cdfca.org/library/publications/2015/la-probation-outcomes.pdf>.

299. *See* Michal Finklestein et al., *Posttraumatic Stress Disorder and Vicarious Trauma in Mental Health Professionals*, 40(2) HEALTH & SOCIAL WORK 25 (2015); Ted Bober & Cheryl Regehr, *Strategies for Reducing Secondary or Vicarious Trauma: Do They Work?* 6(1) BRIEF TREATMENT AND CRISIS INTERVENTION 1 (2006).

300. *See* A.B. 1140, 2015–2016 Leg. Sess. (Cal. 2015), [https://leginfo.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201520160AB1140](https://leginfo.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB1140) (creating a change in California Victims of Violent Crime funding to remove provisions prioritizing the applications of victims who are not felons. Assembly Bill 1140 was approved by the governor and enacted October 7, 2015).

to follow through on the commitment to deliver trauma-specific therapies, and that investment will yield huge long-term benefits to health and community safety.<sup>301</sup>

*a. Barriers to Identification of Childhood Trauma*

Some of the most intractable barriers to early and accurate identification of trauma have to do with human nature. Children who suffer trauma may be fearful to talk about it due to shame, cultural taboos, or an instinct to protect their families. Joan did not acknowledge that she had been raped for over ten years after the abuse had stopped. People she trusted asked her about sexual abuse, trained social workers and mental health professionals evaluated her, and, as her attorney, I explained that revealing information could help her case. Still, she did not speak of the abuse. Perhaps Joan did not consciously remember the repeated rapes she suffered, she felt ashamed, she did not know how to name it, or she did not want to endanger her parents. Children are afraid of the implications of the child welfare or police involvement in tearing apart their families, fearing not only for themselves, but also for their siblings.

If the defense attorney is the one to gather the information about trauma, client-centered representation and the ethical restrictions of attorney-client confidentiality can be barriers to the juvenile system's accurate identification.<sup>302</sup> Juvenile defense attorneys will be ethically bound to maintain their client's history of trauma if revealing that information will have a deleterious impact on their client's treatment by the prosecutor or judge. To combat this, a legal presumption of trauma, and codification of the requirement that trauma be used only as *mitigation* is necessary. To ensure that trauma is in fact being used as intended, statistical studies that measure its use should be undertaken in random jurisdictions, and particularly in jurisdictions plagued by urban violence and those already prone to the most severe systematic racial inequities.

*b. Guarding Against the Dangers of Too Much Trauma: Net-Widening and Trauma as an Aggravator*

One danger with a presumption of trauma is that children will be treated for something from which they are not suffering. To guard against this, mental health professionals—social workers, licensed marriage and family counselors, psychologists, and psychiatrists—will have to be integrated into the juvenile justice system reform process and have greater roles in educating the players in the system. Though with education all players can try to spot signs of trauma, the ultimate

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301. See JUSTICE POLICY INST., *supra* note 297.

302. See MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2010) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are pursued."); see also MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2010) ("[A] lawyer shall not reveal information related to the representation of a client unless the client gives informed consent.").



diagnosis of trauma suffering should be left to a mental health professional.<sup>303</sup> Excellent metrics for screening for trauma symptoms are available and the DSM-V provides guidance to mental health professionals so that they can identify trauma and traumatic disorders even if children are not forthcoming about all of their experiences.<sup>304</sup> When greater awareness of trauma permeates the mindset of all who interact with children in the juvenile justice system, the earlier and more accurate identification of trauma sufferers should outweigh the risk that someone who has not suffered trauma is screened to determine their potential exposure. Professionally trained mental health experts with appropriate screening tools should be able to probe for trauma exposure without harming the few youth who have not suffered trauma.

Trauma could be a net-widener, giving rise to a significant increase in juvenile justice entanglement and government coercion for low-level and first-time offenders. It is not the goal to get children more involved in the juvenile justice system because they have suffered trauma. Indeed, when services are available outside of the juvenile system, youth should receive services through other systems of care such as the department of mental health, school, or the child welfare system.

There is also a danger that trauma can be used as an aggravator whether as to culpability or to justify the harmful removal of a child from his or her home and community in favor of incarceration. Even a facile understanding of trauma, demands a drastic reduction in the incarceration of children. However, there is also a danger that focusing on trauma may lead some decision makers such as judges, prosecutors, and probation officers to conclude that youth must be removed from their homes and communities because they are too damaged to be safe in the community.<sup>305</sup> The danger of home removal, itself a trauma, could potentially be greater for children in the juvenile justice system if their trauma suffering became more transparent.<sup>306</sup> There is good cause for this concern.<sup>307</sup> Awareness of the harms of removal from the home, and the trauma it induces, through education and training, should address this concern. Even with education, and the codification of trauma as a *mitigator*, defenders must hold prosecutors, judges, and probation

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303. An attorney's ethical responsibility to protect client confidentiality would have an impact on the attorney's role.

304. See KERIG, *supra* note 73; NAT'L JUVENILE DEFENDER CTR., *supra* note 42.

305. FEIERMAN & FINE, *supra* note 8, at 1.

306. While beyond the scope of this Article, one expert proposes that answer lies in providing services to poor families *before* children become known to the juvenile or child welfare systems. Michael S. Wald, *Beyond CPS: Developing Effective Systems for Helping Children in "Neglectful" Families*, 41 CHILD ABUSE AND NEGLECT 49, 49-52 (2015) (Noting that one in five children in the U.S. live in poverty. Neglect accounts for sixty percent of referrals to the child protection services and seventy-five percent of substantiations. Recognizing that neglect is highly associated with parents who themselves received neglectful upbringings and who live in areas of concentrated poverty, Wald suggests that the best approach is to offer support for parenting through our education and health systems).

307. In the child welfare system children of color are more often removed from their homes than their white peers. *Id.* at 60.

officers accountable to ensure that they never use trauma as an aggravating factor to justify incarceration.

*c. Guarding Against Racism and Disparate Treatment*

There is a risk that these reforms could benefit white youth while youth of color will not receive appropriate treatment or will be subjected to even harsher treatment than they are currently afforded. Some youth of color are currently being punished more harshly in the wake of reforms that had the design of reducing harshness across the board in attempts to curb the school-to-prison pipeline and reduce across the board the numbers of youth who are incarcerated. For instance, when Florida changed its laws to reduce school referrals to law enforcement for minor offenses, white students reaped the benefit while students of color actually comprised a higher percentage of school-based referrals *after* the implementation of the law in 2009 than they did before it was passed.<sup>308</sup> When New York reduced its juvenile facility population by 45%, use of mechanical restraints like handcuffs only fell by 29%, showing that the children who were incarcerated were suffering harsher treatment at a greater rate.<sup>309</sup>

Training on trauma must address racism head on. Racial and cultural sensitivity should be incorporated into all trauma education so that the players in the system do not jump to the wrong conclusions about trauma. Further, states and the Department of Justice alike should keep statistics and commission studies to make sure that certain groups of children are not being punished more harshly and that reforms are benefitting all children equally.

*d. Are There Some Child Offenders Who Require Incapacitation?*

Even where reforms work towards eliminating incarceration as we know it today, some traumatized offenders may nonetheless pose a great enough threat to community safety risk to warrant their removal from society for a short period of time.<sup>310</sup> If necessary at all, instances of secure confinement should be extremely rare because incarceration itself is trauma-inducing, it is at odds with effective delivery of treatment, and it is counter-productive to healthy, positive development.<sup>311</sup> It is important to keep in mind that relatively few children in the juvenile system and among the population of children currently incarcerated have commit-

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308. AM. CIVIL LIBERTIES UNION OF FLA., TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 8 (2010), [http://b.3cdn.net/advancement/28126d1c2dd547b9f9\\_0um6btbgo.pdf](http://b.3cdn.net/advancement/28126d1c2dd547b9f9_0um6btbgo.pdf).

309. O’Brien, *supra* note 217.

310. BURRELL, *supra* note 30, at 2 (acknowledging a small number of youth may need to be confined, and discussing the need to examine the ways children can be served without being locked up).

311. *See id.* (calling for limited use of incarceration because detention is “inherently traumatic and counter-productive to producing good outcomes”) (internal citations omitted).

ted truly serious or violent offenses.<sup>312</sup> With children in the juvenile system it is also critical to recognize that it is impossible to ascertain during their adolescence, no matter how severe their suffering or how extreme the offense, whether or not they will reform.<sup>313</sup> Indeed, the vast majority of delinquent youth outgrow offending. Defenders must combat any tendency on the part of other players in the system to argue that even years of therapeutic intervention may not enable the offenders perceived to be the most damaged and dangerous to access the tools to cope in society.

In the event that removal from the community may be appropriate, a trauma-informed sentencing practice for youthful offenders means that all traumatized offenders, even those who may not initially demonstrate promise for reform, must be provided treatment in a safe setting and be offered a meaningful opportunity to demonstrate their growth.<sup>314</sup> The trauma-focused perspective that society bears some responsibility in treating traumatized offenders proactively and compassionately, mandating that these offenders be afforded humane conditions of confinement and are never subjected to the use of force and to the deleterious and abhorrent practice of solitary confinement. Further, while changing the philosophy, physical facilities, treatment, and overall approach of secure institutions, even for the few youth who may need to be secured, it is also paramount to keep in mind that confining a child for longer than six months yields no reduction in recidivism, so any secure confinement should be short in duration.<sup>315</sup>

#### CONCLUSION

Many youthful offenders in juvenile and adult delinquency courts are suffering from trauma. Whether due to child abuse, parental neglect, abandonment, sexual abuse, violence in the home, violence in the community, criminal victimization, racism, or other factors related to the stressors of poverty, trauma is pervasive. Trauma also matters. Left untreated, the effects of trauma can leave individuals without the coping mechanisms and ability to regulate their emotions, leaving them vulnerable to misperceive their surroundings, responding, even violently, to a trigger at any moment. Untreated, trauma victims are unaware of their own hypervigilance and are left to misinterpret events, overestimate threats, and respond from a place of misperception. Correcting the current failure to identify these sufferers and respond constructively to them is a community safety priority.

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312. See *supra* note 164 and accompanying text.

313. Justice Kennedy famously pronounced, “[I]t does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.” *Graham v. Florida*, 560 U.S. 48, 77 (2010).

314. See *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (discussing how, in the context of life without the possibility of parole sentences, youth sentenced to life without parole deserve meaningful opportunity for release).

315. See FEIERMAN, MORDECAI & SCHWARTZ, *supra* note 201, at 2.

Adopting a trauma-informed response to childhood offending will necessitate a reorientation of our juvenile justice system, infusing every aspect of how the juvenile system responds to the children who come to its attention. Trauma must be identified, considered, and constructively addressed by actors in the juvenile and criminal justice systems and in all settings (stationhouse, courthouse, and detention center alike). Offenders should be presumed to suffer from trauma. Children in the juvenile justice system should be accurately, compassionately, and constructively viewed as trauma sufferers. Trauma-focus cannot be merely added onto a system that was created with presumptions, philosophies, and goals that pre-date a comprehensive understanding of youth development and trauma. A trauma-informed and developmentally aware re-orientation will entail ongoing education for all players in the justice system and an increased incorporation of trauma-trained mental health experts in the reforms and new juvenile justice processes. It will address how adolescent development and trauma interact cumulatively, reducing culpability even more than one factor could account for on its own. Through a trauma-informed lens, sufferers who have offended will more accurately be viewed as possessing reduced or nullified culpability and the systems will function to craft procedures and responses designed to effectively treat trauma, thereby rehabilitating the offender and promoting community safety. By recognizing the significance of a child's experience of trauma, the juvenile justice system will provide appropriate individualized and needs-based treatment and ensure that the children in its care are helped, and never harmed and re-traumatized by incarceration as it exists today.

A trauma-informed justice system will work to eliminate incarceration. Incarcerating trauma sufferers in response to their criminal and delinquent behavior may succeed in incapacitating these individuals for the duration of their sentence; however, it will *not* constructively address the underlying trauma that led to the conduct. Indeed, incarceration will likely compound and worsen the underlying trauma, making the offender more susceptible to volatile criminal behavior in the future. With youthful offenders, who, under our current regime, would be released back into the community, the stakes for treatment, rehabilitation, and community safety are particularly high. Simply put, incarceration will not prepare traumatized youthful offenders to succeed in the world once they are released from detention. It is incumbent upon the justice system to eliminate incarceration as we know it for trauma suffering child offenders, treat their underlying trauma, and ensure safe settings to provide treatment. Because contemporary understanding of the diversity and complexity of trauma is evolving, the expertise required to identify trauma and choose from amongst the many new evidence-based treatment options available is dynamic. Resources will need to be committed to ongoing examination of trauma, refinement of and fidelity to evidence-based treatment design, and sharing of expertise.