

**DELAWARE'S ACCESS TO JUSTICE COMMISSION'S COMMITTEE ON  
FAIRNESS IN THE CRIMINAL JUSTICE SYSTEM**

A Report on the Root Causes of Racial Disparities in Delaware's Criminal Justice System

Prepared By The

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October 2015

*Access to Justice Commission's Committee on  
Fairness in the Criminal Justice System:  
Equal Justice Initiative—Report on Root Causes of Racial Disparities*

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## **I. EXECUTIVE SUMMARY**

The Equal Justice Initiative is a private, nonprofit organization that provides legal representation to indigent defendants and prisoners who have been denied fair and just treatment in the legal system. EJI litigates on behalf of juvenile offenders, condemned prisoners, the wrongfully convicted, poor people who were denied adequate representation, and others whose trials were impacted by racial bias or prosecutorial misconduct.

The history of racial inequality and economic injustice in the United States has created continuing challenges for all Americans and we believe more must be done to advance our collective goal of equal justice for all. EJI works to confront the history of racial inequality and economic injustice in the United States. EJI works with communities that have been marginalized by poverty and discouraged by unequal treatment. Additionally, EJI prepares reports, newsletters, and manuals to assist advocates and policymakers in the critically important work of reforming the administration of criminal justice.

EJI is excited to have been invited to participate in Delaware's Access to Justice Commission's Committee on Fairness in the Criminal Justice System. EJI was asked to consider a number of topics related to the criminal justice system in order to evaluate best practices that jurisdictions have employed to help address issues of racial disparities and economic injustice. EJI was also asked to remain sensitive to collateral impacts on public safety while addressing ways Delaware's criminal justice system could be reformed to reduce the disproportionate impact on people of color and the economically disadvantaged.

In this paper, EJI has identified several of the root causes of racial disparities in the criminal justice system, including: implicit bias, trauma, the school-to-prison pipeline, and the juvenile justice system. EJI has studied academic papers, governmental and institutional reports, and the reforms of other jurisdictions to define these causes and recommend approaches that Delaware can take to address and treat these causes. Based on our research, EJI recommends the following reforms:

- Train decision-makers throughout the criminal justice system on the effects of implicit bias.
- Create, support, and expand culturally competent, community-based services

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that address trauma experienced in communities of color.

- Distribute funding and resources equitably among schools; eliminate “zero tolerance” and other policies that criminalize childhood behavior; and train school teachers and officials on implicit bias.
- Reduce the arrest and incarceration of youth by providing alternative, risk-based programming that encourages a healthy transition to adulthood rather than thwarts development through incarceration.

## **II. MASS INCARCERATION AND THE MYTHOLOGY OF RACIAL DIFFERENCE**

Mass incarceration has profoundly shaped American life. In the early 1970s, there were approximately 300,000 people in prisons and jails. Today there are over 2.3 million men, women, and children incarcerated in America, with another eight million people on parole, probation, or under criminal justice supervision. The effects on communities of color—particularly African Americans and Latinos—are especially severe. While African Americans make up approximately thirteen percent of the national population, they are forty percent of those currently incarcerated. In America today, one out of every three black baby boys born in 2001 will go to jail or prison if current trends continue, and black men are more than six times more likely to be incarcerated than white men. In Delaware, these racial disparities are even more pronounced: African Americans make up approximately 22 percent of the state's population but more than half (56.6 percent) of the prison population.<sup>1</sup> When pretrial detainees are included, the rate rises to 58.3 percent.<sup>2</sup>

The root causes of racial disparities in the criminal system cannot be properly addressed without understanding and recognizing the history of racial injustice that preceded them. During the Civil War, the Delaware state legislature, opposed to freedom for enslaved black Delawareans, pushed for financial compensation for slave owners as a prerequisite for emancipation, and ultimately refused to ratify the Thirteenth Amendment altogether. Slavery remained legal in Delaware even after the end of the Civil War; it was not formally abolished until the Thirteenth Amendment was ratified at the national level. EJI's Race and Poverty Project has documented the extent to which slavery profoundly influenced all areas of American society and specifically how the myth of white racial superiority was developed to sustain and justify this practice. Because the Thirteenth Amendment did not address this underlying myth of racial difference, what followed its ratification was a series of practices through which racial bias and discrimination continued, including convict-leasing, whereby black Americans arrested for "crimes" like loitering were reenslaved as laborers on white-owned farms and businesses throughout the South. Moreover, African Americans were violently subordinated in the post-slavery era through widespread racial terrorism, creating an environment in which there was the constant threat of violence in response to any perceived transgression of racialized social boundaries or the status quo. EJI has recently documented that over 4,000 black Americans were lynched and thousands more were terrorized during the first half of the twentieth century.



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At the same time, racial hierarchies became entrenched in the law. African Americans faced discrimination in Delaware where Jim Crow laws were enforced, racial segregation denied black children educational opportunities, and very well-defined racial boundaries undermined opportunities for success in black communities. Particularly critical to racial segregation and discrimination was “redlining,” a practice by which real estate agents, backed by policies created and implemented by banks and the federal government, diverted black Americans into impoverished residential areas. Redlining, combined with other racially restrictive federal loan programs and racial covenants, prevented African Americans from escaping segregated neighborhoods, even if they accumulated the financial means to do so, and created our contemporary demographics—urban landscapes where African Americans are warehoused in isolated, impoverished, high-crime neighborhoods. These deliberate, government-backed discriminatory policies not only barred African Americans from home ownership and severely limited access to credit and jobs, but also forced black children into segregated, isolated schools of poor quality because of lower tax revenues. At the same time black communities faced widespread discrimination, whites received unprecedented support via the New Deal, largesse which built our contemporary white middle class and formed the basis for the wealth gap that exists between black and white communities.<sup>3</sup> These factors are critical to understanding the existence of highly-segregated neighborhoods, as well as the chronic, intergenerational poverty experienced by residents in these communities.

Throughout this period, a dangerous narrative emerged where people of color were criminalized and thought more likely to be guilty of crimes and illegal behavior. These narratives of racial difference created a presumption of guilt that made black Delawareans particularly vulnerable to unfair administration of criminal justice.

This is the framework and context for the contemporary root causes of racial disparities in the criminal system, including those areas of disparities identified in this report: health and trauma, the school-to-prison pipeline, and the juvenile justice system. These areas are key to understanding the overrepresentation of African Americans in the criminal justice system and where reforms and diversions are possible. The phenomenon of subconscious discrimination or “implicit bias,” addressed at the outset and subsequently throughout this paper, has its roots in centuries-old stereotypes about black people as inferior, criminal, and presumptively dangerous. These stereotypes continue to drive discriminatory behavior, even when unintentional. Many recommendations and case studies focus on addressing implicit bias and ameliorating its effects in decision making as well as reforming the structures that continue to disproportionately drive African Americans and people of color generally into

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the criminal justice system and towards the margins of society.

### **III. IMPLICIT BIAS**

There is increasing recognition of the role that implicit bias against African Americans plays at every level of our criminal justice system. “Implicit bias” refers to “discriminatory biases based on either implicit attitudes—feelings that one has about a particular group—or implicit stereotypes—traits that one associates with a particular group.”<sup>4</sup> Implicit biases are important to understanding how racial discrimination operates because they often conflict with self-reported attitudes, otherwise known as “explicit bias.”<sup>5</sup>

The most well-known implicit bias test, and the easiest to use to illustrate the general concept, is the Implicit Association Test (IAT). It has been most commonly used to measure implicit attitudes about African Americans (AA) relative to European-Americans (EA).<sup>6</sup> To take the test the respondent sits at a computer and undergoes a series of tests measuring her response times when associating a series of words, positive and negative, with white and African American faces.<sup>7</sup> In the United States, the vast majority of people who have taken the IAT have shown an implicit bias favoring European-Americans over African Americans.<sup>8</sup>

The results reveal two important findings. First, implicit biases appear even when an individual appears neutral on a measure of explicit bias.<sup>9</sup> In other words, “IAT findings of implicit bias are perfectly compatible with explicit commitments to equality.”<sup>10</sup> Second, IAT results predict real-world behavior, and do so better than explicit measures.<sup>11</sup> One of the most striking examples of this predictive ability occurred in a study of doctors asked to determine “whether to recommend state-of-the art thrombolytic therapy for patients with coronary heart disease. As the doctors’ anti-black bias, as measured by the IAT, increased, their rate of recommending this treatment for black patients decreased.”<sup>12</sup> In another example, subjects who showed a strong preference for white people over black people on the IAT “hesitated less[,] made fewer speech errors,” and smiled more at the experimenter when the experimenter was white as opposed to black, indicating that their IAT preference for whites over blacks correlated with a higher level of comfort with the white over black experimenter. Researchers also found that when white American subjects were shown photos of black faces, their amygdalas were activated, “a presumed indicator of fear or other negative emotional arousal.”<sup>13</sup>

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Thus, despite an individual's outward avowals of lack of prejudice, and even despite their belief that they hold no prejudice, not only do the majority of people hold prejudices but also their behavior is determined by them. As one judge who has worked fairly extensively on issues of implicit bias wrote, "[S]ocial scientists are convinced that we are, for the most part, unaware of them. As a result, we unconsciously act on such biases even though we may consciously abhor them."<sup>14</sup>

This conclusion has profound implications for the criminal justice system, because witnesses, police officers, prosecutors, defense attorneys, jurors, judges, probation and parole officers, and policy makers—people at all stages of a criminal prosecution—may believe themselves to be acting unbiasedly when they actually are acting on unconscious racial biases. Studies consistently demonstrate implicit biases about African Americans that relate directly to the criminal justice system, with African Americans consistently implicitly associated with criminality, violence, and dangerousness.

**A. Effects on Decision Making in the Criminal System**

Numerous studies have demonstrated strong unconscious associations between blackness and criminality in white subjects' minds.<sup>15</sup> In one study, white subjects were more quickly able to recognize an image of a gun when they had first been shown black faces as opposed to white faces.<sup>16</sup> In another study, subjects were shown images of a black face and a white face on a screen simultaneously, which then "quickly disappeared and were replaced by a dot probe in the visual location of either face."<sup>17</sup> The participants' task was to locate the dot probe as quickly as possible.<sup>18</sup> Some participants had been subconsciously primed with images associated with crime (guns, knives, fingerprints, police badges, and handcuffs), and some had not.<sup>19</sup> Being primed with crime images led subjects to be faster at detecting the dot where the black face had been.<sup>20</sup> Moreover, participants who had been primed with crime were slower to locate the dot when it was in the white face location than those not primed with crime,<sup>21</sup> indicating a *disassociation* between whites and criminality.

Another dot probe study tested the implicit biases of police officers.<sup>22</sup> Consistent with the other studies, officers primed with the crime words were faster to find a dot in the location where a black face had been than officers who were not primed.<sup>23</sup> And officers primed with the crime words were *slower* to find the dot where a white face had been than officers who had not been primed.<sup>24</sup> As a second step to this study, officers were asked to identify, from memory, the faces they had seen.<sup>25</sup> Here, officers "were more likely to identify

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a face that was more stereotypically Black than the target when they were primed with crime than when they were not primed.”<sup>26</sup> In another study of police officers, the officers were asked to answer the question, “Who looks criminal?”<sup>27</sup> The results were that more black faces were judged to be criminal than white faces and that “highly stereotypical Black faces were more likely to be judged criminal than any other group in the study.”<sup>28</sup>

**B. Recommendations**

i. *Policing*

Researchers have identified multiple ways implicit biases affect policing. The most stark are the “shooter bias studies,” which reveal that even trained police officers make the decision to shoot more rapidly when a black suspect is holding a gun.<sup>29</sup> Similarly, research demonstrates that African Americans and Latinos are subjected to traffic stops more frequently than whites, and once stopped, searched at higher rates. These disparities are most severe “when the level of officer discretion is highest—seat belts, vehicle equipment, and vehicle regulatory issues.”<sup>30</sup> For example, following a seat-belt violation, African Americans are 223 percent more likely to be searched than whites; Latinos are 106 percent more likely to be searched.<sup>31</sup>

Recognizing these problems, a number of police departments have implemented implicit bias trainings.<sup>32</sup> A training typically runs between five and six hours and is intended to teach officers “skills to reduce and manage their own biases and to promote the ‘unlearning’ of the association between black Americans and criminality.”<sup>33</sup> The section on controlling responses may be most important.<sup>34</sup> It involves “role-playing scenarios that feature counterstereotypical facts; and thus, it permits officers to observe their own biases in action and to glean tips for how to react in the future.”<sup>35</sup>

Additionally, President Obama commissioned a task force in 2015 to examine policing in the 21<sup>st</sup> century. The task force prepared 40 pages of recommendations for how police departments can improve trust and legitimacy with communities of color and more effectively protect public safety. These recommendations should be reviewed, considered and implemented by every police department in Delaware.

ii. *Prosecutorial Discretion*

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The interaction of implicit bias and prosecutorial discretion indicates “that prosecutors unwittingly display implicit racial bias at a variety of decision points,” and that “in the aggregate, the harms of these biases” are likely quite substantial.<sup>36</sup> One important reform is to require prosecutors’ offices to collect and store comprehensive racial demographic information at every stage of the charging process for the purpose of review for systemic patterns and the sparking of discussion and self-monitoring.<sup>37</sup> Some offices have also tried “category-masking” wherein a case intake officer or other staff person obscures race, name, and other identifying data from a prosecutor until after she has made a charging or plea-bargaining decision.<sup>38</sup> A focus on hiring more diverse staff in prosecutor’s offices may also reduce the impact of implicit bias in light of evidence that diverse juries make better group decisions than do homogenous juries.<sup>39</sup>

iii. *Defense Attorneys*

Even defense attorneys, who may be trying to represent the best interest of their clients, are not immune from bias. These biases can affect an attorney’s assessment of her client’s culpability, her perception of whether and how a particular sentence would impact her client’s life, how seriously she weighs client’s interest, her willingness to accept a plea that is not in the client’s best interest, and how she presents a case at trial. As with prosecutors, defense attorneys should receive implicit bias training to ensure they are not unwittingly working against their clients’ best interests.

iv. *Juries*

Judge Mark Bennett, U.S. District Court judge for the Northern District of Iowa and “a nationally-recognized expert on implicit bias in the legal system,”<sup>40</sup> has taken the lead in trying to address implicit bias from the bench.<sup>41</sup> Judge Bennett has publicly called for bar associations, state high courts, and other legal organizations to establish standing committees to study implicit bias.<sup>42</sup> Judge Bennett also recommends a variety of judge-initiated reforms, including educating the jury on implicit bias, and referencing implicit bias in jury instructions.<sup>43</sup> One final recommendation is to require judges to allow expert testimony on the impact of racial bias on jury verdicts.<sup>44</sup>

v. *Judges*

In addition to being trained to help remove bias from juries, judges should be trained

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to limit the impact of their own biases. Judges' biases can influence a wide variety of consequential decision making, including sentencing, with potentially profound impacts on incarceration rates.<sup>45</sup> Kang, Bennett et al. suggest teaching judges several techniques to limit unconscious bias.<sup>46</sup> First, judges should be taught to doubt their own objectivity.<sup>47</sup> Most judges view themselves as especially objective as compared to their peers. One study found that 97 percent of judges at a conference believed themselves to be in the top quartile of their peers at the same conference at “avoiding prejudice in decisionmaking”; a study of a another group of judges found that 97.2 percent thought they were in the top half in terms of avoiding bias.<sup>48</sup> Studies demonstrate individuals are especially likely to act on their biases when they believe they are objective,<sup>49</sup> and that those who feel they are more objective are in fact less likely to be.<sup>50</sup>

Second, Delaware should find ways to increase judges' motivation to be fair.<sup>51</sup> Research has shown that the more motivated a person is to check their biased behavior, the more successful she will be.<sup>52</sup> Motivation can be achieved by creating awareness of the way implicit bias works, so “[j]udges should be internally persuaded that a genuine problem exists.”<sup>53</sup> Implicit bias training itself, and the “discomfiting” effect it can have, can serve as one form of motivation.<sup>54</sup> Third, judges should hold themselves accountable by collecting even basic data about patterns in their convictions and sentencing.<sup>55</sup> “Increasing accountability has been shown to decrease the influence of bias.”<sup>56</sup>

Finally, Delaware should endeavor to lighten case loads. Cognitive overload can lead to more biased decisions.<sup>57</sup> To this end, reducing the number of arrests by reducing police officer bias may be a useful tool. We encourage the committee to consult the Kang, Bennett, et al. we cite here for more specific recommendations.<sup>58</sup>

vi. *Parole Boards, Parole Officers, and Probation Officers*

Implicit bias training is important for parole boards for the same reason it is for judges and juries: to help mitigate the impact of racial bias in adjudications. After a decision is made to give a sentence of probation or grant parole, however, the power to incarcerate shifts in large part to a new set of officials—probation and parole officers—who possess broad discretion. And in Delaware, these determinations have a major impact on incarceration rates. A 2012 study showed that 39 percent of Delaware prison admissions were for probation violations, and data from 2009-11 showed that probation for African Americans was revoked at a higher rate than for whites.<sup>59</sup> Thus, implicit bias training for probation and parole

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officers could both reduce racial disparities and cut Delaware's overall incarceration rate. This is especially true in the juvenile context, where juvenile probation officers have wide discretion in recommending a course of adjudication to the court.<sup>60</sup>

Delaware has already taken steps in this area by participating in the ABA Criminal Justice Section's Racial Justice Improvement Project.<sup>61</sup> Through this collaboration, the Delaware Racial Justice Task Force "sponsored a day-long training on implicit bias and bias-free decisionmaking for all supervisory probation officers."<sup>62</sup> Delaware has made implicit bias training a part of new probation officers' mandatory training and amended the Department of Probation and Parole's professional conduct policy to expressly prohibit discriminatory decisions by probation officers.<sup>63</sup>

EJI recommends that Delaware initiate empirical study of these reforms. Data collected could help the state evaluate the success of the programs, how to strengthen or alter them, and whether to expand them into other areas of the criminal system.

#### **IV. TRAUMA**

Many black Americans experience trauma in their everyday lives. This trauma can stem from living in poverty, violence, maltreatment, or events like losing a loved one or a house fire. These traumatic events affect the mental, emotional, and social well-being of black Americans, and many black Americans suffer from post-traumatic stress disorder (PTSD) as a result. The trauma experienced by black Americans increases the likelihood that black Americans will come in contact with the criminal justice system, causing racial disparities in the system. This section discusses different types of trauma experienced by black Americans, the consequences of those traumas, the availability of mental health treatment, and reforms that have been instituted to address trauma and its negative effects.

##### **A. Trauma Defined**

Trauma theory "explains the neurobiological and psychological consequences of overwhelming and threatening life experiences."<sup>64</sup> In 1998, the Center for Disease Control and Prevention (CDC) conducted the Adverse Childhood Experiences (ACE) study, which is considered one of the most important and largest public health studies to examine the relationship between exposure to trauma as a child and negative health outcomes in adulthood. The findings of the ACE study suggest "that certain experiences are major risk

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factors for the leading causes of illness and death as well as poor quality of life in the United States.”<sup>65</sup> Two-thirds of the participants in the ACE study reported at least one ACE and more than one in five of the participants reported three or more ACEs.<sup>66</sup> Other studies show that 83 percent of youth living in the inner city report experiencing one or more traumatic events.<sup>67</sup> 59 to 91 percent of children and youth in the community health system report trauma exposure; and 60 to 90 percent of youth in the juvenile justice system have experienced traumas.<sup>68</sup> The major finding of the ACE study is that as the number of ACEs increase, so does the risk for the following health and social problems: alcoholism and alcohol abuse, chronic obstructive pulmonary disease (COPD), depression, fetal death, health-related quality of life, illicit drug use, ischemic heart disease (ISD), liver disease, risk for intimate partner violence, multiple sexual partners, sexually transmitted diseases (STDs), smoking, suicide attempts, unintended pregnancies, early initiation of smoking, early initiation of sexual activity, and adolescent pregnancy.<sup>69</sup> This exposure to trauma can also negatively affect the functioning of both adults and children, undermining parenting efforts, daily relationships, and family dynamics, and can also increase the risk of familial violence.<sup>70</sup>

The reactions of children to trauma include: “increased monitoring of their environment for dangers, anxiety when separated from trusted adults, irritability and aggression, or increased need for affection, support, and reassurance.”<sup>71</sup> In the short term, these reactions aid the child in coping with the trauma they experienced, but in the long term, these symptoms progress to PTSD in 24 to 34 percent of children exposed to community violence.<sup>72</sup> Attempts to explain the severity and chronic nature of the effects of experiencing repeated traumas generally focus on the cumulative effects of experiencing multiple traumas.<sup>73</sup> But experiencing trauma causes children to feel unsafe and unable to control situations, which results in children anticipating further traumatic events while trying to deal with the effects of one trauma.<sup>74</sup> Thus, “it is the combination of experience and anticipation of traumatic events that leads to the long-term functional changes in multiple systems that is characteristic of complex PTSD.”<sup>75</sup> This “anticipatory anxiety” causes symptoms much like those associated with PTSD: fears, preoccupations, nightmares, vigilance, avoidance, and enactments.<sup>76</sup>

Experiencing trauma also puts the developmental processes at risk.<sup>77</sup> The symptoms of PTSD that affect attention concentration and memory cause children to suffer disruptions in academic learning and skill development.<sup>78</sup> Additionally, their hypervigilance and heightened sense of alert may prevent them from having normal social interactions with their peers, isolating them from other children and delaying their development of social



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competence.<sup>79</sup> These children also view the world as threatening, lack basic trust in the ability of others to protect them, and lack self-confidence.<sup>80</sup> In the long run, “children with chronic trauma histories experience ongoing functional impairments, including substance abuse, delinquency, suicidality, acts of self-destruction, chronic anger, unstable relationships, and dissociation.”<sup>81</sup>

## **B. The Trauma of Poverty and Violence**

Poverty in America disproportionately affects people of color. At least one out of three black children in America lives in a household with an income below the poverty line.<sup>82</sup> 49 percent of children in urban areas, 9.7 million children, live in low-income families, and black families are more than twice as likely to experience economic hardships than white families.<sup>83</sup> Studies have found that growing up in poverty contributes to the development of “toxic stress,” or stress at a level that can affect children’s health, brain development, and social and emotional well-being.<sup>84</sup> Youth that grow up in poverty are more likely “to experience multiple traumas and significant adverse life events, and to thus develop complex symptoms of traumatic distress at disproportionate rates.”<sup>85</sup> Studies of children living in poor inner-city neighborhoods estimate that anywhere from 70 to 100 percent of those children experience high rates of exposure to trauma.<sup>86</sup>

Poverty increases exposure to trauma and the distress that comes with daily living. When families run out of coping resources, family relations decline and “vital functions such as protection from harm, provision of basic needs, and capacity to adapt and develop are threatened, often resulting in perpetual cycles of crises.”<sup>87</sup> Research has shown that socioeconomic status is an important factor in the intergenerational transmission of trauma.<sup>88</sup> Because ethnic groups are overrepresented among those living in poverty, members of these groups often suffer additional trauma due to racism and negative social perceptions associated with people living in poverty.<sup>89</sup> People who are impoverished also suffer from more mental health issues than people of affluence.<sup>90</sup> Studies have consistently shown that people with the lowest socioeconomic status are about two to three times more likely than those with the highest socioeconomic status to have a mental disorder and to have higher levels of psychological distress.<sup>91</sup>

Additionally, socioeconomic status also increases the likelihood of black Americans becoming members of “high-need populations,” which include the homeless, the incarcerated, those dealing with substance abuse issues, and children placed in foster care.<sup>92</sup>

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At a very basic level, poor neighborhoods lack resources, and the residents of these neighborhoods experience substantial distress and disadvantage from high rates of unemployment, homelessness, substance abuse, and crime.<sup>93</sup> Also, in these communities, “unemployment [is] higher; schools are poorer; access to capital, fresh produce, transit and health care is more limited; exposure to environmental toxins is greater; and family supports and services are fewer.”<sup>94</sup> Thus, families of color raising children in impoverished neighborhoods are exposed to multiple, ongoing traumas.

Communities that are socially and economically unstable have a high turnover of residents and low levels of supervision of their youth, making these communities ripe for violence.<sup>95</sup> Thus, in addition to the normal stresses associated with childhood and adolescence, many children growing up in impoverished circumstances are often exposed to “violent crime in their neighborhood or school; gang and drug activity; house fires; victimization, incarceration, or death of a family member; family violence; and maltreatment; this rate of exposure raises public health concerns.”<sup>96</sup>

Men of color from these neighborhoods are perceived as being predisposed to violent behavior and are disproportionately arrested for violent crimes.<sup>97</sup> But in 2001, the Surgeon General’s report on Youth Violence, citing self-reports of youth from both minority and majority populations, found that disparities in violent acts committed “may not be as large as arrest records suggest.”<sup>98</sup> The Report on Youth Violence concluded that “race and ethnicity, considered in isolation from other life circumstances, shed little light on a given child’s or adolescent’s propensity for engaging in violence.”<sup>99</sup>

Children and youth that live in these environments often witness violence and are more likely to attend low-quality schools, have few opportunities for safe, organized recreation, to suffer the loss of a loved one, and to suffer abuse and neglect.<sup>100</sup> This situation is more dire for children that are “polyvictims,” meaning exposed to multiple types of violence. The Department of Justice and Centers for Disease Control and Prevention, in its groundbreaking study National Survey of Children’s Exposure to Violence (NatSCEV), found that one in ten children in America are polyvictims.<sup>101</sup> The consequences of community violence are also well-documented and “while direct victims are at the greatest risk of harm, effects are systemic.”<sup>102</sup> The issue of community violence is a public health issue, not just a criminal justice problem.<sup>103</sup>

In 1979, U.S. Surgeon General Julius B. Richmond “declared violence a public health

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crisis and 33 years later that crisis remains.”<sup>104</sup> Homicide is the leading cause of death among African American youth ages to 15-24.<sup>105</sup> One out of ten children living in a major American city report witnessing a shooting or a stabbing.<sup>106</sup> And this year, 46 million of the 76 million children living in the United States will be confronted by violence, crime, abuse, and psychological trauma.<sup>107</sup> The concept of community violence includes both direct personal exposure and exposure through witnessing and other indirect routes.<sup>108</sup> The exposure of youth to violence and victimization “is directly linked to negative outcomes for young people.”<sup>109</sup> These negative outcomes include “increased depression, substance abuse, risky sexual behavior, homelessness, and poor school performance . . . [and] increase[d] [] odds of becoming a perpetrator of violent crimes, including felony assault and intimate partner violence, doubles the likelihood of problematic drug use, and increases the odds of committing property crimes.”<sup>110</sup> These negative outcomes result in part from a loss of a sense of safety and the difficulty that victimized youth have integrating into and becoming pro-social members of the community.<sup>111</sup> These youth respond to their experiences with aggression, withdrawal, and other high-risk behaviors, including offending.<sup>112</sup> For example, youths with high violence exposure are ten times more likely to engage in binge drinking and carry a handgun than youths with no violence exposure.<sup>113</sup>

### **C. Recommendations**

Stopping these cycles of trauma starts with an acknowledgment of community violence not as a mere crime problem but rather as a collective social trauma—both a public health scourge and a moral issue.<sup>114</sup> Unfortunately, too many approaches to these issues emphasize personal responsibility, overcoming the odds, and getting tough on crime, instead of structural change to social environments. Successful outcomes for families impacted by trauma and urban poverty “are highly dependent upon the availability of and access to assessment and treatment practices that are trauma-specific, family-centered, and target all levels of the system impacted by trauma.”<sup>115</sup> The Surgeon General’s Report on Mental Health published in 2000, asserted that in the United States,

mental health programs, like general health programs, are rooted in a *population-based public health model*. Broader in focus than medical models that concentrate on diagnosis and treatment, public health attends, in addition, to the health of a population in its entirety. A public health approach encompasses a focus on epidemiological surveillance, health promotion, disease prevention, and access to services. . . . [Thus] the report attaches high

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importance to public health practices that seek to identify risk factors for mental health problems; to mount preventive institutions that may block the emergence of severe illnesses; and to actively promote good mental health.<sup>116</sup>

Any public health approach must include a cultural component. Understanding culture is essential to any treatment or reform measure because “culture bears on whether people even seek help in the first place, what types of help they seek, what types of coping styles and social supports they have . . . how much stigma they attach to mental illness . . . [and] the meanings that people impart to their illness.”<sup>117</sup> The Department of Health and Human Services termed this understanding of culture “cultural competence,” which emphasizes “the recognition of patients’ cultures and then develops a set of skills, knowledge, and policies to deliver effective treatments,” and “is the conviction that services tailored to culture would be more inviting, would encourage minorities to get treatment, and would improve their outcomes once in treatment.”<sup>118</sup> Importantly, “[t]he term competence places the responsibility on mental health service organizations and practitioners—most of whom are white—and challenges them to deliver culturally appropriate services.”<sup>119</sup>

Still, the participation of community members and service providers to design and implement culturally appropriate services is critical.<sup>120</sup> This is especially important in regards to African Americans because some African-Americans are hesitant to seek treatment and prefer clinicians of the same race or ethnicity in part because of concerns about discrimination and racism.<sup>121</sup> A survey conducted in 1999 found that 12 percent of African Americans, compared to 1 percent of whites, felt that they were judged unfairly or treated with disrespect by a health provider because of their race or ethnic background.<sup>122</sup> These numbers were even higher in a report published by the Commonwealth Fund Minority Health Survey, which found that 43 percent of African Americans, compared to 5 percent of whites, felt that they were treated badly by a health provider because of their race or ethnicity.<sup>123</sup> And there is evidence that racial stereotypes affect the treatment decisions of clinicians.<sup>124</sup> For example, one study found that African American youth were four times more likely than whites to be physically restrained after acting in similarly aggressive ways, suggesting that racial stereotypes of black people as violent affected the decision to restrain the black patients.<sup>125</sup> Another study found that white therapists rated a videotape of an African American client with depression more negatively than they did a white patient with identical symptoms.<sup>126</sup>

It is also crucial to the success of any reform program to involve youth as leaders,

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planners, and peer experts in all initiatives defending children against violence and its harmful effects.<sup>127</sup> The engagement of youth to develop strategies and programs to defend children against violence and its harmful effects is “essential to develop effective solutions to the complex problems leading to and resulting from children’s exposure to violence.”<sup>128</sup> Also, leaders of faith should be involved in developing and implementing any reform efforts since African Americans often turn to their faith to cope with trauma. “[P]rayer is among their most common coping responses.”<sup>129</sup> African Americans’ commitment to religion provides a potential avenue to addressing the issues they face that arise from their traumatic experiences. Thus, community churches and religious leaders should play an active role in addressing the trauma experienced by these communities.

Another coping strategy that African Americans employ heavily is relying on their fellow community members, friends, family, neighbors, and voluntary associations, for help and support; “[t]his strategy has evolved from the historical African American experience of having to rely on each other, often for their very survival.”<sup>130</sup> “It is widely accepted that parental response and family functioning are powerful mediators between trauma and its impact on children,”<sup>131</sup> and thus, reform initiatives that encompass training and treatment for parents are recommended.

In the Attorney General’s Report on Children Exposed to Violence, the Defending Childhood Initiative recommended that, “The first crucial step in protecting our children is to identify and provide timely and effective help to those who are already being victimized by violence and [e]nsure that all children exposed to violence are identified, screened, and assessed and [e]nsure universal public awareness of the crisis of children exposed to violence and change social norms to protect children from violence and its harmful effects.”<sup>132</sup> Because black Americans often seek treatment from hospitals and their primary health care providers, “[c]ommunity health centers as well as other public and private primary health settings provide a vital frontline for the detection and treatment of mental illnesses and the co-occurrence of mental illnesses with physical illnesses.”<sup>133</sup> It is recommended that these service providers integrate PTSD screenings into their routine treatment processes.<sup>134</sup> Similar screenings should be conducted at schools.

The Attorney General’s Report on Children Exposed to Violence also recommended a public awareness campaign to create fundamental changes in perspective in every organization, community, and household in our country,<sup>135</sup> and the promotion of professional education and training on the issue of children exposed to violence.<sup>136</sup> Standards and a

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curriculum should be developed to ensure that all students and professionals working with children and families are aware of the scope of the problem of children's exposure to violence as well as their responsibility to provide trauma-informed services and trauma-specific, evidence-based treatment within the scope of their professional expertise.<sup>137</sup> Relatedly, the authors of the influential *Perceived Racism and Mental Health Among Black Americans* study recommended that therapists assess racism experiences as part of standard procedure when treating black Americans.<sup>138</sup>

i. *Case Study: Philadelphia's Public Health Approach to Addressing Trauma*

Over the past eight years, using many of the recommendations above, Philadelphia, led by Arthur C. Evans, Jr., PhD, the Commissioner of Philadelphia's Department of Behavioral Health and Intellectual Disability Services (DBHIDS), and with the support of Mayor Michael Nutter, has been treating trauma as a major health issue and developing ways to address PTSD. Philadelphia's plan was to develop a behavioral health system with "a comprehensive approach [to trauma] that can have a broad impact with multiple strategies."<sup>139</sup> To achieve this goal, Philadelphia identified four objectives necessary to a public health approach: (1) a broad understanding of trauma; (2) community interventions and enhanced community skills and capacity; (3) effective behavioral health services; and (4) strategic cross system partnerships.<sup>140</sup>

The first objective was an effort to redefine trauma beyond the individual and treatment level and to foster an understanding of trauma as existing at many ecological levels from individual, to family, to community, to society.<sup>141</sup> To do so, in April 2012, the Institute for Safe Families launched the Philadelphia Adverse Child Experiences Task Force to "develop policies, practices, and research with pediatric settings that mitigate conditions arising from toxic stressors and ACE and that increase the wellbeing of children and their families."<sup>142</sup> The Philadelphia ACE Task Force is made up of practitioners and public health leaders and is now a part of the Health Federation of Philadelphia.<sup>143</sup> Philadelphia was also host to the first National Summit on Adverse Childhood Experiences in 2013, and in 2014, the Health Federation of Philadelphia was awarded a grant to help develop community-level efforts that can be used to institute trauma-informed care nationwide.<sup>144</sup>

The second objective, providing effective behavioral health services, sought to ensure those services were trauma-informed and took trauma-specific approaches.<sup>145</sup> DBHIDS

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advocated the use of evidence-based treatments like Child and Family Traumatic Stress Intervention; Trauma Focused Cognitive Behavioral Therapy; prolonged exposure; and Dialectical Behavior Therapy.<sup>146</sup> But with respect to this objective, the City believed success meant not just intervening with individual clinicians but with systems.<sup>147</sup> Thus, DBHIDS advocated implementing the Sanctuary Model, specifically through the Philadelphia Alliance for Childhood Trauma Services (PACTS).<sup>148</sup> The Sanctuary Model, which originated in Philadelphia around the 1980s, was developed by a team of clinicians, led by Dr. Sandra Bloom, and “is a blueprint for clinical and organizational change which, at its core, promotes safety and recovery from adversity through the active creation of a trauma-informed community. A recognition that trauma is pervasive in the experience of human beings forms the basis for the Sanctuary Model's focus not only on the people who seek treatment, but equally on the people and systems who provide that treatment.”<sup>149</sup>

PACTS is a project led by DBHIDS and funded by the Substance Abuse and Mental Health Services Agency's National Child Traumatic Stress Initiative.<sup>150</sup> PACTS is one of 72 sites nationally awarded a four-year Community Treatment Center (Category III) grant. DBHIDS has provided for the training of twelve agencies trained in Trauma Focused Cognitive Behavioral Therapy, which will serve as the core behavioral health providers for PACTS.<sup>151</sup> These agencies will also be trained in Child and Family Traumatic Stress Intervention, which is the only evidence-based practice shown to prevent PTSD in youth ages 7 to 17 when initiated within the first 45 days after a potentially traumatic event.<sup>152</sup> PACTS' objectives include increasing the number of children screened in various physical and behavioral settings such as pediatric emergency departments, primary care clinics, juvenile court, and child welfare sites and providing early post-traumatic intervention to prevent the development of PTSD.<sup>153</sup>

The third objective, building strategic cross-system partnerships, required Philadelphia to create trauma-informed relationships between those institutions, agencies, and service providers that would be in a position to identify and aid those people who have experienced trauma.<sup>154</sup> These institutions include the court system, schools, first responders, law enforcement, Department of Human Services, health care providers, and emergency room departments.<sup>155</sup> Police officers and first responders received training in crisis intervention and mental health first aid to better assess and respond to individuals with behavioral health challenges.<sup>156</sup> This crisis intervention training helps officers to differentiate between people who are being defiant and those who may have other issues motivating their behavior. The training also helps officers learn how to resolve situations without force.

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Philadelphia area hospitals are addressing trauma through a trauma-informed, hospital-based violence intervention program called Healing Hurt People, which was developed at Drexel University.<sup>157</sup> Healing Hurt People provides an opportunity for early intervention, services, and supports. The program is currently operating at two Philadelphia area hospitals with plans to expand the program city-wide.<sup>158</sup> The programs' behavioral health interventions offer clients a personalized plan to keep them safe from future violence and increase their access to health care and education.<sup>159</sup>

Also, in March 2015, Philadelphia unveiled “Action Plan 3.0,” an initiative that will train teachers and staffers in the district to recognize and assist the thousands of students experiencing trauma.<sup>160</sup> The school district has already, for the past two years, been offering courses to teachers, funded through the United Way, on how to recognize children who are experiencing trauma and strategies to help them be effective in the classroom.<sup>161</sup> The City has also funded training for therapists in evidence-based PTSD treatments and collaborated with local faith leaders to train these leaders about mental health resources.

Finally, to achieve the fourth objective, developing community interventions and strengthening the skills and capacity of communities to address trauma and resulting behavioral health issues, Philadelphia established community response teams, community coalitions, the Porch Light Initiative, and the Youth Move campaign.<sup>162</sup> The Porch Light Initiative is a “public art approach to achieving health and wellness in Philadelphia . . . . [that] works closely with communities to uplift public art as an expression of community resilience and a vehicle of personal and community healing.”<sup>163</sup> The Initiative creates murals that “focus specifically on mental health and substance abuse, as well as other issues that affect our mental health including faith and spirituality, homelessness, trauma, immigration, war and community safety and tensions.”<sup>164</sup> Youth Move Philadelphia “is a program provided by the Department of Behavioral Health and Intellectual Disability Services developed to inform teens, through crisis intervention training, about the importance of emotional and social health/wellbeing and resilience, and to reduce the stigma of mental health and substance abuse challenges among their peers.”<sup>165</sup> The city also created a website—[healthymindsphilly.org](http://healthymindsphilly.org)—where people can screen themselves for symptoms of PTSD.<sup>166</sup>

Traumatic experiences from living in violent neighborhoods to growing up in poverty affect the psychological, emotional, social, and physical health of black Americans. The violence prevalent in communities of color has long been declared a public health crisis, but policy generally has not treated it as such. Implementing reforms in this area is essential, as



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this crisis contributes to racial disparities in the criminal justice system because it negatively affects the psychological and social health of black Americans, increasing the likelihood that they will come in contact with the criminal justice system.

## **V. THE SCHOOL-TO-PRISON PIPELINE**

The “school-to-prison pipeline” refers to “the nationwide trend where poor and minority students are funneled out of the education system and into the criminal justice system.”<sup>167</sup> These “pushout” policies are widely seen to have resulted from “zero tolerance” school disciplinary policies, which can be traced in part to the Gun-Free Schools Act of 1994.<sup>168</sup> That act aimed to eliminate guns from schools and tied federal funding to mandatory suspensions for students who brought weapons to schools.<sup>169</sup> The policy was often extended to drugs and then “spiraled out of control” to cover all manner of disciplinary violations, leading to a contemporary landscape in which students are expelled from school or arrested for violations that a generation before would have sent them to the back of the classroom or the principal’s office.<sup>170</sup>

The school-to-prison-pipeline channels students into the criminal justice system both directly and indirectly. Suspended students are less likely to graduate on time and more likely to be suspended again, repeat a grade, drop out, and become involved in the juvenile justice system.<sup>171</sup> A suspension or expulsion can also result in a student being sent to an alternative placement for students with behavioral problems.<sup>172</sup> Such a placement often leads to a child dropping out of school, after which they are three-and-a-half times more likely to become incarcerated than high school graduates.<sup>173</sup> The pipeline operates even more directly, however, through the increasing collaboration between school officials and law enforcement in disciplining students. Many schools employ police officers as security guards or “school resource officers,”<sup>174</sup> or call the police for behavior that would formerly have been dealt within the school, meaning that the first response to a disciplinary issue is by an officer of the criminal justice system.

One of the most troubling aspects of the school-to-prison pipeline is the extent to which it disproportionately impacts students of color. In 2014, the U.S. Department of Education released results of a study of every public school in the country showing grave disparities.<sup>175</sup> The study showed that “African American students without disabilities are more than three times as likely as their white peers without disabilities to be expelled or suspended.”<sup>176</sup> Even at the preschool level, while black students are only 18% of the students,

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they comprised “42% of students suspended once, and 48% of the students suspended more than once.”<sup>177</sup> Overall, while African American students made up 15% of students, they comprised 35% of students suspended once, 44% of students suspended more than once, and 36% of students expelled.<sup>178</sup> Perhaps most disturbingly, “over 50% of students who were involved in school-related arrests or referred to law enforcement are Hispanic or African-American.”<sup>179</sup>

In discussing these numbers, the Departments of Justice and Education jointly wrote:

[R]esearch suggests that the substantial racial disparities of the kind reflected in the CRDC data are not explained by more frequent or more serious misbehavior by students of color. . . . [I]n our investigations we have found cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students. In short, racial discrimination in school discipline is a real problem.<sup>180</sup>

In looking at root causes of the over representation of people of color in the criminal justice system, the school-to-prison pipeline must be examined closely. Therefore, we identify the causes of the school-to-prison pipeline and offer ameliorative recommendations and promising models for further study.

**A. Root Causes of the School to Prison Pipeline**

i. *Neighborhood and School Segregation, Lack of Resources, and Perverse Incentives*

Racial housing segregation has led to school segregation and the under resourcing of schools attended primarily by students of color.<sup>181</sup> Numerous factors in the middle to end of the last century led to segregated, isolated, and under resourced black neighborhoods.<sup>182</sup> These factors included: white flight to suburbs; redlining mandated by federal, state, and local policies that designated black communities as “undesirable and marked in red to indicate that they . . . would not receive federal financial investment”; a national realtor association policy of steering black families away from white communities; denial of Federal Housing Authority financing to black applicants despite credit-worthiness; and racial covenants that prevented black people from buying homes in suburban communities.<sup>183</sup> The consequence has been the isolation of black and Latino children in poor neighborhoods with

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concentrated poverty and fewer resources.<sup>184</sup> “On average, white students attend schools among a student body in which thirty percent of students are poor, while black and Latino students attend schools with sixty-five and sixty-six percent poor student populations, respectively.”<sup>185</sup> In addition, while suburbs were “created by rational actors that act on several normative assumptions about lifestyle and economic well-being: the mobility to choose suitable residential communities; knowledge of different revenue and expenditure patterns, as well as the supply of adequate public services; and freedom from strict constraints on employment,” and are “family-oriented, middle and upper-middle income areas. . . . guided by ideals of family orientation, uncluttered streets, or practical convenience,” these “civic-minded principles [were] absent in the erection of illogical large public housing projects in poorer communities.”<sup>186</sup>

Because school funding is based on local tax revenues, schools in these poor neighborhoods are extremely under funded in relation to those in well-off neighborhoods.<sup>187</sup> 81 percent of Asian-American and 71 percent of white high school students “attend high schools where the full range of math and science courses are offered,” but only 57 percent of African American and 67 percent of Latino students do.<sup>188</sup> 40 percent of public school districts do not offer preschool, and where they do it is usually only part day.<sup>189</sup> Also where they do, barely half are available to all students within the district.

Sixty years after Brown v. Board of Education, funding discrepancies among districts have led to a situation in which the U.S. Secretary of Education says school systems remain “fundamentally separate and unequal.”<sup>190</sup> In the less than 20 years in which desegregation was pursued in earnest, the achievement gap between black and white students was cut almost in half.<sup>191</sup> Studies have shown that desegregation had positive impacts on black achievement and no effect on white achievement,<sup>192</sup> and that black students who attend desegregated schools are more likely to graduate from high school and college, earn higher incomes, and have better health outcomes.<sup>193</sup> This is no surprise given that racially and socioeconomically segregated schools have been shown to have “less qualified teachers, high levels of teacher turnover, less successful peer groups and inadequate facilities and learning materials.”<sup>194</sup>

We know, in other words, that desegregation works. However, as school districts have been released from desegregation orders over the last 20 years, schools nationwide have resegregated, leaving in place a landscape of segregated schools in many states including Delaware.<sup>195</sup> As this has occurred, the narrowing of the achievement gap has slowed,

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reversed, and even intensified.<sup>196</sup>

Delaware had the 7th highest black student enrollment (33.2 percent of the student body) in 2009-10, the date of a large-scale study on resegregation of schools.<sup>197</sup> But this enrollment was largely concentrated in segregated schools. Sixty percent of these black students attended schools in which they were the majority, with 13.2 percent attending highly segregated schools which were 90-100 percent African American.<sup>198</sup>

In addition to its effects on achievement and general indicators of health and success, the isolation of students of color in these schools has multiple effects that feed the school-to-prison pipeline. First, the lack of resources alone may put more pressure on teachers and administrators than exists in wealthy schools to “push out” difficult students in order to have more resources for other students.<sup>199</sup> Second, “[f]ederal and local policies that overemphasize accountability testing create perverse incentives for school administrators to manipulate test scores by segregating and excluding poorly performing students out of the accountability paradigm.”<sup>200</sup> At the same time, the experience of living in poor, isolated communities—including pervasive joblessness and reduced access to health care<sup>201</sup>—may lead to more students having difficulties that lead them to be candidates for exclusion.<sup>202</sup> Socioeconomic status is a predictor of academic success.<sup>203</sup> Academic failure can lead to “frustration, lessened motivation, peer rejection, poor interactions with teachers, a desire to escape, and aggressive behavior,” which can in turn lead to suspension, expulsion, and school-based arrest.<sup>204</sup> Poverty increases the odds of a child experiencing various other problems that can make them vulnerable to disciplinary action at school, including housing instability, inadequate nutrition, exposure to pollution, poor health care, family abuse and neglect, exposure to violence, developmental delays, chronic stress, depression, and possibly even stunted brain development.<sup>205</sup> They also are less likely to have “school readiness,” which “is generally defined as a broad set of skills that affect children’s ability to learn in school: physical health, motor skills, self-care, emotional and behavioral self-regulation, social skills, communication skills, pre-academic skills, attention, curiosity, and motivation to learn.”<sup>206</sup> Thus, in the very districts that do not have enough basic resources are more students who need additional resources.

Regardless of whether an individual student of color attends one of these isolated, poverty-concentrating schools, she can still be subject to segregation *within* her school. At least two mechanisms can lead to this in-school segregation: standardized testing and racially biased educational tracking.<sup>207</sup> Standardized testing poses multiple threats to students of

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color.<sup>208</sup> Two of the major threats are stereotype threat and selection system bias.<sup>209</sup>

Stereotype threat is a psychological process through which negative stereotypes about a group of people cause individuals within the group to suffer psychological distress that negatively affects their behavior.<sup>210</sup> For example, studies show that stereotypes depicting black students as less intelligent depresses black student standardized test performance.<sup>211</sup> Taking a standardized test can trigger the stereotype, causing black students to feel “the risk of being judged or treated stereotypically, or of doing something that would inadvertently confirm the stereotype.”<sup>212</sup> The resulting anxiety causes black students to underperform.<sup>213</sup>

Selection system bias is a form of standardized testing bias that occurs when standardized tests are used to measure academic or intellectual potential instead of another diagnostic tool that entails less racial disparity.<sup>214</sup> The interaction between stereotype threat and selection systems bias “contributes to disparate minority student pushout in at least three ways:”<sup>215</sup>

First, standardized tests cause minority students to receive an unequal education because they cause minority students to be inappropriately placed in special education and low-performing classes at disparate rates. Second, standardized tests inhibit minority student high school graduation and college admittance because many states require students to pass a standardized test in order to graduate from high school and matriculate to college. Lastly, courts have concluded that education research shows that teachers acting under false assumptions because of low test scores will treat the disadvantaged student in such a way as to make him conform to their low expectations; this acting out process—the self-fulfilling prophecy—makes it appear that the false assumptions were correct, and the student's real talent is wasted.<sup>216</sup>

“Tracking” refers to the sorting of students into different academic “tracks” based on “academic ability,”<sup>217</sup> such as placing students in vocational as opposed to college-bound, or remedial as opposed to “gifted” courses. “[A]n abundance of research shows that the purported benefits of tracking are based on faulty assumptions,” i.e. that “tracking inhibits learning for students placed in low-ability groups and does not aid achievement for students place in higher groups.”<sup>218</sup> Yet it is used by the vast majority of schools<sup>219</sup> and is often based on the racially-biased standardized testing discussed immediately above as well as subjective evaluations by teachers and counselors<sup>220</sup> that can be influenced by bias. Tracking also

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intersects with the underresourcing of schools through housing segregation discussed above, resulting in schools with higher student of color populations providing more lower track and fewer “college gateway” classes.<sup>221</sup>

Overall, “black and Latino students are far less likely to be identified as gifted and talented, or to be enrolled in advanced placement (AP) courses than whites.”<sup>222</sup> Their disparate placement in low-performing groups means they are “often subjected to rote curricula that lead to inattentiveness and lower attendance rates.”<sup>223</sup> Moreover, once they realize that they are not going to get from school the “rewards of education—namely, acquisition of knowledge and skills and ultimately, admission to college, and access to good paying jobs”—they are more likely to act in ways that subject them to discipline and drop out.<sup>224</sup>

ii. *“Zero Tolerance” Policies*

While zero tolerance policies originally focused on weapons violations, they have expanded to all manner of violations. One scholar summarized recent examples as follows:

In 2006, the American Civil Liberties Union and New York Civil Liberties Union reported that many New York City public school students were getting arrested for minor school disciplinary infractions like being late to class or bringing a cellular phone to school. A black Florida child was arrested and referred to disciplinary alternative education because she wore a tube top to school. A seven-year-old San Antonio student spent several days as the youngest student amongst teenagers, and the only first-grader, in an alternative education program after a pocketknife was found on his person. . . . A sixteen-year-old honor student was expelled from high school and sent to alternative education for five days after school officials discovered a butter knife on his person. These examples are merely a small sample of the absurd results that may occur in a system that promotes student criminalization and ostracization.<sup>225</sup>

The National Association of School Psychologists has observed, “Some teachers and administrators favor zero tolerance policies because they remove difficult students from school; administrators perceive zero tolerance policies as fast-acting interventions that send a clear, consistent message that certain behaviors are not acceptable in the school.”<sup>226</sup> No

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research, however, shows that zero tolerance policies achieve long-term deterrence,<sup>227</sup> and studies show that zero tolerance policies do not make schools safer, possibly because they have been extended to cover so many things other than dangerous offenses.<sup>228</sup> One study found that 95 percent of out-of-school suspensions were for nonviolent, minor disruptions such as tardiness or disrespect.<sup>229</sup> And they “do not serve as deterrents to future incidences because the range of ‘crimes’ that are punished creates confusion amongst students about what is actually not allowed.”<sup>230</sup> Moreover, applying zero tolerance policies to such a wide range of disciplinary issues gives teachers and school administrators a great degree of discretion in who to punish and how severely. Thus, while one purported advantage of zero tolerance policies was that they could allegedly be applied to all students equally, in reality they often have the opposite effect.

The continuing legacy of racial and economic segregation in this country (discussed in Part V.A.i., above) creates a situation in which the desire to “remove” difficult students disproportionately harms the most vulnerable kids—often students of color. Schools with the least resources are the most likely to feel pressure to push out students in order to distribute their limited resources across a smaller number of students. However these schools are in under-resourced neighborhoods, where students need more—not less—help, but may be subjected to the harshest discipline.

iii. *Criminalizing Student Conduct*

Related to zero tolerance policies is the trend toward treating behaviors as criminal acts rather than school disciplinary problems. In 2013, the Congressional Research Service reported that in 2007 (the last year for which data was available), there were already 19,000 student resource officers in schools.<sup>231</sup> Some schools have gone as far as to have “police precincts outfitted with holding stations on their campus[es],” or “completely transferring control over school safety to local police departments.”<sup>232</sup> A National Assessment of School Resource Officers commissioned by the National Institute of Justice and the U.S. Department of Justice, found: “One [of] the most frequent and destructive mistakes many SRO programs make is to fail to define the SROs’ roles and responsibilities in detail before—or even after—the officers take up their posts in schools. When programs fail to do this, problems are often rampant in the beginning of the program—and often persist for months and even years.”<sup>233</sup> Whether because of lack of training of SROs, or because of teachers’ and administrators’ increased reliance on calls to police, students are being criminally cited and arrested for what previously would have been school-based disciplinary issues.

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“Traditional adolescent behavior, such as talking out of turn or doodling on a desk, may now be treated as a punishable offense—like disorderly conduct or vandalism—that provides grounds for both school and criminal sanction.”<sup>234</sup> The examples are plentiful:

In September 2007, a California high-school student was arrested for failing to clean up all the crumbs after dropping cake on the floor, and her friend was arrested for recording the incident on her cell phone. In December 2007, a Florida ten-year-old was arrested for cutting her lunch with a knife from home. In September 2008, a Louisiana teen was arrested for making a cell phone call in class. In February 2009 a fourteen-year-old Wisconsin student was arrested for texting on a cell phone in class. In April 2009, a Pennsylvania student was arrested for tossing an orange to another student.<sup>235</sup>

In a New York City public school, a kindergartner with attention deficit disorder was handcuffed and removed from class.<sup>236</sup> In April 2005, when a five-year-old African American kindergartner in St. Petersburg, Florida, threw a temper tantrum, school officials called the police, who in turn arrested, handcuffed, and shackled the child and held her in a police cruiser for three hours.<sup>237</sup>

iv. *Explicit and Implicit Biases Among School Administrators*

When teachers have the discretion to decide whether a child has violated a school rule—e.g., disrespecting a teacher—both explicit and implicit biases are implicated. Even a teacher or administrator who is not consciously racist may harbor implicit biases against students of color that can lead to similar results at all levels of the school discipline process. With some zero tolerance policies being “triggered by non-violent behavior such as truancy, ‘disrespect,’ and ‘noncompliance,’”<sup>238</sup> the discretion afforded a teacher or administrator allows their biases to potentially lead them to find a student “guilty” of a zero tolerance offense. Zero tolerance policies “are often applied unevenly following minor rule infractions involving African American students.”<sup>239</sup> Even without zero tolerance policies, school employees’ biases can come into play, reading black students’ behavior in a more negative light than white students’, assigning harsher penalties to black students, and, based on biases associating black people with criminality, even making school employees more likely to involve law enforcement.



## **B. Recommendations**

Our recommendations are designed to address the role of systemic racism in creating inequities in the educational system, as well as changing specific policies within the educational system, both of which feed the school-to-prison pipeline.

- i. *Make Meaningful the Promise of Brown, and Create School Funding Equity*

School discipline will not be equitable if schools are not equal. Sixty years after Brown v. Board of Education, funding discrepancies among districts have led to a situation in which the U.S. Secretary of Education says school systems remain “fundamentally separate and unequal.”<sup>240</sup> Despite the success of integration, the last 20 years have seen the resegregation of schools throughout the country, leaving in place a landscape of segregated schools in many states including Delaware.<sup>241</sup> We recommend that Delaware address this problem by exploring options for reinitiating the proactive desegregation of its public schools.

- ii. *End Zero Tolerance Policies for all Non-Violent Behavioral Offenses*

Zero tolerance policies should be ended for all behavioral offenses that do not involve a weapon, and “weapon” should be clearly defined to encompass only those items such as guns that pose such a threat to students that they cannot be tolerated.<sup>242</sup>

- iii. *End the Criminalization of Non-criminal School Misbehavior by Clearly Delineating Between Criminal Behavior and School Misbehavior and Appropriately Training all School Employees, Including, Where Applicable, School Resource Officers*

State boards of education should adopt policies stating that “children will not be subject to formal law enforcement intervention—whether that intervention takes the form of a criminal citation, ticket, or summons, filing of a delinquency petition, referral to a probation officer, or an actual arrest—for ordinary school discipline issues.”<sup>243</sup> All school personnel, including teachers, administrators, and where they are present, school resource officers, should be trained in this policy. There is a question whether the presence of school resource officers in schools in and of itself should be ended because it creates too tight of a

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nexus between the education and criminal justice systems. To the extent that school resource officers are deemed necessary, however, their role must be clearly defined.

a. Model Principles for School Resource Officer Training

Model language developed by the ACLU for training school resource officers is just as effective for defining the line between criminal acts and school misbehavior when they are not present, and should be considered in creating new policy:

- School Resource Officers are responsible for criminal law issues, not school discipline issues.
- Absent a real and immediate threat to student, teacher, or public safety, incidents involving public order offenses including disorderly conduct; disturbance/disruption of schools or public assembly; trespass; loitering; profanity; and fighting that does not involve physical injury or a weapon, shall be considered school discipline issues to be handled by school officials, rather than criminal law issues warranting formal law enforcement intervention (e.g., issuance of a criminal citation, ticket, or summons, filing of a delinquency petition, referral to a probation officer, or actual arrest). In other contexts, officers are expected to evaluate whether an individual poses an “immediate threat” to “safety.” See Graham v. Connor, 490 U.S. 386, 396 (1989).
- Students shall not be arrested at school, except where the child poses a real and immediate threat to student, teacher, or public safety; or a judicial warrant specifically directs the arrest of the student in a school; in all other instances the execution of an arrest warrant shall be undertaken at a location other than a school.
  - o School principals shall be consulted prior to an arrest of a student where practicable.
  - o The student’s parent or guardian shall be notified of a child’s arrest as soon as practicable.<sup>244</sup>

iv. *Redirect Funds from Incarcerating Children to Providing Mental Health Services in Schools and Educating Children*

Given the grave overutilization of the criminal justice system to address school misbehavior and the fact that much misbehavior arises from other underlying issues students

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face, especially in isolated, poverty-stricken neighborhoods, state boards of education should reprioritize funding. Funds currently used to process children through the criminal justice system and incarcerate them should be diverted to providing mental health experts in schools, such as school psychologists, counselors, and social workers, in order to treat students' underlying problems and keep them in school.<sup>245</sup>

Specifically, funds should be diverted from incarceration to education. A critical place to start is pre-K education. In 2013, the National Institute for Early Education Research and Rutgers Graduate School of Education ranked Delaware 33rd in providing access to pre-K education for 4-year olds and indicated that Delaware did not provide any public education for 3-year-olds.<sup>246</sup> Given the growing and compelling data on the central importance of early childhood education to positive educational and life outcomes for children, we encourage Delaware to make this crucial investment.

v. *Train School Employees in Implicit Bias*

As at all levels of the criminal justice system, training all school employees in implicit bias may help reduce the role these biases play in disciplinary decisions, and thus may help decrease racial disparities.

vi. *Explore Public-Private Partnerships*

Delaware's unique position with regard to the private sector provides important opportunities for challenging the school-to-prison pipeline. We encourage Delaware to leverage the support of its business community to supplement the public education system and improve educational outcomes. By engaging the State's broad corporate base, Delaware can develop connections between business and school districts through a variety of projects – for example, mentoring programs and externships – and we encourage the exploration of these and other innovative ideas for corporate involvement in improving public education. Delaware has the potential to become a national model on leveraging public-private partnerships to address systemic problems in both the educational and criminal justice systems.

**C. Promising Models for Further Study**

i. *Clayton County, Georgia's Cooperative Model*

Judge Steve Teske of Clayton County Juvenile Court set out to end zero-tolerance policies because 90 percent of the children appearing in his courtroom were there for misdemeanors, mostly of the kind previously handled by school principals.<sup>247</sup> To address the problem, in 2003 he collaborated with school officials, community leaders, and law enforcement to achieve a cooperative agreement limiting school referrals of disciplinary issues to juvenile court.<sup>248</sup> Under the agreement, a first misdemeanor delinquent act would result in a warning, and a second would likely send the student to an intervention or mediation program; in most cases, an arrest could not occur until a third violation.<sup>249</sup>

Since 2003, the agreement has reduced Clayton County's daily detention rate by 80 percent.<sup>250</sup> Juvenile arrests have declined 60 percent, serious weapons charges have decreased 70 percent, and graduation rates have increased 24 percent.<sup>251</sup>

ii. *Restorative Justice in Denver's Public Schools*

The Denver Public School System has had success with moving away from zero tolerance by experimenting with restorative justice programs. The programs began as a pilot in 2005 and had expanded to serve six middle schools and one high school in the 2009-10 academic year.<sup>252</sup> According to the Denver Public Schools, "Restorative Approaches (RA) are a philosophical approach which holds that wrong-doing is best addressed through identifying the harm done through one's actions and creating steps to repair the harm. Rather than punishment of wrong-doers, RA focuses on creating an opportunity for the wrong-doer to make things right with those harmed and the community as a whole."<sup>253</sup> Each participating school has a restorative justice coordinator who is tasked with "attempting to divert cases that may otherwise end in suspension and arrest."<sup>254</sup> When a case comes to the coordinator, she discusses it with the referring party to determine if restorative justice is appropriate.<sup>255</sup> If so, and if all parties agree to participate in restorative justice, several meetings take place, which may include students, parents, administrators, teachers and outside community members.<sup>256</sup> The meetings generally "result in a contract that specifies what each party will do to resolve the case."<sup>257</sup>

Denver Public Schools Superintendent Tom Boasberg praised the program: "We have

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seen that restorative justice works best to keep our schools safer, to keep our students in school studying, and to help our students learn from their mistakes and make them right.”<sup>258</sup> Improvements occurred on multiple measures in the first several years of the program, including academic performance, school attendance and timeliness, and social skills.<sup>259</sup> Most striking, perhaps, were the improvements in the area of behavior and discipline. In the 2008-09 school year, for example, among the sample students, the number of office referrals decreased by 90 percent between the first and second semester, and suspensions dropped 87 percent.<sup>260</sup> In the 2009-10 school year, office referrals dropped 88 percent, and suspensions decreased by 89 percent.<sup>261</sup>

iii. *Positive Behavioral Interventions & Supports (PBIS)*

Positive Behavioral Interventions & Supports (PBIS) is a system for moving a school's disciplinary system from discouraging bad behavior to encouraging good behavior. Rather than a reactive disciplinary system, PBIS seeks to build a proactive system<sup>262</sup> to move a school culture from exclusionary to inclusionary practices for managing behavior.<sup>263</sup> PBIS aims to “create a predictable environment that establishes and maintains positive relationships between the adults and students through consistent teaching, reinforcement, and recognition of pro-social behaviors.”<sup>264</sup>

PBIS is defined as “a framework for enhancing the adoption and implementation of a continuum of evidence-based interventions to achieve academically and behaviorally important outcomes for all students.”<sup>265</sup> PBIS began as a way to manage behavior of individual students with developmental disabilities and was then expanded to the school-wide level.<sup>266</sup> School-wide PBIS (SWPBIS) has three tiers.<sup>267</sup> “The first tier . . . uses universal strategies implemented throughout the school to support the positive behavior of all students. The second tier applies additional strategies for students who need more support . . . . For the remaining approximately 5 percent of students who do not respond to universal and targeted strategies, individualized supports are developed at the third tier.”<sup>268</sup>

Elementary schools have used SWPBIS to achieve significant reductions in suspension rates.<sup>269</sup> Research on SWPBIS at the high school level is limited, but some schools have claimed significant reductions in dropout rates.<sup>270</sup> SWPBIS may also be able to reduce not only office referrals for all students, but also racial disparities in disciplinary actions.<sup>271</sup>

## **VI. RACIAL DISPARITIES IN THE JUVENILE JUSTICE SYSTEM**

According to Delaware's "Disproportionate Minority Contact"<sup>272</sup> statistics, youth of color are arrested and detained in disproportionately high rates, with African American youth representing 58 percent of juveniles arrested between 2010 and 2014 and more than two-thirds of admissions to the state's incarceration and detention facilities.<sup>273</sup> Yet, youth of color make up less than a third of Delaware's child population.<sup>274</sup>

Such disparities have persisted since the creation of the modern juvenile justice system, not just in Delaware but across the nation. Established to rehabilitate children, the juvenile justice system has been transformed to more closely mirror the adult criminal justice system both in form and purpose. Its current form is no less immune to racial bias, disproportionately impacting youth of color at every point in the system from arrest to disposition. The consequences of such disparities are manifold, and they feed into some racial disparities in the adult criminal system. The problem, however great, can be remedied, and advances have been made both in reducing arrests and detention and in creating a juvenile justice system that delivers on the promise of rehabilitation.

### **A. Origins of the Juvenile Justice System**

In 1899, the first juvenile court system was established in Cook County, Illinois, to provide a more appropriate alternative to the adult criminal system. Ostensibly, the reformers behind the court's creation sought to establish a system the primary function of which was not to punish children, but to protect and rehabilitate them.<sup>275</sup> This new system departed significantly from the adult criminal system. Infractions were civil rather than criminal, with children being adjudicated rather than convicted and given dispositions rather than sentences. The changes were not just a matter of vocabulary, as juvenile courts did away with the procedural and evidentiary rules attendant to adult criminal proceedings. Indeterminate sentencing meant judges could tailor dispositions. The system favored discretion and flexibility so as to address the needs of each child individually, and it focused attention on a child's environment and background rather than on the details of the crime.<sup>276</sup>

However, the rehabilitative aims of the new system were not equitably targeted, and different racial and ethnic groups were treated differently. Reformers crafted a system that primarily targeted European immigrant youth, particularly boys. Critics in this period pointed out that the kinds of behavior penalized in the new system, including drinking, roaming the

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streets, frequenting dance-halls, and staying out late at night, were attributed primarily to children of poor immigrant households.<sup>277</sup> At the same time, there were significant racial disparities that saw black youth arrested and incarcerated at disproportionate rates. Thus, black youth comprised 22 percent of Chicago's juvenile court caseload, though African Americans made up only 7 percent of Chicago's population.<sup>278</sup>

Another set of early critiques focused on the lack of procedural protections that were accorded adults, but not youth. The informality and flexibility of the juvenile justice system in the early 1900s led to sentences that did not conform to the severity of crime alleged, resulting in years of youth detention for minor crimes.<sup>279</sup> Thus, in the 1960s and 1970s, the Supreme Court began requiring greater procedural safeguards in line with the Constitutional requirements of adult criminal proceedings.<sup>280</sup> The Court mandated that youth be afforded the right to counsel, notice, and a fair and impartial hearing, in addition to applying the "beyond a reasonable doubt" standard.<sup>281</sup> However, juvenile justice systems still remain distinct from adult criminal proceedings; for example, youth do not have a constitutional right to a jury trial. As the nature of juvenile court proceedings were transformed to more closely mirror those in adult criminal courts, the purpose of juvenile courts shifted as well, taking on a more punitive rather than rehabilitative approach.<sup>282</sup>

So too legislatures around the country began to establish harsher, more punitive measures amidst a moral panic to confront what they saw as rising rates of crime.<sup>283</sup> As a result, the daily juvenile detention population increased 72 percent between 1985 and 1995, with most youth detained for non-violent offenses.<sup>284</sup> State leaders began making it easier to transfer juveniles to adult courts, passing legislation that made it automatic for certain crimes or automatic at certain ages.<sup>285</sup> These initiatives themselves are often rooted in racialized conceptions of crime. For example, the campaigners behind California's proposition 21, passed in 2000 to increase punishments for youth involved in gang activity, put out ads depicting African American youth killing innocent bystanders in drive-by shootings.<sup>286</sup> Notably, violent crime rates had been decreasing for several years prior.<sup>287</sup>

Today's juvenile justice system is still characterized by flexibility and informality, but has procedural trappings and a legislative mandate that permits it greater pursuit of retribution.<sup>288</sup> "[T]his apparent attempt to have it both ways—to pursue punishment and treatment, intervention and confinement, proportionality and rehabilitation, formality and informality—has created an entity that does none of these things particularly well."<sup>289</sup> As will be discussed, such a system invites pervasive racial bias, often unintentional, and embodies

structural norms that result in youth of color experiencing worse outcomes than white youth.

### **B. Rates of Arrest Do Not Accurately Reflect Rates of Offending**

Across the country, as in Delaware, children of color are arrested and detained at remarkably higher rates than their white counterparts.<sup>290</sup> Though accounting for only 15 percent of the youth population in the United States in 2009, African American youth comprised 31 percent of youth arrested.<sup>291</sup> In Delaware, African American children make up less than a third of the state's youth population, but represent 58 percent of youth arrested and nearly two thirds of youth incarcerated or in detention.<sup>292</sup> The only point of contact where youth of color do not represent a disproportionate share is diversion, where white children are diverted at a disproportionately high rate.<sup>293</sup>

The disproportionate rate of arrest and incarceration for African American youth does not correspond to a similarly disproportionate rate in actual offending and, in some cases, is contrary to relative rates of offending. Although African American youth may commit slightly more violent crime than white youth, the two groups commit nearly the same amount of property crimes.<sup>294</sup> However, white youth commit drug crimes at higher rates than African American youth, though African American youth are arrested at twice the rate of white youth for such offenses.<sup>295</sup> Thus, even assuming there are differential rates of offending for some crimes, there are no differential offending patterns that match the substantial difference in arrest and incarceration rates between white youth and youth of color. In fact, in two large meta-analyses examining research on the effects of race in juvenile justice, factors other than race failed to account for the disproportionate rates of arrest and incarceration of non-white youth, indicating that some form of racial bias influenced such outcomes.<sup>296</sup>

### **C. The Creep of Racial Bias Into the Juvenile Justice System**

The juvenile justice system cannot be divorced from the social, political, and economic forces that contribute to racial disparities in wealth, employment, incarceration, and numerous other areas of community life.<sup>297</sup> This is particularly true because in the juvenile justice system judges, attorneys, probation officers, and others look beyond the details of the alleged offense to aspects of a child's character and the circumstances in which he and his family live. The broader societal context is an integral component of evaluating racial disparities across the criminal justice system, from the invisibility of drug use in suburban communities to differential punishment for possession of different illicit



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substances.

The flexibility and informality of the juvenile justice system offers substantial opportunity for racial bias, however unintentional, to affect outcomes at every phase of juvenile proceedings, from arrest through intake, detention, waiver to adult court, adjudication, and disposition. At each stage, youth of color fare worse, including in Delaware.<sup>298</sup>

Disproportionate arrest rates may be influenced by a number of confounding factors. One factor is location. For example, dense, poor neighborhoods that are predominantly communities of color may harbor more open-air markets for the sale of drugs, but wealthier neighborhoods that are predominantly white host drug transactions that occur behind closed doors. This is one reason why, despite the higher incidence of drug use among white youth, youth of color are arrested more often for drug offenses.<sup>299</sup> Disproportionate arrest rates may also be influenced by decisions on the ground as the decision whether to arrest a juvenile is significantly influenced by perceived attributes of an alleged offender, for example demeanor. Youth that appear “fractious, obdurate, or . . . nonchalant in their encounters with patrolmen” are more likely to be arrested, but those who appear respectful and remorseful are less so.<sup>300</sup> Such considerations are not only highly susceptible to implicit bias,<sup>301</sup> but also reinforce the need to reevaluate how police are trained and how they operate in communities of color.

Following arrest, the process of recording details of alleged offenses and gathering requisite social histories presents more opportunities for bias to influence the adjudication and disposition process. For example, in crafting narrative reports of an offense, research indicates that officers are more likely to attribute misbehavior by youth of color to internal forces, like poor moral character, which tends to result in more punitive dispositions.<sup>302</sup> Other factors, like supervision and care at home, may also be used in the adjudication and disposition process. Where such factors are based on poorly investigated, anecdotal information, the risk is much greater that stereotypes and implicit bias will lead to harsher outcomes for youth of color.<sup>303</sup>

Racial bias that influences earlier stages of juvenile justice proceedings can accumulate to weigh heavily upon adjudication and disposition, though bias can be introduced at this stage as well.<sup>304</sup> One example of this accumulation effect is the positive correlation between pre-trial detention and a disposition of incarceration.<sup>305</sup> Biases that spur

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arrest and descriptions of offenses that signal poor character increase the likelihood of preventive pre-trial detention, which in turn increases the likelihood of an incarceration disposition. In addition, the same bias that may influence how an officer writes up an offense, may also influence how a judge views a juvenile. This can be the difference between diversion and detention or between long or short periods of detention or incarceration.<sup>306</sup> Where behavior is seen as the expression of moral corruption, which a judge is more likely to think when a youth of color is before the bench,<sup>307</sup> rather than an act of adolescent recklessness, as in the case of a white youth,<sup>308</sup> a juvenile of color will be dealt with more harshly with longer periods of detention, lack of diversion, and transfer to adult court.<sup>309</sup>

**D. The After Effects of Disproportionately Severe Outcomes**

Treating youth of color more severely exposes them to juvenile detention facilities that now more closely resemble and function like adult correctional facilities, taking the focus away from rehabilitation and ignoring the relevance of developmental psychology as youth transition to adulthood. In general, most youth “age out” of delinquent behavior, even violent behavior, offending less as they mature and enter adulthood.<sup>310</sup> However, this aging out may not occur where a youth’s development is interrupted by incarceration. Adolescence is a time when identity is formed and when youth develop the ability to resist peer pressure, control impulses, and begin to understand and control emotional responses.<sup>311</sup>

While this developmental process partly explains why youth age out of offending, it also underscores why youth are not responsive to “tough on crime” initiatives and how incarceration can disrupt emotional and social development in a way that contributes to recidivism. There is hardly any research that supports the proposition that children respond to harsh punishment, whether as a deterrent or because they were “taught [ ] a lesson.”<sup>312</sup> Youth who are sentenced to incarceration in prison rather than juvenile facilities are more likely to re-offend.<sup>313</sup> Thus, critical to reducing disparities in the criminal justice system as a whole is not simply responding to racial disparities in youth arrests and detention, but providing a system that facilitates a healthy transition to adulthood rather than undermining adolescent development.<sup>314</sup>

**E. Strategies and Recommendations to Root Out Racial Disparities**

There have been two major responses to racial disparities in the juvenile justice

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system.<sup>315</sup> First, states and localities have sought to reduce arrest and detention rates while steering youth towards community-based rehabilitation and development programs. The Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI) takes this approach and Delaware is already involved with this initiative. The second response is targeted at the smaller population of youth that are detained and incarcerated for more severe offenses and consists of small-scale, tailored treatment centers exemplified by the Missouri model.

i. *Case Study: Juvenile Detention Alternatives Initiative*

JDAI implementation has shown substantial results in reducing arrest and detention rates in the aggregate, though it has been somewhat less effective at addressing racial disparities, which appears to be the case in Delaware.<sup>316</sup> The approach taken by JDAI has been to emphasize “more objective, risk-based” strategies for reducing detention of low- and medium-risk youth while also providing a broader spectrum of alternative programming to detention.<sup>317</sup> The mechanisms for achieving such results include diversifying system staff, collecting adequate data, and creating risk assessment instruments that provide a more objective method of evaluating youth that is also sensitive to social and cultural correlates of race.<sup>318</sup> Delaware has worked on plans to implement some of these mechanisms, like collecting relevant data and bring stakeholders together, though full scale implementation remains unfulfilled.<sup>319</sup>

Developing a broad spectrum of local, culturally competent alternatives to detention is critical, especially for youth who may have more extensive histories of offending but pose a medium or small threat to public safety.<sup>320</sup> Without significant alternatives to detention, judges, even with tools like a more objective risk assessment mechanism, are less able to keep youth out of detention. One example, established in Chicago, is the establishment of Evening Report Centers, which are local community-based organizations that provide programming during afternoon and evening hours, providing a monitoring and programming mechanism while allowing children to remain at home.<sup>321</sup> A critical aspect of creating a spectrum of alternatives is locating them in neighborhoods where otherwise potential detention cases are concentrated.<sup>322</sup>

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ii. *Case Study: The Missouri Model*

The Missouri model presents a method of providing rehabilitative and treatment-oriented programming when detention is warranted. Departing significantly from the corrections model of juvenile detention, Missouri opted for small facilities that bore no resemblance to jails and prisons but that were located near communities from which the youth hailed.<sup>323</sup> Youth sleep on bunks in rooms and halls decorated to provide a more home-like feel and wear normal clothes rather than prison issued jump suits. Supervision takes the form of involved, specially-trained staff rather than uniformed officers stationed around the facility.<sup>324</sup> This provides an environment in which individualized attention, including therapy, treatment, training, and education, can be provided with family support, but without exposing youth to the danger, uncertainty, and dehumanization inherent in correctional settings.<sup>325</sup> Finally, Missouri provides extensive support after youth are released from detention, including by assigning many youth a community mentor. As a result, under 10 percent of youth return to the juvenile justice system once released.<sup>326</sup>

Delaware has already started to adopt some of these measures to help reduce the extremely disproportionate composition of youth in its juvenile justice system, but it must continue to reform the policies that underlie outsized rates of arrest and detention for youth of color. The history of the juvenile justice system is instructive and can offer lessons in understanding how racial bias can impact each important decision in the juvenile justice system. By understanding how racial bias, however unintentional, can infiltrate decision-making defined by discretion and flexibility, policy makers, court officials, and administrators can continue to pursue necessary reforms like an objective risk assessment tool developed with a conscious consideration for how it may impact communities of color. Further, the state must continue to adapt its ability to provide supervision and treatment and move away from large detention units, exploring new ways of providing programming to youth in their communities to support a healthy transition to adulthood.

## **VII. CONCLUSION**

The era of mass incarceration has its roots in mythologies of racial difference created to sustain and justify slavery. Thus, eliminating racial disparities in the modern criminal justice system requires awareness of the persistence of these mythologies of racial difference, which were enforced by violence and terror in the decades after the Civil War and entrenched in all areas of the law. This awareness can then inform an understanding of how implicit

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bias, individual and community trauma, the school-to-prison pipeline, and the juvenile justice system drive severe racial disparities in Delaware's criminal justice system. Evaluating how and why implicit bias impacts the administration of the criminal justice system, then undertaking reforms to eliminate its influence on decision-making, will help eliminate racial disparities. Knowledge of how and why trauma affects individuals, especially children, and communities can enable the implementation of initiatives that offer an alternative to arrest and incarceration, which has only resulted in the disproportionate incarceration of people of color. In the same way, eliminating unforgiving policies that harshly and severely punish children, especially those that result in removing children from school and placing them in detention, rather than facilitate a healthy transition into adulthood, will provide long-term benefits to children, their communities, and the state as a whole.

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3. The programs included social security (which excluded domestic and agricultural workers, or more than 3/4 of all black workers), mortgage assistance, small business loans, education via the GI Bill and other legislation. See generally Ira Katznelson, *When Affirmative Action Was White: An Untold Story of Racial Inequality in Twentieth Century America* (2005).
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5. Id.; Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Cal. L. Rev. 945, 949 (2006).
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7. Id.
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For this reason, schools choosing to use school-based law enforcement officers should carefully ensure that these officers’ roles are focused on protecting the physical safety of the school or preventing the criminal conduct of persons other than students, while reducing inappropriate student referrals to law enforcement.

Schools should also ensure that school-based law enforcement officers do not become involved in routine school disciplinary matters. For the same reasons, schools without campus-based security should avoid involving law enforcement or encouraging the use of law enforcement techniques (such as arrest, citations, ticketing, or court referrals) in routine disciplinary matters. To ensure the proper functioning of any school-based law enforcement program and to avoid negative unintended consequences, schools should provide clear definitions of the officers’ roles and responsibilities on campus, written documentation of

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255. Id.

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256. Id.

257. Id.

258. Lessons in Racial Justice and Movement Building: Dismantling the School-to-Prison Pipeline in Colorado and Nationally, [http://b.3cdn.net/advancement/ad2cf09c7de156e4d2\\_b9m6i8ubh.pdf](http://b.3cdn.net/advancement/ad2cf09c7de156e4d2_b9m6i8ubh.pdf)

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260. Id. at 2 (citing Myriam L. Baker, DPS Restorative Justice Project Report: Year Three Year End Report 2008-2009, Outcomes, Inc. (2009); Myriam L. Baker, DPS Restorative Justice Project Report: Year Four Executive Summary 2009-10, Outcomes Inc. (2010).).

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262. Dawn M. Netzel & Lucille Eber, Shifting from Reactive to Proactive Discipline in an Urban School District: A Change of Focus Through PBIS Implementation, 5 J. Positive Beh. Interventions 71, 74 (2003).

263. Id. at 86.

264. JoAnne Malloy, Intercepting the Dropout Trajectory, 21 National Dropout Prevention Center/Network Newsletter 1 (2009), available at <http://dropoutprevention.org/wp-content/uploads/2015/05/newsletter-v21n1-2009.pdf>.

265. George Sugai and Brandi Simonsen, Positive Behavioral Interventions and Supports: History, Defining Features, and Misconceptions (June 19, 2012), available at [http://www.pbis.org/common/cms/files/pbisresources/PBIS\\_revisited\\_June19r\\_2012.pdf](http://www.pbis.org/common/cms/files/pbisresources/PBIS_revisited_June19r_2012.pdf).

266. Netzel & Eber, supra note 262, at 71.

267. Delaware Positive Behavior Support Project, Multi-Tiered Systems of Support for Student Success, <http://wordpress.oet.udel.edu/pbs/> (last visited Oct. 14, 2015); see also Jared



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S. Warren et al, Urban Applications of School-Wide Positive Behavior Support, 5 J. Positive Beh. Interventions 80, 81 (2003).

268. Netzel & Eber, supra note 262, at 71; see also Warren et al, supra note 267.

269. See Netzel & Eber, supra note 262, at 77 (citing one elementary school's 22% reduction in overall suspensions after one school year using SWPBIS).

270. See Julie King & JoAnne Malloy, How PBIS Can Lead to School Improvement, 21 National Dropout Prevention Center/Network Newsletter 4-5 (2009), available at <http://dropoutprevention.org/wp-content/uploads/2015/05/newsletter-v21n1-2009.pdf>.

271. Kent McIntosh et al., Recommendations for Addressing Discipline Disproportionality in Education, PBIS OSEP Technical Assistance Center, 2 (2015), available at <https://www.pbis.org/Common/Cms/files/pbisresources/RecommendationsForAddressingDisciplineDisproportionality.pdf>.

272. “Disproportionate Minority Contact” (DMC) is a term drawn from the federal Juvenile Justice and Delinquency Prevention Act and programs it authorized. The term refers to racial disparities in the juvenile system.

273. State of Delaware FY 2015 Title II Formula Block Grant: 2015-2017 Three Year Comprehensive Plan at 2-4 [hereinafter DMC Plan].

274. Id.

275. Perry L. Moriearty, Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy, 32 N.Y.U. Rev. L. & Soc. Change 285, 295 (2008); Henning, supra note 60, at 405.

276. W. John Thomas, Dorothy E. Stubbe, & Geraldine Pearson, Race, Juvenile Justice, and Mental Health: New Dimensions in Measuring Pervasive Bias, 89 J. Crim. L. & Criminology 615, 620 (1999).

277. Id.; Henning, supra note 60, at 405.

278. Henning, supra note 60, at 407.

279. Moreiarty, supra note 275, at 295.

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280. Thomas et al., supra note 276, at 621; Robert Anthonen, Furthering the Goal of Juvenile Rehabilitation, 13 J. Gender Race & Just. 729, 732-33 (2010).
281. Moriearty, supra note 275, at 295-96.
282. Id. at 295.
283. Elizabeth S. Scott & Laurence Steinberg, Adolescent Development and the Regulation of Youth Crime, 18 Future Child. 15, 17-18 (2008).
284. Moreiarty, supra note 275, at 303.
285. Scott & Steinberg, supra note 283, at 17-18; Thomas et al., supra note 276, at 622.
286. Scott & Steinberg, supra note 283, at 18.
287. Id. at 18.
288. Anthonen, supra note 280, at 732-33.
289. Moreiarty, supra note 275, at 297.
290. David Kusnetz, Note, Addressing Structural Racism in Juvenile Justice Through Experimentalism, 47 Colum. J.L. & Soc. Probs. 245, 249; Moriearty, supra note 275, at 320; Henning, supra note 60, at 408-09.
291. Henning, supra note 60, at 408-09.
292. DMC Plan, supra note 273, at 2-4.
293. DMC Plan, supra note 273, at 6.
294. Moriearty, supra note 273, at 311-12.
295. Eleanor Hinton Hoytt et al., Annie E. Casey Foundation, Reducing Raical Disparities in Juvenile Detention 19-21 (2002).
296. See Moriearty, supra note 275, at 312-13.
297. Hinton Hoytt, supra note 295, at 18.

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298. See DMC Plan, supra note 273, at 8; Henning, supra note 60, at 408-09.
299. Hinton Hoytt, supra note 295, at 21.
300. Moriearty, supra note 275, at 300-01.
301. See supra Section III, “Implicit Bias”; Hinton Hoytt, supra note 295, at 26.
302. Moriearty, supra note 275, at 314-15; Henning, supra note 60, at 423; Hinton Hoytt, supra note 295, at 25-26.
303. Moriearty, supra note 275, at 302-04; Hinton Hoytt, supra note 295, at 36.
304. Hinton Hoytt, supra note 295, at 18.
305. Moriearty, supra note 275, at 305-06.
306. One study found a parallel between mental health detention and diversion of juvenile offenders to mental health treatment. Minority youth were over-represented in mental health institutions and in juvenile detention in Connecticut’s only state run youth psychological institution, but white youth were being diverted to mental health treatment at a greater rate. The study concluded that in both cases clinicians controlling admittance to mental health treatment and judges controlling diversion decisions were disproportionately choosing less restrictive options for white youth. Thomas et al., supra note 276, at 664.
307. Moriearty, supra note 275, at 314-15; Henning, supra note 60, at 423; Hinton Hoytt, supra note 295, at 25-26.
308. Henning, supra note 60, at 424.
309. Henning, supra note 60, at 423-24; Hinton Hoytt, supra note 295, at 24.
310. Scott & Steinberg, supra note 283, at 25.
311. Henning, supra note 60, at 400-401.
312. Scott & Steinberg, supra note 283, at 26.
313. Scott & Steinberg, supra note 283, at 26.

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314. Scott & Steinberg, supra note 283, at 25; Henning, supra note 60, at 400-401.
315. Richard A. Mendel, Annie E. Casey Foundation, *The Missouri Model: Reinventing the Practice of Rehabilitating Youthful Offenders* 5 (2010) [hereinafter *The Missouri Model*].
316. See Kusnetz, supra note 290, at 258; Hinton Hoytt, supra note 295, at 31; Chief Justice Earl Warren Institute on Law and Social Policy, *JDAI Sites and States: An Evaluation of the Juvenile Detention Alternatives Initiative: JDAI Sites Compared to Home State Totals* 15 (2012); DMC Plan, supra note 273, at 4-6.
317. *The Missouri Model*, supra note 315, at 32.
318. Hinton Hoytt, supra note 295, at 32; Moriearty, supra note 275, at 291.
319. See DMC Plan, supra note 273, at 18-21.
320. Richard A. Mendel, Annie E. Casey Foundation, *No Place for Kids: The Case for Reducing Juvenile Incarceration* 30 (2011) [hereinafter *No Place for Kids*].
321. Hinton Hoytt, supra note 295, at 30
322. Richard A. Mendel, Annie E. Casey Foundation, *Juvenile Detention Alternatives Initiative: Progress Report 2014*, at 8 (2014).
323. *The Missouri Model*, supra note 315, at 15.
324. *The Missouri Model*, supra note 315, at 27-28.
325. *The Missouri Model*, supra note 315, at 20-21.
326. David Gottesman & Susan Wile Schwarz, *Juvenile Justice in the U.S.: Facts for Policymakers* 4 (2011).