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*Trauma-Focused Justice:  
Recognizing Systemic Trauma*

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## TRAUMA-FOCUSED JUSTICE: RECOGNIZING SYSTEMIC TRAUMA

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### I. INTRODUCTION

Both the juvenile justice and criminal justice systems have begun to recognize trauma<sup>1</sup> as well as their own potential to traumatize.<sup>2</sup> Trauma, especially childhood trauma, has far-reaching implications for systems—from policing to incarceration—and those impacted by these systems, including

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1. *See, e.g.*, NAT’L CHILD TRAUMATIC STRESS NETWORK, ESSENTIAL ELEMENTS OF A TRAUMA-INFORMED JUVENILE JUSTICE SYSTEM (2015), [https://www.nctsn.org/sites/default/files/resources/essential\\_elements\\_trauma\\_informed\\_juvenile\\_justice\\_system.pdf](https://www.nctsn.org/sites/default/files/resources/essential_elements_trauma_informed_juvenile_justice_system.pdf); NAT’L CHILD TRAUMATIC STRESS NETWORK & ABA CTR. ON CHILD. & L., TRAUMA-INFORMED RESOURCE FOR PROSECUTION INVOLVING JUVENILES (2021), <https://www.nctsn.org/sites/default/files/resources/resource-guide/trauma-informed-resource-for-prosecution-involving-juveniles.pdf>.

2. Overpolicing can itself be traumatic. *See* Marilyn W. Lewis & Liyun Wu, *Exposure to Community Violence Versus Overpolicing and PTSD Among African American University Students*, 31 J. HUM. BEHAV. SOC. ENV’T 1026, 1026 (2021) (finding that “being stopped by the police poses a greater risk to the students’ development of PTSD than living in a violent community”). Furthermore, incarceration itself is a traumatic event and should be avoided. *See generally* SUE BURRELL, NAT’L CHILD TRAUMATIC STRESS NETWORK, TRAUMA AND THE ENVIRONMENT OF CARE IN JUVENILE INSTITUTIONS (2013), [http://www.njjn.org/uploads/digital-library/NCTSN\\_trauma-and-environment-of-juvenile-care-institutions\\_Sue-Burrell\\_September-2013.pdf](http://www.njjn.org/uploads/digital-library/NCTSN_trauma-and-environment-of-juvenile-care-institutions_Sue-Burrell_September-2013.pdf).

victims,<sup>3</sup> defendants,<sup>4</sup> and communities<sup>5</sup> alike.<sup>6</sup> An appreciation of trauma has wide-ranging benefits. Indeed, most victims and offenders are members of the same community.<sup>7</sup> While justice systems must institute a trauma-informed response to each impacted individual and every legal transaction, this Article focuses on the implications trauma recognition portends for those accused of crimes. Trauma-focused justice requires a framework that fully appreciates the complexity of trauma all forms of oppression and bias have induced.<sup>8</sup> In

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3. See Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L. J. 457, 457–58 (2006) (describing recovery from victimization of a crime, a frequent source of trauma, as an “arduous, dynamic and lengthy process that requires victims themselves to take active steps to facilitate their own recovery”).

4. See Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 645, 669 (2016) (discussing how the Supreme Court has recognized trauma as mitigating the culpability of youthful defendants).

5. See Lauren Weisner, *Individual and Community Trauma: Individual Experiences in Collective Environments*, ILL. CRIM. JUST. INFO. AUTH. 4–6 (July 15, 2020), <https://icjia.illinois.gov/researchhub/articles/individual-and-community-trauma-individual-experiences-in-collective-environments> (describing trauma’s effects on “the broader community” including negative effects on “community well-being” in ways that “contribute to individual-level traumas and hamper the ability to effectively address trauma when it occurs”); see also HOWARD PINDERHUGHES ET AL., PREVENTION INST., ADVERSE COMMUNITY EXPERIENCES AND RESILIENCE: A FRAMEWORK FOR ADDRESSING COMMUNITY TRAUMA 14 (2015), <https://www.preventioninstitute.org/publications/adverse-community-experiences-and-resilience-framework-addressing-and-preventing/> (“The symptoms of community trauma are the product of decades of economic, political and social isolation, a lack of investment in economic development and for the maintenance and improvement in the built environment, the loss of social capital with the flight of middle class families, and the concentration of poverty and exposures to high levels of violence.”).

6. See, e.g., LEILA MORSY & RICHARD ROTHSTEIN, ECON. POL’Y INST., TOXIC STRESS AND CHILDREN’S OUTCOMES 1, 10–12 (2019), <https://www.epi.org/publication/toxic-stress-and-childrens-outcomes-african-american-children-growing-up-poor-are-at-greater-risk-of-disrupted-physiological-functioning-and-depressed-academic-achievement/> (discussing how “[i]ndependent of other characteristics, children exposed to more frightening and threatening events are more likely to suffer from academic problems, behavioral problems, and health problems”).

7. See Gregory M. Zimmerman et al., *Does the Strength of the Victim-Offender Overlap Depend on the Relationship Between the Victim and Perpetrator*, 48 J. CRIM. JUSTICE 21, 21 (2017) (finding that “the odds of violent offending are 76% higher among respondents who were victimized as compared to youth who were not victimized”); see also Kristin N. Henning, *What’s Wrong with Victims’ Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1144 n.227 (2009) (citing statistics from 2004 showing that “as many as two-thirds of victims of juvenile violent crime are children”); Ezzat A. Fattah, *The Vital Role of Victimology in the Rehabilitation of Offenders and Their Reintegration into Society*, 56 RES. MATERIAL SERIES 71, 80 (2000), [https://www.unafei.or.jp/publications/pdf/RS\\_No56/No56\\_10VE\\_Fattah3.pdf](https://www.unafei.or.jp/publications/pdf/RS_No56/No56_10VE_Fattah3.pdf) (“The roles of victim and victimizer are not fixed, assigned, or static. . . . The same individual can move successively, or even simultaneously, from one role to the other.”).

8. See *Belonging Statement*, BRENÉ BROWN (Aug. 2021), <https://brenebrown.com/bbearg-belonging-statement/> (“In addition to violence and neglect, poverty,

February of 2023, the University of Arkansas at Little Rock Law Review convened a symposium, *TRAUMA ACES: Adverse Childhood Experiences and Trauma Informed Justice*, to explore the ways trauma has been and should be integrated into the law.

This Article continues this exploration, providing a description of what trauma is, who is impacted by trauma, and how traumatic experiences affect individuals. In addition, this Article situates trauma within the Supreme Court's mitigation framework for adolescents.<sup>9</sup> The framework is based on the developmental research recognized by the Supreme Court in three landmark cases—*Roper v. Simmons*,<sup>10</sup> *Graham v. Florida*,<sup>11</sup> and *Miller v. Alabama*.<sup>12</sup> Youth demand particular attention because most individuals who commit crimes do so during adolescence—the period of time between about twelve to twenty-five years old.<sup>13</sup> In the criminal justice system, late adolescents, or those who are nearing age twenty-five, have historically been categorized and treated as adults.<sup>14</sup> Yet, their adolescence makes them uniquely suited to benefit from reforms designed to leverage their potential for growth.<sup>15</sup> This group is disproportionately comprised of people of color,

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racism, sexism, ageism, ableism, sizeism, homophobia, transphobia, Islamophobia, antisemitism, xenophobia, and other systemic forms of oppression and/or bias are trauma.”)

9. In this Article, “youth,” “children,” and “juvenile” refer to those under the age of eighteen, whether as a class or as an individual. “Adolescent” or “adolescence” refer to the developmental stage, both physiological and neurological. “Juvenile” alternatively may refer to youth subject to juvenile delinquency court jurisdiction, whereas “criminal” more broadly refers to the adult system.

10. See generally *Roper v. Simmons*, 543 U.S. 551 (2005).

11. See generally *Graham v. Florida*, 560 U.S. 48 (2010).

12. See generally *Miller v. Alabama*, 567 U.S. 460 (2012).

13. See LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 5, 10 (2014) [hereinafter STEINBERG, AGE OF OPPORTUNITY] (describing adolescence as the time period between approximately ten and twenty-five years of age); JUST. POL'Y INST., IMPROVING APPROACHES TO SERVING YOUNG ADULTS IN THE JUSTICE SYSTEM 1 (2016), [https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/jpi\\_young\\_adults\\_final.pdf](https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/jpi_young_adults_final.pdf) [hereinafter IMPROVING APPROACHES]; see also LEIGH COURTNEY ET AL., URBAN INST., A MATTER OF TIME: THE CAUSES AND CONSEQUENCES OF RISING TIME SERVED IN AMERICA'S PRISONS 11 (2017), [https://apps.urban.org/features/long-prison-terms/a\\_matter\\_of\\_time\\_print\\_version.pdf](https://apps.urban.org/features/long-prison-terms/a_matter_of_time_print_version.pdf) (noting that nearly forty percent of “people serving the longest prison terms” started serving time before age twenty-five).

14. See, e.g., *Graham*, 560 U.S. at 74–75 (quoting *Roper*, 543 U.S. at 574) (discussing how “[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,” and doing the same in the criminal justice context).

15. See STEINBERG, AGE OF OPPORTUNITY, *supra* note 13, at 8–11 (explaining how adolescents' brains develop at a rate rivaling the brain growth rate of an infant, thereby making adolescents particularly able to develop new behaviors).

meaning racism further complicates the trauma analysis.<sup>16</sup> Late adolescents often grow out of their criminal activity.<sup>17</sup> Trauma-specific treatment enhances rehabilitation.<sup>18</sup>

## II. WHAT IS TRAUMA?

Trauma results when an individual's adverse experiences involve a threat to their life, safety, or well-being, and overwhelm the individual's ability to cope.<sup>19</sup> A traumatic experience is an acute stressful experience or set of experiences over time that causes someone to suffer a "breakdown of self-regulatory functions."<sup>20</sup> Justice-involved individuals experience both stress from adversity and traumatic stress.<sup>21</sup> Common childhood traumatic experiences include experiencing or witnessing violence (such as physical or sexual

16. IMPROVING APPROACHES, *supra* note 13, at 1 (finding that in observed cities and counties, well over half of those incarcerated between ages eighteen and twenty-four are people of color).

17. CATHERINE INSEL ET AL., CTR. FOR L. BRAIN & BEHAV. MASS. GEN. HOSP., WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE: A GUIDE FOR JUDGES, ATTORNEYS, AND POLICY MAKERS 37, 43 (2022), <https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/> [hereinafter WHITE PAPER]; Emily Buss, *Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition*, 89 U. CHI. L. REV. 843, 848, 880 (2022) [hereinafter Buss, *Kids Are Not So Different*].

18. See, e.g., Precious Skinner-Osei et al., *Justice-Involved Youth and Trauma-Informed Interventions*, 16 JUST. POL'Y J. 1, 16 (2019) ("[Trauma-informed care] can help reduce behavioral and security concerns within juvenile justice facilities and improve overall youth outcomes by reducing recidivism, improving mental health outcomes, and increasing self-esteem and sense of self-efficacy among [justice-involved youth].").

19. KRISTINE BUFFINGTON ET AL., NAT'L COUNCIL JUV. & FAMILY COURTS, TEN THINGS EVERY JUVENILE COURT JUDGE SHOULD KNOW ABOUT TRAUMA AND DELINQUENCY 3 (2010), [https://www.ncjfcj.org/wp-content/uploads/2012/02/trauma-bulletin\\_0.pdf](https://www.ncjfcj.org/wp-content/uploads/2012/02/trauma-bulletin_0.pdf); compare AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271 (5th ed. 2013) (listing traumatic events, in the context of Posttraumatic Stress Disorder, as "[e]xposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:" (1) "Directly experiencing the traumatic event(s)"; (2) "Witnessing, in person, the event(s) as it occurred to others"; (3) "Learning that the traumatic event(s) occurred to a close family member or close friend . . ."; and (4) "Experiencing repeated or extreme exposure to aversive details of the traumatic event(s)"), with Anushka Pai et al., *Posttraumatic Stress Disorder in the DSM-5: Controversy, Change, and Conceptual Considerations*, 7 BEHAV. SCI. 1, 2, 5 (2017) (arguing that new DSM-5 criteria for trauma "restrict[s] its inclusiveness" and "further limit[s] the types of events that qualify").

20. Valery Krupnik, *Trauma or Adversity?*, 25 TRAUMATOLOGY 256, 259 (2019).

21. *Id.* at 256 (defining trauma as a type of stress response that differs from both a normal stress response and from a response to adversity); see Hayley M.D. Cleary et al., *How Trauma May Magnify Risk of Involuntary and False Confessions Among Adolescents*, 2 WRONGFUL CONVICTION L. REV. 173, 175 (2021) [hereinafter Cleary et al., *How Trauma May Magnify Risk*] (finding that "most research" on trauma and justice-involved youth "indicates that about 10% to 50% of justice-involved youth meet criteria for current or recent PTSD" as compared to a "3-6% prevalence rate of current or recent PTSD in community samples of youth").

abuse), abandonment, and familial incarceration.<sup>22</sup> Individuals with these experiences often need mental health support and become involved with the child welfare system.<sup>23</sup>

In 1998, doctors at Kaiser Permanente and the Center for Disease Control (“CDC”) published pioneering trauma research, *The Adverse Childhood Experiences (ACE) Study*.<sup>24</sup> The research demonstrated that a patient’s success in adulthood was compromised by adverse childhood experiences, otherwise known as “ACEs”; the greater the extent of exposure to abuse or dysfunction within one’s home during childhood, the worse one’s health issues will be as an adult.<sup>25</sup> The original study described seven categories of experiences constituting ACEs, including:

- Psychological abuse
- Physical abuse
- Sexual abuse
- Exposure to substance abuse of a household member
- Mental illness of a household member
- Domestic violence of mother or stepmother
- Criminal behavior of a household member<sup>26</sup>

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22. While “[t]here is no single agreed-upon list of experiences that encompass what we refer to as adverse childhood experiences,” in one nationwide study the two most common ACEs nationwide were “economic hardship” and “the separation or divorce of a parent or guardian.” VANESSA SACKS & DAVID MURPHY, CHILD TRENDS, THE PREVALENCE OF ADVERSE CHILDHOOD EXPERIENCES, NATIONALLY, BY STATE, AND BY RACE/ETHNICITY 3, 6–8 (2018), [https://wyafterschoolalliance.org/wp-content/uploads/2021/06/ACESBriefUpdated-Final\\_ChildTrends\\_February2018-1-1.pdf](https://wyafterschoolalliance.org/wp-content/uploads/2021/06/ACESBriefUpdated-Final_ChildTrends_February2018-1-1.pdf) (describing the prevalence of individual ACEs nationally and by state).

23. KAREN M. ABRAM ET AL., U.S. DEP’T JUST., PTSD, TRAUMA, AND COMORBID PSYCHIATRIC DISORDERS IN DETAINED YOUTH 4–5 (2013), <http://www.ojjdp.gov/pubs/239603.pdf> [hereinafter DISORDERS IN DETAINED YOUTH] (finding that youth who experienced trauma in the last year reported “witnessing violence [as the] precipitating trauma”); see ERICA J. ADAMS, JUST. POL’Y INST., HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 2 (2010), [http://www.justicepolicy.org/images/upload/10-07\\_REP\\_HealingInvisibleWounds\\_JJ-PS.pdf](http://www.justicepolicy.org/images/upload/10-07_REP_HealingInvisibleWounds_JJ-PS.pdf); see also Hui Huang et al., *The Journey of Dually-Involved Youth: The Description and Prediction of Rereporting and Recidivism*, 34 CHILD. & YOUTH SERVS. REV. 254, 254 (2012) (explaining that “delinquency rates were approximately 47% greater for youth associated with at least one substantiated allegation of maltreatment”).

24. Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245, 251 (1998) [hereinafter *ACE Study*].

25. See *id.* at 245–46, 248, 251 (the measure of extent of ACEs is ascertained by simply adding “the sum of the categories with an exposure”); see also *CDC-Kaiser ACE Study*, CTR. FOR DISEASE CONTROL & PREVENTION (April 6, 2021), <https://www.cdc.gov/violenceprevention/aces/about.html>.

26. *ACE Study*, *supra* note 24, at 248.

Multiple ACEs can lead those affected to have poor health outcomes, engage in behaviors risky to health (such as smoking and substance use), and face socioeconomic challenges.<sup>27</sup> Arkansas is “the state with the highest prevalence” of children who had at least one ACE and is one of five states where “as many as one in seven children had experienced three or more ACEs, a significantly higher ratio than the national average.”<sup>28</sup>

Nonetheless, ACEs, as originally conceptualized, do not fully capture all of the adversity that many justice-involved individuals face. The study was focused on a unique adult population, composed of many adults who had some college education and who identified as white.<sup>29</sup> Indeed, the ACE study selected its particular categories because it found them to be the “most common” in interviews conducted by the researchers who developed the study.<sup>30</sup> For instance, the original ACE study characterized the incarceration of a family member as an ACE, but did not characterize parental separation, food scarcity, poverty, or homelessness as ACEs.<sup>31</sup> Some studies now argue for expanding the definition of ACEs to include homelessness,<sup>32</sup> poverty,<sup>33</sup> and

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27. See generally Melissa T. Merrick et al., *Vital Signs: Estimated Proportion of Adult Health Problems Attributable to Adverse Childhood Experiences and Implications for Prevention—25 States, 2015-2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 999 (2019), <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6844e1-H.pdf>. Furthermore, some forms of trauma are generationally self-perpetuating. See also LINDA G. MILLS, *VIOLENT PARTNERS: A BREAKTHROUGH PLAN FOR ENDING THE CYCLE OF ABUSE 85-90* (2009) (explaining how a child who has been directly abused by his parents is significantly more likely to become a violent adult; showing that the cycle of abuse and violence is ongoing) [hereinafter MILLS, *VIOLENT PARTNERS*].

28. SACKS & MURPHY, *supra* note 22, at 1-2, 4 (noting that Arkansas is “the state with the highest prevalence” of children who “have experienced at least one ACE” and that Arkansas is one of five states where “as many as one in seven children had experienced three or more ACEs, a significantly higher ration than the national average”).

29. *CDC-Kaiser ACE Study*, *supra* note 25 (74.8% were white and 39.3% were college graduates or higher).

30. Eduardo R. Ferrer, *Transformation Through Accommodation: Reforming Juvenile Justice by Recognizing and Responding to Trauma*, 53 AM. CRIM. L. REV. 549, 564 n.117 (2016) [hereinafter *Transformation Through Accommodation*].

31. See *ACE Study*, *supra* note 24, at 248 (listing the yes-or-no questions on the ACE survey); see also NADINE BURKE HARRIS, *THE DEEPEST WELL: HEALING THE LONG-TERM EFFECTS OF CHILDHOOD TRAUMA AND ADVERSITY* 227-29 app. 1, app. 2 (2018) [hereinafter HARRIS, *THE DEEPEST WELL*] (providing an ACE score survey one can take themselves as well as an ACE questionnaire a parent or caregiver could complete on behalf of a child).

32. Radcliff et al., *Homelessness in Childhood and Adverse Childhood Experiences (ACEs)*, 23 MATERNAL & CHILD HEALTH J. 811, 811 (2019).

33. Afifi et al., *Confirmatory Factor Analysis of Adverse Childhood Experiences (ACEs) Among a Community-Based Sample of Parents and Adolescents*, 20 BMC PEDIATRICS, no. 178, April 2020, at 1, <https://bmcpediatr.biomedcentral.com/articles/10.1186/s12887-020-02063-3>; see André Douglas Pond Cummings et al., *Trauma: Community of Color Exposure to the Criminal Justice System as an Adverse Childhood Experience*, 90 U. CIN. L. REV. 857, 869 (2022) [hereinafter Cummings et al., *Trauma: Community of Color*] (referring to a 2018 published

racism.<sup>34</sup> Methods and tools for assessing trauma, such as the ACEs framework, continue to evolve and there is still work to be done.<sup>35</sup>

Dr. Nadine Burke Harris, a pediatrician who served as California's Surgeon General, provides an example of an ACE assessment which includes a greater breadth of experiences that qualify as ACEs.<sup>36</sup> For example, Dr. Harris's ACE questionnaire asks whether one's child "was often treated badly because of race, sexual orientation, place of birth, disability, or religion," as well as whether one's child "had a serious medical procedure or life-threatening illness."<sup>37</sup> By recognizing more experiences as ACEs, it becomes easier to identify and conceptualize the sheer volume of childhood trauma. Recognizing the full extent of trauma is essential to performing the triage necessary to ameliorate the public health crisis all trauma poses.

### III. WHO IS IMPACTED?

All people can experience trauma, but some experience more trauma than others. Rates at which people experience particular kinds of traumatic experiences vary when examining factors such as race, gender, and identity.<sup>38</sup> On average, 45% of children in the United States have experienced at least one ACE.<sup>39</sup> Broken down nationally by race, 40% of white children have

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study by the Journal of the American Medical Association Pediatric which found that "[t]hose identifying as Black or Latino and those with less than a high school education or an annual income below \$15,000 were more likely to have more ACEs' and reported that 61 percent of Black, non-Hispanic children experienced at least one ACE").

34. See Cummings et al., *Trauma: Community of Color*, *supra* note 33, at 869; see also *Transformation Through Accommodation*, *supra* note 30, at 565 n.117 ("[J]ust because a particular childhood experience is not within the confines of the ACE survey does not mean that such an experience could not rise to the level of toxic stress.").

35. Although some of these tools fail to account for factors that should be included, such as race, poverty, homelessness, and contact with the police or judicial system. See e.g., Jason M. Lang & Christian M. Connell, *Development and Validation of a Brief Trauma Screening Measure for Children: The Child Trauma Screen*, 9 PSYCH. TRAUMA: THEORY RSCH. PRAC. & POL'Y 390, 390 (2017); Kristen R. Choi et al., *Validation of the Traumatic Events Screening Inventory for ACEs*, 143 PEDIATRICS, no. 4, 2019, at 1, <https://publications.aap.org/pediatrics/article/143/4/e20182546/37204/Validation-of-the-Traumatic-Events-Screening?autolog-incheck=redirected> (Both of these tools were created after 2016, but neither account for race, homelessness, or contact with the police or judicial system as factors).

36. See HARRIS, *THE DEEPEST WELL*, *supra* note 31, at 227–29 app. 1, app. 2.

37. *Id.*

38. See e.g., CTR. DISEASE CONTROL PREVENTION, *YOUTH RISK BEHAVIOR SURVEY 43–55* (2021), [https://www.cdc.gov/healthyouth/data/yrbs/pdf/YRBS\\_Data-Summary-Trends\\_Report2023\\_508.pdf](https://www.cdc.gov/healthyouth/data/yrbs/pdf/YRBS_Data-Summary-Trends_Report2023_508.pdf) (discussing the differing rates at which youth experienced different types of violence, as divided across gender, race, and sexual identity); SACKS & MURPHY, *supra* note 22, at 10 (finding that children of different races and ethnicities do not experience ACEs equally; "[n]ationally, one in three black non-Hispanic children have experienced two to eight ACEs, compared to only one in five white non-Hispanic children").

39. SACKS & MURPHY, *supra* note 22, at 1.



experienced at least one ACE, while 61% of Black children nationwide have experienced at least one ACE.<sup>40</sup> Those figures utilize the traditional ACE analysis and not one that incorporates race-related trauma. As a group, Black youth “are the most likely to have experienced the death of a parent or guardian.”<sup>41</sup> The CDC found that the largest percentage of youth to report missing school due to safety concerns were Black<sup>42</sup> and LGBTQ students.<sup>43</sup> Females in the juvenile justice population report greater instances of interpersonal violence in familial and romantic relationships, as well as more mental health issues, than their male peers.<sup>44</sup> Youth involved in the juvenile justice system are often the “most highly victimized youth.”<sup>45</sup> Northwestern’s Juvenile Project found that over ninety percent of the detained youth studied had at least one traumatic experience.<sup>46</sup>

Legal scholar Angela Onwuachi-Willig describes a phenomenon of “cultural trauma” as the repeated harm that people of color see and experience.<sup>47</sup> Cultural trauma results when a history of routine harm, media attention on the harm, and public conversation about the meaning of the harm combine.<sup>48</sup> Thus, when an exceptional tragedy occurs, and such tragedy becomes routinely expected and discussed, it becomes a cultural trauma.<sup>49</sup> Cultural trauma, systematic oppression, and discrimination create feelings of exclusion and foster concerns over lack of protection.<sup>50</sup>

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40. *Id.* at 2.

41. *Id.* at 9.

42. This Article will capitalize the word “Black.” See Nancy Coleman, *Why We’re Capitalizing Black*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/insider/capitalized-black.html?referringSource=articleShare>.

43. YOUTH RISK BEHAVIOR SURVEY, *supra* note 38, at 47–48.

44. NAT’L CHILD TRAUMATIC STRESS NETWORK, COMPLEX TRAUMA: IN JUVENILE JUSTICE SYSTEM-INVOLVED YOUTH 3 (2016), [https://www.nctsn.org/sites/default/files/resources//complex\\_trauma\\_in\\_juvenile\\_justice\\_system\\_involved\\_youth.pdf](https://www.nctsn.org/sites/default/files/resources//complex_trauma_in_juvenile_justice_system_involved_youth.pdf).

45. David E. Arredondo, *Child Development, Children’s Mental Health, and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL’Y REV. 13, 27–28 (2003) (describing children in the juvenile justice system and explaining psychosocial challenges of trans-generational neglect and criminal system involvement).

46. DISORDERS IN DETAINED YOUTH, *supra* note 23, at 1.

47. Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmitt Till Verdict*, 34 SOC. THEORY 335, 335–36 (2016).

48. *Id.* at 336.

49. *Id.* at 336–37. Onwuachi-Willig identifies three preconditions for cultural trauma: a history of routine trauma, widespread media attention, and public conversations about the meaning of that harm. *Id.* at 336.

50. *Id.* at 337, 347.

People of color experience this trauma routinely.<sup>51</sup> For instance, the deaths of Breonna Taylor,<sup>52</sup> Tyre Nichols,<sup>53</sup> and George Floyd<sup>54</sup> capture the routine experience of the police killing unarmed Black people.<sup>55</sup> Such public atrocities remind Black people that they are “at risk of summary execution.”<sup>56</sup>

Collective traumas, like those illustrated above, live in the bodies and minds of people of color.<sup>57</sup> Tragic public spectacles resurface memories of traumatic events for affected groups and reinforce their sense of routine trauma.<sup>58</sup> This resurfacing reminds the group that “neither they nor their rights

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51. See, e.g., JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 153 (2017) (Describing the day-to-day reality for Black, low-income students: “Our students complained constantly about how the police treated them. They told us they were routinely subjected to verbal abuse, stopped and searched for drugs or weapons, or even punched, choked, or shoved. Most of them felt at risk whenever an officer approached.”)

52. Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Mar. 9, 2023), <https://www.nytimes.com/article/breonna-taylor-police.html> (describing police shooting of Breonna Taylor, an innocent Black medical worker who was sleeping when police conducted a poorly planned and reckless raid).

53. Jason Hanna et al., *Video Shows Tyre Nichols Calling for his Mother, Beaten by Officers now Charged in his Death*, CNN (Jan. 28, 2023, 11:52 AM), <https://www.cnn.com/2023/01/27/us/tyre-nichols-memphis-friday/index.html>. Twenty-nine year old Tyre Nichols was pulled over for “reckless driving” and subsequently killed by five police officers. *Id.* Nothing was found to substantiate the probable cause required for the initial traffic stop. *Id.* See also Tyler Clifford, *Five ex-Memphis Police Officers Charged with Murder in Death of Tyre Nichols*, REUTERS (Jan. 27, 2023, 4:57 AM), <https://www.reuters.com/legal/former-memphis-police-officer-indicted-tyre-nichols-death-cnn-reports-2023-01-26/>.

54. *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/article/george-floyd.html>.

55. Onwuachi-Willig, *supra* note 47, at 353 (discussing the “trauma narratives currently growing out of a series of non-indictments and non-convictions for police officers and quasi-police officers who have killed African Americans—victims such as Trayvon Martin, Eric Garner, Tamir Rice, Shelly Frey, Freddie Gray, Alexia Christian, Meagan Hockaday, Alton Sterling, and Philando Castile”).

56. KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* 160 (2021).

57. Onwuachi-Willig, *supra* note 47, at 335; see U.S. DEP’T OF JUST., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 80 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) (“[W]hen police and courts treat people unfairly, unlawfully, or disrespectfully, law enforcement loses legitimacy in the eyes of those who have experienced, or even observed, the unjust conduct.”).

58. Onwuachi-Willig, *supra* note 47, at 336; see Cummings et al., *Trauma: Community of Color*, *supra* note 33, at 869 (“[A]dmitting the statistical truth that Black children in the United States are the group more prone to trauma is only the first step in fully understanding and confronting the ugly truth—Black children experience trauma because it is traumatic to be raised as a Black person in the United States.” (emphasis omitted)); see also Monnica T. Williams et al., *Assessing PTSD in Ethnic and Racial Minorities: Trauma and Racial Trauma*, 38 *DIRECTIONS PSYCHIATRY* 3, 179, 181, 184–85 (2018), [https://www.monnicawilliams.com/articles/Williams\\_RacialTraumaPTSD\\_2018.pdf](https://www.monnicawilliams.com/articles/Williams_RacialTraumaPTSD_2018.pdf) (finding that exposure to subtle forms of racism

are protected and respected in society.”<sup>59</sup> In addition to race, socioeconomics and geography also impact one’s access to safety and reliable policing.<sup>60</sup> Marginalized individuals experience the trauma of being over-policed,<sup>61</sup> the trauma of not being protected by police,<sup>62</sup> and the trauma that stems from the over-incarceration of one’s community.<sup>63</sup>

#### IV. TRAUMA’S IMPACT

Those who have experienced unresolved trauma may be less mature than their age would reflect.<sup>64</sup> When youth suffer from traumatic experiences, the brain structures that regulate their emotions, behavior, and impulsivity are less developed and function irregularly, making them even more impulsive than youth without significant trauma exposure.<sup>65</sup> The extent of the harm to brain development and health is more severe as the number of adverse events increases.<sup>66</sup> Such detrimental outcomes include an “earlier onset of risk-taking behaviors, substance misuse, psychiatric diagnoses, smoking, earlier onset of medical conditions and earlier death . . . .”<sup>67</sup>

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can have a “traumatic effect on one’s sense of psychological well-being and impair the individual’s ability to cope with adversity”).

59. Onwuachi-Willig, *supra* note 47, at 337.

60. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2115, 2118 (2017).

61. Cummings et al., *Trauma: Community of Color*, *supra* note 33, at 872 (describing “hyper police presence” and summarizing a 2020 Harvard study showing that Black Americans are three times as likely to be killed during a police encounter than similarly situated whites).

62. Bell, *supra* note 60, at 2118 (describing “neglectful policing” and over-policing as “twin perils” for communities of color).

63. See Jennifer Gonnerman, *Kalief Browder, 1993-2015*, *NEW YORKER* (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> (providing the story of seventeen year old Kalief Browder, who was tortured and traumatized during his 700-day pretrial detention at Riker’s Island, before his case was ultimately dismissed).

64. See U.S. DEP’T HEALTH & HUM. SERVS., *CHILD WELFARE INFO. GATEWAY, UNDERSTANDING THE EFFECTS OF MALTREATMENT ON BRAIN DEVELOPMENT* 11–12 (2009), [https://ocfcpacourts.us/wp-content/uploads/2020/06/Understanding\\_the\\_effects\\_of\\_maltreatment\\_000938.pdf](https://ocfcpacourts.us/wp-content/uploads/2020/06/Understanding_the_effects_of_maltreatment_000938.pdf); see generally Jack P. Shonkoff & Andrew S. Garner, *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 *PEDIATRICS* 232 (2012) (detailing the links between early-life adversity and later physical and mental impairments).

65. ADAMS, *supra* note 23, at 2; see Cleary et al., *How Trauma May Magnify Risk*, *supra* note 21, at 188.

66. Joan Luby et al., *Association Between Early Life Adversity and Risk for Poor Emotional and Physical Health in Adolescence: A Putative Mechanistic Neurodevelopment Pathway*, 171 *JAMA PEDIATRICS* 1168, 1168–75 (2017); see *ACE Study*, *supra* note 24, at 245.

67. WHITE PAPER, *supra* note 17, at 821 (applying also to those within the original study’s “relatively well educated and employed population”).

Mechanically, trauma's effects on the brain manifest in a variety of ways—some known and some still unknown.<sup>68</sup> Exposure to trauma can cause the hippocampus to shrink, even months after exposure to trauma ceases.<sup>69</sup> When one's ability to cope with stress is consistently overwhelmed, the prefrontal cortex's function is inhibited, the amygdala is overstimulated, and the ability to cope with stress further deteriorates.<sup>70</sup> In turn, one's neurological system, immune system, hormonal system, and cardiovascular system are all affected.<sup>71</sup> A person who has experienced toxic stress may exhibit exaggerated responses to perceived threats, "increased anxiety, arousal, and aggression," impulsive behavior or inability to concentrate, worse memories, and a tendency to engage in riskier behavior.<sup>72</sup>

Trauma's effects can manifest in ways that could be confused with symptoms associated with various disorders, including ADHD, bipolar, and "preschizophrenia."<sup>73</sup> Using ADHD as an example, diagnosis is based "entirely on [its] symptoms"; symptoms of inattention, impulsiveness, and hyperactivity.<sup>74</sup> Yet toxic stress, common amongst those with higher ACE scores, causes individuals to easily be triggered into survival states that may lead to symptoms consistent with ADHD.<sup>75</sup> Where this is the case, the appropriate treatment for traumatic disorders could vary markedly from that for ADHD.<sup>76</sup> For instance, nonstimulant medications can become preferred over the usual stimulant medications.<sup>77</sup> Trauma must be accurately identified and

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68. HARRIS, *THE DEEPEST WELL*, *supra* note 31, at 57–58 ("There is still a lot we don't know about how stress affects the brain, but every day, promising studies show us more and more.").

69. *Id.* at 58.

70. *Id.* at 61 (describing author's experiences performing ADHD assessments on patients with four or more ACEs, finding that "the problem was chronic dysregulation of the stress-response system, which inhibited the prefrontal cortex, overstimulated the amygdala, and short-circuited the stress thermostat—in other words, toxic stress").

71. *Id.* at 65.

72. *Id.* at 67–70 (describing symptoms of toxic stress's effects on various parts of the brain, including: an overstimulated amygdala, dysregulated locus coeruleus, inhibited prefrontal cortex, effects on the hippocampus, and the desensitization of one's dopamine receptors, making one with toxic stress need to engage in more dopamine-rich activities to acquire "the same amount of pleasure").

73. GLENN N. SAXE ET AL., *TRAUMA SYSTEMS THERAPY FOR CHILDREN AND TEENS* 164 (2d ed. 2016).

74. HARRIS, *THE DEEPEST WELL*, *supra* note 31, at 60; *see* SAXE ET AL., *supra* note 73, at 164 (for instance, schizophrenia is often characterized by "paranoia, hallucinations, and disorganized thought" which can all occur during "survival states" that traumatized children may have).

75. HARRIS, *THE DEEPEST WELL*, *supra* note 31, at 61 ("But now I knew that if a patient had four or more ACEs, [they were] thirty-two times as likely to have learning or behavior problems, which suggested that the underlying issue was probably not ordinary ADHD.").

76. *Id.* at 65 (discussing nonstimulant treatments).

77. *Id.*

distinguished from other conditions that manifest similarly. By relying upon specifically trained practitioners who understand trauma's nuanced intersection with cognitive, behavioral, and hormonal symptoms of other conditions, trauma's role can be identified and differentiated. Once correctly diagnosed, adhering to evidence-based practices in treating those with trauma is paramount.

## V. TRAUMA AND JUSTICE-INVOLVED ADOLESCENTS

According to neuroscience and developmental psychology, youth are different from, and therefore less culpable than, adults for three main reasons.<sup>78</sup> First, youth are immature as compared to adults.<sup>79</sup> Youth are impulsive and have difficulty predicting the consequences of their actions.<sup>80</sup> Adolescents tend to underestimate the possibility of harmful and self-destructive consequences while simultaneously overestimating the potential for positive outcomes and rewards.<sup>81</sup> Second, young people are particularly susceptible to

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78. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

79. Brief for the Am. Psych. Ass'n et al. as Amici Curiae Supporting Petitioners at 3–5, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) [hereinafter APA Brief Supporting Petitioners in *Graham*]; see Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 495 (2009) [hereinafter Buss, *Rethinking the Connection*] (reviewing ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (2008)), and stating that adolescents are psychosocially immature, rendering them unable to/less able to control their emotions and are more likely to be attracted to risky behavior); see also Buss, *Kids Are Not So Different*, *supra* note 17, at 869–70 (discussing neuroscientific recognition of a “maturity gap” between cognitive and psychosocial development, accounting “for the impulsivity and vulnerability to peer influence identified by the Court in the *Roper* line of cases”).

80. Brief for the Am. Med. Ass'n et al. as Amici Curiae Supporting Neither Party at 4, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647) [hereinafter AMA Brief in *Miller*]; APA Brief Supporting Petitioners in *Graham*, *supra* note 79, at 3–5 (discussing a study finding that adolescents account for risks and rewards differently from adults and are more likely to take risks); L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 421–23 (2000) (arguing adolescents are greater risk takers and discussing studies in support); Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 343–44 (1992) (stating that reckless behavior is a normative part of adolescent actions).

81. AMA Brief in *Miller*, *supra* note 80, at 2–4; APA Brief Supporting Petitioners in *Graham*, *supra* note 79, at 3–5; see ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 40–41 (2008) (discussing a study showing adolescents have less cognitive control and instead choose immediate rewards); see also Buss, *Rethinking the Connection*, *supra* note 79, at 495; Lucy C. Ferguson, *The Implications of Developmental Cognitive Research on “Evolving Standards of Decency” and the Imposition of the Death Penalty on Juveniles*, 54 AM. U. L. REV. 441, 457 (2004) (Adolescents “lack realistic risk-assessment abilities, and are not as future-oriented as are adults.”).

pressure and influence.<sup>82</sup> Because they cannot easily remove themselves from their day-to-day environments, they are vulnerable to harm and emotional trauma.<sup>83</sup> For instance, a young person cannot simply leave a home where they experience abuse or leave a community with frequent shootings. Third, youth have tremendous potential to change and grow.<sup>84</sup> Youth possess tremendous capacity to learn from mistakes.<sup>85</sup> Youthful misdeeds—even illegal and serious conduct—do not reflect permanent character flaws.<sup>86</sup> Risk-taking and criminality peak in adolescence, and decline thereafter.<sup>87</sup> Indeed, very few youth with delinquency histories continue offending as adults, even without justice system intervention.<sup>88</sup>

The justice system has a great potential to impact growth, prosocial development, and rehabilitation. Neuroplasticity is the brain's ability to adapt and change based on various stimuli.<sup>89</sup> Neuroplasticity is at its lifetime peak

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

83. *Roper*, 543 U.S. at 569 (“[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

84. *Id.* at 570; see generally FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* ch. 8 (1982) (proposing that the best response to juvenile crime is to let adolescents grow up and grow out of it).

85. See, e.g., *Roper*, 543 U.S. at 570; *Miller v. Alabama*, 567 U.S. 460, 472 (2012); *Graham v. Florida*, 560 U.S. 48, 68 (2010).

86. *Roper*, 543 U.S. at 570.

87. Elizabeth Cauffman et al., *How Developmental Science Influences Juvenile Justice Reform*, 8 U.C. IRVINE L. REV. 21, 26 (2018); Neelum Arya, *Family-Driven Justice*, 56 ARIZ. L. REV. 623, 625–26 (2014).

88. See Gwen A. Kurz & Louis E. Moore, *8 Percent Problem Study Findings*, ORANGE CNTY. PROB. DEP'T (Mar. 1999), <https://ocprobation.ocgov.com/resources/archives/8-percent-solution/8-percent-problem-study-findings> (discussing the 8% solution, which was later published as MICHAEL SCHUMACHER & GWEN A. KURZ, *THE 8% SOLUTION: PREVENTING SERIOUS, REPEAT JUVENILE CRIME* (2000)). The online piece demonstrates that the Orange County Probation Department tracked 3,000 first-time juvenile offenders and found that in most cases, the children did not reoffend and that only eight to ten percent of children committed at least three additional offenses during the study period. *Id.* See also Cauffman et al., *supra* note 87, at 26; Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 297–98 (2012) (citing a three-year study that followed over a thousand serious male offenders charged with felonies and found 8.7% of the participants were persistent offenders); Buss, *Kids Are Not So Different*, *supra* note 17, at 848 (“Because much offending occurs in adolescence and young adulthood—and most offenders offend *only* in adolescence and young adulthood—expanding juvenile exceptionalism to include young adults would belie its exceptional status.”); WHITE PAPER, *supra* note 17, at 3; see generally ZIMRING, *supra* note 84 (asserting that adolescence is a transitional period and that delinquency during adolescence is generally temporary).

89. STEINBERG, *AGE OF OPPORTUNITY*, *supra* note 13, at 21–25.

during adolescence,<sup>90</sup> rendering a youth's brain capable of developing new behaviors.<sup>91</sup> Along with the incredible potential for pro-social growth, the plasticity of an adolescent's growing brain also means that young people are vulnerable to harmful experiences that negatively shape their growth.<sup>92</sup>

Resilience is the process of accessing one's personal and external support systems to respond to and "overcome adversity."<sup>93</sup> Resilience also reflects a capacity to maintain healthy functioning following a negative experience and to rebound afterward.<sup>94</sup> Youth can be particularly resilient. The justice system has a substantial role to play in fostering this resilience by reinforcing and recognizing that resilience is a skill that youth can develop.<sup>95</sup> The justice system can fulfill this role by adopting a strength-based approach,<sup>96</sup> emphasizing the effort an affected individual demonstrates even when the behavior is not perfect. For example, if a young person who had been attacked en route to school continues to show up to school, even if with a weapon, the justice system can emphasize that the young person is in fact trying to go to school. The justice system can further foster resiliency by systematically recognizing that family and community connections can be sources of resilience.<sup>97</sup>

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90. *Id.* at 5, 8–11 (referring to adolescence as the period between ten to twenty-five years of age and explaining how adolescence rivals ages zero to three in peak neuroplasticity).

91. *Id.*

92. See Danya Glaser, *Child Abuse and Neglect and the Brain—A Review*, 41 J. CHILD. PSYCH. & PSYCHIATRY 97, 110 (2000).

93. Kaitlin Happer et al., *Children's Resilience and Trauma-Specific Cognitive Behavioral Therapy: Comparing Resilience as an Outcome, a Trait, and a Process*, 73 CHILD ABUSE & NEGLECT 30, 34 (2017) [hereinafter *Children's Resilience*].

94. Mark D. Seery et al., *Whatever Does Not Kill Us: Cumulative Lifetime Adversity, Vulnerability, and Resilience*, 99 J. OF PERSONALITY & SOC. PSYCH. 1025, 1025; see, e.g., THE NAT'L CHILD TRAUMATIC STRESS NETWORK, RESILIENCE AND CHILD TRAUMATIC STRESS 1 (2016), <https://www.nctsn.org/resources/resilience-and-child-traumatic-stress> (describing resilience as "the ability of a child to recover and show early and effective adaptation following a potentially traumatic event").

95. See *Children's Resilience*, *supra* note 93, at 30–32, 39 (studying three different conceptualizations of resiliency, concluding that resilience as a process was most supported—an increase in resilience directly correlated to a decrease in the degree of posttraumatic stress and depressive systems associated—and that findings "suggest that clinicians have an opportunity to promote symptom reduction in maltreated children through fostering resilience").

96. "The fundamental assumption of the strengths perspective is that all people have strengths, talents and goals . . . . The strengths model emphasizes that the capacity for growth and recovery is an innate ability of human beings." Manon AM Krabbenborg et al., *A Strengths Based Method for Homeless Youth: Effectiveness and Fidelity of Houvast*, 13 BMC PUB. HEALTH 359, 360 (2013) (discussing success of a strengths-based approach with treating abused women and people with mental illness); see also Mark D. Seery et al., *supra* note 94, at 1038 ("people are not doomed to be damaged by adversity").

97. See *Children's Resilience*, *supra* note 93, at 39 (mentioning "a child's ability to access external support" as relevant to assessing a child's resilience); see also SAXE ET AL., *supra* note 73, at 112 (discussing the goal of a trauma system therapy as "leaving a better system" to a

Trauma and resilience impact justice-involved youth, late adolescents, and fully grown adults. There is tremendous potential for rehabilitation and reform when the juvenile and criminal justice systems recognize and respond to all forms of trauma with compassion, accurate accountability, and growth opportunity.

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given child and their parents that enable them to better help themselves and advocate for themselves “within the system of care”).