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# Black Boys Matter: Developmental Equality

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# BLACK BOYS MATTER: DEVELOPMENTAL EQUALITY

*Nancy E. Dowd\**

*[T]he question of how one should live within a black body, within a country lost in the Dream, is the question of my life . . .*

– Ta-Nehisi Coates<sup>1</sup>

## INTRODUCTION

The American Dream is one of equality and opportunity; the ability to succeed and be whoever and whatever one wants to be, limited only by one's own drive and talent. But for Black boys, this is not the reality. As Ta-Nehisi Coates so eloquently explains in *Between the World and Me*, his letter to his then seventeen-year-old son, the overriding reality is danger to the body, literally the threat to one's life, filling him with fear for his son.<sup>2</sup> Grounded in his own experience growing up in inner-city Baltimore, it is a no less justified fear for his son raised amidst relative wealth and privilege.<sup>3</sup> Coates writes about being stopped in his car by the Prince Edward County police while he was in college. He had done nothing but was acutely aware that meant nothing in this dangerous moment when anything could happen to him, and be justified.<sup>4</sup> Quite literally, you hold your breath as you read this passage; you know his fear is warranted. Nor is his fear for his son misplaced. Indeed, his letter

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\* Professor and David Levin Chair in Family Law, University of Florida Levin College of Law. This Article was the basis for the 2016 Hofstra Distinguished Family Law Lecture. I thank the dean, faculty, students, and staff for their warm welcome and insightful dialogue shared during the lecture and in many communications after the lecture. I deeply appreciate critical feedback from Stephanie Bornstein, Frank Rudy Cooper, Joanna Grossman, Vinay Harpalani, Shani King, Ann McGinley, Kenneth Nunn, Rachel Rebouché, Katheryn Russell-Brown, Barbara Stark, and Barbara Bennett Woodhouse. I also benefitted from the insights of participants in the 2015 Duke University Civil Rights Conference; the 2015 UNCRC Conference on Article 3 held in Edinburgh, Scotland; the University of Florida Faculty Workshop Series; and the 2016 AALS Section on Human Rights program. Kevin Paule, J.D. 2016, University of Florida, provided outstanding research assistance.

1. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 12 (2015).

2. *Id.*

3. *See id.* at 75-77.

4. *Id.*

to his son was triggered by his son's reaction to the refusal to indict the Ferguson police officer who killed Michael Brown.<sup>5</sup> But, Michael Brown was neither the first nor the last young Black man or boy to lose his life to private or state violence. Every new death reinforces that this is unexceptional. The fear for the body, for life itself, is real for every Black boy and man.

But this fear is only the tip of the iceberg. Beyond the danger to the bodies of Black boys and men is the reality that as children or as adults, if they survive, most will fall far short of realizing the American Dream. This Article confronts that larger reality and aims to change it. Allowing this reality to persist violates fundamental principles of law, of morality, of humanity.<sup>6</sup> In this Article, I confront this reality and articulate a groundbreaking strategy for change.<sup>7</sup> I propose developmental equality as a model to accomplish children's equality.<sup>8</sup> Using developmental scholarship grounded in the lives of children of color and other outsider children, I aim to infuse and shift the law's perspective on development and harness developmental insights to achieve equality. A developmental equality model would be the basis for policy and litigation strategies to identify and dismantle structural discrimination, prevent ongoing replication of inequality for children, and provide affirmative support for *all* children's opportunity to develop.<sup>9</sup>

I make the case for the developmental equality model by looking to the life course of Black boys from birth to age eighteen. In this Article, I gather and distill the social science research on the development of Black boys. This data is important in its own right, because Black boys matter: they deserve our focus and attention as a group. The data also serves to expose structural discrimination that fosters not only the inequality and subordination of Black boys, but also inequalities generally for children linked to their identities.<sup>10</sup> This deeper look into the lives of Black boys from birth until legal adulthood informs the model of developmental equality, and that model as applied to their lives points to structural factors and the role of the state in children's continuing inequalities.

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5. *Id.* at 11.

6. *See infra* Parts I–III.

7. *See infra* Part III.

8. *See infra* Part III.

9. *See infra* Part III.

10. For application internationally, see Nancy E. Dowd, *A Developmental Equality Model for the Best Interests of Children*, in *IMPLEMENTING ARTICLE 3 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BEST INTERESTS, WELFARE AND WELL-BEING* (Elaine E. Sutherland & Lesley-Anne Barnes Macfarlane eds., 2016).

My analysis is not intended to create a hierarchy of harm or need. I do not claim that Black boys matter more, or Black girls matter less.<sup>11</sup> Nor do I claim that Latino, Asian, or Muslim children are less affected.<sup>12</sup> Rather, the life course of Black boys demonstrates the centrality of developmental equality to all children who face unequal developmental hurdles tied to the intersection of identity (or identities) and state-supported structures. And, while my focus is on children subordinated and challenged in normative development due to identity, this same model might be used as well to identify how privilege is reinforced for some children, advantaging them unfairly and reproducing hierarchies among children.<sup>13</sup>

Developmental equality identifies the structural components of inequality created and sustained by the state. Exposure of that structural inequality should trigger an obligation on the part of the state to dismantle, reorganize, and reorient those systems.<sup>14</sup> The state should

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11. Kimberlé Williams Crenshaw has powerfully argued that the challenges facing Black girls and women must not be rendered invisible. See KIMBERLÉ WILLIAMS CRENSHAW ET AL., AFRICAN AMERICAN POLICY FORUM, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2015), [http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF\\_SMN\\_Brief\\_Full\\_singles-min.pdf](http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf).

12. For example, this perspective is equally applicable to children outside of the United States. See, e.g., LILLA FARKAS, EUROPEAN COMM'N, REPORT ON DISCRIMINATION OF ROMA CHILDREN IN EDUCATION (2014), [http://ec.europa.eu/justice/discrimination/files/roma\\_childdiscrimination\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma_childdiscrimination_en.pdf); Zama Coursen-Neff, *Discrimination Against Palestinian Arab Children in the Israeli Educational System*, 36 N.Y.U. J. INT'L L. & POL'Y 749, 791-95 (2004); Melissa Eddy, *In Sweden, the Land of the Open Door, Anti-Muslim Sentiment Gains a Foothold*, N.Y. TIMES, Jan. 3, 2015, at A4; Alessandria Masi, *France's Secularism Is Driving Young Muslims Out of School, Work and French Culture*, INT'L BUS. TIMES (Jan. 21, 2015, 10:11 AM), <http://www.ibtimes.com/frances-secularism-driving-young-muslims-out-school-work-french-culture-1789258>. For a global perspective on inequalities among children, see UNICEF, THE STATE OF THE WORLD'S CHILDREN 2006: EXCLUDED AND INVISIBLE 7-12 (2005), [http://www.unicef.org/sowc06/pdfs/sowc06\\_fullreport.pdf](http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf) and *Ending Child Poverty Now*, CHILDREN'S DEF. FUND, [www.childrensdefensefund.org](http://www.childrensdefensefund.org).

13. See BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW 144-48 (1998); Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, in RACE, CLASS, AND GENDER: AN ANTHOLOGY 74, 74-78 (Margaret L. Andersen & Patricia Hill Collins eds., 9th ed. 2016); Sharon Elizabeth Rush et al., *Doing Anti-Racism: Toward an Egalitarian American Society*, 29 CONTEMP. SOC. 95, 97-98 (2000); Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 40-41 (1999).

14. As President John F. Kennedy stated, "Simple justice requires that public funds, to which all taxpayers of all races[, colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination." *Title VI of the Civil Rights Act of 1964* 42 U.S.C. § 2000d et seq., DEP'T JUST., <https://www.justice.gov/crt/fcs/TitleVI-Overview> (last updated Jan. 22, 2016) (alteration in original) (describing the aims of the Civil Rights Act); see also Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012) (prohibiting discrimination on the basis of race, color, and national origin in programs receiving federal financial assistance); Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012) (prohibiting discrimination on the basis of sex).

take evidence of bias seriously, whether linked to policies and practices, or people, or both. Beyond dismantling barriers to development, an affirmative approach would require state action to insure equality of development and opportunity.<sup>15</sup>

The Article proceeds in three parts. In Part I, I evaluate the use of a developmental frame in legal analysis and public policy and outline my developmental equality model.<sup>16</sup> Typically, the developmental perspective imagines the child as neutral: race-less, gender-less, class-less. Using such a frame in the guise of progressive policy is fundamentally flawed. Even worse, it reinscribes inequalities rather than attacking them, while claiming a more child-centered, progressive approach. After critiquing the neutral child of those models, I suggest reframing the legal developmental lens to a “developmental equality model.”<sup>17</sup> This model incorporates insights from social scientists who have focused on the development of children of color, in particular the work of Margaret Beale Spencer and Cynthia García Coll.<sup>18</sup> The developmental equality model is a powerful tool to make the promise of equality real. It can be used (1) to expose and dismantle barriers to equality; (2) to recognize and celebrate positive racial identity development; and (3) to create concrete benchmarks to achieve real equality by maximizing potential and opportunity for *all* children.

In Part II, I argue for the necessity of the model by examining the life course of Black boys based on social science research specifically focused on them and their development.<sup>19</sup> This scholarship exposes steep developmental challenges. These challenges arise not from individual families or communities, but rather from conditions designed by the state or known by the state to harm particular families and communities. The individual pattern of exacerbated developmental challenges is reinforced by identity-based policies affecting families and communities in a cycle that perpetuates inequality.

In Part III, I explore how the developmental equality model generates strategies for equality. The model highlights the structures and cultural norms of the state that create substantial negative developmental

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15. Evaluation of strategies and their theoretical underpinnings is the next step in my project. For an exploration of international norms, see Dowd, *supra* note 10. For a critique of one litigation strategy, see Nancy E. Dowd, *Straight Out of Compton: Developmental Equality and a Critique of the Compton School Litigation*, 45 CAP. U. L. REV. (forthcoming 2017) (manuscript at 39-40), <https://ssrn.com/abstract=2827847>. My larger project is a book to be published by New York University Press, tentatively entitled *Equality Reimagined: The Case of Black Boys*.

16. See *infra* Part I.

17. See *infra* Part I.B.3.

18. See *infra* Part I.B.1–2.

19. See *infra* Part II.

hurdles that differentially affect identifiable groups of children based on identity. Undermining development generates potentially lifelong subordinating consequences that are difficult or impossible to overcome. I focus here on the poverty system, the educational system, and the juvenile justice system.

Having identified three critical systems that block development, I then consider the use of the developmental equality model for legal analysis and public policy to support not only the equality of Black boys, but of *all* children.<sup>20</sup> Beyond dismantling what currently harms and discriminates among children, a developmental equality framework could be the basis to construct affirmative policies, structures, and culture that support *all* children and youth. Such affirmative obligations must be constructed with great care, to maximize family autonomy and integrity, given the history of destructive, counter-productive interventions into the lives of families of color and the poor.

The exploratory discussion of strategies in Part III includes both litigation and policy. From a litigation perspective, a developmental equality model might expand the scope of the landmark case brought against the Compton Unified School District.<sup>21</sup> From a policy perspective, a developmental equality model could be implemented in systems that currently block rather than support developmental growth and opportunity, or be the basis to create an affirmative system of children's rights and support. Although this strategic project will be more fully fleshed out in future work, I demonstrate here how focusing on the example of Black boys, transforming their development from a pathway littered with challenges and dead ends to one reflecting a fundamental guarantee of individual support and opportunity, can meaningfully insure their equality. Making Black boys matter is a path to embrace a commitment to developmental equality that benefits all children currently treated as less than full and equal persons.

### I. A DEVELOPMENTAL MODEL

A developmental model or perspective in law is critical to both a theoretical, strategic vision for children, and as a metric to hold the state

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20. See *infra* Part III.

21. P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1126 (C.D. Cal. 2015). All documents for *Compton Unified School District* are available online. See *Home*, TRAUMA & LEARNING, <http://www.traumaandlearning.org/home> (last visited Nov. 26, 2016). A motion to dismiss the case was denied on September 29, 2015. See *Compton Unified Sch. Dist.*, 135 F. Supp. 3d at 1144, 1150. For a fuller discussion of the case, see *infra* notes 364-67 and accompanying text. For my critical analysis of *Compton Unified School District*, see Dowd, *supra* note 15 (manuscript at 39-40).

accountable to dismantle existing barriers and to insure developmental support for all children. Such a perspective imagines the state as a responsive state dedicated to the equality of its citizens.<sup>22</sup> It is crucial that this developmental perspective be informed by an intersectional race and gender model, rather than a “colorblind,” gender-neutral approach. A developmental *equality* model insures that the power of the developmental perspective is harnessed to achieve equality for children, rather than inadvertently or deliberately used to reinforce hierarchy among children.

In this Part, I first describe the existing developmental model assumed in current legal frameworks. I then explore the work of two social scientists, Margaret Beale Spencer and Cynthia García Coll, who put children of color at the center of their analysis, and expose the impact of identities and structural discrimination.<sup>23</sup> Using their work, and fusing it with legal principles of equality and our obligations to children, I construct the model of developmental equality. This model can be used to identify barriers to equality from birth and provide support for real, substantive equality of opportunity for all children. The life course example of Black boys, explored in Part II, validates the usefulness of the developmental equality model in exposing the role of identity factors in state-created structural barriers to development. The model points the way forward not only for Black boys but for all children.

### A. Critique of the Dominant Model

Developmental research has been a powerful tool to reorient legal rules and social policy related to children and youth.<sup>24</sup> Indeed, one might

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22. The foundation of such an approach is vulnerability theory, informed by identities theory. See Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339, 1355-60 (2015); see also Nancy E. Dowd, *Unfinished Equality: The Case of Black Boys*, 2 IND. J.L. & SOC. EQUALITY 36, 38-45 (2013); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 19-22 (2008).

23. See *infra* Part I.B.1-2.

24. This approach is epitomized by Justice Kagan’s majority opinion in *Miller v. Alabama*:

Our [prior] decisions rested not only on common sense—on what “any parent knows”—but on science and social science as well. In *Roper*, we cited studies showing that “[o]nly a relatively small proportion of adolescents” who engage in illegal activity “develop entrenched patterns of problem behavior.” And in *Graham*, we noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”—for example, in “parts of the brain involved in behavior control.” We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s “moral culpability” and enhanced the prospect that, as the years go by and neurological development occurs, his “deficiencies will be reformed.”

argue that a developmental lens has begun to fundamentally reshape family law and juvenile justice.

Developmental arguments have been particularly effective toward reframing juvenile justice to reflect the immature and incomplete brain development of adolescents that affects their judgment, risk taking, and susceptibility to peer influence.<sup>25</sup> The consequence has been to dismantle harsh sentences for juveniles on the basis that they are different from adults, not yet fully neurologically or emotionally developed and, therefore, are both less culpable while also having greater potential for rehabilitation.<sup>26</sup> The potential exists to extend this developmental understanding throughout the juvenile justice system.

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*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

132 S. Ct. 2455, 2464-65 (2012) (footnote omitted) (first quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2010); and then quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)); *see also* *Montgomery v. Louisiana*, 136 S. Ct. 718, 734, 736 (2016) (applying *Miller v. Alabama* retroactively). The Court reaffirmed this view in its most recent summary dispositions vacating and remanding to state courts five juvenile life-without-parole cases. *Purcell v. Arizona*, No. 15-8842 (U.S. Oct. 31, 2016) (mem.); *Najar v. Arizona*, No. 15-8878 (U.S. Oct. 31, 2016) (mem.); *Arias v. Arizona*, No. 15-9044 (U.S. Oct. 31, 2016) (mem.); *DeShaw v. Arizona*, No. 15-9057 (U.S. Oct. 31, 2016) (mem.); *Tatum v. Arizona*, No. 15-8850 (U.S. Oct. 31, 2016). Justice Sotomayor, concurring in those dispositions, restated the importance of developmental considerations and meaningful developmental inquiry by the courts:

This Court explained in *Miller v. Alabama* that a sentencer is “require[d] . . . to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” Children are “constitutionally different from adults for purposes of sentencing” in light of their lack of maturity and underdeveloped sense of responsibility, their susceptibility to negative influences and outside pressure, and their less well-formed character traits. Failing to consider these constitutionally significant differences, we explained, “poses too great a risk of disproportionate punishment.” In the context of life without parole, we stated that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”

*Tatum*, slip op. at 1 (Sotomayor, J., concurring) (citations omitted) (quoting *Miller*, 132 S. Ct. at 2464, 2469).

25. *Miller*, 132 S. Ct. at 2464-68 (citing cases in which the U.S. Supreme Court applied developmental arguments to reframe juvenile justice); *see also* *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375-79 (2009) (accounting for developmental issues in finding school strip search unreasonable, although no liability based on qualified immunity).

26. *See Miller*, 132 S. Ct. at 2464-68. Many harsh aspects of juvenile incarceration remain, including the practice of solitary confinement. *Stop Solitary: Ending the Solitary Confinement of Youth in Juvenile Detention and Correctional Facilities*, ACLU, <https://juvjustice.org/sites/default/files/ckfinder/files/Ending%20the%20Solitary%20Confiement%20of%20Youth%20in%20Juv%20Detention%20and%20Correctional%20Facilities.pdf> (last visited Nov. 26, 2016). For a comprehensive critique of the juvenile justice system, see *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* (Nancy E. Dowd ed., 2015) and Shay Bilchik, *Redefining the Footprint of Juvenile Justice in America*, in *JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM* 21, 21-26 (Nancy E. Dowd ed., 2011). *See generally* RICHARD ROSS, *JUVENILE IN JUSTICE* (2012).



Conversely, the same scientific evidence has been important to determine capability and maturity in the reproductive rights realm.<sup>27</sup> Many teenagers are sufficiently mature to make decisions about their reproductive choices.<sup>28</sup> The consequences if youth are not allowed this choice, coupled with recognition of their capability to make their own decisions in a setting that permits time and reflection, suggest that maturity and capability may be defined differently in different situations, at different ages, and based on the specific experience and capabilities of particular youth.

These two seemingly opposing positions, recognizing immaturity and poor decision making versus respecting sufficient maturity and capability to make major life decisions, suggest that the use of the developmental lens needs to be nuanced and careful so as not to infantilize children and youth, but at the same time to recognize the fluid developmental dynamic that affects behavior and relates to legal concerns of capability and capacity. As children's rights scholar Barbara Woodhouse has so eloquently written, adolescents in particular need to be supported in their opportunity to develop, including their opportunity to make mistakes.<sup>29</sup>

One final example of an area where the developmental perspective has been helpful has been with respect to issues of custody and shared parenting, particularly to differentiate between the needs and support of children at different ages and over time.<sup>30</sup> Florida, like many states, recognizes developmental information as a relevant factor in determining the best interests of the child in devising parenting plans.<sup>31</sup> In addition, guidance and sample plans of the courts expressly differentiate between the needs of infants versus middle school children or older teenagers.<sup>32</sup> As distinguished from juvenile justice and

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27. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 444-45 & n.31 (1990); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 439-40 (1983); *Bellotti v. Baird*, 443 U.S. 622, 633-42 (1979); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 709 (1977).

28. See Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J.L. & GENDER 175, 186-89 (2011) (explaining state statutes that require minors be legally "mature" to make reproductive choices).

29. BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* 38-40 (2010).

30. See, e.g., *Needs of Children of Different Ages*, CAL. CTS., <http://www.courts.ca.gov/16238.htm> (last visited Nov. 26, 2016) (explaining the needs of children throughout their life).

31. The Florida custody statute includes developmental considerations as a factor to craft parenting plans. FLA. STAT. § 61.13(3)(a)-(m) (2006).

32. For example, the Oregon courts provide plans that accounts for the difference in needs of children of all ages. See *Sample Parenting Schedules*, OR. JUD. DEP'T, <http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/familylaw/allsampleschedules-whatistbestformchild.pdf> (last visited Nov. 26, 2016).

reproductive rights, here the developmental data is used as a guidepost to formulate individualized plans that adjust over time congruent with normative developmental stages.<sup>33</sup>

The use of developmental scholarship in law commonly conceptualizes development as linear, represented most familiarly in the developmental charts from infancy to adulthood that organize physical, cognitive, emotional, and other aspects of development according to age-linked norms.<sup>34</sup> The linear view reminds us that children are a moving target, with unique needs at various ages and stages. So, for example, normative adolescent needs and behavior are far different from those of newborns.<sup>35</sup> This linear progression also highlights particular periods as especially critical: infancy and adolescence are the two most dynamic periods of development.

An ecological development model, grounded in the work of Uri Bronfenbrenner and most strongly advocated in legal analysis by Woodhouse, provides a more complex picture that situates the individual's linear development within an ecology, capturing the impact of the environment on the child and the dynamic interaction of various aspects of the environment with individual aspects of the child.<sup>36</sup> Conceptualized as concentric networks of self, family, community, systems, and ideologies, all aspects of this complex ecology affect outcomes. This perspective is incorporated in law in the recognition that context matters. Of these interlocking systems, the most significant are *microsystems*—those systems that have a direct impact on children (family, peers, community, schools).<sup>37</sup> Where those systems overlap

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33. In addition to change over time that must be a part of many parenting plans, divorcing parents also deal with the impact of the divorce on their children, which varies by age in terms of immediate impact as well as long term implications for development and socialization. See Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297, 300-01 (2000).

34. Common developmental stages and indicators are used to evaluate children and to provide guidance to parents. See, e.g., *Developmental Milestones*, CDC, <http://www.cdc.gov/ncbddd/actearly/milestones> (last visited Nov. 26, 2016).

35. At six months, some of the benchmarks are sitting up with support, rolling over, and saying two syllable words. See *Your Baby at Six Months*, CDC, [http://www.cdc.gov/ncbddd/actearly/pdf/checklists/checklists\\_6mo.pdf](http://www.cdc.gov/ncbddd/actearly/pdf/checklists/checklists_6mo.pdf) (last visited Nov. 26, 2016). In adolescence, goals include separation from parents, independent work habits, dealing with sexuality, and identity development. *Positive Parenting Tips for Healthy Child Development: Teenagers (15-17 Years of Age)*, CDC, <http://www.cdc.gov/ncbddd/childdevelopment/positiveparenting/pdfs/teen-15-17-w-mpa.pdf> (last visited Nov. 26, 2016).

36. See URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* 3-19 (1979); WOODHOUSE, *supra* note 29, at 29-33; Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 424-33 (2005).

37. See BRONFENBRENNER, *supra* note 36, at 132.

creates *mesosystems*, ideally reinforcing the overlapping microsystems. So, for example, the family and schools mutually support academic achievement; and, neighborhoods support both the families within them and the schools located within the neighborhoods that serve children.<sup>38</sup> *Exosystems* more indirectly, but no less significantly, impact children through their effects on the micro- and mesosystems, through institutions and systems (for example, policies and systems of anti-poverty support, child welfare, education, health care, and juvenile justice).<sup>39</sup> Overarching the entire ecology is the *macrosystem* of cultural ideals, biases, and beliefs (for example, beliefs about development, core societal principles, and pervasive stereotypes).<sup>40</sup>

The value of the ecological approach is in seeing the interlocking nature of the various pieces of the ecology. Instead of isolating the child, or narrowly focusing on the family as the sole determinant of the child's well-being, the ecological model recognizes that families are only part of the picture; they do not function independently. Ideally, the interlocking systems are functional for all children, sharing what Woodhouse has called generist values, creating a healthy, supportive ecology; when they lack that goal, systems on various levels can be highly dysfunctional and toxic to children.<sup>41</sup>

One other valuable insight into development comes from neuroscience. Neuroscience tells us both of the impact of negative ecological factors and of the brain's resiliency.<sup>42</sup> Focusing on

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38. See *id.* at 176-77, 249-54.

39. See *id.* at 237-57.

40. See *id.* at 258-91.

41. See WOODHOUSE, *supra* note 29, at 29-47; Woodhouse, *supra* note 36, at 430-33.

42. Adverse childhood experiences ("ACEs") research focuses on the impact of trauma, including complex trauma, and resiliency. See ACES TOO HIGH, <http://acestoohigh.com> (last visited Nov. 26, 2016); *Injury Prevention & Control: Division of Violence Prevention*, CDC, <http://www.cdc.gov/violenceprevention/acestudy> (last visited Nov. 26, 2016); *Three Core Concepts in Early Development*, CTR. ON DEVELOPING CHILD HARV. U., <http://developingchild.harvard.edu/resources/three-core-concepts-in-early-development> (last visited Nov. 26, 2016). For the use of ACEs research in litigation, see *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1126, 1130-33 (C.D. Cal. 2015) and *Historic Ruling in Landmark Complaint on Unique Learning Needs of Children Affected by Trauma*, PUB. COUNS. (Sept. 30, 2015), <http://www.publiccounsel.org/stories?id=0172>. For discussion of the Compton case, see *supra* note 21 and accompanying text and *infra* notes 364-70 and accompanying text. The ACEs concept is helpful in describing the consequences of developmental inequality and dealing with those consequences, but structurally it is most helpful as a basis for policy to dismantle the causes of these developmental hurdles. For neuroscience work on the impact of trauma, see Marie F. Peters & Grace Massey, *Mundane Extreme Environmental Stress in Family Stress Theories: The Case of Black Families in White America*, in *SOCIAL STRESS AND THE FAMILY: ADVANCES AND DEVELOPMENTS IN FAMILY STRESS THERAPY AND RESEARCH* 193, 200-06 (Hamilton I. McCubbin et al. eds., 1983); James Garbarino et al., *What Children Can Tell Us About Living in Danger*, 46 *AM. PSYCHOLOGIST* 376, 377 (1991); Gilda Graff, *Everything Has Changed, but Nothin' Has Changed: Shame, Racism, and a Dream Deferred*, 38 *J. PSYCHOHISTORY*

neurological development and capability, neuroscience is a more narrow perspective than the ecological model or the linear progression model, both of which include multiple systems as part of development. Neuroscience nevertheless can be particularly helpful in understanding the physical developmental foundation of complex behavior. For example, neuroscience explains why adolescents are both capable and immature, by reminding us that this is linked to the lack of full development of the frontal lobe.<sup>43</sup> The outsized risk-taking propensity of teens is because their neurological skill at making judgments is not yet fully developed.<sup>44</sup> Indeed, neuroscience would suggest that from a brain architecture perspective, legal adulthood might arguably be delayed to age twenty-five.<sup>45</sup> At the same time, increasing maturity and capacity for judgment may be the basis to encourage independent judgment-making as part of the very process of development of judgment and maturity.<sup>46</sup>

Neuroscience also informs us about the impact of a range of factors on the brain's developmental process. We can measure scientifically the toll taken on normal brain development by being confronted with severe stressors.<sup>47</sup> Just as abuse and domestic violence have an impact on the

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346, 355-57 (2011); Kathryn E. Grant et al., *Psychological Symptoms Affecting Low-Income Urban Youth*, 19 J. ADOLESCENT RES. 613, 625-28 (2004); Janice P. Gump, *Reality Matters: The Shadow of Trauma on African American Subjectivity*, 27 PSYCHOANALYTIC PSYCHOL. 42, 46 (2010); Kristina Hood et al., *Stress Among African American Emerging Adults: The Role of Family and Cultural Factors*, 22 J. CHILD & FAM. STUD. 76, 77-78, 82 (2013); Kristin L. Hunt et al., *Risky Business: Trauma Exposure and Rate of Posttraumatic Stress Disorder in African American Children and Adolescents*, 24 J. TRAUMATIC STRESS 365, 366-68 (2011); Colter Mitchell et al., *Social Disadvantage, Genetic Sensitivity, and Children's Telomere Length*, 111 PROC. NAT'L ACAD. SCI. 5944, 5947-48 (2014); and Elisa G. Triffleman & Nnamdi Pole, *Future Directions in Studies of Trauma Among Ethnoracial and Sexual Minority Samples: Commentary*, 78 J. CONSULTING & CLINICAL PSYCHOL. 490, 492-94 (2010); and see also Annie Stopford, *There's No Trust at All in Anything: Psychosocial Perspectives on Trauma in a Distressed African American Neighborhood*, in FRAGMENTS OF TRAUMA AND THE SOCIAL PRODUCTION OF SUFFERING: TRAUMA, HISTORY, AND MEMORY 221, 229-33 (Michael O'Loughlin & Marilyn Charles eds., 2015); Hope M. Hill et al., *Exposure to Community Violence and Social Support as Predictors of Anxiety and Social and Emotional Behavior Among African American Children*, 5 J. CHILD & FAM. STUD. 399, 408-12 (1996); and Hope M. Hill & Serge Madhere, *Exposure to Community Violence and African American Children: A Multidimensional Model of Risks and Resources*, 24 J. COMMUNITY PSYCHOL. 26, 27-28 (1996).

43. See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 44-46 (2008).

44. See Mark Fondacaro, *Why Should We Treat Juvenile Offenders Differently Than Adults? It's Not Because the Pie Isn't Fully Baked!*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, *supra* note 26, at 29, 30.

45. See JANE KROGER, *IDENTITY IN ADOLESCENCE: THE BALANCE BETWEEN SELF AND OTHER* 93-101 (3d ed. 2004) (detailing a study that examined cognitive developmental framework in various stages of cognitive consciousness).

46. For a discussion on the competency of minors, see Rebouché, *supra* note 28, at 186-89.

47. See *Injury Prevention & Control: Division of Violence Prevention*, *supra* note 42.

developing brain, so too do factors like racism, linked particularly to stress.<sup>48</sup> At the same time, neuroscience reminds us of the brain's resiliency and what factors contribute to that resiliency.

In recent U.S. Supreme Court cases where the Court has strongly embraced a developmental perspective, the Court has particularly relied on the markers of linear, normative development, and neuroscience scholarship on the progression of brain development in the teenage years.<sup>49</sup> The Court has given some attention to contextual factors, but tends to keep the focus narrower than that suggested by the ecological model. So, for example, in *Miller v. Alabama*, where two cases were consolidated to consider whether juveniles who committed homicide could be sentenced to life without parole, the Court critiqued the practice of mandatory sentences of life without parole because the practice "precludes consideration of . . . chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."<sup>50</sup> In addition, the Court noted that the rule also precluded taking into account the circumstances of the offense as well as of the home and family environment.<sup>51</sup> The Court noted that one of the two defendants, who was an accessory to robbery and murder of a store clerk but did not shoot the clerk, had a family background which the Court characterized as "immersion in violence" because his mother and grandmother had shot other individuals.<sup>52</sup> That defendant was fourteen when charged as an adult, and was African American.<sup>53</sup> The Court described the second defendant's home life in considerable detail as "pathological," including a drug-addicted mother, a life in and out of foster care, and a physically abusive stepfather.<sup>54</sup> This second defendant had tried to kill himself four times, beginning in kindergarten.<sup>55</sup> Also fourteen when he committed his crime, he beat his victim, then set a fire to cover his crime.<sup>56</sup> This defendant was white.<sup>57</sup> In the analysis of the white defendant, the Court seemed to be sympathetic

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48. See Grant et al., *supra* note 42, at 625-26; Gump, *supra* note 42, at 48-49; Hill & Madhere, *supra* note 42, at 27-28; Hunt et al., *supra* note 42, at 365; Mitchell et al., *supra* note 42, at 5944; Peters & Massey, *supra* note 42, at 196-98, 210-11; Triffleman & Pole, *supra* note 42, at 491.

49. See *supra* note 24 and accompanying text.

50. 132 S. Ct. 2455, 2468 (2012).

51. *Id.*

52. *Id.*

53. *Id.* at 2455.

54. *Id.* at 2469.

55. *Id.*

56. *Id.* at 2462.

57. Joint Appendix of Petitioner at 23, 39, *Miller*, 132 S. Ct. 2455 (No. 10-9646), 2012 WL 94587.

to the difficulties he experienced in his life; in the analysis of the Black defendant, the Court appeared to lay blame on the family for encouraging the use of violence, although the defendant did not commit the acts of violence but rather was charged as an accessory.

The Court did not explicitly take race into account in evaluating the maturity, competence, and responsibility of the *Miller* defendants for their crimes, nor was race explicitly considered in the context relevant to their sentencing. Even if race is not the explanation for the Court's differential evaluation of the two defendants, the absence of consideration of race to assess the life course and developmental pathway of the defendants obscures the challenges specific to race and gender in development. This is not surprising given the "neutral" child of mainstream developmental analysis. But it obscures the limits of that model, which is hardly neutral.

The developmental research base is not diverse. Much of the psychological research on children that is the basis for understanding and constructing developmental norms has been critiqued as racially biased.<sup>58</sup> The children initially researched were exclusively white, and research continues to be dominated by study of white children. "[M]iddle class White behaviors, norms and values are used as the standard of normality and psychosocial adjustment against which non-White youth are evaluated."<sup>59</sup> In addition, white and African American youths are "assumed to have similar experiences and equal access to participation in American social institutions."<sup>60</sup>

The research patterns have persisted despite this critique.<sup>61</sup> In other words, like many "sciences," the assumptions or questions generating research claim universality without examining that assumption or what

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58. See generally DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880-1996, at 109, 116-17 (1997); see also *infra* notes 71-73 and accompanying text.

59. Jewelle Taylor Gibbs, *High-Risk Behaviors in African American Youth: Conceptual and Methodological Issues in Research*, in STUDYING MINORITY ADOLESCENTS: CONCEPTUAL, METHODOLOGICAL, AND THEORETICAL ISSUES 55, 70 (Vonnice C. McLoyd & Laurence Steinberg eds., 1998).

60. *Id.*; see also Vonnice C. McLoyd & Suzanne M. Randolph, *Secular Trends in the Study of Afro-American Children: A Review of Child Development, 1936-1980*, 50 MONOGRAPHS SOC'Y RES. CHILD DEV., nos. 4-5, 1985, at 78, 80-81; Vonnice C. McLoyd & Suzanne M. Randolph, *The Conduct and Publication of Research on Afro-American Children: A Content Analysis*, 27 HUM. DEV. 65, 72-75 (1984); Vonnice C. McLoyd, *The Legacy of Child Development's 1990 Special Issue on Minority Children: An Editorial Retrospective*, 77 CHILD DEV. 1142, 1144 (2006); Vonnice C. McLoyd, *The Role of African American Scholars in Research on African American Children: Historical Perspectives and Personal Reflections*, 71 MONOGRAPHS SOC'Y RES. CHILD DEV., no. 1, 2006, at 121, 122-25.

61. See Stephen M. Quintana et al., *Race, Ethnicity, and Culture in Child Development: Contemporary Research and Future Directions*, 77 CHILD DEV. 1129, 1132-34 (2006).

subjects are studied. Norms reflect who is in the field and what children they study. This suggests the dominant developmental lens is deficient because it is racialized but presented as universal and neutral. So, for example, the application of norms has been completely one way:

Although it is relatively common to apply models of parenting from Whites of European descent to other ethnic or racial groups, it seems unthinkable to test models of normative development derived from minority ethnic groups on White children of European descent. This double standard illustrates the culturally parochial approach to understanding normative development in much of the extant research.<sup>62</sup>

When minority children are studied, historically and currently, the dominant perspective is deviancy.<sup>63</sup> The research question commonly is some variant of “what is going on that causes children of color to behave badly.”<sup>64</sup> Connected to this research pattern focused on deviancy is limitation of the subjects of study to kids characterized as “high risk,” “urban,” or “urban low income” youth, all of which begin to sound like euphemisms or code words for children and youth of color, ignoring differences among their circumstances.<sup>65</sup> There is little study of successful youth of color,<sup>66</sup> varying ecologies, or positive models of resilience.<sup>67</sup> Much remains unknown about positive developmental pathways for minority children because those questions continue to be so little studied.<sup>68</sup> One scholar suggests three areas have not been significantly researched for children of color: normative development in context; intergroup relations and attitudes; and identity development.<sup>69</sup> Moreover, the evidence from children of color reminds us that all children’s development is racialized, although the process of racialization differs for minority versus majority children.<sup>70</sup>

Psychoanalytic theory as well has been criticized as normatively white.<sup>71</sup> The exposure of this bias brings the core assumptions of

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62. *Id.* at 1134.

63. *See id.* at 1132-34.

64. *See supra* notes 60-61.

65. *See* Gibbs, *supra* note 59, at 57-58. This is not to say urban settings or geography in general are not relevant but rather that the label “urban youth” frequently means youth of color.

66. *See id.* at 79 (suggesting future studies focus on resilient African American youths).

67. Lawson V. Bush & Edward C. Bush, *God Bless the Child Who Got His Own: Toward a Comprehensive Theory for African-American Boys and Men*, 37 W.J. BLACK STUD. 1, 2-4 (2013).

68. Natasha J. Cabrera et al., *Positive Development of Minority Children: Introduction to the Special Issue*, 6 CHILD DEV. PERSP. 207, 207-08 (2012).

69. Quintana et al., *supra* note 61, at 1133-36.

70. *Id.* at 1131-32.

71. For example, one scholar notes Freudian theory centers on white, Eurocentric perspectives

psychoanalytic theory into question, and it raises questions about whether kids and adults of color are unnecessarily pathologized while also ignoring the basis for their state of being, their strengths, and the cognitive and emotional skills forged in this toxic emotional/psychological environment:

[W]ritings of minority psychologists and social scientists have appreciated for many years the limitations of traditional psychological theories when applied to people of color. From the early 1900s, pioneers in this field emphasized the importance of cultural values, socioeconomic factors and the realities of discrimination and racism in understanding the psychology and life experience of minority group peoples.<sup>72</sup>

One critique of the existing developmental model in law, therefore, is that mainstream models are based on the experiences and assumptions of middle class white males (and only more recently have included females).<sup>73</sup> So they are hardly universal, neutral, or dispassionate. As one researcher put it, “Even the rat was white.”<sup>74</sup> Second, race remains missing, or at best, marginalized, from the mainstream model as a developmental factor.<sup>75</sup> This second critique is explored in the following Subpart.

### B. *Adjusting the Lens: Developmental Equality*

Developmental models generally presume a child unraced and ungendered. That approach misses the role of race and gender in development and the ways in which race and gender render children

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drawn from Freud’s experiences, particularly his Jewish heritage. His view of family relationships, she notes, has a tendency to over-pathologize, minimize strengths, and misinterpret the behavior and motivations of African American families and individuals. See Harriet Curtis-Boles, *The Application of Psychoanalytic Theory and Practice to African Americans*, in CAL. SCH. OF PROF’L PSYCHOLOGY, HANDBOOK OF MULTICULTURAL EDUCATION, RESEARCH, INTERVENTION, AND TRAINING 193, 193-200 (Elizabeth Davis-Russell ed., 2002). Similarly, she notes modern theory on relationships, especially the role of parents, tends to focus on mothers and their responsibility for raising well-adjusted children, but ignores the social context of racism for Black parents. *Id.* at 200-04.

72. *Id.* at 193 (citations omitted); see also Lauren H. Supplee et al., *Emotion Regulation Strategies and Later Externalizing Behavior Among European American and African American Children*, 21 DEV. & PSYCHOPATHOLOGY 393, 393-96 (2009); Laura A. Rainville, *Fighting to Grow: A Developmental Approach to Aggression Among Inner City, African American Adolescent Boys 11-14* (2011) (unpublished Ph.D. dissertation, California Institute of Integral Studies) (on file with the California Institute of Integral Studies).

73. See *supra* notes 58-72 and accompanying text.

74. ROBERT V. GUTHRIE, *EVEN THE RAT WAS WHITE: A HISTORICAL VIEW OF PSYCHOLOGY* (2d ed. 1998).

75. See *infra* Part I.B.



unequal, and subordinate them, because of ways in which their normative development is made more difficult due to the hurdles those identities trigger. Two scholars whose work describes this dynamic are Margaret Beale Spencer and Cynthia García Coll.<sup>76</sup> Their work suggests the necessity of reframing the developmental model to one of developmental equality. Such a model would be the basis to challenge state policies and institutions; provide a metric for equality; and be the basis for support of racial/ethnic identity. Such a model might also have the potential to uncover the replication of privilege.<sup>77</sup>

### 1. Margaret Beale Spencer

Spencer's phenomenological variant of ecological systems theory ("PVEST") model combines Bronfenbrenner's ecological approach with phenomenological perspective (the study of the development of human consciousness and awareness).<sup>78</sup> Spencer sees development as framed by the interaction of identity, context, and experience.<sup>79</sup> The model considers the impact of critical identity factors on individual perceptions of self and opportunities, imposed expectations or stereotypes, and the interaction of these processes with the normal maturational processes such as puberty and identity exploration in adolescence. According to Spencer, in this model "risk is best viewed as an *exacerbation of normative challenges and competencies due to larger sociopolitical processes . . . and/or lack of resources* and resilience as successful coping with these exacerbated challenges."<sup>80</sup> This is a critical part of Spencer's theory: the normative—meaning normative developmental stages and growth to meet developmental benchmarks—is exacerbated by identity.<sup>81</sup>

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76. See *infra* Part I.B.1–2.

77. Uncovering how privilege is constructed and reaffirmed is as important as understanding subordination. See *supra* note 13 and accompanying text. For a discussion of white racial favoritism, see *infra* notes 210-18, 222 and accompanying text.

78. See Margaret Beale Spencer et al., *A Theoretical and Empirical Examination of Identity as Coping: Linking Coping Resources to the Self Processes of African American Youth*, 7 APPLIED DEV. SCI. 181, 182 (2003) [hereinafter Spencer et al., *A Theoretical and Empirical Examination*]; Margaret Beale Spencer et al., *Understanding Hypermasculinity in Context: A Theory-Driven Analysis of Urban Adolescent Males' Coping Responses*, 1 RES. HUM. DEV. 229, 231 (2004) [hereinafter Spencer et al., *Understanding Hypermasculinity*]; see also Margaret Beale Spencer et al., *African American Adolescents: Adaptational Processes and Socioeconomic Diversity in Behavioral Outcomes*, 11 J. ADOLESCENCE 117, 134 (1988) [hereinafter Spencer et al., *African American Adolescents*]; Margaret Beale Spencer & Carol Markstrom-Adams, *Identity Processes Among Racial and Ethnic Minority Children in America*, 61 CHILD DEV. 290, 299 (1990).

79. Spencer's model relies on but differs from that offered by Bronfenbrenner. Spencer et al., *Understanding Hypermasculinity*, *supra* note 78, at 231.

80. *Id.* at 230 (emphasis added).

81. *Id.*; see also Margaret Beale Spencer, *Old Issues and New Theorizing about African-*

Spencer's model focuses on five basic components that contribute to identity: risk, stress, coping, identity, and life outcomes.<sup>82</sup> The interaction of these translates into net vulnerability, net stress management, reactive coping mechanisms, emergent identities, and adverse or productive life stage specific coping mechanisms.<sup>83</sup> As youth engage in this process, they are creating an identity that is either reinforced and supported, or not: "Identity lays the foundation for future perception, self-appraisal, and behavior, yielding adverse or productive life-stage-specific coping outcomes."<sup>84</sup>

Spencer's model is specifically designed to take into account the development of youth of color. In this model, both risk and stress are strongly affected by systemic and institutional factors; and systemic factors also come into play when a youth adopts a coping mechanism identified as maladaptive, which can have serious consequences for their emerging identity. As Spencer points out, all children develop in the context of culture, but do so differently: "Some children develop in a cultural context in which their culture, race or ethnicity are considered privileged over other cultural and racial groups. This privilege is, unfortunately, neither recognized as such nor acknowledged as a significant life-course asset."<sup>85</sup> Neither privilege nor subordination has been explored in most mainstream development scholarship.<sup>86</sup> The dominant questions have been geared to "what" is happening in development, not "how."<sup>87</sup>

The exacerbation of risk is identified in the early part of Spencer's model and has an impact throughout the individual's process of constructing identity. Risk contributors are factors that are part of self-appraisal and depend on the individual's interaction with society.<sup>88</sup> This

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*American Youth: A Phenomenological Variant of Ecological Systems Theory*, in AFRICAN AMERICAN YOUTH: THEIR SOCIAL AND ECONOMIC STATUS IN THE UNITED STATES 37, 49-54 (Ronald L. Taylor ed., 1994).

82. Spencer et al., *Understanding Hypermasculinity*, *supra* note 78, at 233.

83. *Id.* at 232-33.

84. *Id.* at 233.

85. Margaret Beale Spencer, *Revisiting the 1990 Special Issue on Minority Children: An Editorial Perspective 15 Years Later*, 77 CHILD DEV. 1149, 1149 (2006).

86. *Id.* at 1151.

87. *Id.*; see Suniya S. Luthar & Bronwyn E. Becker, *Privileged but Pressured? A Study of Affluent Youth*, 73 CHILD DEV. 1593, 1594, 1597, 1604 (2002); Suniya S. Luthar & Shawn J. Latendresse, *Adolescent Risk: The Costs of Affluence*, 95 NEW DIRECTIONS FOR YOUTH DEV. 101, 111-13 (2002); Claude M. Steele, *The Psychology of Self-Affirmation: Sustaining the Integrity of the Self*, 21 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 261, 281-83 (1988); see also Claude M. Steele et al., *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 379, 385-89 (2002) (discussing how stereotype threats and social identity threats can impede performance in academics, work, and athletics).

88. Spencer et al., *Understanding Hypermasculinity*, *supra* note 78, at 232.

includes the individual's response to stereotypes and biases. Here Spencer includes race, sex, socioeconomic status ("SES") factors, physical characteristics of the individual, and biological/temperament characteristics as factors that contribute to risk.<sup>89</sup> Each of these factors is influenced by stress engagement.<sup>90</sup> Stress is subdivided into neighborhood dangers, social supports, and daily hassles.<sup>91</sup> In sum, this part of Spencer's model identifies the interaction of identities, structures, culture, and social factors. Identity factors by their terms generate risk; structural factors trigger stress dynamics.

It is this exacerbation of the normative that should, I would argue, trigger mandatory affirmative action by the state because the exacerbation *flows* from state action. Spencer's model exposes at a very individual level the costs and challenges facing children of color, and their source. Their very identity, by race and gender, is characterized as risk because it is linked to the structural interactions that incorporate stereotypes and cognitive bias.<sup>92</sup> In addition, those triggers are exacerbated by neighborhood conditions and daily micro-aggressions and prejudices that are race- and gender-linked to the families and communities within which children of color function. Rather than providing support, that context is itself poorly supported and undermined. The source of those familial and community developmental challenges are state structures and policies.

The remaining factors in Spencer's model continue to expose how individual responses to this exacerbated risk are linked to structural factors. Coping with exacerbated risk (the risk triggered by identity factors, located in structures that disproportionately hamper or block development) can be adaptive or maladaptive, in that the individual engages in strategies that can help or hurt in relation to structural responses to their behavior.<sup>93</sup> Maladaptive actions identified by Spencer include hypermasculinity, reactive ethnocentrism, or personal orientation.<sup>94</sup> It is important to note, however, that these responses are "maladaptive" to the extent that they are likely to lead to further structural responses that create even more difficult developmental

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89. Spencer et al., *A Theoretical and Empirical Examination*, *supra* note 78, at 182; Spencer et al., *Understanding Hypermasculinity*, *supra* note 78, at 230.

90. Spencer et al., *Understanding Hypermasculinity*, *supra* note 78, at 232-33.

91. *See id.* at 232-33, 242.

92. *See* Spencer et al., *A Theoretical and Empirical Examination*, *supra* note 78, at 182; Spencer et al., *Understanding Hypermasculinity*, *supra* note 78, at 233.

93. *See* Dena Phillips Swanson et al., *Black Males' Structural Conditions, Achievement Patterns, Normative Needs, and "Opportunities,"* 38 URB. EDUC. 608, 612 (2003).

94. *See* Spencer et al., *Understanding Hypermasculinity*, *supra* note 78, at 239; Swanson et al., *supra* note 93, at 618-19.

challenges—such as interaction with the juvenile justice system, which can result in direct and collateral roadblocks to development and opportunity. Each of the maladaptive responses can be exacerbated by ongoing stress, so it is an even more negative interaction. The lethal interactions between police and young Black men are the extreme examples of this interaction, so commonplace that they must be deemed a systemic response, not rogue action.<sup>95</sup> Adaptive solutions on the other hand reinforce positive identities. This parallels the resistant identities as well as the positive consequences of racial identity as a strength and resilience factor.<sup>96</sup> How this developmental dynamic ultimately affects life stages is Spencer's final factor, with adverse outcomes including juvenile or adult justice systems, mental illness, poor health, and lack of intimacy.<sup>97</sup> Surviving this series of challenges is tricky but also generates real strengths:

Structural racism in American society stems from systematic, institutionalized practices resulting in the subordination and devaluation of minority groups and the setting up of life course barriers for all of its members' life course experiences. The consequences of structural racism for minority youth are twofold. First, minority youth in America often live and mature in high-risk environments characterized by systemic, structural barriers to individual success . . . . Second, instances of resilience . . . often go unrecognized, thus, denying individuals a sense of success and accomplishment.<sup>98</sup>

A specific example that Spencer discusses in her work is the adoption of hypermasculinity as a coping mechanism, frequently triggering very negative systemic results.<sup>99</sup> Fear of violence and insecurity trigger this coping mechanism. Thus, hypermasculinity is an expression of vulnerability.<sup>100</sup> As Spencer explains, “[i]n addition to the normative maturational challenges, Black boys must also deal with prejudice and the negative, stereotypic connotations associated

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95. BLACK LIVES MATTER, <http://blacklivesmatter.com> (last visited Nov. 26, 2016). The *Washington Post* has compiled a database on fatalities as a result of police interactions. *991 People Shot by Police in 2015*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings> (last visited Nov. 26, 2016).

96. See *infra* notes 247-90.

97. Swanson et al., *supra* note 93, at 618.

98. Margaret Beale Spencer, *Resilience and Fragility Factors Associated with the Contextual Experiences of Low Resource Urban African American Male Youth and Families*, in DOES IT TAKE A VILLAGE?: COMMUNITY EFFECTS ON CHILDREN, ADOLESCENTS, AND FAMILIES 51, 53 (Alan Booth & Ann C. Crouter eds., 2001); see also Spencer et al., *African American Adolescents*, *supra* note 78, at 121-25; Spencer & Markstrom-Adams, *supra* note 78, at 301-05.

99. Spencer et al., *Understanding Hypermasculinity*, *supra* note 78, at 234.

100. See *id.* at 235-41.

with Black masculinity, which is often inherently viewed as hypermasculinity. These stereotypes are pervasive, as they cut across multiple ecological settings.”<sup>101</sup> Her model exposes this ultimate “catch-22” of risk and stress that is reinforced and generated from systems that generate highly negative images and assumptions that lead to predictable coping mechanisms that then trigger further negative response.<sup>102</sup> The social and systemic response to white boys acting out as teenagers is frequently that “boys will be boys,” that they will outgrow this behavior (which, in fact, most teenagers do); the response to Black boys and other boys of color engaging in the same behavior is to view them as serious threats.

The interaction of race and gender is a particularly strong component of Spencer’s model.<sup>103</sup> As Spencer points out, adolescent identity development “involves coming to understand one’s self as a member of a society within a particular ethnic, cultural, religious, or political tradition”; it is a process of “defining oneself [by] becoming part of a normative cultural tradition.”<sup>104</sup> For African American males:

[T]he task of managing an ego-supporting identity while coping with generalized negative imagery is, at best, daunting . . . . [They] are expected to shoulder the traditional negative stereotypes associated with male adolescence in general, along with the added burden of enhanced and often unacknowledged negative imagery linked with minority status.<sup>105</sup>

So the normal maelstrom of adolescent development, characterized by confusion and vulnerability, is exacerbated for African American adolescents by “[n]egative stereotypes, scarcity of positive role models, lack of culturally competent instruction and direction, and problems associated with low socioeconomic status and high-risk neighborhoods.”<sup>106</sup> They are aware of the culture’s stereotypes and expectations of them as they are at a key developmental stage for identity formation.<sup>107</sup> Two critical settings are school and community

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101. *Id.* at 236 (citations omitted).

102. *Id.* at 239; *see also* Gregory Seaton, *Toward a Theoretical Understanding of Hypermasculine Coping Among Urban Black Adolescent Males*, 15 J. HUM. BEHAV. SOC. ENV’T 367, 371 (2007).

103. *See, e.g.*, Swanson et al., *supra* note 93, at 613.

104. Margaret Beale Spencer, *Identity, Achievement Orientation, and Race: “Lessons Learned” About the Normative Developmental Experiences of African American Males*, in RACE AND EDUCATION: THE ROLE OF HISTORY AND SOCIETY IN EDUCATING AFRICAN AMERICAN STUDENTS 100, 102 (William H. Watkins et al. eds., 2001).

105. *Id.* at 103.

106. Swanson et al., *supra* note 93, at 618.

107. *See id.* For a discussion on the exacerbation of normative developmental challenges at the

environments.<sup>108</sup> Spencer also identifies coping strategies, such as religion, spirituality, and cultural pride, for a positive sense of self.<sup>109</sup>

The PVEST analysis exposes how development is impacted in negative ways, and the kinds of interventions needed to build social capital. But Spencer also cautions that we not overlook the resilience and strength of Black boys.<sup>110</sup> Most importantly, her model exposes structural and cultural factors that are within the power and control of the state that generate developmental challenges. The identification of the state as the source of developmental barriers should trigger the necessity of state action to correct the state's own discrimination in not only failing to support developmental equality, but also its role in actively subordinating the development of children of color.

## 2. Cynthia García Coll

Cynthia García Coll's child development model focuses on social stratification and its impact on child development—separating stratification into social position, racism, and segregation.<sup>111</sup> As with Spencer, her model is a modification of Bronfenbrenner's ecological model.<sup>112</sup> García Coll's focus is on the context in which children of color live. She articulates the impact of culture in the life of every child, but also the uniquely dualistic nature of culture for outsider children: external or mainstream culture and its shaping of institutions has a powerful impact on children individually and on their families, as well as infusing the structures within which they function, including schools, housing, and community resources.<sup>113</sup> Families construct as well as live within culture, responding to racial and ethnic subordination by majority white culture, parenting their children to live and survive in two worlds. Families embody both resistance and identity.<sup>114</sup>

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adolescence stage, see Spencer et al., *A Theoretical and Empirical Examination*, *supra* note 78, at 182-83.

108. Swanson et al., *supra* note 93, at 619.

109. Spencer et al., *A Theoretical and Empirical Examination*, *supra* note 78, at 187.

110. Swanson et al., *supra* note 93, at 626.

111. For a description of García Coll's model, see Cynthia García Coll & Katherine Magnuson, *Cultural Differences as Sources of Developmental Vulnerabilities and Resources*, in HANDBOOK OF EARLY CHILDHOOD INTERVENTION 94, 94-111 (Jack P. Shonkoff & Samuel J. Meisels eds., 2d ed. 2000); Cynthia García Coll et al., *An Integrative Model for the Study of Developmental Competencies in Minority Children*, 67 CHILD DEV. 1891, 1895-97 (1996); Cynthia García Coll, *Review, Developmental Outcome of Minority Infants: A Process-Oriented Look into Our Beginnings*, 61 CHILD DEV. (SPECIAL ISSUE ON MINORITY CHILDREN) 270, 271-73 (1990); and Cynthia García Coll & Laura A. Szalacha, *The Multiple Contexts of Middle Childhood*, FUTURE CHILD., Winter 2004, at 81, 82 (2004).

112. See García Coll et al., *supra* note 111, at 1893-95.

113. See García Coll & Szalacha, *supra* note 111, at 88.

114. See *id.*; see also García Coll et al., *supra* note 111, at 1906-08; García Coll, *supra* note

García Coll's model "incorporates the contextual, racial, and cultural factors that play critical roles for children who are not part of mainstream society."<sup>115</sup> Three key conclusions flow from her model:

It is the interplay of . . . social position, racism, and segregation—that creates the unique conditions and pathways for children of color . . . [Second, a] segregated school or neighborhood environment that is inhibiting due to limited resources may, at the same time, be promoting if it is supportive of the child's emotional and academic adjustment, helping the child to manage societal demands imposed by discrimination. [Third, the] behavioral, cognitive, linguistic, and motivational deficits of minority . . . children are more appropriately recognized as manifestations of adaptive cultures, as families develop goals, values, attitudes, and behaviors that set them apart from the dominant culture.<sup>116</sup>

Context thus powerfully impacts development. As García Coll states, "A fundamental assumption of the model is that cognitive, emotional, and behavioral development is profoundly affected by the child's *social position* within a socially-stratified society replete with racism and discrimination, and by the promoting or inhibiting nature of the child's school and neighborhood."<sup>117</sup> The three aspects of social stratification—social position, racism, and segregation—collectively create the distinctive conditions faced by these children, and "it is these 'non-shared' experiences with mainstream populations that define the unique pathways of development for children of color."<sup>118</sup> These unique experiences can be harshly subordinating and challenging:

What is the cost to the development of the child who is teased or even hit or kicked by other children in school because he or she has darker skin, slanted eyes, or an accent? What is the cost of coming to know that people of your cultural background are considered dumb, no good, ugly, or lazy? What is the cost of growing up in a neighborhood that is predominantly non-Anglo and poor? What is the cost of thinking that your teachers do not care if you learn and do not expect you to succeed because of your cultural background? What is the cost of consistently fighting stereotypes and prejudices that are saturated with negative images and demeaning conceptualizations of the culturally different? What are the costs associated with these experiences to an individual's

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111, at 270-73.

115. García Coll & Szalacha, *supra* note 111, at 80-81; *see* García Coll et al., *supra* note 111, at 1906-08.

116. García Coll & Szalacha, *supra* note 111, at 81; *see* García Coll et al., *supra* note 111, at 1904-08.

117. García Coll & Szalacha, *supra* note 111, at 82 (emphasis added).

118. *Id.* at 83.

health, well-being, and developmental outcome. What are the benefits, if any?<sup>119</sup>

García Coll identifies eight constructs in her model that affect cognitive, emotional, and behavioral development based on the child's social position within a society characterized by racism and discrimination, plus the supporting or inhibiting nature of the child's school and neighborhood.<sup>120</sup> The eight constructs are social position; racism; segregation; promoting/inhibiting environments; adaptive culture; child characteristics; family; and developmental competencies.<sup>121</sup> She maintains that what are labeled as deficits of minority children—behavioral, cognitive, and motivational—are more accurately seen as coping mechanisms and adaptive cultures.<sup>122</sup> Diversity is a protective factor, a resource for children.<sup>123</sup>

One extremely important factor in the developmental context for children of color is segregation, which García Coll defines not only as housing segregation but also economic and social/cultural segregation. She points out that segregation may generate support for children as compared to an integrated setting where children are treated as outsiders.<sup>124</sup> Segregation's effects include what is available in the

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119. García Coll & Magnuson, *supra* note 111, at 105.

120. How this context plays out varies by the age and stage of children. For example, García Coll's research has considered the implications of her model for middle childhood, defined as ages six to twelve, when children have their first experience of interaction with institutions beyond their families and neighborhoods. García Coll & Szalacha, *supra* note 111, at 82; *see* García Coll & Magnuson, *supra* note 111, at 99. Specifically, García Coll has noted:

It is during this period that children develop a sense of competence, forming ideas about their abilities, the domains of accomplishment they value, and the likelihood that they will do well in these domains. . . . [D]evelopment of positive attitudes toward school, academic achievement, and aspirations for the future can have major implications for children's success as adults.

García Coll & Szalacha, *supra* note 111, at 82.

It is also a time when children experience the direct impact of majority culture: children for the first time may "experience exclusion, devaluation, invisibility, discrimination, and racism, and these may become important potential sources of influence on their interactions and reactions to 'mainstream' society." García Coll & Szalacha, *supra* note 111, at 82. Majority culture impacts schools, neighborhood, media, and other institutions that affect the family. *See id.* at 84. A different set of systemic factors impacts children from birth to age three. García Coll, *supra* note 111, at 270. At this stage, García Coll argues the most relevant factors to the child's development are cultural beliefs, caregiving practices, health care practices, family structure and characteristics, socioeconomic factors, and biological factors. *Id.* at 271.

121. García Coll & Szalacha, *supra* note 111, at 82-83; *see also* García Coll et al., *supra* note 112, at 1895-96.

122. *See* García Coll et al., *supra* note 112, at 1907; García Coll & Szalacha, *supra* note 111, at 87-88.

123. García Coll & Szalacha, *supra* note 111, at 89-91.

124. *Id.* at 85.



neighborhood for kids to do, and the level of safety, which can influence parents to isolate their children in order to keep them safe.<sup>125</sup>

García Coll also focuses on families' interactions with media/culture, which can embrace or isolate their culture, as well as deliver messages about their culture/identity.<sup>126</sup> She argues for rethinking the role of families, neighborhood, and culture: "Most developmental research, clinical interventions, and social policies have regarded the child-rearing values, attitudes, practices, and norms of the dominant culture (that is, white, Anglo-Saxon, middle class) to be optimal for child development."<sup>127</sup> This translates into difference as deviance or deficit, and directing interventions to compensate or correct the deficits. To the contrary, "[f]amilies and children of color develop goals, values, attitudes, and behaviors that set them apart from the dominant culture because of social stratification deriving from prejudice, discrimination, racism, or segregation, and the differential access to critical resources"<sup>128</sup>:

Racism, discrimination, and diminished life opportunities related to segregation constitute the critical, underlying source of risk for children of color . . . . Experiences of exclusion at various societal levels constitute, at a minimum, insults to children's healthy social and cognitive development. Segregation, in its many forms—including residential, economic, linguistic, social and psychological—not only places the child at risk, but also contributes to significant mistrust among populations of diverse cultural backgrounds.<sup>129</sup>

García Coll's model exposes the presence of racism, and the subsets of prejudice, discrimination, and oppression, as normative for outsider children; identifies segregation as normative, evidenced by the resegregation of American society; and points to schools, media, and health care as critical environments that either promote or inhibit the child.<sup>130</sup> Just as Spencer's model identifies exacerbated risk triggered by identities as normative, García Coll's model identifies subordination in children's context as normative. Equally critical is García Coll's insight about culture. The goal of equality is not to dismantle cultural identity, but to dismantle subordination.

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125. *Id.* at 86.

126. *See* García Coll & Magnuson, *supra* note 111, at 99-100.

127. García Coll & Szalacha, *supra* note 111, at 88.

128. *Id.*

129. *Id.* (footnotes omitted).

130. *Id.*

### 3. A Developmental Equality Model

Using Spencer and García Coll's work to reframe the developmental model in law generates a developmental perspective that can serve not just to describe *what* happens, but to expose *how* it happens. Development is affected by systems and state-supported culture that marginalize and subordinate some children. A model focused on these dynamics and committed to children's equality can serve as a metric to trigger state responsibility to dismantle state structures and policies that undermine children's development. It may also serve to generate positive state responsibility to support children's developmental equality.

In tandem, these scholars expose the developmental burden placed on children of color. The source of much of that burden is the state. Their stark illustrations of the developmental costs and challenges together with the principles of equality should generate a more nuanced and realistic developmental perspective that might meaningfully be used as a theoretical and practical tool to challenge inequality sustained and supported by the state. Because developmental insights have already made inroads into legal analysis, reframing the developmental model so that it supports all children does not require persuading courts or legislatures to adopt an entirely new analytical tool, but rather to refine and adjust their analysis. Developmental equality, however, mandates far more. Fused with legal principles of equality, this model exposes the location and sources of inequality that negatively impact the developmental trajectory of children by their identities (singly or in combination). It tells us the playing field for a child at birth is determined and predictable, and the end result is hierarchy and inequality, not opportunity and support to become the best each child can be. Unequal outcomes, as exposed by fusing developmental knowledge with equality principles, expose the critical role of state actions and structures in creating developmental hurdles and roadblocks. Together, the powerful critiques of Spencer and García Coll expose the importance of intersectional analysis to understand how identity, as currently experienced by children of color, triggers an exacerbated set of developmental challenges that operates to expose them to risk, harm, and failure. Infusing this knowledge in law adds to our use of development to understand children better, to assess their needs, and to recognize their competency and voice.

By using a developmental equality lens, the source of exacerbated risks is exposed: as long as identity alone or in combination triggers heightened developmental challenges or differential developmental support, this analysis exposes continuing inequalities for identifiable

groups of children. Spencer and García Coll identify the impact of structural and cultural factors. As long as those factors persist and continue to be supported by the state, the state is complicit in generating children's inequalities. Fundamental equality, long since recognized, should make this pattern, once clear, unlawful as well as morally unacceptable.<sup>131</sup> Making children unequal, supporting them not only differentially but in a way that subordinates some, contradicts our most fundamental idea of equality. The developmental equality lens is then essential to achieving the long delayed goal of equality. It must include not only dismantling but also a substantive standard of maximizing developmental potential for every child.

The power of the developmental equality lens, and its potential, are explored in the next section by examining the developmental arc of Black boys. This is a synergistic analysis: the model explains the pattern of their development, by telling us where to focus; and their life course substantiates the model, validating the focus on state-created structures and policies. Developmental equality is essential and critical to legal analysis focused on moving the developmental context of Black boys from a toxic ecology of predictable harm and hopelessness, or even death, to a supportive path valuing their identities, individuality, and opportunities.<sup>132</sup> The example of Black boys illuminates, through the developmental equality model, all children who are currently tracked for a life of inequality. Using the model in legal analysis is critical to expose structural and cultural factors that underlie the persistence of those inequalities, as a foundation for attacking those sources of inequity via litigation or public policy strategies.

## II. BLACK BOYS

Why focus on the lives of Black boys? Because their lives starkly illuminate how developmental inequality functions and replicates hierarchy among children. The high likelihood of negative life

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131. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” (footnote omitted)).

132. A 2015 study released by the American Sociological Association measuring whether adolescents and young adults thought it was likely that they would reach age thirty-five found only half of Blacks thought they would reach thirty-five compared to sixty-six percent of whites. The expectations were even lower for second generation Mexican Americans (forty-six percent) and for foreign-born Mexicans (thirty-eight percent). See Tara D. Warner & Raymond R. Swisher, *Adolescent Survival Expectations: Variations by Race, Ethnicity, and Nativity*, 56 J. HEALTH & SOC. BEHAV. 478, 486-91 (2015). The sharp differential between whites and Blacks ages twelve through twenty-five in this study illustrates their read of the developmental context and what awaits them as adults.

outcomes, and the funneling of their lives toward subordination, show us how it is done. And, they lead us to ask the other question(s):<sup>133</sup> “Who else?” When we do, we more specifically look for other identities and intersectionalities linked to inequality of gender, race, ethnicity, class, and immigration status that expose similar patterns.

I began this research in the juvenile justice system.<sup>134</sup> That system not only exposes a sharp pattern of racial and ethnic disparities, but also the overwhelming failure of the system, for all boys and for society, to produce positive outcomes (in addition to its mismatch and distinctive failures for girls).<sup>135</sup> The racial configuration, however, is particularly disturbing, and in exploring that pattern, I began to search earlier in their lives. One of the pipelines into the juvenile justice system is schools.<sup>136</sup> But schools not only feed the juvenile justice system, they produce unequal educational outlines along race and gender lines. Pushing back further, the link to later negative achievement outcomes is evident on day one of kindergarten; and even on day one of preschool.<sup>137</sup> It became evident that inequality begins with the context into which Black boys are born. This developmental story, from birth, is essential to understanding the inequality of Black boys and why developmental equality is critical for all children. Study of the lives of children of color, as noted earlier, has been limited, submerged under a developmental norm grounded in the study of mostly white children, or when directed at children of color, has focused on questions that presume deficit and deviance.<sup>138</sup> Despite the unevenness and underdevelopment of the research, however, several clear themes emerge from the available research regarding the development of Black boys.

First, racialized patterns of development emerge early, literally at birth and in early childhood, traceable to several factors: the impact of

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133. See Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189-90 (1991).

134. See, e.g., Richard E. Redding, *Lost in Translation No More: Marketing Evidence-Based Policies for Reducing Juvenile Crime*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, *supra* note 26, at 139, 142-44.

135. See generally A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, *supra* note 26; JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 26.

136. See Joseph C. Gagnon & Brian R. Barber, *Preventing Incarceration Through Special Education and Mental Health Collaboration for Students with Emotional and Behavioral Disorders*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 26, at 82, 83-86.

137. See SARA MEAD, STAND FOR CHILDREN LEADERSHIP CTR., QUALITY PRE-K: STARTING EARLY TO CLOSE ACHIEVEMENT GAPS AND BOOST STUDENT ACHIEVEMENT 2-4 (2012), <https://standleadershipcenter.org/sites/standleadershipcenter.org/files/media/WWSF-PreKindergarten.pdf>.

138. See *supra* notes 58-75 and accompanying text.

poverty; lack of support of Black families and communities; the impact of early racial awareness; and the poor quality of child care and pre-kindergarten.<sup>139</sup> Second, this racialized pattern becomes an intersectional race and gender pattern to the disadvantage of Black boys once they reach school.<sup>140</sup> As Black boys engage with the world outside their families and communities, they face stark stereotypes and significant cognitive bias, particularly at school. Third, adolescence, as critical as the early years of development to neurological growth and overall development, generates further challenges for all children but particularly for Black boys.<sup>141</sup> All adolescents experience a confusing and challenging array of physical, emotional, cognitive, and other changes at this stage, and move from dependency to emerging identity as adults. For Black boys, to that volatile mix is added the necessity of constructing a racial identity. This identity is both a strength and a danger. One of the keys to success for Black males is a strong racial identity. But that very identity can trigger dangerous reactions, particularly from police and other authority figures. Policies of discipline and policing, both in schools and on the streets, affect their lives, in addition to their exacerbated risk of interface with the juvenile justice system. Fourth, resistance to oppression and stereotypes emerges in this context that constrains and funnels Black boys toward failure.<sup>142</sup> Those Black boys who succeed resist and build a persona of strength. The patterns of those who succeed are grounded in strong family relationships, strong racial identity, and the positive impact of racial socialization.

The dualism of the developmental patterns of Black boys, of the effects of subordination as well as positive resistance and success, cautions that the developmental data not be read either as a deterministic mark of failure, inadequacy, and inferiority, nor as an identification of a resilient path that simply needs to be followed by all. Too often in the analysis of Black boys, Black families, and Black communities, any evidence of what is perceived as negative is read quickly against a persisting script of racial inferiority and blame of family and communities, rather than confronting the strength and persistence of racism and its structural manifestations and state responsibility.<sup>143</sup> The

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139. *See infra* Part II.A.

140. *See infra* Part II.B.

141. *See infra* Part II.C.

142. *See infra* Part II.D.

143. *See, e.g.*, DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 5-6 (1965). *The Negro Family: The Case for National Action* is also known as the Moynihan Report, after the author Daniel Patrick Moynihan.

pattern of dualism instead suggests the importance of removing the obstacles to developmental success and adult opportunity, while recognizing and sustaining unique and positive cultural strategies.

In the Subparts that follow, I present the interdisciplinary research according to these four themes. In Part III, based on this data, I use the developmental equality model (1) to identify the role of the state in constructing inequality, and (2) to generate strategies for change.

#### A. *Early Developmental Patterns, Poverty, and Racial Awareness*

From birth to age three is a period of critical development where the context of children's families (neighborhood, work, economic circumstances, wealth, stability) has a huge impact on children reaching developmental benchmarks.<sup>144</sup> Indeed, even before birth, the impact of maternal circumstances and health on the developing fetus has significant impact. From birth to age three, there is an explosion in neurological growth.<sup>145</sup> Positive support or interventions to facilitate early development at the familial level can have tremendous impact.<sup>146</sup> Conversely, trauma has significant developmental effects.<sup>147</sup> While trauma is a part of life for virtually all children, toxic levels of trauma generate significant developmental consequences. Chronic stress for Black boys emanates from two sources: economic disadvantage, including violence connected with poverty; and racism, both from the consequences of historical racism in the current lives of their families and communities, as well as from the current manifestations of racism.<sup>148</sup> Poverty and racism generate stress, and stress challenges children's development in a very significant way.<sup>149</sup>

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144. For data on birth (and pre-birth) to age three, see *Early Development & Well-Being, ZERO TO THREE*, [www.zerotothree.org/early-development](http://www.zerotothree.org/early-development) (last visited Nov. 26, 2016). For a discussion on the importance of the context for development, see generally BRONFENBRENNER, *supra* note 36.

145. See *Early Development & Well-Being, supra* note 144.

146. See *Implementing Early Intervention Program for Adolescent Mothers*, U.S. DEP'T HEALTH & HUM. SERVICES, <http://homvee.acf.hhs.gov/Implementation/3/Early-Intervention-Program-for-Adolescent-Mothers-/39/1> (last updated Apr. 2013); Constance M. Dallas, *Paternal Involvement of Low Income AA Fathers with Children in Multiple Households*, UIC C. NURSING, <https://www.nursing.uic.edu/research/paternal-involvement-low-income-aa-fathers-children-multiple-households> (last visited Nov. 26, 2016).

147. For a fuller discussion, see *supra* note 42 and accompanying text on the ACEs project, which details the impact of high trauma environments and ways to build resilience.

148. For a discussion on work in the field of neuroscience, see *supra* note 42 and accompanying text.

149. There are few post-traumatic stress disorder ("PTSD") studies on African American adults or children. See Hunt et al., *supra* note 42, at 365; see also Stopford, *supra* note 42, at 229-33; Hill et al., *supra* note 42, at 408-12. One scholar has argued that racism has an impact inter-generationally, in collective memory, as well as presently. See Gump, *supra* note 42, at 46-49.

Two-thirds of African American children are born into poverty.<sup>150</sup> Poverty affects the opportunity structures that impact parental well-being, family formation, and parent-child bonds, thereby potentially rendering toxic the most critical ecology for children in their early years—their family. The developmental set-up here is the interaction this will foreseeably create between children and school, as well as how this compromises the ability of parents to provide support for their child's education.<sup>151</sup> Poverty exacts a terrible price on development, particularly the development of very young children.<sup>152</sup> It is associated with consequences for physical, intellectual, and emotional development.<sup>153</sup> It affects where children live and how they live, including nutrition, family well-being and interaction, safety, and community well-being.<sup>154</sup>

The positive support of families is especially critical to foster children's attachment, which is linked to warm and responsive parenting. Secure attachment affects school readiness and behavior.<sup>155</sup> What affects parents most strongly, and derivatively their children, are context and SES factors.<sup>156</sup> While racial differences in early childhood frequently are framed as differentials in parenting, to the contrary, those differences are more often linked to SES factors.<sup>157</sup> Those factors, in

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150. See Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J. L. & POL'Y 53, 58-59 (2012). As of 2013, the poverty rate for African American children was 38.3%, holding steady even as overall poverty rates for children had dropped somewhat, to 20%. Eileen Patten & Jens Manual Krogstad, *Black Child Poverty Rate Holds Steady, Even as Other Groups See Decline*, PEW RES. CTR. (July 14, 2015), <http://www.pewresearch.org/fact-tank/2015/07/14/black-child-poverty-rate-holds-steady-even-as-other-groups-see-declines>. In the United States, the rate of child poverty is high and runs deep. See *id.* (presenting comprehensive data on child poverty from 1976 to the latest data released in 2013).

151. See KATHERYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 125-29 (2013); CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 46-53 (2014).

152. See Douglas D. Ready, *Socioeconomic Disadvantage, School Attendance, and Early Cognitive Development: The Differential Effects of School Exposure*, 83 SOC. EDUC. 271, 272-73 (2010).

153. Nancy E. Dowd, *What Men?: The Essentialist Error of the "End of Men,"* 93 B.U. L. REV. 1205, 1210-12 (2013).

154. Birkhead, *supra* note 150, at 60 n.21; Steven H. Hobbs & Shenavia Baity, *Tending to the Spirit: A Proposal for Healing the Hearts of Black Children in Poverty*, 26 B.C. THIRD WORLD L.J. 107, 110-14 (2006).

155. See Casey A. Dexter et al., *Parenting and Attachment Among Low-Income African American and Caucasian Preschoolers*, 27 J. FAM. PSYCHOL. 629, 634-35 (2013).

156. See Jonathan R. H. Tudge et al., *A Window into Different Cultural Worlds: Young Children's Everyday Activities in the United States, Brazil, and Kenya*, 77 CHILD DEV. 1446, 1464 (2006). In other words, parents are preparing their children for one or more cultures; parents of minority children are preparing them both for the dominant culture but also for their place within the affirmative values of their cultural group. See *id.*

157. See Dexter et al., *supra* note 155, at 631. It is important to note here that although race and SES are often related, race and SES function differently and independently in children's

turn, are significantly linked to state-created environments and structures that lead to, and perpetuate, poverty.

Poverty also has a significant impact on family forms.<sup>158</sup> The dominant family form for African American children is a single parent, mother-headed family.<sup>159</sup> Single parents generally are not well supported; this is especially true of non-marital families.<sup>160</sup> In addition, there are strong negative stereotypes about women of color and their role as mothers.<sup>161</sup> Maternal education level, family income level, maternal age, neighborhood quality, and family structure can all negatively impact school readiness.<sup>162</sup> Although mothers often function within networks of support, they are subject to ongoing stress—and maternal stress has a negative impact on child development.<sup>163</sup> There are particular maternal behaviors that have been correlated with better school achievement: maternal warmth, for example, correlates with better reading, and home learning stimulation links with math skills.<sup>164</sup> Supporting mothers, and helping them to avoid maternal depression and stress, can have a strong positive impact on children and their school readiness at kindergarten.<sup>165</sup>

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development. Hillary N. Fouts et al., *Infant Social Interactions with Multiple Caregivers: The Importance of Ethnicity and Socioeconomic Status*, 43 J. CROSS-CULTURAL PSYCHOL. 328, 342-43 (2012).

158. See NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 119 (2010); EDIN & NELSON, *supra* note 151, at 125-29.

159. The proportion of single parent families has remained at roughly two-thirds of African American families for the past five years. *Children in Single-Parent Families By Race*, KIDS COUNT DATA CTR., <http://datacenter.kidscount.org/data/tables/107-children-in-single-parent-families#detailed/1/any/false/36,868,867,133,38/10,168,9,12,1,13,185/432,431> (last visited Nov. 26, 2016).

160. See NANCY E. DOWD, IN DEFENSE OF SINGLE PARENT FAMILIES 19-21 (1997); see also EDIN & NELSON, *supra* note 151, at 125-29; HUNTINGTON, *supra* note 151, at 46-53; Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PENN. L. REV. 921, 961-62 (2005); Solangel Maldonado, *Shared Parenting and Never-Married Families*, 52 FAM. CT. REV. 632, 635-36 (2014); *About the Fragile Families and Child Wellbeing Study*, FRAGILE FAMILIES & CHILD WELLBEING STUDY, <http://www.fragilefamilies.princeton.edu/about> (last visited Nov. 26, 2016).

161. The classic critique is that of Daniel Patrick Moynihan. See, e.g., THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION, *supra* note 143, at 30-31; see also Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1478-91 (2012); Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 873-74 (1994).

162. Claire E. Baker, *Parenting and Cultural Socialization as Predictors of African American Children's Science and Social Studies Achievement*, 18 J. AFR. AM. STUD. 92, 100-01 (2014).

163. Claire E. Baker & Iheoma U. Iruka, *Maternal Psychological Functioning and Children's School Readiness: The Mediating Role of Home Environments for African American Children*, 28 EARLY CHILDHOOD RES. Q. 509, 511 (2013).

164. *Id.* at 514.

165. Without that readiness, by kindergarten, under existing systems, the gaps widen. See *id.* at 516.



Fathers have significant developmental impact as well:

Fathering is a dynamic, multidimensional construct that has direct links to children's health, education, and social-emotional development. Early childhood research suggests that fathering may be particularly important during the first 5 years of life, when children are rapidly acquiring cognitive skills that can contribute to early school success. . . . [T]here is very little literature on the specific ways in which African American fathers contribute to their children's early academic achievement and readiness for school.<sup>166</sup>

Sustaining father involvement is particularly important given the patterns of family and residence for children and their biological parents.<sup>167</sup> Low income fathers engage significantly with their children, but poverty and fathers' lack of opportunity and hopelessness, as well as the impact of mass incarceration coupled with a punitive child support systems, make parenting for some fathers difficult and conflicted.<sup>168</sup>

It is critical to emphasize that policies that undermine poor families and parents, and fail to provide opportunity for them or their children, are a public policy choice, structurally carried out, that consigns their children to the likelihood of failure. The links between parental poverty and outcomes for children are clear.<sup>169</sup> The correlations between poverty and children's socio-emotional development include poor school outcomes (including low achievement and higher rates of dropping out), teen parenthood, substance abuse, gang involvement, and violence.<sup>170</sup> Family, instead of being a resilience factor, becomes a risk factor.

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166. Claire E. Baker, *African American Fathers' Contributions to Children's Early Academic Achievement: Evidence from Two-Parent Families from the Early Childhood Longitudinal Study-Birth Cohort*, 25 EARLY EDUC. & DEV. 19, 19 (2014) (citations omitted).

167. EDIN & NELSON, *supra* note 151, at 125-29.

168. See Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 293-96 (2013); Daniel L. Hatcher, *Forgotten Fathers*, 93 B.U. L. REV. 897, 909-10 (2013).

169. See Vonnie C. McLoyd, *The Impact of Economic Hardship on Black Families and Children: Psychological Distress, Parenting, and Socioemotional Development*, 61 CHILD DEV. 311, 311 (1990) ("[P]overty and economic loss diminish the capacity for supportive, consistent and involved parenting and render parents more vulnerable to the debilitating effects of negative life events . . . [; generate] psychological distress deriving from an excess of negative life events, undesirable chronic conditions, and the absence and disruption of marital bonds, [and] . . . adversely affects children's socioemotional functioning in part through its impact on the parent's behavior toward the child.").

170. Oscar A. Barbarin, *Coping and Resilience: Exploring the Inner Lives of African American Children*, 19 J. BLACK PSYCHOL. 478, 479 (1993).

This begins in infancy.<sup>171</sup> Infants are incredibly malleable, and there are identifiable positive interventions that work to foster development.<sup>172</sup> “[M]ore optimal patterns of cognitive development [are] associated with intensive early educational child care, responsive stimulating care at home, and higher maternal IQ . . . . [C]hild care experiences [are] related to better cognitive performance in part through enhancing the infant’s responsiveness to his or her environment.”<sup>173</sup> The issues that arise for children once they begin school have already emerged by ages three to five years.<sup>174</sup>

Especially important is the support of cognitive development, as the potential impact of poverty on cognitive development is well known: “The cognitive development of children reared in low-income families is generally characterized by average performance on standardized tests during infancy, *followed by gradual declines during early and middle childhood* for U.S. children in general and for African American children specifically.”<sup>175</sup> This is a critical point to emphasize: children begin their lives at relative cognitive equality. Inequality emerges in the first few years.<sup>176</sup> Cognitive development is correlated with social competence, which includes emotional regulation and impulse control.<sup>177</sup> Supporting cognitive skills in higher order thinking increases the ability to self-regulate and creates less behavioral issues for children once

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171. See Margaret R. Burchinal et al., *Early Intervention and Mediating Processes in Cognitive Performance of Children of Low-Income African American Families*, 68 CHILD DEV. 935, 950 (1997). One of the ironies of advances in neonatal care is an increased survival rate of low birth rate babies but a higher number of infants with impairment. Agnes Perenyi et al., *Neurodevelopmental Outcome and Risk Factors for Impaired Development of African American Infants in an Underserved Urban Population: A Population-Based Study*, 22 J. HEALTH CARE POOR & UNDERSERVED 983, 991 (2011).

172. Burchinal et al., *supra* note 171, at 951.

173. *Id.* at 935.

174. See, e.g., Emily M. Moiduddin, *Understanding the Sources of Racial and Gender Disparities in Early Childhood Aggression* 34-40 (2008) (unpublished Ph.D. dissertation, Princeton University) (on file with Princeton University).

175. Burchinal et al., *supra* note 171, at 935 (emphasis added) (citations omitted). For cognitive deficits, in addition to socio-emotional functioning, and the connections between the two, see Oscar Barbarin et al., *Development of Social-Emotional Competence in Boys of Color: A Cross-Sectional Cohort Analysis from Pre-K to Second Grade*, 83 AM. J. ORTHOPSYCHIATRY 145, 145-46 (2013).

176. Burchinal et al., *supra* note 171, at 935.

177. See Jeffrey M. Brown et al., *Socioemotional Trajectories in Black Boys Between Kindergarten and the Fifth Grade: The Role of Cognitive Skills and Family in Promoting Resiliency*, 83 AM. J. ORTHOPSYCHIATRY 176, 177 (2013); Kristin M. Scott et al., *From Higher Order Thinking to Higher Order Behavior: Exploring the Relationship Between Early Cognitive Skills and Social Competence in Black Boys*, 83 AM. J. ORTHOPSYCHIATRY 185, 186-87 (2013).

they begin school.<sup>178</sup> This link between cognitive skills and behavior continues through fifth grade.<sup>179</sup>

This consequence is particularly important for Black boys: “Cognitive skills during kindergarten and first grade are especially important in the positive emotional functioning of Black boys throughout childhood.”<sup>180</sup> Black boys are often scrutinized and evaluated under stereotypes assuming that they will behave poorly and may experience harsh discipline to counter this perceived stereotypic behavior.<sup>181</sup> The very definition of norms in emotional regulation and externalizing behavior conventionally has been defined by white middle class children, in racial comparisons of young children.<sup>182</sup> For Black boys, “the cast for the patterns may have been set as early as kindergarten.”<sup>183</sup>

Cognitive skills also directly impact academic achievement. The achievement gap appears very early, by age three, and reflects differences in resources in families and neighborhoods that impact development. “[T]he relative disadvantages in aspects of neighborhood (social disorganization), family (less income, more authoritarian attitudes, and less verbal stimulation), and schooling (teachers with lower expectations of Black children compared to white children) may account for differential attainment and achievement between the two.”<sup>184</sup> These linkages return us to contextual factors in infancy and toddlerhood.<sup>185</sup>

Because of the impact of context on families, child care and pre-kindergarten systems are more important for poor children and children of color than for higher income children as possible sources of resilience and support not provided directly to their families and communities.<sup>186</sup> Yet, child care in the United States generally does not reflect a high level of care, and low-income parents are less likely to have access to high

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178. Brown et al., *supra* note 177, at 183.

179. *See id.*

180. *Id.*

181. *See* Scott et al., *supra* note 177, at 186.

182. Supplee et al., *supra* note 72, at 395.

183. Brown et al., *supra* note 177, at 183.

184. Margaret Burchinal et al., *Examining the Black-White Achievement Gap Among Low-Income Children Using the NICHD Study of Early Child Care and Youth Development*, 82 CHILD DEV. 1404, 1405-06 (2011).

185. *See id.* at 1416-17.

186. Pre-kindergarten is equally important to development, across race and class. William T. Gormley Jr. et al., *The Effects of Universal Pre-K on Cognitive Development*, 41 DEV. PSYCHOL. 872, 881 (2005).

quality care.<sup>187</sup> So children with the greatest needs have limits on access to the least resourced systems.

In addition to the impact of poverty on early development, pervasive racism impacts children of color very early in their lives. Racial awareness emerges early in all children and has an impact on self-awareness as well as the perception of others. Such cultural and social cognition of discrimination and stereotypes emerges by age three and is the foundation for racial awareness in children as they begin kindergarten. “The first years of elementary school have been identified as a ‘critical period’ in the development of young children because dramatic changes are occurring within the child in terms of growth in cognitive skills as well as outside the child in terms of changes in the social environment.”<sup>188</sup> Children act on the basis of learned stereotypes, as well as sensing how they are viewed. Young children learn to sort and separate the meanings of such differences, from social and cultural clues embedded in stereotypes.

The perception of discrimination begins as part of social and cultural cognition.<sup>189</sup> There is evidence of awareness of discrimination in preschool and elementary children<sup>190</sup>:

[B]y age 10, children can recognize discriminatory actions that are both overt . . . and covert . . . , understand that these actions may be caused by others’ social stereotypes, and use contextual information to make decisions about whether discrimination is likely to have occurred. The underpinnings of this understanding appear to emerge as early age 5 or 6.<sup>191</sup>

The perception of discrimination is “likely to affect individuals’ identity formation, peer relations, academic achievement, occupational goals, and mental and physical well-being. Perceiving other individuals . . . to be the victims of discrimination is likely to affect these domains as well,” so this impacts all children with messages of subordination, privilege, or both.<sup>192</sup> To combat the negative impact of racial awareness, parents engage in racial socialization, defined by one

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187. J. LEE KREADER ET AL., NAT’L CTR. FOR CHILDREN IN POVERTY, CHILD CARE & EARLY EDUCATION RESEARCH CONNECTIONS: INFANT AND TODDLER CHILD CARE QUALITY 5-6 (2005), <http://www.researchconnections.org/childcare/resources/6872/pdf>.

188. Margaret O’Brien Caughy et al., *Neighborhood Matters: Racial Socialization of African American Children*, 77 CHILD DEV. 1220, 1221 (2006).

189. Christia Spears Brown & Rebecca S. Bigler, *Children’s Perceptions of Discrimination: A Developmental Model*, 76 CHILD DEV. 533, 537-42 (2005).

190. *Id.* at 534.

191. *Id.* at 535.

192. *Id.* at 533.

scholar as including cultural socialization, preparation for bias, and promotion of mistrust,<sup>193</sup> and parents must start this at a very young age with their children. Racial socialization helps children in both cognitive development and engaging less in behaviors that trigger behavioral issues.<sup>194</sup> This process of racial awareness and racial socialization intensifies in middle childhood, from six to twelve, when children to a greater degree move beyond their family and engage in the process of identity formation.<sup>195</sup>

Thus both race and poverty generate major developmental challenges for a disproportionate number of children of color. Even for those children raised in middle- and upper-income families, race generates developmental issues.<sup>196</sup> The state's role in creating and perpetuating this context is strong. State policies create and perpetuate structural causes of poverty, fail to provide support to families and communities to move out of poverty, and fail to provide resources sufficient for families of whatever form to provide critical developmental support to their children. All of these state actions collectively generate deep developmental consequences for Black children who disproportionately are poor.<sup>197</sup> Their primary critical

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193. Caughy et al., *supra* note 188, at 1220.

194. *Id.* at 1220-21.

195. DEVELOPMENTAL PATHWAYS THROUGH MIDDLE CHILDHOOD: RETHINKING CONTEXTS AND DIVERSITY AS RESOURCES 10 (Catherine R. Cooper et al. eds., 2005); Niobe Way et al., "I'm Not Going to Become No Rapper": Stereotypes as a Context of Ethnic and Racial Identity Development, 28 J. ADOLESCENT RES. 407, 423 (2013).

196. For a discussion on stereotype threat that includes numerous studies done on college campuses, see *infra* notes 218-21 and accompanying text. Class privilege does not insulate Black boys from racial profiling or police bias. In the wake of the scrutiny of the Chicago police over the shooting of Laquan McDonald, a second video was released of the tasing of Philip Coleman, a thirty-eight-year-old University of Chicago political science graduate, who subsequently died. Stacy St. Clair et al., *Video Shows Taser Used on Philip Coleman in Chicago Police Custody*, CHI. TRIB. (Dec. 8, 2015, 8:47 PM), <http://www.chicagotribune.com/news/ct-chicago-police-philip-coleman-taser-death-20151207-story.html>. The brutal and inhuman treatment of Coleman in no way reflected any class privilege. Additionally, the son of Charles Blow, a prominent *New York Times* columnist, was detained at gunpoint, after leaving the library at Yale, by a college police officer. Scott Jaschik, *Yale Police Aim Gun at Columnist's Son, Turn Spotlight on Racial Profiling on Campus*, PBS NEWSHOUR (Jan. 26, 2015, 1:22 PM), <http://www.pbs.org/newshour/runtdown/yale-police-point-gun-columnists-son-bring-spotlight-back-racial-profiling-campus>.

197. DEBORAH POVICH ET AL., THE WORKING POOR FAMILIES PROJECT, LOW-INCOME WORKING FAMILIES: THE RACIAL/ETHNIC DIVIDE 2-6, 13 (2015) ("Reducing racial/ethnic economic disparities will not only improve economic conditions for millions of lower-income parents, but will also benefit children . . ."); see also Kevin A. Bryan & Leonardo Martinez, *On the Evolution of Income Inequality in the United States*, 94 ECON. Q. 97, 109-14 (2008); Thomas Piketty & Emmanuel Saez, *Top Incomes and the Great Recession: Recent Evolutions and Policy Implications*, 61 IMF ECON. REV. 456, 472-75 (2013); Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 554-59 (2016).

environment after family is school. As the next Subpart details, the early developmental challenges (which continue throughout their childhood) are not addressed or equalized once children begin school. Rather, inequality is exacerbated, and this is particularly the case for Black boys.

### B. School, Cognitive Bias, and Stereotypes

A significant proportion of Black boys begin school hampered by the context of poverty and its ongoing effects on their development. “Socioeconomic status (SES) differences in children’s reading and educational outcomes are ubiquitous, stubbornly persistent, and well documented. Economically disadvantaged children acquire language skills more slowly, exhibit delayed letter recognition and phonological sensitivity, and are at risk for reading difficulties.”<sup>198</sup> Poor communities have the risk of “low quality child care, poor and distressed schools, and economically depressed neighborhoods.”<sup>199</sup> Instead of psychosocial competence, based on self-regulation and resources from family and peers, which can be used to manage stress, Black boys experience barriers, not supports, in the school environment that exacerbate the effects of poverty.<sup>200</sup>

Added to the effects of developmental hurdles already placed in their path is the likelihood that Black boys will be subject to significant stereotyping and cognitive bias from teachers and other school personnel once they begin school. This results in differential and declining school achievement, disproportionate diagnosis for learning disabilities that exclude them from mainstream education, and

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198. Nikki L. Aikens & Oscar Barbarin, *Socioeconomic Differences in Reading Trajectories: The Contribution of Family, Neighborhood, and School Contexts*, 100 J. EDUC. PSYCHOL. 235, 235 (2008) (citations omitted); see also Robin L. Jarrett, *Resilience Among Low-Income African American Youth: An Ethnographic Perspective*, 25 ETHOS 218, 224-25 (2007). This in turn links to less books at home, parents being less involved with their children’s education, children being less likely to be read to by parents, and having less resources to draw upon in schools and communities. Aikens & Barbarin, *supra*, at 236.

199. Jarrett, *supra* note 198, at 247. A number of scholars have explored the interaction and intersection of the risks generated by poverty. See, e.g., Lisa Armistead et al., *Parenting and Child Psychosocial Adjustment in Single-Parent African American Families: Is Community Context Important?*, 33 BEHAV. THERAPY 361, 364, 370-71 (2002) [hereinafter Armistead et al., *Parenting and Child Psychosocial Adjustment*]. See generally Lisa Armistead et al., *Psychosocial Adjustment of African American Children in Single-Mother Families: A Test of Three Risk Models*, 64 J. MARRIAGE & FAM. 105 (2002) [hereinafter Armistead et al., *Psychosocial Adjustment*]; John M. Bolland et al., *Development and Risk Behavior Among African American, Caucasian, and Mixed-Race Adolescents Living in High Poverty Inner-City Neighborhoods*, 40 AM. J. COMMUNITY PSYCHOL. 230 (2007); Susan Li et al., *Risk and Protective Factors for Urban African-American Youth*, 39 AM. J. COMMUNITY PSYCHOL. 21 (2007).

200. Armistead et al., *Psychosocial Adjustment*, *supra* note 199, at 145.

disproportionate discipline that excludes them from school (by suspension or expulsion).<sup>201</sup>

Black boys confront strong negative stereotypes at school.<sup>202</sup> One of the strongest stereotypes about Black men is that they are dangerous, associated with evil and threat, and likely to be criminals.<sup>203</sup> These stereotypes are triggered by Black boys when they begin to grow from toddlers to young boys.<sup>204</sup>

Stereotypes function in a dual way: they directly impact children as well as serve as the foundation for implicit bias exercised by others toward them.<sup>205</sup> Claude Steele's work on stereotype threat is particularly helpful to understand the impact of stereotyping on children's growth, and how it confounds their achievement in school; in particular, Steele focuses on the impact of stereotypes on their objects. As Steele points

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201. Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 *Yale L.J.* 2619, 2647 (1998) (book review); see also Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 *L. & HUM. BEHAV.* 483, 499-500 (2004). See generally Mariagiovanna Baccara et al., *Child-Adoption Matching: Preferences for Gender and Race*, 6 *AM. ECON. J. APPLIED ECON.* 133 (2014); Johnson, *supra*.

202. See *supra* notes 199-201 and accompanying text. The persistence of historically negative stereotypes is disturbing, especially their source in media and pervasive culture. See EARL OFARI HUTCHINSON, *THE ASSASSINATION OF THE BLACK MALE IMAGE* 133-37 (1996) (discussing the powerful articulation of stereotypes, including historical origins and the persistence of stereotypes in modern times).

203. Joan W. Howarth, *Representing Black Male Innocence*, 1 *J. GENDER RACE & JUST.* 97, 102-08 (1997). Comparing Emmett Till and Trayvon Martin, Elijah Anderson notes the persistence of negative racial stereotypes linked to concentrations of Blacks, along with greater integration of Blacks into the middle class. The stereotype, he argues, is what he calls the "iconic ghetto," a definition that is linked to all Blacks in public and when they are "out of place." Elijah Anderson, *Emmett and Trayvon: How Racial Prejudice in America Has Changed in the Last Sixty Years*, *WASH. MONTHLY*, Jan.-Feb. 2013, at 31, 31-33. Professor James Forman, Jr., argues that class is a huge factor in identifying what portion of the Black community and other communities of color are affected by stigma. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 *N.Y.U. L. REV.* 21, 52-58 (2012).

204. See TOM RUDD, KIRWAN INST., *RACIAL DISPROPORTIONALITY IN SCHOOL DISCIPLINE: IMPLICIT BIAS IS HEAVILY IMPLICATED 2* (2014), <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/02/racial-disproportionality-schools-02.pdf> ("Research suggests that Black students as young as five are routinely suspended and expelled from schools for minor infractions like talking back to teachers or writing on their desks.").

205. Media is particularly powerful in the creation and perpetuation of the stereotypes about Black men. DENNIS ROME, *BLACK DEMONS: THE MEDIA'S DEPICTION OF THE AFRICAN AMERICAN MALE CRIMINAL STEREOTYPE* 72-75 (2004). Dennis Rome argues that social cognition research on implicit bias should be applied to Federal Communications Commission ("FCC") regulation of media that feeds or reproduces bias; ignoring this means structures/institutions create individual and group support for structures/institutions that recreate racist hierarchy. His concrete solutions utilize information on implicit bias to ground legal policy-making that would shift from bias to equality. See *id.* at 121-22. His project seeks to change thinking by using the science to change policy and law in a way that forces institutional change to the extent that is possible. See *id.*

out, competence is not something that simply *is*, but emerges from social relations and the sense of one's ability.<sup>206</sup> Competence is fragile:

[I]ntellectual competence is not just something inside a person's head. Rather it is quite literally the product of real or imagined interactions with others. How a student construes the way he or she is viewed and treated by others matters a lot: how welcomed or excluded, how respected, how tuned in to others' difficulties and triumphs—these perceptions can exert a profound influence on intellectual competence, on motivation, and ultimately upon a student's academic self-concept. Competence is fragile, then, because it is transacted within a web of social relations.<sup>207</sup>

Stereotypes impact academic performance, engagement, and self-concept because of the impact of stereotypes on the perception of the target as well as teachers, parents, and peers.<sup>208</sup>

When a negative stereotype about a group that one is part of becomes personally relevant, usually as an interpretation of one's behavior or an experience one is having, stereotype threat is the resulting sense that one can then be judged or treated in terms of the stereotype or that one might do something that would inadvertently confirm it.<sup>209</sup>

Stereotype threat (the worry that one will conform to a stereotype) creates pressure on students not to fail; yet, ironically, stereotype threat undermines performance.<sup>210</sup> So, for example, the classic experiment of Steele and Joshua Aronson compared white and Black college students with matched SAT scores taking the same test, but in two different scenarios.<sup>211</sup> In one, students were told the test measured intellectual ability; in the other, that it was simply a lab test.<sup>212</sup> The intellectual ability information triggered stereotype threat for the Black students of conforming to stereotypes of inferiority—and the Black students underperformed.<sup>213</sup> On the other hand, in the lab test scenario, with no

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206. Joshua Aronson & Claude M. Steele, *Stereotypes and the Fragility of Academic Competence, Motivation and Self-Concept*, in HANDBOOK OF COMPETENCE AND MOTIVATION 436, 438-44 (Andrew J. Elliot & Carol S. Dweck eds., 2005).

207. *Id.* at 437 (citation omitted).

208. *Id.* at 438-40.

209. Steele et al., *supra* note 87, at 389; see also Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 808 (1995); Claude M. Steele, *The Psychology of Self-Affirmation: Sustaining the Integrity of the Self*, 21 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 261, 280-81 (1988).

210. Aronson & Steele, *supra* note 206, at 440-41.

211. Steele & Aronson, *supra* note 209, at 799.

212. *Id.*

213. *Id.* at 801, 805-06.



stereotype threat trigger, Black students performed as well as equally skilled whites.<sup>214</sup>

This effect has been replicated with privileged groups, including white males at top universities, in experiments by Steele and his colleagues.<sup>215</sup> As Steele explains, all of us have social identities. Some cue lets us know one of our identities may trigger a negative in that setting, and that feels threatening, affecting our experience in that setting. According to Steele, “There are two primary triggers that can turn the performance of challenging cognitive tasks into a stereotype-threatening situation—ability evaluation, and the salience of a social identity that is stereotyped as inferior in the ability domain.”<sup>216</sup> Such threat is felt strongly by those who care about doing well and those with strong racial/ethnic identity.<sup>217</sup> Steele and his colleagues conclude that stereotype threat is a major factor in the achievement gap when other factors are held constant (for example, differences in SES, schools, and the quality of teachers).<sup>218</sup>

Steele’s analysis, with experiments done primarily on college students, puts into perspective the tricky interpretation of data about achievement, between reinforcing the conclusion of damage, deficit, and blame, as opposed to seeing the pattern as one of damage but resilience—the ability to resist the threat, and the implementation of means to counter threat.<sup>219</sup> Steele emphasizes that African Americans have not been passive victims of stereotype threat; to the contrary, he characterizes their response as one of “resilience and creativity.”<sup>220</sup> Stereotype threats can be counteracted with specific strategies, so the

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214. *Id.* at 801.

215. Aronson & Steele, *supra* note 206, at 443.

216. *Id.* at 447.

217. *Id.* at 447-48.

218. See Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613, 623 (1997); Claude M. Steele & Paul G. Davies, *Stereotype Threat and Employment Testing: A Commentary*, 16 HUM. PERFORMANCE 311, 320-21 (2003); Claude M. Steele, *Through the Back Door to Theory*, 14 PSYCHOL. INQUIRY 314, 316-17 (2003); see also Claude Steele & David A. Sherman, *The Psychological Predicament of Women on Welfare*, in CULTURAL DIVIDES: UNDERSTANDING AND OVERCOMING GROUP CONFLICT 393, 406-08 (Deborah A. Prentice & Dale T. Miller eds., 1999); Steele & Aronson, *supra* note 209, at 808.

219. Claude M. Steele, *Kenneth B. Clark’s Context and Mine: Toward a Context-Based Theory of Social Identity Threat*, in RACIAL IDENTITY IN CONTEXT: THE LEGACY OF KENNETH B. CLARK 61, 66-75 (Gina Philogène ed., 2004). He uses the example of the doll studies of Kenneth and Mamie Clark, famously used to justify the decision in *Brown v. Board of Education*. See *id.* at 62. The studies were used to argue that segregation damaged Black children. *Id.* at 62-63. Other social scientists, however, saw more harm from integration, but for a long while the deficit model prevailed. *Id.* at 63.

220. *Id.* at 65.

positive message of Steele's work is that things can change, rejecting the notion of permanent deviance/defect as the takeaway of his work.<sup>221</sup>

Stereotypes are not only a challenge for the objects of the stereotype, but are also the basis for implicit bias. Cognitive bias/implicit discrimination is the subject of a deep body of literature, demonstrating how discrimination functions, and how it is possible to hold egalitarian views but also to discriminate.<sup>222</sup> More recently, research on implicit racial favoritism has added to this understanding. In addition to negative bias, positive bias favoring whites operates simultaneously.<sup>223</sup> Neuroscience has added to this body of work, and reinforcing that bias is learned and malleable, not hard wired. The pervasiveness of discrimination is well established.<sup>224</sup>

Jerry Kang, one of the most prolific and powerful writers about cognitive bias, advocates specific strategies for dismantling cognitive bias but stresses that implicit bias is a problem that can be resolved.<sup>225</sup> As Kang notes, strategies must correlate with the deep and strong extent of the problem:

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221. For a discussion on how the theory is misused, see Claude M. Steele & Joshua A. Aronson, *Stereotype Threat Does Not Live by Steele and Aronson (1995) Alone*, 59 AM. PSYCHOL. 47, 47-48 (2004). For more recent research on stereotype threat theory, see generally STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION (Michael Inzlicht & Toni Schmader eds., 2012).

222. For a recent review of implicit bias and cognitive bias, see L. Song Richardson & Philip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 120-24 (2014); L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2962-66 (2015). Included in this work is the social psychology research on white racial favoritism: that the absence of negative bias toward Blacks does not mean race neutrality. Also operating is positive bias associated with the favored racial group, whites. *See id.*

223. Katherine Russell Brown, *The Fatal Relationship Between Black Men and the Police: Consideration of Implicit Bias*, in POLICING BLACK MEN: ARREST, PROSECUTION AND PRISON (Angela Davis ed., forthcoming 2016) (manuscript at 13) (on file with author); Richardson, *supra* note 222, at 2962-66; Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 905-23 (2015).

224. *See* AM. PSYCHOLOGICAL ASS'N, DUAL PATHWAYS TO A BETTER AMERICA: PREVENTING DISCRIMINATION AND PROMOTING DIVERSITY 11-42 (2012), <https://www.apa.org/pubs/info/reports/dual-pathways-report.pdf>; APA Council of Representatives, *APA Resolution on Racial/Ethnic Profiling and Other Racial/Ethnic Disparities in Law and Security Enforcement Activities*, AM. PSYCHOL. ASS'N (Feb. 2001), <http://www.apa.org/about/policy/racial-profiling.aspx>. For a discussion on the long historical link of racism, see Anderson, *supra* note 203, at 32-33. For a discussion on pervasiveness, see Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 955-60 (2006); Jonathan Kahn, *Race, Genes, and Justice: A Call to Reform the Presentation of Forensic DNA Evidence in Criminal Trials*, 74 BROOK. L. REV. 325, 352-56 (2009); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1036-42 (2006); and Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1190-1211 (1995).

225. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1568-89 (2005).

(1) [T]he magnitude of implicit bias toward members of outgroups or disadvantaged groups is large, (2) implicit bias often conflicts with conscious attitudes, endorsed beliefs, and intentional behavior, (3) implicit bias influences evaluations of and behavior toward those who are the subject of the bias, and (4) self, situational, or broader cultural interventions can correct systemic and consensually shared implicit bias.<sup>226</sup>

Kang identifies “racial mechanics” as “the ways in which race alters intrapersonal, interpersonal, and intergroup interactions . . . . They seriously challenge current understandings of our ‘rational’ selves and our interrelations.”<sup>227</sup> Most of us have bias linked to stereotypes and negative attitudes, but we do not acknowledge them because we lack the insight to be aware of our bias.<sup>228</sup> This is the interplay of mapping, schemas, and triggers, all constructed and malleable, and therefore mechanisms that presently reinforce biases, according to Kang but which could be used to change implicit thinking.<sup>229</sup> Others as well emphasize that empathy and same-race identification of greater empathy is a learned behavior, not an inevitable cognitive turn.<sup>230</sup>

Stereotypes and implicit cognitive bias render competent children and youth less competent, their potential for achievement undermined by their processing of how they are viewed by others as well as bias in how they are treated by teachers and others. This has a significant impact on their educational experience, and as they mature and separate more from their parents, or encounter more of their community and the broader world, it creates a major identity challenge in adolescence, as well as the threat of harm from others, that creates an adolescence full of risk. Scholars in both of these areas have identified strategies to deal with stereotypes and cognitive bias, emphasizing that these realities are constructed, not innate, and their operation to undermine equality similarly can be confronted and addressed.

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226. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1064 (2006) (footnotes omitted).

227. Kang, *supra* note 225, at 1493.

228. *See id.* at 1505-14.

229. *See id.* For an application of implicit bias research to reframing affirmative action, see Kang & Banaji, *supra* note 226, at 1090-1101.

230. Feng Sheng & Shihui Han, *Manipulations of Cognitive Strategies and Intergroup Relationships Reduce the Racial Bias in Empathic Neural Responses*, 61 NEUROIMAGE 786, 795-96 (2012); *see also* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1247-50 (2002); Gary Blasi & John T. Yost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1134-37 (2006).

Racism (whether overt bias or implicit/cognitive bias that drives behavior) also has a powerful impact on mental health. Surprisingly little has been done to study the impact of discrimination upon children's development.<sup>231</sup> The overall impact of racism is underestimated, understudied, and unacknowledged.<sup>232</sup> The available research indicates that the impact of racism on mental health and well-being is deep, chronic, and potentially debilitating.<sup>233</sup> Resistance requires powerful resources when marshaled by adults; this resilience is far more difficult to muster by children. African American boys are likely to underuse mental health services if they seek help at all.<sup>234</sup> While all children have inadequate mental health access, and less access if they are poor, masculinity norms of denying and avoiding mental health issues further diminish the likelihood of seeking treatment.<sup>235</sup>

Racism correlates with stress, depression, and the lack of a healthy sense of self and well-being.<sup>236</sup> "The psychological cost of striving to

231. Celia B. Fisher et al., *Discrimination Distress During Adolescence*, 29 J. YOUTH & ADOLESCENCE 679, 680 (2000) ("[The] impact [of discrimination] on adolescent development and well-being continues to be ignored in mainstream research."); see also Vanessa M. Nyborg & John F. Curry, *The Impact of Perceived Racism: Psychological Symptoms Among African American Boys*, 32 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 258, 259 (2003) (noting that the little research that exists on African American adults "appears almost voluminous when contrasted with studies of children"). But see, e.g., Lionel D. Scott, Jr. & Laura E. House, *Relationship of Distress and Perceived Control to Coping with Perceived Racial Discrimination Among Black Youth*, 31 J. BLACK PSYCHOL. 254, 265-69 (2005) (examining the effect of discrimination and stress on African American youth).

232. Williams and Morris identify three effects of racism:

First, racism in societal institutions can lead to truncated socioeconomic mobility, differential access to desirable resources, and poor living conditions that can adversely affect mental health. Second, experiences of discrimination can induce physiological and psychological reactions that can lead to adverse changes in mental health status. Third, in race-conscious societies, the acceptance of negative cultural stereotypes can lead to unfavorable self-evaluations that have deleterious effects on psychological well-being.

David R. Williams & Ruth Williams-Morris, *Racism and Mental Health: The African American Experience*, 5 ETHNICITY & HEALTH 243, 243 (2000).

233. There are mental health issues for all children, and a completely inadequate mental health system that is least likely to be used by children of color. See David Katner, *Delinquency, Due Process, and Mental Health: Presuming Youth Incompetency*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, *supra* note 26, at 104, 105-07, 113-15.

234. Michael A. Lindsey et al., *Family Matters: The Role of Mental Health Stigma and Social Support on Depressive Symptoms and Subsequent Help Seeking Among African American Boys*, 36 J. BLACK PSYCHOL. 458, 459-60 (2010).

235. See NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 25-56 (2010).

236. Fisher et al., *supra* note 231, at 690-93; Robert D. Latzman et al., *Racial Differences in Symptoms of Anxiety and Depression Among Three Cohorts of Students in the Southern United States*, 74 PSYCHIATRY 332, 333-34 (2011); see also Ronald L. Simons et al., *Discrimination, Crime, Ethnic Identity, and Parenting as Correlates of Depressive Symptoms Among African American Children: A Multilevel Analysis*, 14 DEV. & PSYCHOPATHOLOGY 371, 387 (2002).

maintain a positive sense of self while facing frequent exposure to discriminatory experiences can tax youths' coping resources, resulting in disillusionment, depression, and anxiety."<sup>237</sup> Higher SES children and youth of color may be more stressed because of their greater exposure to racism and need to be prepared to deal with it.<sup>238</sup> Racism acts as a chronic stress, with severe challenges for well-being:

Racism can traumatize, hurt, humiliate, enrage, confuse, and ultimately prevent optimal growth and functioning of individuals and communities. While, within the context of racism, there have always been abundant examples of resilience, strength of character, capacity for love and giving, joy, fulfillment, and success, there remain far too many examples of despair, dysfunction, isolation, hopelessness, destructiveness, and spiritual depletion.<sup>239</sup>

Stress emerges from "episodic stress . . . , daily hassles . . . , and chronic strain."<sup>240</sup>

In terms of mental health and psychological behavior, much of the research on Black boys, and children more generally, has focused on externalizing responses versus internal reactions.<sup>241</sup> These hidden, internal reactions tend to be ignored, and that omission renders what is happening to kids more invisible. This is particularly true about depression. Depression in children generally was rarely studied before the 1970s, based on the assumption that children do not get depressed; but modern studies show a significant correlation between depression and race discrimination,<sup>242</sup> as well as indicate that depression is common among adolescents.<sup>243</sup> Anxiety is also a neglected area of study for African American children but is related to interaction with

237. Gene H. Brody et al., *Perceived Discrimination and the Adjustment of African American Youths: A Five-Year Longitudinal Analysis with Contextual Moderation Effects*, 77 CHILD DEV. 1170, 1183 (2006).

238. Laura M. Bogart et al., *Association Between Perceived Discrimination and Racial/Ethnic Disparities in Problem Behaviors Among Preadolescent Youths*, 103 AM. J. PUB. HEALTH 1074, 1077-80 (2013).

239. Shelly P. Harrell, *A Multidimensional Conceptualization of Racism-Related Stress: Implications for the Well-Being of People of Color*, 70 AM. J. ORTHOPSYCHIATRY 42, 42 (2000) (citation omitted).

240. *Id.* at 45; see also Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1126-27, 1133-35 (2008).

241. Grant et al., *supra* note 42, at 615 ("[T]here has been no published investigation of occurrence and cocurrence of a broad range of internalizing problems . . . in a sample of low-income urban adolescents and little investigation of the associations between internalizing problems and externalizing problems in this population.").

242. Simons et al., *supra* note 237, at 385-87.

243. See Paula B. Repetto et al., *Trajectories of Depressive Symptoms Among High Risk African-American Adolescents*, 35 J. ADOLESCENT HEALTH 468, 468 (2004) ("Researchers estimate that 20% to 40% of adolescents report experiencing depressive symptoms.").

stress and racial socialization.<sup>244</sup> Boys are more likely to report depression than girls, and the symptoms increase over time and link to academic deficits.<sup>245</sup>

Stereotypes, cognitive bias, and mental health impacts occur dominantly, although not exclusively, at school.<sup>246</sup> Policies that structure academic achievement, codes of conduct and discipline, teacher education, and concepts of what each child is entitled to from public education, currently permit the continued functioning of challenging, even crippling, educational systems to function to the detriment of Black boys—accepting their failure and criminalization as normative. This undermining of developmental success from state-created structures and policies is further heightened in adolescence, exacerbating the foundational problems created earlier.

### C. Adolescence and Racial Identity

Adolescence is a critical developmental phase for children, for different though equally complex reasons as early childhood. The core task of adolescence is the development of identity and separation from one's parents.<sup>247</sup> This occurs amidst physical changes and neurological maturation that is a work in progress, not completed until early adulthood.<sup>248</sup> Often this is a period of intense experimentation, not always well thought out, characterized by bad judgment and strong peer influence. For boys, due to the influence of masculinities, it carries the risk of hypermasculinity and hypervulnerability.<sup>249</sup> For Black boys, it is even more volatile because they are most at risk for being perceived as dangerous just as they adopt an identity, including a racial identity, which is critical to their success.<sup>250</sup>

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244. See generally Angela Neal-Barnett, *Orphans No More: A Commentary on Anxiety and African American Youth*, 33 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 276 (2004).

245. Janet A. Kistner et al., *Ethnic and Sex Differences in Children's Depressive Symptoms*, 36 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 171, 174-78 (2007).

246. Carol A. Wong et al., *The Influence of Ethnic Discrimination and Ethnic Identification on African American Adolescents' School and Socioemotional Adjustment*, 71 J. PERSONALITY 1197, 1221-22 (2003).

247. See KROGER, *supra* note 45, at 60-61, 71.

248. See *Teenage Brain: A Work in Progress (Fact Sheet)*, NIMH (Sept. 10, 2010), [http://www2.isu.edu/irh/projects/better\\_todays/B2T2VirtualPacket/BrainFunction/NIMH-Teenage%20Brain%20-%20A%20Work%20in%20Progress.pdf](http://www2.isu.edu/irh/projects/better_todays/B2T2VirtualPacket/BrainFunction/NIMH-Teenage%20Brain%20-%20A%20Work%20in%20Progress.pdf).

249. See DOWD, *supra* note 235, at 75-85, 91-100.

250. On racial identity for children of color, both as a challenge and as an asset and resilience factor, see Susan D. McMahon & Roderick J. Watts, *Ethnic Identity in Urban African American Youth: Exploring Links with Self-Worth, Aggression, and Other Psychosocial Variables*, 30 J. COMMUNITY PSYCHOL. 411, 412-15 (2002) and see also Aerika S. Brittian, *Understanding African American Adolescents' Identity Development: A Relational Developmental Systems Perspective*, 38

“Adolescents not only ‘make bad decisions,’ they ‘make decisions badly.’”<sup>251</sup> Indeed, it is common to have an antisocial/aggressive period into young adulthood.<sup>252</sup> This is normative in late teens, peaking at age seventeen, after which teens desist from this behavior by early adulthood. The relationship between inward emotions and outward violence is often not what it seems.<sup>253</sup> Much of the research on adolescents focuses on white males and externalizing behavior; far less research focuses on kids of color, and if they are studied, it is almost exclusively in low-income urban settings.<sup>254</sup>

Masculinities have a huge impact on all male adolescents, as young men adopt the identity of being a man. Aggressiveness is often a sign of hypervulnerability.<sup>255</sup> The combination of race and gender factors makes masculinity especially risky for Black males. “Being Black and male is

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J. BLACK PSYCHOL. 172, 178-79 (2012); Wesley Bryant, *Internalized Racism’s Association with African American Male Youth’s Propensity for Violence*, 42 J. BLACK STUD. 690, 691-92 (2011); Frederic D. Harper et al., *Counseling Strategies with Black Boys and Black Men: Implications for Policy*, 78 J. NEGRO EDUC. 216, 218-21 (2009); Kerstin Pahl & Niobe Way, *Longitudinal Trajectories of Ethnic Identity Among Urban Black and Latino Adolescents*, 77 CHILD DEV. 1403, 1403, 1404-06 (2006); Duane E. Thomas et al., *The Influence of Cultural and Racial Identification on the Psychosocial Adjustment of Inner-City African American Children in School*, 32 AM. J. COMMUNITY PSYCHOL. 217, 218-20, 223-26 (2003); and Wong et al., *supra* note 246, at 1203-04, 1221-22. See generally A.L. Roberts et al., *Race/Ethnic Differences in Exposure to Traumatic Events, Development of Post-Traumatic Stress Disorder, and Treatment-Seeking for Post-Traumatic Stress Disorder in the United States*, 41 PSYCHOL. MED. 71 (2011); Eleanor K. Seaton et al., *The Prevalence of Perceived Discrimination Among African American and Caribbean Black Youth*, 44 DEV. PSYCHOL. 1288 (2008).

251. Laval S. Miller-Wilson, *Law and Adolescence: Examining the Legal and Policy Implications of Adolescent Development Research for Youth Involved in the Child Welfare, Juvenile Justice, or Criminal Justice Systems*, 79 TEMP. L. REV. 317, 322 (2006). See generally ROBERT J. HAGGERTY ET AL., *STRESS, RISK, AND RESILIENCE IN CHILDREN AND ADOLESCENTS: PROCESSES, MECHANISMS, AND INTERVENTION* (1994); Michael Cunningham, *African American Adolescent Males’ Perception of Their Community Resources and Constraints: A Longitudinal Analysis*, 27 J. COMMUNITY PSYCHOL. 569 (1999).

252. See David L. Rabiner et al., *Predicting the Persistence of Aggressive Offending of African American Males from Adolescence into Adulthood: The Importance of Peer Relations, Aggressive Behavior, and ADHD Symptoms*, 13 J. EMOTIONAL & BEHAV. DISORDERS 131, 131 (2005).

253. See Terri N. Sullivan et al., *Associations Between Sadness and Anger Regulation Coping, Emotional Expression, and Physical and Relational Aggression Among Urban Adolescents*, 19 SOC. DEV. 30, 31-33, 41-45 (2010).

254. Grant et al., *supra* note 42, at 614.

255. Robert E. Aronson et al., *Challenges to Masculine Transformation Among Urban Low-Income African American Males*, 93 AM. J. PUB. HEALTH 732, 735-38 (2003); Elaine F. Cassidy & Howard C. Stevenson, Jr., *They Wear the Mask: Hypervulnerability and Hypermasculine Aggression Among African American Males in an Urban Remedial Disciplinary School*, 11 J. AGGRESSION MALTREATMENT & TRAUMA 53, 57-58, 67-71 (2005); Karisman Roberts-Douglass & Harriet Curtis-Boles, *Exploring Positive Masculinity Development in African American Men: A Retrospective Study*, 14 PSYCHOL. MEN & MASCULINITY 7, 7-8 (2013); Seaton, *supra* note 102, at 372-73.

surreal. You are desired and you are despised.”<sup>256</sup> As one scholar notes, one response to this perception is “reactive coping”: “Being missed, dissed, and pissed presents the struggle of constructing identity within a quicksand of false Black male images and is as vulnerable as one can get. . . . Racial profiling of Black males while they drive, walk, shop, talk, stand, and gather in groups has reached epidemic proportions.”<sup>257</sup> This extraordinarily difficult context makes nearly every identity move dangerous.<sup>258</sup> Bravado is particularly the response in high risk neighborhoods for self-protection.<sup>259</sup> This makes masculinity and development distinctive for Black boys.<sup>260</sup> It also is a complex identity, bicultural in the sense that identity is framed differently in the community and in the dominant culture.<sup>261</sup>

The link between masculinity and violence is strong, but as the work of James Garbarino argues, violence is the predictable outcome of risk factors that make boys feel shame. The “lost boys” whom Garbarino writes about, boys who have killed, are predominantly Black. As he points out, “Sociologists have long recognized that the experience of racial discrimination provokes feelings of rage and shame, which play a potent role in stimulating violence.”<sup>262</sup> Shame is the key emotion in his analysis.

Violence is present for Black adolescents in several ways, linked first because of the likelihood that a significant number are growing up

256. Howard C. Stevenson, *Boys in Men's Clothing: Racial Socialization and Neighborhood Safety as Buffers to Hypervulnerability in African American Adolescent Males*, in *ADOLESCENT BOYS: EXPLORING DIVERSE CULTURES OF BOYHOOD* 59, 59 (Niobe Way & Judy Y. Chu eds., 2004).

257. *Id.* at 61.

258. VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* 40 (2011); Victor M. Rios, *The Consequences of the Criminal Justice Pipeline on Black and Latino Masculinity*, 623 *ANNALS AM. ACAD. POL. & SOC. SCI.* 150, 155-56 (2009).

259. Michael Cunningham & Leah Newkirk Meunier, *The Influence of Peer Experiences on Bravado Attitudes Among African American Males*, in *ADOLESCENT BOYS: EXPLORING DIVERSE CULTURES OF BOYHOOD*, *supra* note 256, at 219, 228; *see also* Raymond Gunn, *Inner-City “Schoolboy” Life*, 595 *ANNALS AM. ACAD. POL. & SOC. SCI.* 63, 65 (2004).

260. *See* Shanette M. Harris, *Psychosocial Development and Black Male Masculinity: Implications for Counseling Economically Disadvantaged African American Male Adolescents*, 73 *J. COUNSELING & DEV.* 279, 279-80 (1995); *see also* JEREMY N. PRICE, *AGAINST THE ODDS: THE MEANING OF SCHOOL AND RELATIONSHIPS IN THE LIVES OF SIX YOUNG AFRICAN-AMERICAN MEN* 183-85 (2000); Shanette M. Harris, *Black Male Masculinity and Same-Sex Friendships*, 16 *W. J. BLACK STUD.* 74, 75-77 (1992); Jay C. Wade & Aaron B. Rochlen, *Introduction: Masculinity, Identity, and the Health and Well-Being of African American Men*, 14 *PSYCHOL. MEN & MASCULINITY* 1, 2-3 (2013).

261. *See* Andrea G. Hunter & James Earl Davis, *Constructing Gender: An Exploration of Afro-American Men's Conceptualization of Manhood*, 6 *GENDER & SOC.* 464, 471-77 (1992).

262. JAMES GARBARINO, *LOST BOYS: WHY OUR SONS TURN VIOLENT AND HOW WE CAN SAVE THEM* 11 (1999).



in poor neighborhoods.<sup>263</sup> Violence is present in poor neighborhoods and is directed at Black boys. Violence per se has a strong negative impact on development because it triggers aggression in response, and that triggers both peer and state violence. Violence is also a reaction to Black youth as themselves. This has been played out all too persistently and publicly since the death of Trayvon Martin, although it was always present but less public. In numerous killings of young Black men, it is because they are perceived as dangerous, but often found without weapons, or killed with a level of violence that far exceeds any actual or perceived threat.<sup>264</sup> So the role of violence connects to the structural conditions of poverty but also the cultural norms and stereotypes attached in particular to Black boys and men.<sup>265</sup>

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263. See Peter B. Edelman & Joyce Ladner, *Introduction* to ADOLESCENCE AND POVERTY: CHALLENGE FOR THE 1990S, at 1, 1 (Peter B. Edelman & Joyce Ladner eds., 1991) (“[T]he journey has become *mission impossible*—resulting in problems and outcomes so devastating that recovery into adulthood of self-sufficiency and marriage, let alone any broader societal participation, is out of question . . . . [This promotes] a culture of disengagement.” (emphasis added)).

264. A recent example is the death of Laquan McDonald in Chicago, shot sixteen times as he was walking in the middle of a street, with no apparent aggressive move toward police and armed only with a knife. Steve Mills et al., *Laquan McDonald Police Reports Differ Dramatically from Video*, CHI. TRIB. (Dec. 5, 2015, 1:25 AM), <http://www.chicagotribune.com/news/local/breaking/ct-laquan-mcdonald-chicago-police-reports-met-20151204-story.html>; see also Cooper, *supra* note 22, at 1347-55; Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 227-37 (2015).

265. See Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyperincarceration and Black Male Identity Performance*, 93 B.U. L. REV. 1185, 1189-1204 (2013); McGinley, *supra* note 264, at 242-51; see also JAMES GILLIGAN, PREVENTING VIOLENCE 32-37 (2001) (presenting his classic work on boys and violence and concluding that the root of violence is shame produced by disrespectful conditions and treatment); Kevin M. Fitzpatrick, *Aggression and Environmental Risk Among Low-Income African-American Youth*, 21 J. ADOLESCENT HEALTH 172, 176-77 (1997) (detailing the link between witnessing violence and aggression); Phillip L. Hammack et al., *Social Support Factors as Moderators of Community Violence Exposure Among Inner-City African American Young Adolescents*, 33 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 450, 457-60 (2010) (linking a lack of protective factors with violence and negative outcomes); Donna E. Howard, *Searching for Resilience Among African-American Youth Exposed to Community Violence: Theoretical Issues*, 18 J. ADOLESCENT HEALTH 254, 256-58 (1996) (surveying the literature on resilience factors for African American youth witnessing violence); Anthony E. O. King, *Understanding Violence Among Young African American Males: An Afrocentric Perspective*, 28 J. BLACK STUD. 79, 81-92 (1997) (analyzing historical data on violence towards African American males and linking it to slavery and ongoing oppression); Desmond U. Patton & David W. Johnson, *Exposure to Community Violence and Social Capital: African American Students in the Critical Transition to High School*, 16 HARV. J. AFR. AM. PUB. POL’Y 53, 54-57 (2009) (addressing the impact of exposure to violence on adolescent networks); Suzanne M. Randolph et al., *Behavior Problems of African American Boys and Girls Attending Head Start Programs in Violent Neighborhoods*, 11 EARLY EDUC. & DEV. 339, 346-47, 349 (2000) (concluding that children in violent neighborhoods have higher numbers of behavior problems); Patrick H. Tolan et al., *The Developmental Ecology of Urban Males’ Youth Violence*, 39 DEVELOPMENTAL PSYCHOL. 274, 276-88 (2003) (analyzing the impact of violence on child development using the ecological model); Jeanne A. Yakin & Susan D. McMahon, *Risk and Resiliency: A Test of a Theoretical Model for*

Within this context, even outside of poor communities, the adolescent task of constructing identity requires another essential task for Black boys: constructing a racial identity, an entirely unique developmental task and one fraught with peril. President Barack Obama's memoir of his early life is a high profile example of this critical construction of identity.<sup>266</sup> The importance of racial identity is due to several factors. First, it is the universal developmental piece of adolescence to create one's identity.<sup>267</sup> Second, coexistent with the difficulty of this task is the affirmative story of racial identity. Racial identity, grounded in a strong identity of valuing culture and community, provides resilience. It is a strength. This is a distinctive factor in the lives of Black boys and invites comparisons with the generating of racial identity among white boys. Constructing identity is reactive coping in one sense, but involves pride also. Racial identity also is diverse and creative; it is not singular or confined to an ideal.<sup>268</sup> There is no one meaning to being a Black man.<sup>269</sup> Racial identity is plural. Finally, and ironically, racial identity is important because racial identity may trigger danger. So, one's very strength triggers challenges.

Racial identity is not an integral part of child development theory—it is only studied for children of color—so the developmental piece of racial identity has been marginalized.<sup>270</sup> The process of constructing

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*Urban, African-American Youth*, 26 J. PREVENTION & INTERVENTION COMMUNITY 5, 13-14 (2003) (differentiating distal and proximate factors regarding violence to determine what factors contribute to a child acting violently). See generally Sarah A. Stoddard et al., *Thinking About the Future as a Way to Succeed in the Present: A Longitudinal Study of Future Orientation and Violent Behaviors Among African American Youth*, 31 J. BLACK PSYCHOL. 270 (2011) (linking resilience affected by violence to future goals).

266. BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* (1995).

267. The challenge of being able to move through this volatile and risk-laden phase comes with the additional challenges posed for Black boys by race, gender and, for low income boys, class. See Pahl & Way, *supra* note 250, at 1404-06, 1411-13; see also JANET MANCINI BILLSON, *PATHWAYS TO MANHOOD: YOUNG BLACK MALES STRUGGLE FOR IDENTITY* 228-30 (2d ed. 1996); Ashley B. Evans et al., *Academic Self-Concept in Black Adolescents: Do Race and Gender Stereotypes Matter?*, 10 SELF & IDENTITY 263, 272-75 (2011); Diane M. Hall et al., *Acting "Tough" in a "Tough" World: An Examination of Fear Among Urban African American Adolescents*, 34 J. BLACK PSYCHOL. 381, 382-83 (2008).

268. See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 860-63, 896-903 (2006).

269. MARK ANTHONY NEAL, *NEW BLACK MAN* 16-30 (2015); Athena D. Mutua, *Theorizing Progressive Black Masculinities*, in *PROGRESSIVE BLACK MASCULINITIES* 3, 34 (Athena D. Mutua ed., 2006).

270. See McMahon & Watts, *supra* note 250, at 412-13; Joanna Lee Williams et al., *Integrating Racial and Ethnic Identity Research into Developmental Understanding of Adolescents*, 6 CHILD DEV. PERSP. 304, 306-07 (2012).

racial identity begins in middle childhood, and is linked to racial awareness, which emerges in early childhood.<sup>271</sup> Racial awareness begins as early as six, and by middle childhood, children have an awareness of both racial identity and its consequences.<sup>272</sup> Early middle childhood, roughly second to fourth or fifth grade, “is an active period for meaning-making as children [describe] ethnic identity to include ideas such as language, physical appearance, pride, relative social position, and culture.”<sup>273</sup> At this developmental stage, abstract thought capability emerges, so children clearly understand social identities.<sup>274</sup>

One group of scholars identify three aspects to racial identity: connection to one’s racial group, awareness of racism and negative attitudes, and awareness of whether one’s group succeeds.<sup>275</sup> Phinney breaks down ethnic identity into “self-identification, sense of belonging, and pride in one’s group.”<sup>276</sup> According to her, it is a gradual process of unfolding.<sup>277</sup>

Racial identity is positively correlated to school achievement, providing resilience to discrimination experienced in school.<sup>278</sup> There is

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271. Inna Altschul et al., *Racial-Ethnic Identity in Mid-Adolescence: Content and Change as Predictors of Academic Achievement*, 77 CHILD DEV. 1155, 1156-57 (2006).

272. *Id.*

273. Leoandra Onnie Rogers et al., *Meaning Making in Middle Childhood: An Exploration of the Meaning of Ethnic Identity*, 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 99, 99 (2012).

274. *Id.* at 103-06.

275. Altschul et al., *supra* note 271, at 1156; *see also* Thomas et al., *supra* note 250, at 218-19.

276. McMahon & Watts, *supra* note 250, at 413.

277. *See* Jean S. Phinney, *A Three-Stage Model of Ethnic Identity Development in Adolescence*, in ETHNIC IDENTITY: FORMATION AND TRANSMISSION AMONG HISPANICS AND OTHER MINORITIES 61, 73-76 (Martha E. Bernal & George P. Knight eds., 1993); Pahl & Way, *supra* note 250, at 1404; Jean S. Phinney & Anthony D. Ong, *Conceptualization and Measurement of Ethnic Identity: Current Status and Future Directions*, 54 J. COUNSELING PSYCHOL. 271, 274-75 (2007); Jean S. Phinney, *Stages of Ethnic Identity Development in Minority Group Adolescents*, 9 J. EARLY ADOLESCENCE 34, 42 (1989); *see also* Eleanor K. Seaton et al., *The Status Model of Racial Identity Development in African American Adolescents: Evidence of Structure, Trajectories, and Well-Being*, 77 CHILD DEV. 1416, 1424 (2006) (finding that kids with an achieved status had the strongest psychological well-being); Tiffany Yip et al., *African American Racial Identity Across the Lifespan: Identity Status, Identity Content, and Depressive Symptoms*, 77 CHILD DEV. 1504, 1504-05 (2006).

278. Sheretta T. Butler-Barnes et al., *African American Adolescents’ Academic Persistence: A Strengths-Based Approach*, 42 J. YOUTH ADOLESCENCE 1443, 1446 (2013); *see also* Deborah Rivas-Drake et al., *Ethnic and Racial Identity in Adolescence: Implications for Psychosocial, Academic, and Health Outcomes*, 85 CHILD DEV. 40, 46-48 (2014) (reviewing the existing literature on race/ethnic identity and positive impact); Christian A. Friend et al., *Parental Racial Socialization and the Academic Achievement of African American Children: A Cultural-Ecological Approach*, 15 J. AFR. AM. STUD. 40, 44-45 (2011) (surveying the literature on how bias affects academic achievement); Ciara Smalls et al., *Racial Ideological Beliefs and Racial Discrimination Experiences as Predictors of Academic Engagement Among African American Adolescents*, 33 J. BLACK PSYCHOL. 299, 304-07 (2007).

little scholarship on exactly how this works.<sup>279</sup> Racial pride contributes to a feeling of control and ability to accomplish, as well as self-acceptance.<sup>280</sup> It is protective, especially for so-called “at risk” youth and contributes to their positive coping and behavior.<sup>281</sup> Interestingly, in low SES neighborhoods, high racial pride is associated with high GPA; in more advantaged neighborhoods, one study found that high pride correlates with lower GPA.<sup>282</sup> Having a strong identity can be motivating and can act as a buffer,<sup>283</sup> but in suburban neighborhoods, where Black boys may have only token representation, the interface of identity with the racial context of school is different.<sup>284</sup>

Making it through the tricky phase of adolescence, difficult for any child, is thus an enormously more complex and risky, even life-threatening, developmental phase for Black boys and young men. The risks they face arise from a complex array of systems created and operated by the state, particularly the continued inequalities of the educational system, the persistence of the effects of poverty, and the combined impact of policing their behavior in school and on the streets. In addition, they are likely to come into contact with the juvenile justice system at this stage, by school referral or in relation to behavior out of school. Just as they are exploring identity by functioning beyond their families and communities, they are subject to interactions with police at school and on the streets that increasingly translate fear and threat into system constraint and incarceration. Adolescents as a group commonly engage in behavior that violates the law, but many, if not most, are never arrested, or if they are, are diverted from serious consequences.<sup>285</sup> Black boys, on the other hand, are disproportionately system-involved and disproportionately likely to face increasingly severe consequences, including incarceration at the deepest end of

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279. See Butler-Barnes et al., *supra* note 278, at 1443 (“Unfortunately, relatively little scholarship explores how African American adolescents draw on personal and cultural assets to persist and thrive in the face of discriminatory experiences.”); Pahl & Way, *supra* note 250, at 1404.

280. Pahl & Way, *supra* note 250, at 1411-13.

281. McMahon & Watts, *supra* note 250, at 423; Enrique W. Neblett et al., *The Promise of Racial and Ethnic Protective Factors in Promoting Ethnic Minority Youth Development*, 6 CHILD DEV. PERSP. 295, 298-99 (2012).

282. Christy M. Byrd & Tabbye M. Chavous, *Racial Identity and Academic Achievement in the Neighborhood Context: A Multilevel Analysis*, 38 J. YOUTH & ADOLESCENCE 544, 553 (2009).

283. *Id.* at 556.

284. *Id.* at 557; see also Rebecca J. Bulotsky-Shearer et al., *Peer Play Interactions and Readiness to Learn: A Protective Influence for African American Preschool Children from Low-Income Households*, 6 CHILD DEV. PERSP. 225, 228-29 (2012) (finding that racial pride is still a protective factor for suburban African American boys).

285. Nancy E. Dowd, *Introduction: Justice for Kids*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 26, at 1-3.

the system.<sup>286</sup> They are disproportionately referred to the adult criminal justice system for crimes committed as minors, a system which makes no effort at rehabilitation.<sup>287</sup> The failure of the juvenile system to insure public safety or the well-being and rehabilitation of a substantial portion of children committed to its care, disproportionately Black boys, means that this system powerfully arrests development and imposes long-term consequences for adult opportunities due to direct and collateral consequences.<sup>288</sup>

Finally, Black boys as adolescents face the potential that they will be a victim of violence. We have a litany of death that keeps adding new tragedies from private or public violence: Trayvon Martin, Laquan McDonald, Freddie Grey, Jordan Davis, and Tamir Rice are only a few.<sup>289</sup> Black teenagers' risk of death is higher than any other demographic group.<sup>290</sup> No matter what the range of teenage behavior is, this group distinctively risks never living beyond their teenage years. No piece of data could more graphically illustrate the stacked developmental deck. And if they survive their adolescent years, the possibility of significant developmental strikes against them—lack of education, criminal justice involvement, and lack of opportunity—is very high, resulting from the very identity that ultimately can be their strength, if they survive.

#### D. Resistance and Resilience

The challenges to development and negative correlations of Black boys' context are cumulative and daunting. But, the racial identity

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286. *Id.* at 3-4.

287. *Id.*

288. James Bell, *Child Well-Being: Toward a Fair and Equitable Public Safety Strategy for the Twenty-First Century*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, *supra* note 26, at 23, 34-49; Sue Burrell, *Collateral Consequences of Juvenile Court: Boulders on the Road to Good Outcomes*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, *supra* note 26, at 333-40.

289. For background on the life and death of each of these individuals, see *Trayvon Martin*, BIO., <http://www.biography.com/people/trayvon-martin-21283721> (last visited Nov. 26, 2016); Ashley Fantz & AnneClaire Stapleton, *Abused and In and Out of Foster Homes, Laquan McDonald's Tragic Life*, CNN (Nov. 25, 2015, 7:23 PM), <http://www.cnn.com/2015/11/25/us/laquan-mcdonald-life-chicago>; Janell Ross, *Why You Should Know What Happened in Freddie Gray's Life—Long Before His Death*, WASH. POST (Dec. 19, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/19/why-you-should-know-what-happened-in-freddie-grays-life-long-before-his-death>; Mike Hayes, *The Life and Last Days of Jordan Davis*, BUZZFEED (Mar. 31, 2014, 11:10 AM), <http://www.buzzfeed.com/mikehayes/the-life-and-last-days-of-jordan-davis#udlbe5ZLB>; and Mary Kilpatrick, *Tamir Rice's Family Remembers 12-Year-Old at Memorial Service*, CLEVELAND.COM (Dec. 4, 2014, 7:28 AM), [http://www.cleveland.com/metro/index.ssf/2014/12/tamir\\_rice\\_familys\\_remembers\\_1.html](http://www.cleveland.com/metro/index.ssf/2014/12/tamir_rice_familys_remembers_1.html).

290. See Dowd, *supra* note 22, at 46.

research exposes resistance and positive outcomes, as well, that have been under-researched and poorly understood. One illuminating piece of data given the challenges to identity is that contrary to the prediction of low self-esteem levels for Black boys, and for Black children and youth in general, their self-esteem levels when measured are quite high.<sup>291</sup> Self-esteem is developmentally important as it reflects past experience and has an impact on future success.<sup>292</sup> Not only do African American children not suffer from low self-esteem, but research shows they have higher self-esteem than other racial groups<sup>293</sup> and, among African American children, boys have higher self-esteem than girls.<sup>294</sup> According to scholars, several factors that contribute to high self-esteem are racial socialization and development of a strong racial identity.<sup>295</sup> Segregated schools and communities also have a positive impact by generating a feeling of belonging and support, and group identity.<sup>296</sup>

Racial socialization is critical, and families are the core of providing this support. Racial socialization is protective for anxiety and stress, and positively affects school achievement.<sup>297</sup> Family is an important factor in studies on the factors that correlate with successful Black boys.<sup>298</sup> A particular form of family is not critical but rather the presence of a strong family.<sup>299</sup> Parents are important in a distinctive way

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291. Bernadette Gray-Little & Adam R. Hafdahl, *Factors Influencing Racial Comparisons of Self-Esteem: A Quantitative Review*, 126 *PSYCHOL. BULL.* 26, 40 (2000).

292. See Tom Luster & Harriette Pipes McAdoo, *Factors Related to Self-Esteem Among African American Youths: A Secondary Analysis of the High/Scope Perry Preschool Data*, 5 *J. RES. ADOLESCENCE* 451, 463-64 (1995).

293. Gray-Little & Hafdahl, *supra* note 291, at 40.

294. See *id.* at 29, 34, 42; see also Dwight L. Greene, *Naughty by Nature: Black Male Joyriding—Is Everything Gonna be Alright?*, 4 *COLUM. J. GENDER & L.* 73, 77-111 (1994); Brenda Major et al., *Perceiving Personal Discrimination: The Role of Group Status and Legitimizing Ideology*, 82 *J. PERSONALITY & SOC. PSYCHOL.* 269, 280 (2002); Nancy Rumbaugh Whitesell et al., *Developmental Trajectories of Personal and Collective Self-Concept Among American Indian Adolescents*, 77 *CHILD DEV.* 1487, 1499 (2006); Jean M. Twenge & Jennifer Crocker, *Race and Self-Esteem: Meta-Analyses Comparing Whites, Blacks, Hispanics, Asians, and American Indians and Comment on Gray-Little and Hafdahl (2000)*, 128 *PSYCHOL. BULL.* 371, 385-89 (2002).

295. See Gray-Little & Hafdahl, *supra* note 291, at 28, 41.

296. García Coll & Szalacha, *supra* note 111, at 84-85 (finding that there is stronger identity and better school outcomes for children of color in schools where they are dominant versus schools where they are a minority).

297. Meeta Banerjee et al., *Racial/Ethnic Socialization and Parental Involvement in Education as Predictors of Cognitive Ability and Achievement in African American Children*, 40 *J. YOUTH ADOLESCENCE* 595, 596, 602-03 (2011); Ashley B. Evans et al., *Racial Socialization as a Mechanism for Positive Development Among African American Youth*, 6 *CHILD DEV. PERSP.* 251, 253-54 (2012); Kristen M. McCabe et al., *Family Protective Factors Among Urban African American Youth*, 28 *J. CLINICAL CHILD PSYCHOL.* 137, 146-47 (1999).

298. Banerjee et al., *supra* note 297, at 602-03; McCabe et al., *supra* note 297, at 146-47.

299. In one study, mothers were found to be especially significant for Black boys. FREEMAN A. HRABOWSKI III ET AL., *BEATING THE ODDS: RAISING ACADEMICALLY SUCCESSFUL AFRICAN*

in the development of all African American children because they must prepare their children for a world still framed and pervaded by racism. The literature recognizes this additional and challenging parenting task.<sup>300</sup> Yet, racial socialization sometimes is blamed or criticized for socializing kids in a defensive way that then is argued to negatively affect kids in school and the greater society.<sup>301</sup>

Although developmental responses of opposition or resistance are normative for adolescents, the exacerbated challenges of Black boys can create patterns of resistance and rebellion that are frequently misconstrued, used to blame Black boys for their subordination. One of the enduring contributions to the racial identity literature, but perhaps the least well understood, is the concept of oppositional culture, sometimes called “the burden of acting white,” frequently interpreted as rejection of majority culture and behavior necessary to succeed because it is racially identified as white.<sup>302</sup>

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AMERICAN MALES 190 (1998).

300. This is the case for all children, but not all parents are functioning in the same context of support (or lack of it) for themselves and their community and culture. Numerous studies that focus on parents either state the obvious, that bad parenting is a risk factor, or that good parenting is a resilience factor, or that family is critical both in early childhood and adolescence for different developmental reasons. See, e.g., Colonie M. K. Gray et al., *Anxiety Symptoms in African American Children: Relations with Ethnic Pride, Anxiety Sensitivity, and Parenting*, 20 J. CHILD & FAM. STUD. 205, 211-12 (2011) (linking parenting with ethnic pride); Erik M. Hines & Cheryl Holcomb-McCoy, *Parental Characteristics, Ecological Factors, and the Academic Achievement of African American Males*, 91 J. COUNSELING & DEV. 68, 74 (2013) (linking parenting impact on outcomes for children); Alexander T. Vazsonyi et al., *Growing Up in a Dangerous Developmental Milieu: The Effects of Parenting Processes on Adjustment in Inner-City African American Adolescents*, 34 J. COMMUNITY PSYCHOL. 47, 67 (2006) (finding that parenting is a resilience factor).

301. There are studies that try to identify parenting factors or structures apart from racial socialization, and those studies find that two parents are better than one; that having an involved father is helpful and that warm nurturing parenting is better than the opposite. The assumptions of such work is that a solution or cause can be found in the Black family, which ignores the context in which families operate.

302. See Shauna M. Cooper & Vonnie C. McLoyd, *Racial Barrier Socialization and the Well-Being of African American Adolescents: The Moderating Role of Mother-Adolescent Relationship Quality*, 21 J. RES. ADOLESCENCE 895, 898-901 (2011); Susan M. McHale et al., *Mothers' and Fathers' Racial Socialization in African American Families: Implications for Youth*, 77 CHILD DEV. 1387, 1389-1400 (2006); Kantahyanee W. Murry et al., *Perceptions of Parenting Practices as Predictors of Aggression in a Low-Income, Urban, Predominately African American Middle School Sample*, 9 J. SCH. VIOLENCE 174, 175-84 (2010); Yasser Arafat Payne & Tara M. Brown, *The Educational Experiences of Street-Life-Oriented Black Boys: How Black Boys Use Street Life as a Site of Resilience in High School*, 26 J. CONTEMP. CRIM. JUST. 316, 317-22 (2010); see also Elijah Anderson, *The Social Ecology of Youth Violence*, 24 CRIME & JUST. 65, 70-101 (1998); Frank A. Biafora, Jr. et al., *Racial Mistrust and Deviant Behaviors Among Ethnically Diverse Black Adolescent Boys*, 23 J. APPLIED SOC. PSYCHOL. 891, 892-94, 905-06 (1993). For a discussion on the importance of “respect” as a means of survival, see John A. Rich & Courtney M. Grey, *Pathways to Recurrent Trauma Among Young Black Men: Traumatic Stress, Substance Use, and the “Code of the Street,”* 95 AM. J. PUB. HEALTH 816, 817-22 (2005) and see also RIOS, *supra* note 258, at 98-103; Amy M. Bohnert et al., *Relationships Between Discretionary Time Activities, Emotional*

Signithia Fordham and John Ogbu's classic work argues that subordinating context generates collective responses to oppression that are not "oppositional" in the sense of a recalcitrant child, but rather are in opposition to dehumanization.<sup>303</sup> Important to their analysis is the concept of collective identity, which "refers to people's sense of who they are, their 'we-feeling' or 'belonging.'" <sup>304</sup> "Collective identity usually develops because of people's collective experience or series of collective experiences."<sup>305</sup> It is historically grounded in slavery and post-slavery construction of Black Americans as separate—generating collective identity tied to oppression and exploitation.<sup>306</sup> Labeling behavior as "oppositional" ignores the construction of the category and the context that creates the response; labeling it resistance to oppression reframes it and should generate both a focus on the frame that generates the reaction as well as question whether a single culture or set of standards is required.<sup>307</sup>

Fordham describes identity as complex and oppositional in a variety of ways.<sup>308</sup> For her, the "burden of acting white" is the necessity

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*Experiences, Delinquency and Depressive Symptoms Among Urban African American Adolescents*, 38 J. YOUTH ADOLESCENCE 587, 590-98 (2009); Eleanor Brown, *Black Like Me? "Gangsta" Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308, 321-51 (2000); Marino A. Bruce, *Inequality and Delinquency: Sorting Out Some Class and Race Effects*, 2 RACE & SOC. 133, 134-36 (2000); Holli Drummond et al., *Becoming Violent: Evaluating the Mediating Effect of Hopelessness on the Code of the Street Thesis*, 32 DEVIANT BEHAV. 191, 195-97, 211-15 (2011); King, *supra* note 265, at 86-92; and Deanne L. Wilkinson et al., *Youth Violence—Crime or Self-Help? Marginalized Urban Males' Perspectives on the Limited Efficacy of the Criminal Justice System to Stop Youth Violence*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 25, 27-37 (2009). Critiques of the research on oppositional culture exist. See George Farkas et al., *Does Oppositional Culture Exist in Minority and Poverty Peer Groups?*, 67 AM. SOC. REV. 148, 148, 153 (2002). Recent scholarship argues low achievement is not due to opposition but to underdevelopment of academic skills because of context. Shaun R. Harper & Charles H. F. Davis III, *They (Don't) Care About Education: A Counternarrative on Black Male Students' Responses to Inequitable Schooling*, EDUC. FOUND., Winter–Spring 2012, at 103, 106, 116-18.

303. Signithia Fordham & John U. Ogbu, *Black Students' School Success: Coping with the "Burden of 'Acting White,'"* 18 URB. REV. 176, 179, 200 (1986).

304. John U. Ogbu, *Collective Identity and the Burden of "Acting White" in Black History, Community, and Education*, 36 URB. REV. 1, 3 (2004).

305. *Id.*

306. *See id.* at 8.

307. *See id.* at 9-11. Living in two worlds began in slavery and continues. *Id.* at 9-18. It involves accepting the necessity of adopting white ways of talking and behavior in order to succeed in school and jobs. But, this creates a dilemma: this is the burden of acting white, to come up with a coping strategy for this situation (adopting the ways of a group that subordinates you). *Id.* at 21-22; see also DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA* 33-35 (2013). Other strategies include assimilation, accommodation without assimilation, living in two worlds at different times, ambivalence, resistance/opposition, and encapsulation. Ogbu, *supra* note 304, at 21-23.

308. See Signithia Fordham, *Beyond Capital High: On Dual Citizenship and the Strange Career of "Acting White,"* 39 ANTHROPOLOGY & EDUC. Q. 227, 242 (2008).



to comply with, as well as resist, white norms; to act white in order to succeed as defined in white terms; and also to remain true to one's community: "[I]n exchange for what is conventionally identified as success, racially defined Black bodies are compelled to perform a White identity by mimicking the cultural, linguistic, and economic practices historically affiliated with the hegemonic rule of Euro-Americans."<sup>309</sup> At the same time, this challenges identity within one's community:

[E]very American of African ancestry who opts to perform Whiteness, even episodically, is forced to fight to retain citizenship in the Black community while concurrently seeking acceptance by the hegemonic White society. This compulsory dual citizenship, with one segment being the site of privilege and the other a sign of stigma, produces the phenomenon I defined as acting White.<sup>310</sup>

In her work, Fordham "found that all Black students were alienated by the mismatch between the culture of their community and that of the school."<sup>311</sup> They saw their choices as the option to resist and fail, or to comply and lose their voice.<sup>312</sup> Each path requires loss; each imposes burdens.

Duality of identity is important to recognize because it links to a final important framing of the developmental pathway of Black boys. It is easy, and dangerous, to let a single piece of their developmental pattern lead either to determinism (Black boys are so harmed, broken, or scarred as to be unsalvageable) or to seize on positive identity as an easy solution (support Black boys' development of strong racial identity and that will be sufficient for them to withstand developmental challenges and succeed). Racial identity is tempting to see as the "cure" or an affirmative factor that belies any need to address developmental inequality. Care must be taken to recognize and acknowledge strength and empowerment in the face of adversity without providing an apology or justification for inaction.<sup>313</sup> Racial identity in fact points to structural factors that make such identity critical, as well as illuminating family and community strengths.

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309. *Id.* at 234.

310. *Id.* at 231.

311. *Id.* at 243.

312. *See id.*

313. For a discussion on how cultural mistrust and racial awareness can lead to maladaptive outcomes, see Frank A. Biafora, Jr. et al., *Cultural Mistrust and Racial Awareness Among Ethnically Diverse Black Adolescent Boys*, 19 J. BLACK PSYCHOL. 266, 267-70 (1993). For a discussion on the challenge of identity, see Roy L. Brooks, *Analyzing Black Self-Esteem in the Post-Brown Era*, 4 TEMP. POL. & C.R. L. REV. 215, 220-24 (1995).

In summary, Black boys' cognitive, physical, and emotional development occurs within a context of challenge and threat undermining their sense of competency, self, future, and hope. Their trajectory from birth is one of exacerbated challenges and outright barriers. What is normal in early childhood and adolescence is made more difficult, and separation and subordination begins very early. A huge piece of this is grounded in poverty, and the link between race and poverty. Interwoven with that, but also separate from it, and driving it all, is racism. From a developmental perspective informed by developmental equality, the research exposes the individual cost of racism, and because racism is focused on Black boys as a group, the collective outcome of sustained hierarchy and blocked opportunity. The likely outcome of failure for Black boys is insured by infusing the institutions that most strongly affect their lives with principles and players that make those systems hostile and constricting, not facilitating and supportive. The developmental equality lens focuses our attention on these structural and cultural barriers that largely construct the developmental pathways for many Black boys.

### III. THE WAY FORWARD: USING THE DEVELOPMENTAL EQUALITY MODEL

#### A. *Structural and Cultural Inequality*

The developmental data and patterns of Black boys tell us that race and gender matter in their development; the developmental equality model points us to the key structural and cultural components that drive that negative, inequalitarian trajectory. The list of risks likely to be encountered by Black boys is a list of state-created, reinforced, and recognized risks. Moreover, the systems of risk interact not only to thwart development, but to generate the predictable outcome of this intersection of developmental challenges and barriers as involvement or incarceration in the juvenile and then adult criminal justice systems.

African American men figure so prominently in the correctional system that the number of African American 4-year-old males can be used to model the number of people who will be incarcerated 15-20 years in the future. . . . Of the approximately six hundred thousand 4-year-old African American males growing up in the United States in 2008, prisons are being planned to house 28,134 of them by 2029.<sup>314</sup>

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314. Oscar A. Barbarin, *Halting African American Boys' Progression from Pre-K to Prison: What Families, Schools, and Communities Can Do!*, 80 AM. J. ORTHOPSYCHIATRY 81, 81 (2010).

Three structural factors—the state’s creation of, response to, and perpetuation of poverty; the public educational system; and the state juvenile justice system—particularly function to create developmental hurdles for Black boys.<sup>315</sup> The evidence of this is starkly apparent in the developmental scholarship on Black boys summarized above. It is captured succinctly in three pieces of data that describe, for Black boys as a group, their outcomes within these systems. At birth:

- One in three will be born in poverty.<sup>316</sup>
- One in two will not graduate from high school.<sup>317</sup>
- One in three will be incarcerated in their lifetime,<sup>318</sup> and if they are born into the lower end of socio-economic circumstances, their risk of incarceration doubles.<sup>319</sup>

Cultural factors—biased actors within those systems and bias in the structure of systems, as well as broad societal bias and discrimination that is tolerated, ignored, or facilitated by the state—powerfully impact Black boys on an individual, familial, and community level.<sup>320</sup> State policies and practices that permit and arguably support the perpetuation of those cultural norms translate into state complicity in a culture of denigration, fear, and subordination.<sup>321</sup>

Using the developmental equality model, the first system that impacts their lives is the poverty system, as over one-third of all Black children are born into poverty.<sup>322</sup> Any policy regarding poverty, ignoring poverty, or perpetuating poverty (income support, housing, employment) has a significant impact on the Black community as a whole because such a large proportion of the community is affected, infringing on the

315. See Dowd, *supra* note 22, at 45-48; Dowd, *supra* note 153, at 1212-17, 1222-26.

316. Dowd, *supra* note 22, at 45. The most recent figures are even higher at thirty-eight percent. See *supra* note 144 and accompanying text.

317. See Dowd, *supra* note 22, at 45.

318. *Id.*

319. *Id.*

320. *Id.* at 59-61.

321. Protests at state and private universities illustrate this point. See, e.g., Anemona Hartocollis & Jess Bidgood, *Racial Discrimination Protests Ignite at Colleges Across the U.S.*, N.Y. TIMES, Nov. 12, 2015, at A16; Stephen Deere & Koran Addo, *University of Missouri System President Becomes the Focus Amid Protests at Mizzou*, ST. LOUIS POST DISPATCH (Nov. 9, 2015), [http://www.stltoday.com/news/local/education/university-of-missouri-system-president-becomes-the-focus-amid-protests/article\\_c1a47001-c0ff-5eca-af53-8b1714432fcb.html](http://www.stltoday.com/news/local/education/university-of-missouri-system-president-becomes-the-focus-amid-protests/article_c1a47001-c0ff-5eca-af53-8b1714432fcb.html); Kristen Rein & Roberta Bernstein, *Dueling Princeton Student Petitions Argue Legacy of Woodrow Wilson*, USA TODAY COLL. (Nov. 25, 2015, 10:20 AM), <http://college.usatoday.com/2015/11/25/princeton-student-petitions-woodrow-wilson/>; Isaac Stanley-Becker, *Minority Students at Yale Give List of Demands to University President*, WASH. POST (Nov. 13, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/11/13/minority-students-at-yale-give-list-of-demands-to-university-president/>; Alia Wong & Adrienne Green, *Campus Politics: A Cheat Sheet*, ATLANTIC (Apr. 4, 2016), <http://www.theatlantic.com/education/archive/2016/01/campus-protest-roundup/417570>.

322. See *supra* note 144 and accompanying text.

life course of the individual, their family, and the community as a whole.<sup>323</sup> In addition, historically the perpetuation of Black subordination has been, and continues to be, economic. Slavery connects to Jim Crow connects to current inequalities in wealth, work, housing, and community resources.<sup>324</sup> Poverty undermines full participation in citizenship, and thus the opportunity to effect change and influence policies, structures, and culture.<sup>325</sup>

Poverty policy and systems do little to help children, and much to reinforce the impact of poverty and sustain its effects. Welfare is limited and inadequate to lift a child's family into even marginal ability to sustain basic life needs.<sup>326</sup> Poverty links to poor housing, inadequate schools, high crime rates, lack of basic safety and security, and disproportionate police presence that infuses everyday life with the risk of criminal justice consequences.<sup>327</sup> Poverty stresses families, triggering child welfare interventions at a disproportionate rate for Black families, even when taking their rate of poverty into account.<sup>328</sup> Theoretically designed to help children escape from abuse and neglect, the child welfare system frequently makes matters worse instead of better, due to an inadequate foster care system and policies that ignore evidence-based practices that would suggest a far better outcome for children if they remained with their families or better yet, if affirmative interventions proactively provided support to their families before they are deemed in crisis.<sup>329</sup> A poor child welfare system disproportionately disserves Black children.

The subordination imposed by poverty might, potentially, be outweighed by the education system. Education might provide a means

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323. See Patten & Krogstad, *supra* note 150.

324. See SIGNE-MARY MCKERNAN ET AL., URBAN INST., LESS THAN EQUAL: RACIAL DISPARITIES IN WEALTH ACCUMULATION (2013); Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 7 RACE & SOC. PROBS. 21, 24-28 (2015); William Julius Wilson, *Being Poor, Black, and American: The Impact of Political, Economic, and Cultural Forces*, AM. EDUCATOR, Spring 2011, at 10, 10-14.

325. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 185-91 (2010).

326. See Jasmin Sethi, *Lessons for Social Scientists and Politicians; An Analysis of Welfare Reform*, 17 GEO. J. POVERTY L. & POL'Y 5, 6 (2010) ("Welfare payments are not sufficient to keep people out of poverty.").

327. Lisa Pruitt captures this set of consequences with her concept of spatial inequality. Lisa R. Pruitt, *Spatial Inequality as Constitutional Infirmity, Equal Protection, Child Poverty and Place*, 71 MONT. L. REV. 1, 15-23 (2010).

328. See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001).

329. Leslie Joan Harris, *Challenging the Overuse of Foster Care and Disrupting the Path to Delinquency and Prison*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 26, at 62, 63-71; Birkhead, *supra* note 150, at 70-71; Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 661 (2006).

to mobility and opportunity, and a leveling of economic inequality. To the contrary, however, education perpetuates the separation of children by class.<sup>330</sup> Indeed, some researchers argue that class is even more powerful a determinant of opportunity than race.<sup>331</sup> While this might be the case generally, it does not capture the unique pattern of Black boys and school. School is where discrimination that combines race and gender emerges: in the pattern of low achievement, high rates of discipline, high rates of exclusion through suspension and expulsion, and high rates of tracking by intellectual and emotional disability occur. Overall, Black children enter school, and preschool, at a disadvantage, *and the achievement gap widens once they get in school.*<sup>332</sup> In other words, school makes matters worse.<sup>333</sup>

As Pedro Noguera writes, the negative outcomes for Black boys in school are so pervasive that they are normative.<sup>334</sup> By middle school the disciplinary rates skyrocket, and by high school high rates of dropping out occur, leading to their low rate of completion of high school.<sup>335</sup> They have high rates of suspension and expulsion, magnifying the possibility that they will not complete high school.<sup>336</sup> The high school graduation rate is abysmal, and shockingly low and disproportionate for Black boys.<sup>337</sup> School is constructed by systems of financing, curriculum, and policies legally created and enforced. The differential resources and outcomes are a persistent, well recognized outcome of this system. As a system, education fails to serve Black children at a very high rate; race disadvantage is compounded with gender disadvantage for Black boys, however, as they stand out negatively on parameters of achievement and discipline. They also stand out as more likely to be assigned to special classes that exclude them from mainstream education.<sup>338</sup> Finally, school does not simply fail to educate them; it sends disproportionate numbers

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330. Dowd, *supra* note 22, at 47-48.

331. Sean Reardon's work and the Stanford Center for Education Policy Analysis presents the evidence of class inequality and achievement gaps in education. *See, e.g.,* Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91, 92-105 (Greg J. Duncan & Richard J. Murnane eds., 2011).

332. *Id.* at 99-100; Dowd, *supra* note 22, at 47-48.

333. *See* Dowd, *supra* note 22, at 47-48; Dowd, *supra* note 153, at 1217-19.

334. PEDRO A. NOGUERA, *THE TROUBLE WITH BLACK BOYS: . . . AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION*, at xvii (2008).

335. *Id.*

336. *Id.*; *see also* Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 *ARIZ. ST. L.J.* 313, 321-34 (2016).

337. Dowd, *supra* note 22, at 45, 47-48.

338. NOGUERA, *supra* note 334, at xvii.

of them into a system sure to guarantee and exacerbate failure, the juvenile justice system.<sup>339</sup>

The poverty and education system interaction is geometrically reinforced yet again by the structure, policies, and outcomes of the juvenile justice system. School discipline issues are treated as delinquency, and pipelined to the courts.<sup>340</sup> On the streets, Black boys are disproportionately targeted and implicated by the system, heavily influenced also by disproportionate policing patterns that put them in the cross-hairs of the system.<sup>341</sup> Black boys are disproportionately represented at every stage of the juvenile justice system, and the rate of disproportion increases as the consequences become more serious.<sup>342</sup> Juvenile justice system involvement and its consequences are not insignificant events, but have lifetime consequences, as well as being a strong predictor of adult criminal justice involvement.<sup>343</sup> Mass incarceration does not begin at adulthood; the groundwork for this pernicious and harmful practice begins much earlier, in the juvenile justice system.<sup>344</sup> Finally, policing brings into play another system, intertwined with the education and juvenile justice systems, that does not function fairly or equally, that does not protect from harm, and in the worst cases, is a threat to the very existence of Black boys.<sup>345</sup> Training, field policies, and practices all contribute to this, as does the failure to address bias in policing. This is a state-funded, state-created, legally-defined system just as are the poverty, educational, and juvenile justice systems.

These structural components—the poverty system, the educational system, and the juvenile justice system—have a powerful impact on the lives of Black boys, by collectively erecting significant barriers to their normative development. The impact of the state on families and

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339. See Nance, *supra* note 336, at 331-36; Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 952-57 (2016).

340. Nance, *supra* note 339, at 929-45, 952-57; see also Kaitlin Banner, *Breaking the School-to-Prison Pipeline: New Models for School Discipline and Community Accountable Schools*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, *supra* note 26, at 301, 301-04.

341. Dowd, *supra* note 153, at 1222-26.

342. See JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL AND ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 3-9, 13 (2008); RIOS, *supra* note 258, at 34-40.

343. Burrell, *supra* note 288, at 333-39.

344. The rate of juvenile incarceration in the United States is the highest in the world, far higher than any other country. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 3 fig.1 (2011).

345. See Cooper, *supra* note 265, at 1189-1202; Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 687-92, 698-701 (2009); Richardson, *supra* note 222, at 2963-66.

communities impacts the ability of those ecological components to provide needed support, by compromising the ability to provide “normal” developmental supports, while at the same time demanding of those families and communities extraordinary measures to counteract the hurdles faced by children and youth.<sup>346</sup> The state plays an enormous role in the creation and sustaining of those obstacles.<sup>347</sup> The law perpetuates this role of the state. Not only are Black boys disserved, but this systemic subordination also elevates others and reinforces hegemony based on race, gender, and class.

The level of subordination, and the intersecting structural forms of inequality, are so stark that it suggests comparisons with facial, blatant examples of discrimination: anti-Semitic ghettos and extermination, South African apartheid, misogynist subordination of women and girls, heterosexist homophobic actions, anti-Asian separation and internment.<sup>348</sup> The role of the state in all those cases is unmistakable. The responsibility of the state to dismantle the architecture of developmental inequality should be similarly inescapable. Adopting a developmental equality model is critical to expose the state’s role in *creating* developmental challenges and *subordinating* some children while privileging others. Each of the systems identified here that produces such disproportionate negative outcomes for Black boys is state created and sustained, with knowledge of the patterns that it creates and perpetuates.

### B. Legal Strategies

The developmental equality model exposes the role of the state in fostering layers of inequalities: individual, systemic, and cultural. This is demonstrated by the evidence of the contemporary developmental arc from birth to eighteen of Black boys and the role of structural inequalities in generating developmental challenges triggered by race and gender. State-supported developmental inequality is just as harmful as facial segregation; it insures that a significant proportion of Black boys, and other subordinated groups, will not succeed.

So where might a developmental equality model take us? I briefly sketch here several strategic possibilities that might flow from using this model, among a range of strategies to be explored in depth in future

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346. See Editorial, *Affordable Housing, Racial Isolation*, N.Y. TIMES, June 29, 2015, at A18.

347. The complexity is painstakingly described in a book authored by Kathryn Edin and Timothy J. Nelson. See EDIN & NELSON, *supra* note 151, at 213-16; see also HUNTINGTON, *supra* note 151, at 55-68.

348. While these are unique and broad ranging patterns, the similarity, I would argue, is in the acceptance of inequality as normative rather than as a contradiction of basic principles.

work. The strategies include, first, sustained collection of data and articulating metrics to implement change; second, using the developmental equality model in statutory or constitutional litigation strategies; and third, pursuing policy initiatives to support the developmental equality of all children.

Collecting data relevant to constructing and sustaining policies and structures that achieve developmental equality is critical. By this, I mean using data to concretely achieve goals, not collecting data to simply keep identifying and re-identifying the problem, or what has been called, in the juvenile justice context, endless “adoration of the question.”<sup>349</sup> Similar to the data and studies collected in this Article, and extending further to encompass the identified structural and cultural challenges that block development currently triggered by or related to identities, data collection is essential to crafting litigation and policy, and monitoring outcomes. A model for robust data used might be found in several instruments developed by the United Nations Children’s Fund (“UNICEF”) for its campaign, “A Fair Chance for Every Child.”<sup>350</sup> For example, Multiple Overlapping Deprivation Analysis (“MODA”) is a tool that builds on the UNICEF Global Study on Child Poverty and Disparities and the Oxford Poverty and Human Development Initiative’s Multidimensional Poverty Index.<sup>351</sup> It is notable for its focus, bringing together comprehensive identity factors, structural impacts, and dynamic impacts rather than a snapshot. “It: (a) selects the child as the unit of analysis; (b) adopts a life-cycle approach; (c) applies a whole-child oriented approach; (d) measures monetary poverty and multidimensional deprivations simultaneously for each child; and (e) enriches knowledge from sector-based approaches.”<sup>352</sup> A second UNICEF tool, Monitoring Results for Equity System (“MoRES”), is designed to identify action that needs to be taken and how well actions work.<sup>353</sup> MoRES analyzes “the key factors or bottlenecks that are constraining results for the most disadvantaged children, finding and implementing solutions, and regularly tracking progress toward results.”<sup>354</sup> This puts the most marginalized children at the center, a key component of the developmental equality model, rather than a neutral child. The UNICEF frameworks are sophisticated, ecologically focused, and inclusive of

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349. BELL & RIDOLFI, *supra* note 342, at 15-16.

350. UNICEF, A FAIR CHANCE FOR EVERY CHILD (2015), [http://www.unicef.org/about/execboard/files/A\\_fair\\_chance\\_for\\_every\\_child-22May2015.pdf](http://www.unicef.org/about/execboard/files/A_fair_chance_for_every_child-22May2015.pdf).

351. *Id.* at 32.

352. *Id.*

353. *Id.* at 32-33.

354. *Id.* at 32.



issues of social exclusion in addition to metrics focused on poverty.<sup>355</sup> Nevertheless, it is acknowledged that there is an under-inclusion of data on identity factors based on race and ethnicity, although some inclusion of gender.<sup>356</sup> A developmental equality approach would require additional focus on identities and intersectionality, in combination with poverty, as well a focus on identities standing alone (absent poverty).<sup>357</sup>

The goal of metrics is holding systems accountable, by requiring the dismantling of systems that create barriers to development for some or all children, and evaluating the outcomes of new developmental supports.<sup>358</sup> The gathering of data is not for the purpose of simply gathering information. Rather, it is central to both litigation and policy strategies. In litigation, statistics are critical to establish disparate impact, pattern and practices, and causal links.<sup>359</sup> System outcomes are important for making the case for system change.<sup>360</sup> Social science data is essential to undermine assumptions that can drive invalid conclusions and assumed responsibilities or outcomes, or to demonstrate how stereotypes and bias functions.<sup>361</sup> Similarly, and perhaps even more

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355. *See id.* at 8 (“Even in the midst of plenty, discrimination, exclusion and intergenerational disadvantage continue to draw these children into the vicious cycle of inequity. . . . Looking only at the end results, however, misses the crucial role played by *inequitable initial opportunities*.”).

356. *Id.* at 27.

357. Data on social exclusion and discrimination is less available. *See id.* at 24 (“Nevertheless, qualitative research, reports to national human rights institutions and country-level statistics reflect the ongoing pervasiveness of such discrimination, as well as how its consequences are exacerbated among the poorest.”).

358. The role of data is therefore similar to the statistical analysis critical to disparate impact or pattern and practice litigation in employment discrimination settings, as well as the role of data to establish and monitor remedies, in employment cases as well as school desegregation cases.

359. *See, e.g.,* *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (“Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.”); *NAACP v. Town of Harrison*, 940 F.2d 792, 798 (3d Cir. 1991) (“In order to establish a *prima facie* case of disparate impact discrimination, a plaintiff is required to demonstrate that application of a facially neutral standard has resulted in a significantly discriminatory hiring pattern.”); *Brock v. Int’l Union of Operating Eng’rs, Local 542 Dist. 1*, 140 F. Supp. 3d 432, 438 (E.D. Pa. 2105) (dismissing a claim of discrimination in part because plaintiffs failed to provide “meaningful comparison data or information comparing skill sets of white and non-white union members, or comparative availability for work”).

360. *See, e.g.,* CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., *ASSESSING PROMISING APPROACHES IN CHILD WELFARE: STRATEGIES FOR STATE LEGISLATORS* (2012), [http://www.ncsl.org/documents/cyf/promising\\_approaches\\_childwelfare.pdf](http://www.ncsl.org/documents/cyf/promising_approaches_childwelfare.pdf).

361. For example, plaintiffs challenging California’s Proposition 8, prohibiting same-sex marriage, proffered Michael Lamb as an expert witness to testify that “children raised by gay and lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents.” *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 935 (N.D. Cal. 2010). The District Court held that the state’s interest in promoting opposite-sex parenting over same-sex parenting was not compelling. *Id.* at 1000 (“The evidence does not support a finding that California has an interest in preferring opposite-sex parents over same-sex parents. Indeed, the evidence shows beyond any doubt that parents’ genders are irrelevant to children’s developmental outcomes.”).

importantly, positive legislative change, including dismantling inegalitarian systems or aspects of systems, or establishing affirmative supports for developmental equality, must be grounded in evidence-based solutions that continue to measure outcomes to insure equality goals.<sup>362</sup> The importance of data does not counsel delay in implementing the developmental equality model but does underscore its significance lest the model be domesticated, ignored, or hijacked.<sup>363</sup>

Second, the principle of developmental equality might be used for a litigation strategy grounded in existing statutory mechanisms to dismantle developmental barriers and build supportive systems. One suggestive litigation strategy is the lawsuit brought by the Public Counsel Law Center against the Compton School District in mid-2015.<sup>364</sup> The Compton lawsuit, a class action brought on behalf of students and teachers in Compton, California, uses data and studies from neuroscience and developmental research arising from the Adverse Childhood Experiences (“ACEs”) study.<sup>365</sup> Brought under disability statutes, the Americans with Disabilities Act, and section 504 of the Rehabilitation Act, the lawsuit alleges that the characteristics of the school district, a high poverty neighborhood with all the associated ills of high concentrations of poverty, generate a disproportionate number of students’ trauma or complex trauma.<sup>366</sup> Based on the ACEs research, trauma generates short and long term responses that interfere with learning, and therefore it is alleged to constitute a disability under the terms of the statutes.<sup>367</sup> The suit claims that the conditions present in the district and their known impact on children require that the district accommodate these widespread disabilities by engaging in trauma-informed practices system-wide, K-12, including training all teachers and staff in the use of such methods, in order to provide students with

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362. See, e.g., Brad Parks, *How to Fix America’s Mass Incarceration Problem*, N.Y. POST (Nov. 1, 2015, 6:00 AM), <http://nypost.com/2015/11/01/how-to-fix-americas-mass-incarceration-problem>.

363. See generally LISA GUIBOND ET AL., NAT’L CTR. FOR FAIR & OPEN TESTING, NCLB’S LOST DECADE FOR EDUCATIONAL PROGRESS: WHAT CAN WE LEARN FROM THIS POLICY FAILURE? (2012), [http://fairtest.org/sites/default/files/NCLB\\_Report\\_Final\\_Layout.pdf](http://fairtest.org/sites/default/files/NCLB_Report_Final_Layout.pdf).

364. P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1126 (C.D. Cal. 2015); see also *Home*, *supra* note 21. A motion to dismiss the case was denied on September 29, 2015. *Compton Unified Sch. Dist.*, 135 F. Supp. 3d at 1126. For my extended analysis of the Compton case and a critical look at the ACEs framework, see Dowd, *supra* note 15 (manuscript at 23-28).

365. *Compton Unified Sch. Dist.*, 135 F. Supp. 3d at 1130-31; see also Dowd, *supra* note 15 (manuscript at 23-28); *Home*, *supra* note 21.

366. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (2012); Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012); *Compton Unified Sch. Dist.*, 135 F. Supp. 3d at 1131.

367. *Compton Unified Sch. Dist.*, 135 F. Supp. 3d at 1130-32.

the education they deserve by fostering resilience rather than causing and exacerbating harm.<sup>368</sup>

This is an innovative and groundbreaking lawsuit that seeks help and support for students harmed by a web of systemic factors exacerbated by the structural policies and practices of the school system. This litigation may begin the process of dismantling developmental barriers by attempting system-wide institutional and policy changes. Its strongest potential might be to generate changes in other school districts who wish to avoid litigation, perhaps generating funding requests that lead to legislative change. Nevertheless, as innovative and radical as the Compton suit is, the lawsuit is limited. The litigators have used what is available to remedy the problems faced by these students, which secondarily traumatizes teachers. While the remedy sought is indeed important to address the stresses and harm to the development of the children in the district, it does not target the harms themselves or the extent to which state action (or inaction) creates those harms. It is limited, even if ultimately most successful, to structural change in the school system that at best is reactive rather than proactive, as it does not reach other structures or systems. It also carries the downside of labelling kids as “disabled,” which too easily can lead to marginalizing and blaming the kids themselves, their parents, or their communities for school difficulties or failure.<sup>369</sup> Whether these negatives of the Compton lawsuit outweigh the positives of its potential to generate structural change in the school district is a difficult question.<sup>370</sup>

A more challenging litigation strategy might consider constitutional litigation. The blatant and radically negative role of the state (federal, state, and local government) with respect to Black boys, and other groups of children, is so profound that it suggests an argument that the state violates basic constitutional rights by placing developmental

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368. *See id.*

369. On imperfect support of disabled children, see Yael Cannon et al., *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Children with Social, Emotional, and Behavioral Challenges*, 41 *FORDHAM URB. L.J.* 403, 412-25 (2013); Alex J. Hurder, *Left Behind with No “IDEA”*: *Children with Disabilities Without Means*, 34 *B.C. J.L. & SOC. JUST.* 283, 295-300 (2014); Jennifer Rosen Valverde, *A Poor Idea: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children with Disabilities in the Third Circuit*, 41 *FORDHAM URB. L.J.* 599, 605-24 (2013); and Mark C. Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 41 *J.L. & EDUC.* 95, 97-100 (2012).

370. Another use of existing statutory mechanisms might be to utilize developmental equality as a principle for the distribution of federal funds. So, for example, federal funding for key structural frameworks (welfare, education, and juvenile justice) might be tied to implementation of developmental equality goals. We might reorient systems based on the funneling of funding to achieve developmental equality and demand outcomes that achieve positive outcomes based on developmental equality metrics.

hurdles in the way of identifiable groups of children. Dismantling barriers to developmental equality might be articulated under a theory of children's rights under equal protection, substantive due process, or both. The potential for a robust children's rights analysis exists without the necessity of challenging entrenched doctrine, although the recognition of new fundamental rights or equality rights would doubtless generate resistance similar to that faced by any reframing or changed understanding of constitutional interpretation.<sup>371</sup> Children's rights are uncharted and undeveloped territory in constitutional law, but that very nebulousness, combined with threads of recognition of a doctrine of children's rights, including some sensitivity to developmental factors, may suggest room for doctrinal development.<sup>372</sup> To the extent this suggests positive rights, beyond dismantling barriers and challenges, this is likely to generate resistance as well, given the view by many that our Constitution is only one of negative rights.<sup>373</sup> Yet, the meaning of equality for children, and their special dependency on the systems of society to achieve their developmental potential, arguably generates such obligations, parallel to those recognized internationally by other countries under the U.N. Convention on the Rights of the Child.<sup>374</sup>

Alternatively, developmental equality might require a challenge to the inadequacies of constitutional equality doctrine under equal protection. Such a challenge might be based on incorporating the robust scholarship on implicit cognitive bias and stereotyping to reframe the definition of intent; recognizing discrimination based on patterns of disparate impact as essential to achieve the constitutional design and meaning of equality; and disavowing the principle of color blindness,

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371. Dismantling existing developmental barriers within the educational system, for example, would depend upon an argument that leaving them in place violates the core principles of *Palmore* and *Brown* that equality requires that the state not reinforce or produce inequality. See *supra* note 132 and accompanying text. Challenging the juvenile justice system and policing practices might use a developmental equality argument to expand developmental principles that have emerged in juvenile justice cases.

372. For example, the recognition of developmental principles in a range of cases is one of those threads. See *supra* notes 20-27 and accompanying text.

373. See *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 194-203 (1989); see also *id.* at 203-04 (Brennan, J., dissenting).

374. See Dowd, *supra* note 10. The United States is the only nation that has not ratified the UNCRC, but a coalition of sponsors has suggested a U.S. Children's Bill of Rights that closely follows the principles of the UNCRC. See Madeline Daniels, *120+ Advocacy Groups Endorse Children's Bill of Rights*, CAMPAIGN FOR CHILD. (Oct. 28, 2015), <https://campaignforchildren.org/news/press-release/120-advocacy-groups-endorse-childrens-bill-of-rights>. Also, it essentially would be overruling *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Education as a fundamental right is clearly suggested by the language in *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Plyler v. Doe*, 457 U.S. 202 (1982). This might open the door to establishing other foundational children's rights in the poverty, child welfare, and juvenile justice systems.

which so often has only reinforced white privilege, in favor of embracing color consciousness and the value of racial diversity as the hallmarks of equality.<sup>375</sup> Such a constitutional strategy seems daunting, which may counsel against it. But, it may be useful to remind ourselves that alternative constitutional interpretations that recognize precisely such interpretations of equal protection, exist in robust constitutional dissents that outline a very different constitutional conception of equality.<sup>376</sup> In addition, it might be argued that the recent *Obergefell v. Hodges*<sup>377</sup> decision suggests the possibility of a doctrinal opening to positive rights.<sup>378</sup> Reframed equality analysis could bring a vast range of law and policy under scrutiny.<sup>379</sup> It might be argued that, indeed, it is time for exactly that to happen and to start with children and youth.

Finally, litigation may not be the preferable, or the only, route to developmental equality. Given systemic structural and cultural elements exposed by the developmental equality model, new policy approaches may be more fruitful than any litigation strategy. The theoretical orientation of any proposed new policies will be critical. Among the theoretical possibilities, two of the most promising are the combination of vulnerability theory and identities theories.<sup>380</sup> Vulnerability theory argues for the universality of vulnerability, and requires the state not

375. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“The white race deems itself to be the dominant race in this country. And, so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”).

376. See, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612, 2632-52 (2013) (Ginsburg, J., dissenting); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803-76 (2007) (Breyer, J., dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528-61 (1989) (Marshall, J., dissenting); *McCleskey v. Kemp*, 481 U.S. 279, 320-45 (1987) (Brennan, J., dissenting); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 281-88 (1979) (Marshall, J., dissenting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387-402 (1978) (Marshall, J., dissenting); *Washington v. Davis*, 426 U.S. 229, 256-70 (1976) (Brennan, J., dissenting); *Palmer v. Thompson*, 403 U.S. 217, 231-40 (1971) (Douglas, J., dissenting); *United States v. Guest*, 383 U.S. 745, 761-62 (1966) (Clark, J., concurring); *id.* at 774-86 (Brennan, J., concurring in part and dissenting in part); *Korematsu v. United States*, 323 U.S. 214, 233-42 (1944) (Murphy, J., dissenting); *id.* at 242-48 (Jackson, J., dissenting); *The Civil Rights Cases*, 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting); *The Slaughter-House Cases*, 83 U.S. 36, 83-111 (1872) (Field, J., dissenting).

377. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

378. See *id.* at 2620 (Roberts, J., dissenting); *id.* at 2640-43 (Alito, J., dissenting).

379. See *Washington*, 426 U.S. at 248 (“A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average Black than to the more affluent white.”).

380. Dowd, *supra* note 22, at 38-45, 59-61.

only be responsive, but fair, in providing necessary support to its citizens and in not creating unfair barriers among its citizens.<sup>381</sup> Martha Fineman, the foremost advocate for vulnerability theory, argues that equality is best served by attending to vulnerability, particularly considering the limitations of contemporary equality analysis in constitutional law.<sup>382</sup> Identities theories, including critical race theory, multidimensional masculinities theory, and feminist theory, sustain our focus on race, gender, and class on intersectionality and the necessity of a structural and cultural focus.<sup>383</sup> I remain convinced that paying attention to identities are central to inequalities and to achieving equality.<sup>384</sup> Recent work by Frank Rudy Cooper articulates this position as well.<sup>385</sup> While acknowledging the value of vulnerability theory, Cooper is skeptical about using vulnerability analysis alone, concerned that it could sustain subordination rather than dismantle it.<sup>386</sup> Cooper argues that identity is unavoidable: “[I]dentities, while socially constructed, are materially crucial.”<sup>387</sup> Consistent with scholars who have identified white favoritism as co-constitutive with anti-Black bias, Cooper argues that the conferral of privilege along identity lines must be incorporated with vulnerability analysis.<sup>388</sup> The interaction of vulnerability and identities theories are promising theoretical frameworks for the conceptualization and implementation of developmental equality policies. I mean here not to foreclose other important theoretical insights but to emphasize the importance of theory to policy and identify these two frameworks as ones I see as particularly attuned to the lens of developmental equality.

Beyond the importance of theoretical underpinnings is the need for innovative policies. This is particularly important given the history of the state acting in a heavy-handed, intrusive, and subordinating manner in communities of color and poor communities.<sup>389</sup> One example of a different kind of approach might be to borrow from the teachings of social investment and social determinants.<sup>390</sup> In health care work by Rachel Rebouché and Scott Burris, social determinants analysis

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381. See Fineman, *supra* note 22, at 12-15, 19-22.

382. *Id.* at 8-9, 21.

383. Dowd, *supra* note 22, at 40-44, 59-61.

384. *Id.* at 59-61.

385. See Cooper, *supra* note 22, at 1369-70, 1375.

386. *Id.* at 1363-67.

387. *Id.* at 1347.

388. *Id.* at 1374-78.

389. ROBERTS, *supra* note 328.

390. See, e.g., Rachel Rebouché & Scott Burris, *The Social Determinants of Health*, in OXFORD HANDBOOK OF U.S. HEALTHCARE LAW (I. Glenn Cohen et al. eds., 2016), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199366521.001.0001/oxfordhb-9780199366521-e-51?rskey=a2q5XR&result=1>.

identifies the importance of social conditions and resources to health outcomes—a more powerful factor than genetic makeup or individual choices.<sup>391</sup> Solutions or policies focus on changing the social determinants in a way that supports health care, and healthy lives, for all.<sup>392</sup> Law plays a vital role in this approach, constructing the focus of policy (on social determinants rather than on individuals, families, or communities), and including all complex systems in play.<sup>393</sup> Similarly, such an approach would define different consequences when developmental equality analysis exposes the complicit or primary role of the state in sustaining social determinants that yield inequalities. It would require not only *elimination* of the barrier where it manifests as state involvement in replicating inequality and creating developmental hurdles but also *facilitating* positive support. By identifying the social determinants of inequality, it might attend to more effective ways to reverse those outcomes and sustain the focus on structural change. Monitoring such policies might function much like performance criteria in health care,<sup>394</sup> in addition to providing resources to those who can control and use those resources. Community-based, bottom-up strategies of empowerment to take advantage of familial and community strengths are more likely to be a part of a social determinants approach. Considering innovative policies does not stop with this approach but suggests rather that others should be considered as well, including those suggested by comparative analysis.

Every child should be supported in achieving their maximum and positive development because of the inherent value of children (and their dependence on adults). Well-functioning individuals confer social and economic benefits for everyone, and the equality of all is inextricably linked to the equality of each one. The developmental equality model is a place to start, a foundation for strategy, among many needed to move toward the vision of racial and gender equality that is our unrealized promise to all.

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391. *Id.* at 13 (“Evidence demonstrates that social determinants of health are more important than access to medical care or even one’s genetic makeup.”).

392. *See id.* at 9-13.

393. *Id.* at 6-9.

394. *See, e.g., About CMS*, CMS.GOV, <https://www.cms.gov/about-cms/about-cms.html> (last visited Nov. 26, 2016); *About NCQA*, NCQA, <http://www.ncqa.org/about-ncqa> (last visited Nov. 26, 2016); *Facts About Joint Commission Standards*, JOINT COMM’N (Mar. 25, 2016), [https://www.jointcommission.org/facts\\_about\\_joint\\_commission\\_accreditation\\_standards](https://www.jointcommission.org/facts_about_joint_commission_accreditation_standards). Licensing, accreditation, standards of care by area of practice, professional standards, and region are all collectively used to measure the quality of care and quality of outcomes. Although not without their imperfections, these standards serve the goal of positive outcomes for patients, and that only a well performing system deserves support.