

BLACK LIVES MATTER: TRAYVON MARTIN, THE ABOLITION OF JUVENILE JUSTICE AND #BLACKYOUTHMATTER

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Seventeen-year-old Trayvon Martin’s 2012 murder and the 2013 acquittal of his killer triggered the #BlackLivesMatter movement.¹ In the evolution of calls for racial justice in the wake of the murder of George Floyd, it is essential that the focus not be unduly narrowed to police as the sole source of harm, to men as the only victims, or to adults as the only targets. The Black Lives Matter movement reminds us that the threat to Black lives is not limited to police, but rather is connected to private citizens as well; is not limited to the criminal justice system, but to the web of systems implicated by systemic racism; and is not limited to adult men, but also includes women and girls, children and youth, even toddlers and babies.² Trayvon Martin’s legacy underscores the importance of

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1. Jonathan Capehart, *From Trayvon Martin to “BlacklivesMatter,”* WASH. POST, Feb. 27, 2015, <https://www.washingtonpost.com/blogs/post-partisan/wp/2015/02/27/from-trayvon-martin-to-black-lives-matter/> [https://perma.cc/KZC5-9598]. George Zimmerman killed Trayvon Martin February 26, 2012 and in July 2013, Zimmerman was found not guilty. After the verdict, Alicia Garza, Patrisse Collors and Opal Tometi created #BlackLivesMatter in response to the acquittal. *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> [https://perma.cc/6SZS-GFMN] (last visited Nov. 1, 2020). The organization is now global. Black Lives Matter initially led demonstrations against private and public violence at the deaths of Michael Brown in Ferguson, Missouri, August 9, 2014; Tamir Rice on November 23, 2014; and Eric Garner, July 17, 2014. For the story of the organization and its current work see Patrisse Cullors, *Black Lives Matter Began After Trayvon Martin’s Death. Ferguson Showed US Staying Power*, NBC NEWS, Jan. 1, 2020, <https://www.nbcnews.com/think/opinion/black-lives-matter-began-after-trayvon-martin-s-death-ferguson-ncna1106651>, including discussion of other groups who have mobilized as well.

2. For an overview of the web of systems that intersect to create inequality, see CHILDREN’S DEFENSE FUND, THE STATE OF AMERICA’S CHILDREN 2020 (2020), <https://www.childrensdefense.org/wp-content/uploads/2020/02/The-State-Of-Americas-Children-2020.pdf> [https://perma.cc/RZ9Q-CB8N]; see also Nancy E. Dowd, *Children’s Equality Rights: Every Child’s Right to Develop to Their Full Capacity*, 41 CARDOZO L. REV. 1367, 1369 (2020); NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR (2018) (examining interlocking systems through the lens of the life course of Black boys); BARBARA

remembering and focusing on youth and understanding that the threats posed by racism come not only in the form of lethal private and public violence, but also lesser forms of harm including official incarceration or oversight and unofficial, private, harassment, discrimination, and lack of support. The issues of children and youth are linked to those of adults but also involve unique situations and needs.

In this Essay, I focus on abolition³ of the juvenile justice system, including the virtual elimination of incarceration; the dismantling of the existing juvenile justice (or injustice) system; breaking the school to prison pipeline and the criminalization of school discipline; creating social services with the goal of problem-solving and support of children and youth; teaching skills of restorative justice to support the development and conflict resolution skills of every child; comprehensively surrounding every child, every youth with the means and resources to succeed rather than systems designed to make them fail; and addressing the disproportionate negative contacts between schools, police, teachers, administrators, judges, and other system actors, by eliminating bias and fostering affirmative multidimensional, multiracial,

BENNETT WOODHOUSE, *THE ECOLOGY OF CHILDHOOD: HOW OUR CHANGING WORLD THREATENS CHILDREN'S RIGHTS* (2020). For the particular application of inequalities to women and girls of color, see *#SayHerName Campaign*, AFRICAN AM. POL'Y FORUM, <https://aapf.org/sayhername> [<https://perma.cc/Z8UG-4765>] (last visited Nov. 1, 2020); KIMBERLE WILLIAMS CRENSHAW WITH PRISCILLA OCEN & JYOTI NANDA, *BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED* (2015), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf [<https://perma.cc/UAA2-H9LN>]. On inequalities at birth, see Susan Nittrouer, *Ending the Lottery*, 71 FLA. L. REV. FORUM 132 (2019); JAMILA TAYLOR, CRISTINA NOVOA, KATIE HAMM & SHILPA PHADKE, *ELIMINATING RACIAL DISPARITIES IN MATERNAL AND INFANT MORTALITY* (May 2, 2019), <https://www.americanprogress.org/issues/women/reports/2019/05/02/469186/eliminating-racial-disparities-maternal-infant-mortality/> [<https://perma.cc/PW9B-S7HP>].

Even very young children of color are subject to discipline and policing. For example, an 8-year-old was arrested at school after having a tantrum. Jaelyn Peiser, *"You're going to jail": Body Cam Video Shows an 8-Year-Old Florida Boy Arrested at School*, WASH. POST, Aug. 11, 2020, <https://www.washingtonpost.com/nation/2020/08/11/video-florida-boy-arrested/> [<https://perma.cc/LN6A-JKQ3>]; A child as young as 4 has been arrested in Florida. See Tonya Alanez, *The Youngest Kid Ever Arrested in Florida was a 4-Year-Old*, ORLANDO SUN SENTINEL, Jan. 23, 2016, <https://www.sun-sentinel.com/news/florida/fl-children-arrested-in-florida-20160122-story.html> [<https://perma.cc/DX7C-MA4C>]. Differentials in daycare discipline are widespread. Bill Hathaway, *Implicit Bias May Help Explain High Preschool Expulsion Rates for Black Children*, YALE NEWS (Sept. 27, 2016), <https://news.yale.edu/2016/09/27/implicit-bias-may-explain-high-preschool-expulsion-rates-black-children> [<https://perma.cc/RR2N-6FLC>].

3. I draw inspiration and content from Dorothy E. Roberts, *Forward: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019), and a closer read of the historical concept of abolition, including the unfinished process of reparations and repair with respect to harms as well as the historic failure to affirmatively support equality, dignity, and equal humanity that continues to infect multiple systems and results in ongoing inequality.

multicultural humanity. The goal of abolition is not simply to dismantle the structure and culture of harm, but also to replace harm with support.

The current juvenile justice system is a failure for virtually all who come in contact with it. It does not serve the well-being of the children and youth committed to its care, reflected particularly in high rates of recidivism, subsequent involvement as adults with the criminal justice system, and negative educational and employment outcomes. It does not rehabilitate or correct, nor does it problem solve, and it does not increase societal well-being or safety.

Overwhelmingly, system failure affects boys, especially boys of color.⁴ The failure is exacerbated for girls, doubly disadvantaged by a system even less well designed for them and again filled primarily with girls of color.⁵

The call for abolition and the reorientation of resources currently devoted to policies and practices that neither serve the well-being of youth nor the public safety of the community must be accompanied not only with a redistribution of funds but with a significant increase in funds to serve the needs of children and youth. Abolition of the existing system of juvenile justice must be paired with the creation of services and systems to support families, children, and youth. In the following two sections, I first articulate the justification for abolition of the current system. Second, I suggest the framework of support to replace the existing juvenile justice system.

4. On systemic failures in the juvenile justice system, see NANCY E. DOWD, JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 2–3 (Nancy E. Dowd ed., 2011); Shay Bilchik, *Redefining the Footprint of Juvenile Justice in America*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 21, 21–23 (Nancy E. Dowd ed., 2011). On the disproportionate impact of the juvenile justice system on boys of color, see CHILDREN’S DEFENSE FUND, *supra* note 2, at 28–29; Joshua Rovner, *Disproportionate Minority Contact in the Juvenile Justice System*, SENTENCING PROJECT (May 1, 2014), <https://www.sentencingproject.org/publications/disproportionate-minority-contact-in-the-juvenile-justice-system/> [<https://perma.cc/S536-ZQ8X>]; Dowd, *Children’s Equality Rights*, *supra* note 2, at 1374 n.24, 1375 n.25. On patterns of recidivism, see the research compiled in MST Services, *Do We Know the Full Extent of Juvenile Recidivism?* (Nov. 1, 2018), <https://info.mstservices.com/blog/juvenile-recidivism-rates> [<https://perma.cc/V5A5-A6NY>]; The Annie E. Casey Foundation, *No Place for Kids: The Case for Reducing Juvenile Incarceration* (2011), <https://www.aecf.org/resources/no-place-for-kids-full-report/> [<https://perma.cc/J3XK-PWAT>].

5. On girl offenders in the juvenile justice system, see Danielle E. Parrish, *Achieving Justice for Girls in the Juvenile Justice System*, 65 SOCIAL WORK 149–58 (April 2020); SAMANTHA EHLMANN, NINA HYLAND & CHARLES PUZZANCHERA, GIRLS IN THE JUVENILE JUSTICE SYSTEM, U.S. DEP’T OF JUST. (2019), <https://ojdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251486.pdf> [<https://perma.cc/QK9K-WMMC>]; Sara Goodkind, *Gender-Specific Services in the Juvenile Justice System: A Critical Examination*, 20 AFFILIA 52 (2005); Lawanda Ravoira & Vanessa Patinao, *Girl Matters: Unfinished Work*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 160–61 (Nancy E. Dowd ed., 2011).

I. DISMANTLING JUVENILE JUSTICE: NOT REFORM BUT “BURNING DOWN THE HOUSE”⁶

Calls for abolition of the adult criminal justice system, including the system of mass incarceration and the defunding and overhaul of policing, must be matched with a similar elimination of the current system of juvenile justice, including the virtual elimination of incarceration in all forms used to hold children and youth.⁷ Not only must incarceration in its many forms within the youth and adult criminal justice systems be eliminated, but also the confinement of children and youth in immigration facilities.⁸

Youth incarceration mirrors the high rates of confinement, racial and ethnic disproportionality, and failed outcomes of the adult system.⁹ A

6. See NELL BERNSTEIN, *BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON* (2014).

7. The exceptions where incarceration might be necessary are the rare circumstances where confinement is necessary for the safety of the community or of the youth themselves, and then only under therapeutic conditions, not punitive conditions. On abolition of incarceration except when absolutely necessary, see generally James Bell, *Child Well Being: Toward a Fair and Equitable Public Safety Strategy for the New Century*, in *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* (Nancy E. Dowd ed., 2015); Peter Leone, *Doing Things Differently: Education as a Vehicle for Youth Transformation and Finland as a Model for Juvenile Justice Reform*, in *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* (Nancy E. Dowd ed., 2015); Ursula Kilkelly, *Youth Courts and Children’s Rights: The Irish Experience*, 8 *YOUTH JUSTICE* 39, 40 (2008); Ursula Kilkelly, *Reform of Youth Justice: The ‘New’ Children Act 2001*, *IRISH J. OF CRIM. L.* Part 2 (2007).

8. For reports on immigration youth detention including very young children, and the impact of such detention on children, see David R. Katner, *Trump’s Policy of Putting Kids in Cages: Six Dead, Thousands Separated from Parents, Making America Great Again? Draft on file with author*; Dara Lind, *The Trump Administration’s Separation of Families at the Border, Explained*, *VOX* (Aug. 14, 2018, 1:29 PM), <https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents> [<https://perma.cc/8MA6-BBMY>]; All Things Considered, *Whistleblowers Warn of Harmful Conditions for Children in Migrant Detention Centers*, *NAT’L PUB. RADIO* (Dec. 8, 2018, 5:32 PM), <https://www.npr.org/2018/12/08/674327419/whistleblowers-warn-of-harmful-conditions-for-children-in-migrant-detention-cent> [<https://perma.cc/AVR7-DA73>]; Sheri Fink & Caitlin Dickerson, *Border Patrol Facilities Put Detainees with Medical Conditions at Risk*, *N.Y. TIMES*, Mar. 5, 2019, <https://www.nytimes.com/2019/03/05/us/border-patrol-deaths-migrant-children.html> [<https://perma.cc/Y7NT-M4ZC>]. For a statement on the adverse impact of immigration detention on child development, see Jack P. Shonkoff, *Statement by Center Director Jack P. Shonkoff, M.D. on Separation of Families* (June 20, 2018), <https://developingchild.harvard.edu/about/press/shonkoff-statement-separating-families/> [<https://perma.cc/NX72-TM6A>].

9. See the data collected in JOSHUA ROVNER, *THE SENTENCING PROJECT, DECLINES IN YOUTH COMMITMENTS AND FACILITIES IN THE 21ST CENTURY* (2015), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Youth-Commitments-and-Facilities.pdf> [<https://perma.cc/572Y-SGWJ>] (35,659 youth are incarcerated, down from 76,262 in 2000, and arrests are down 39%); see also WENDY SAWYER, *PRISON POL’Y INITIATIVE, YOUTH CONFINEMENT: THE WHOLE PIE 2019* (2019), <https://www.prisonpolicy.org/reports/youth2019.html> [<https://perma.cc/4QTD->

substantial percentage of youth are committed to adult facilities, so, to some degree, the two systems overlap.¹⁰ Elimination of youth incarceration also must include the abolition of the practice of transferring youth to adult prosecution and incarceration.¹¹

The rate of youth incarceration has dropped 50–60% since 2000 as a result of persistent efforts of advocates, the failed outcomes of the system, the high costs of incarceration, the value and success rates of other options, and other factors.¹² This substantial drop has occurred in nearly all states, with some states achieving a two-thirds drop in their youth incarceration rate.¹³ Overall, one-third of juvenile justice facilities have been closed.¹⁴ Significantly, this drop in confinement has come at no cost to public safety.¹⁵ Indeed, to the extent the system acts only to confine and punish, rather than to accomplish any developmental or rehabilitative purpose, this is not surprising. Incarceration has served to increase the risk of recidivism, not to decrease that risk, and has contributed to adverse public and personal outcomes rather than to youth well-being and greater public safety.¹⁶

While this reduction in incarceration is meaningful, it is far from enough for several reasons. First, this huge drop must be placed in context; it is a reduction from an excessive, massive rate of incarceration.¹⁷ Even with this substantial decrease, *the rate of youth*

KKPT]. On the injustice of the adult system see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

10. By one estimate there are 4,000 youth-under-18 confined in adult prisons and jails. SAWYER, *supra* note 9.

11. On the transfer of juvenile cases to the adult criminal justice system, see JEREE THOMAS, CAMPAIGN FOR YOUTH JUST., *YOUTH TRANSFER: THE IMPORTANCE OF INDIVIDUALIZED FACTOR REVIEW* (2018), http://www.campaignforyouthjustice.org/images/20180314_CFYJ_Youth_Transfer_Brief.pdf [<https://perma.cc/R4LN-7TWD>] (see especially page 4, recommendation made in 2012 by task force of state attorneys-general to whenever possible, prosecute in the juvenile justice system, not the adult system; see also data on disproportionality of transfer by race, at page 6); see also JAMES AUSTIN ET AL., U.S. DEP'T OF JUST., *JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT* (2000), <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf> [<https://perma.cc/2DZ5-EGPP>]; EDWARD P. MULVEY & CAROL A. SCHUBERT, U.S. DEP'T OF JUST., *TRANSFER OF JUVENILES TO ADULT COURT: EFFECTS OF A BROAD POLICY IN ONE COURT* (2012), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/232932.pdf>.

12. For data on the drop in the incarceration rate, see ROVNER, *supra* note 9, at 1.

13. *Id.* at 2.

14. *Id.* at 6.

15. *Id.* at 1.

16. See recidivism data MST Services, *supra* note 4; transfer data THOMAS, *supra* note 11, at 4; see also mass incarceration data Bell, *supra* note 7.

17. THE SENTENCING PROJECT, *FACT SHEET: TRENDS IN U.S. CORRECTIONS 2* (2020), <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/> [<https://perma.cc/PJ5X-T4UV>] (discussing how the rate of incarceration increased 500% in the past 40 years, by one estimate, with 2.2 million people currently in the nations prisons and jails; for youth trends see page 6).

*incarceration in the United States still remains higher than any other country in the world, mirroring the adult incarceration rate, also the highest in the world.*¹⁸ Thus, although the U.S. figures have dropped dramatically, from 355 per 1000 in 1999 to 138 per 1000 in 2017, the U.S. still leads the world with the highest rate of incarceration.¹⁹

According to 2019 figures, on any given day, roughly 48,000 youth are confined in detention centers, long-term facilities, adult prisons and jails, residential treatment, group homes, and other settings.²⁰ Some children are as young as age twelve or younger; the largest proportion of children is teenagers age sixteen or older.²¹ On a daily basis, 1,995 children are arrested each and every day.²² Those arrests, which include arrests at school as well as on the streets and in homes, can include children as young as six.²³

Second, the disproportionality pattern within the rate of incarceration on the basis of race, ethnicity, and gender has not budged.²⁴ *Rather than using policies of reduction to also attack racial and ethnic disproportionality, especially for Black boys and youth who experience rising disproportionality as they get deeper into the system, the racial pattern has been perpetuated.*²⁵ If there has been one shift in this time frame, it is the steady decline in numbers of girls in a system traditionally framed for, and populated by, boys.²⁶ Yet among girls, the racial pattern of disproportionality has been sustained as well.²⁷

Third, *the vast majority of children and youth in the system are not serious offenders.* Only about one fourth of those incarcerated have

18. See PETER WAGNER & WANDA BERTRAM, PRISON POL'Y INITIATIVE, WHAT PERCENT OF THE U.S. IS INCARCERATED?" (AND OTHER WAYS TO MEASURE MASS INCARCERATION) (explaining that the U.S. has less than 5% of the world's population, however the U.S. also has 20% of the global population of incarcerated people).

19. ANNIE E. CASEY FOUND., FEWER YOUNG PEOPLE ARE RESIDING IN JUVENILE JUSTICE FACILITIES (2020), <https://datacenter.kidscount.org/updates/show/258-fewer-residing-in-juvenile-justice-facilities> [<https://perma.cc/A5LD-5BVS>]; see WORLD REPORT, HUMAN RIGHTS WATCH (2016), www.hrw.org; see also ANNIE E. CASEY FOUND., KIDS COUNT DATA CENTER (2017), www.datacenter.kidscount.org [<https://perma.cc/48LD-28HK>]; ACLU, AMERICA'S ADDICTION TO JUVENILE INCARCERATION: STATE BY STATE, <https://www.aclu.org/issues/juvenile-justice/youth-incarceration/americas-addiction-juvenile-incarceration-state-state> [<https://perma.cc/8CL3-LFUN>] (discussing the incarceration rate state by state).

20. SAWYER, *supra* note 9.

21. *Id.*

22. CHILDREN'S DEFENSE FUND, *supra* note 2, at 28.

23. *Id.*

24. SAWYER, *supra* note 9.

25. See *id.*

26. Samantha Ehrmann et al., U.S. Dep't of Just., Girls in the Juvenile Justice System (2019), <https://ojdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251486.pdf> [<https://perma.cc/QN42-TQQW>].

27. *Id.*

committed violent offenses.²⁸ And it should be remembered that those held in immigration detention centers have committed no offense that requires criminal detention.²⁹

The rationale for ending incarceration for all but the small minority of kids who are a risk to themselves or others is two-fold. First, incarceration is developmentally unsound and promotes recidivism rather than successful development.³⁰ Second, the configuration of who is in the system, and the absence of explanations other than bias for those patterns, points to the issue of who is there and why and highlights issues of systemic racism in the streets, schools, and within the juvenile justice system.³¹ The system is fatally flawed because it is unfair and unjust.

Developmentally the largest group in the juvenile justice system, teenagers, especially fifteen through seventeen-year-olds, are behaving like adolescents—taking risks, not exercising good judgment, rebelling against authority and rules, and finding themselves as individuals distinct from their parents.³² They have not finished developing neurologically while at the same time they have matured sufficiently to think and act independently, although not always making the best decisions or behaving according to social norms.³³ A large proportion of adolescents engage in behavior that breaks the rules of criminal law, particularly the laws relating to sex and substance use (legal or illegal substances), as well as assault and minor property crimes.³⁴ An even more substantial group breaks the particular rules that exclusively govern the lives of minors, so-called status offences like the requirement that minors be “governable” by their parents.³⁵ Rule-breaking, even antisocial behavior, is common among adolescents.³⁶ The most successful way to “cure” or problem-solve difficult or defiant adolescent behavior is simply waiting for youth to grow older; they mature and outgrow it, as evidenced by declining rates of offending at age seventeen that continue to drop dramatically as youths age during their twenties.³⁷ This developmental pattern suggests that

28. WENDY SAWYER & PETER WAGNER, PRISON POL’Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/B4UC-JCXS>].

29. See Lind, *supra* note 8.

30. DOWD, *supra* note 4, at 72.

31. See *id.*, at 3–4.

32. See DOWD, *supra* note 4, at 3; see also ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 52–53 (2008); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1402 (2019).

33. See DOWD, *supra* note 4, at 2–3.

34. *Id.* at 3.

35. *Id.* at 2.

36. See SCOTT & STEINBERG, *supra* note 32, at 39, 51.

37. *Id.* at 53.

punitive responses are categorically at odds with these developmental realities and undermine the ability of youth to transition to positive adulthood and citizenship with gains, not losses, to public safety and positive contributions to their communities. The juvenile justice system as currently structured is *not* developmentally informed, *disrupts* positive development, and fails to solve the problems of kids within the system. In addition, because the system imposes collateral consequences on education and employment, it treats offending as a marker of future failure and criminal activity, rather than as a typical deviation or normal developmental path (or the bad luck of being caught doing exactly what thousands of other teenagers do without detection).³⁸ Rather than redirect adolescents toward positive development, the juvenile justice system prepares kids for the adult criminal justice system.

The strong pattern of racial and ethnic disparities—and the skewing of the system toward a toxic structure for its intended subjects, boys (with further negative consequences for girls and for LGBT youth)—is the second justification for abolition. The system is not fair. Its negative consequences and impacts are meted out disproportionately to children and youth of color. Moreover, disproportionality grows as a child gets deeper into the system; the most serious consequences reflect the highest rate of disproportionality:

The kids who are arrested and who move into the juvenile justice system disproportionately are children of color, and boys. This is visible every day in juvenile courts. Black youth are 16 percent of the population aged ten to seventeen but constitute 52 percent of juvenile violent crime index arrest rates, and 33 percent of juvenile property crime index arrest rates. Children of color are disproportionate to their percentage of the population in every stage of the juvenile justice system: arrests, formal charging instead of diversion, transfer to the adult system for charging and prosecution, conviction, and residential placement.³⁹

Girls' presence in the system has been rising dramatically—they now constitute approximately thirty percent of arrests—and disproportionately these are girls of color.⁴⁰ Another rising group in the system are LGBTQ youth, estimated at approximately thirteen percent of

38. 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* (Nancy E. Dowd ed., 2015).

39. DOWD, *JUSTICE FOR KIDS*, *supra* note 4, at 3–4; *see also* CHILDREN'S DEFENSE FUND, *supra* note 2; Rovner, *supra* note 4; and Dowd, *supra* note 4 (discussing data on disproportionality).

40. *See* Parrish, *supra* note 5; EHRMANN, *supra* note 5; Goodkind, *supra* note 5; and Ravoira, *supra* note 5 (data and scholarship on girls in the juvenile justice system).

the juvenile justice system population.⁴¹ Both girls and gender non-conforming youth are ill-served in a system that was not designed for them in mind, exacerbating the effects of a system poorly designed to support the boys who were assumed to be the population to be served.

Finally, the presence of COVID presents an additional reason to abolish youth incarceration to make kids safer. The immediacy of the need to deinstitutionalize kids is clear. According to a report by the American Academy of Pediatricians, there are serious unmet needs in dealing with the juvenile justice population during the pandemic.⁴² This beginning of the process of abolition could be the rationale to trigger the process of permanent abolition by eliminating youth incarceration and pursuing more successful alternatives.

The necessary abolition of the juvenile justice system is not limited to practices of confinement. Rather, it is essential to examine and eliminate the entire system and create in its place a system of support for youth that incorporates an entirely different set of goals, practices, and systemic supports. Essential aspects of the process of abolition require confronting the front end of the system, pre-incarceration, including policing and arrests, as well as practices of oversight through the probation system. It is indicative of the failure of the existing juvenile justice system that the primary recommendation of the Juvenile Justice Project at the University of Florida College of Law in its comprehensive analysis of the system in 2011 was the recommendation that kids should be kept out of the system at all costs.⁴³ To accomplish that goal, the Project recommended recasting front-end parts of the juvenile justice system to reduce the interface of kids with the system.⁴⁴

Rather than recasting or reforming the front end of the juvenile justice system, however, abolition requires elimination and replacement.⁴⁵ This must begin with policing, linking this with the adult policing debate generated in the wake of the death of George Floyd. This requires not just retraining, a reduction in the militarization of police, or a reduction in

41. *Youth in the Juvenile Justice System*, TREVOR PROJECT, <https://www.thetrevorproject.org/get-involved/juvenile-justice/> [<https://perma.cc/2QSR-X6L3>].

42. AMERICAN ACAD. OF PEDIATRICS, RESPONDING TO THE NEEDS OF YOUTH INVOLVED WITH THE JUSTICE SYSTEM DURING THE COVID-19 PANDEMIC (2020), <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/responding-to-the-needs-of-youth-involved-with-the-justice-system--during-the-covid-19-pandemic/> [<https://perma.cc/HP8R-TF4X>]. It should be noted that the AAP also has sharply criticized the practices of solitary confinement and sentences of life in prison without parole as totally inconsistent with developmental and health science regarding adolescents. *Id.*

43. DOWD, *supra* note 4, at 16.

44. *Id.* See also NANCY E. DOWD, A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM (Nancy E. Dowd, ed. 2015) (a visionary recasting of the system in the second volume arising out of the Juvenile Justice Project, collecting models for a reformulated system).

45. See Bell, *supra* note 7; Leone, *supra* note 7; Kilkelly, *supra* note 7.

police budgets, but a wholesale reorientation of what it is police do, why, and who they serve. This must include a specific rethinking of how police interact with children and youth, which must be both developmentally informed and racially informed, in the sense of positive racial interaction with children and youth, their families, and their communities.⁴⁶ The existing pattern of policing is one of subordination and control, highly disproportionate for kids of color and deadly for far too many.⁴⁷ Against a backdrop of commonplace adolescent behavior that violates both criminal and status laws, the reaction to that behavior has typically been a high volume of arrests in daily interactions and a disproportionate set of arrests for kids of color, especially Black boys.⁴⁸ There is contemporary evidence that policing of children and youth, and treating their behavior as subject to arrest, can change.⁴⁹ Along with the recent reduction of youth incarceration, there has been a significant reduction in the volume of arrests.⁵⁰ While that data may be interpreted as reflecting less criminal offending, the developmental data would suggest otherwise. The shift in arrest statistics has not been accompanied by a shift in the treatment of kids of color. The pervasive and persistent presence of racism in the system, or, perhaps more accurately, the functioning of the system as a control system for kids of color, persists.⁵¹

In addition to abolishing current policing practices and the policy of criminalization of (some) adolescents' behavior by arrest, abolishing the front-end connection between schools and the existing juvenile justice system must be part of essential reform. The "school to prison pipeline"

46. See KENNETH NUNN, *The Black Nationalist Cure to Disproportionate Minority Contact*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 4, at 135; PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (illustrated ed. 2018).

47. See VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS (2011).

48. *Id.*

49. See Nicole Karlis, *Oakland is at the Forefront of a National Movement to Abolish Police from K-12 Schools*, Salon (June 30, 2020, 11:52 PM), <https://www.salon.com/2020/06/30/oakland-is-at-the-forefront-of-a-national-movement-to-ban-police-from-k-12-schools/> [<https://perma.cc/DJR6-JK9R>]; Nicole Chavez, *A Movement to Push Police Out of Schools is Growing Nationwide. Here is Why*, CNN (June 28, 2020, 1:52 PM), <https://www.cnn.com/2020/06/28/us/police-out-of-schools-movement/index.html> [<https://perma.cc/PLF3-JTEU>]; and *Mission, DIGNITY IN SCHOOLS* (2017), www.dignityinschools.org/about-us/mission/ [<https://perma.cc/G9AH-XZK3>] (last visited Oct. 1, 2020) (advocacy group whose motto is "counselors not cops"), for discussions on the movement to abolish police in schools, which is an offshoot of calls for radical reform in policing.

50. THE SENTENCING PROJECT, *supra* note 17, at 6.

51. See Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 331 (2016) [hereinafter Nance, *Dismantling*]; Jason P. Nance, *Students, Police and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 957 (2016) [hereinafter Nance, *Students and Police*].

was constructed; it can and must be deconstructed.⁵² Not only has this pipeline criminalized school discipline, extending bad police practices into schools, but it has also reinforced racial bias against children of color by a system that refers discipline problems to criminal consequences more often for those children.⁵³ Just as the existing juvenile justice system has not benefitted kids or increased public safety, so too the criminalization of school discipline has neither benefitted kids nor made schools safer.⁵⁴ The abolition of the criminalization of school discipline is a critical step to disengage school discipline from the criminal justice system. Further steps are essential, including the reorientation of discipline around developmentally-based interventions and the teaching of dispute resolution skills, such as those at the core of school-wide restorative justice practices.⁵⁵

Another important component of abolition is the probation system. The current system in practice appears to trip up adolescents rather than support them; it ignores the developmental literature and instead imposes a draconian system of punishments with predictable negative outcomes.⁵⁶ The failure of this approach is nowhere more evident than in the number of kids confined due to probation violations for insignificant violations.⁵⁷

52. See Nance, *Dismantling*, *supra* note 51, at 324 (arguing that the school-to-prison pipeline results from academic underachievement and over-disciplining students); Nance, *Students and Police*, *supra* note 51, at 929 (arguing that the school-to-prison pipeline arose from the criminalization of school discipline).

53. See Nance, *Dismantling*, *supra* note 51, at 331; Nance, *Students and Police*, *supra* note 51, at 957.

54. See Nance, *Dismantling*, *supra* note 51, at 339, 342, 344–45; Nance, *Students and Police*, *supra* note 51, at 948; Kim, *supra* note 45, at 949.

55. In addition to the advocacy group cited in *supra* note 45, there is the restorative justice movement, Matt Davis, *Restorative Justice: Resources for Schools*, EDUTOPIA (Oct. 4, 2013), <https://www.edutopia.org/blog/restorative-justice-resources-matt-davis> [<https://perma.cc/BD3P-UZ53>]; and wraparound projects like The Brotherhood Sister Sol, a holistic, evidence-based program to support youth that has been operating for 25 years, see The Brotherhood Sister Sol, <https://www.brotherhood-sistersol.org> [<https://perma.cc/CAP8-CXUN>] (last visited Oct. 3, 2020).

56. For the operation and impact of the probation component of the juvenile justice system see Jesse Kelley, *Thousands of Youth are Incarcerated for Low-Level Status Offenses and Technical Violations. This Needs to Stop*, May 23, 2018, INSIDE SOURCES (MAY 23, 2018), <https://www.insidesources.com/thousands-youth-incarcerated-low-level-status-offenses-technical-violations-needs-stop/> [<https://perma.cc/YY29-HU7Y>]; SAWYER, *supra* note 9.

57. The Annie E. Casey Found., *Progress Accelerates for Eliminating Confinement as a Response for Juvenile Probation Violations*, THE ANNIE E. CASEY FOUND. BLOG (Feb. 6, 2019), <https://www.aecf.org/blog/progress-accelerates-for-eliminating-confinement-as-a-response-to-juvenile/> [<https://perma.cc/3JZN-7RWB>] (noting that of kids incarcerated, 23% are there for technical violations); see THE ANNIE E. CASEY FOUND., *TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT* (2018), <https://www.aecf.org/resources/transforming-juvenile-probation/> [<https://perma.cc/SW7S-3FAH>].

The identification of what is wrong with the existing juvenile justice system is not limited to incarceration, policing, arrests and probation; these parts of the system are offered here not as components requiring piecemeal, gradual reform, but rather as symptoms of systemwide failure. Abolition of the system, comprehensively defined, is what is needed.

II. REDIRECTING OUR SUPPORTS: CULTURAL AND SYSTEMIC CHANGE

Racial justice requires not only abolition but replacement; not only better systems of social, familial, and community support but requires a *substantial addition* to existing supports if we are dedicated to making #BlackYouthMatter. The system of juvenile justice must be replaced with interventions designed to support developmental success rather than lifelong failure, viewing youth issues as social and familial rather than judicial. The goal must be full developmental support for all children; not a system of correction and punishment, but of well-being and support. The ultimate replacement for death, violence, and subordination is life, affirmative support, and equality.

Existing systems that purportedly are designed to provide support to children, youth, and families have failed to provide sufficient support and, to the contrary, are frequently systems of subordination. The child welfare system, for example, is underfinanced, unsuccessful, and functions as a oversight system that disproportionately subordinates children of color and their families.⁵⁸ Beginning in pregnancy and continuing from birth through childhood, the health care system fails to provide nondiscriminatory, supportive care.⁵⁹ Healthcare disparities linked to the social determinants of health that further exacerbate health inequalities again are disproportionately suffered by children and families of color.⁶⁰ The uneven quality of child care, early childhood education, and other early childhood inputs means inequality among children is present virtually from birth, and those inequalities are exacerbated rather than equitably addressed once children begin school.⁶¹ Other systems might be added to this list, particularly housing and income

58. DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2001).

59. On health insurance, see *Health Care Coverage for Children*, CHILD TRENDS, <https://www.childtrends.org/indicators/health-care-coverage> [<https://perma.cc/E447-NHJG>] (last visited Oct. 3, 2020); on food insecurity, see CHILD FOOD INSECURITY, FEEDING AMERICA (2018), <https://www.feedingamerica.org/sites/default/files/research/map-the-meal-gap/2016/2016-map-the-meal-gap-child-food-insecurity.pdf> [<https://perma.cc/Q8GD-6S3F>]; on housing insecurity, see OFFICE OF POLICY DEV. & RESEARCH, U.S. DEPT. OF HOUS. & URBAN DEV., *PROTECTING CHILDREN FROM UNHEALTHY HOMES AND HOUSING INSTABILITY* (2014), <https://www.huduser.gov/portal/periodicals/em/fall14/highlight3.html> [<https://perma.cc/L2MT-A62T>].

60. Dowd, *Children's Equality Rights*, *supra* note 2, at 1378.

61. CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014).

supports; what I have mentioned here are offered only as a way of thinking, seeing, and understanding our current context.

Underlying these inadequate systems are poverty and racism. Poverty among children is shockingly common and racially disproportionate.⁶² And the common characteristic of the existing failed interlocking systems is their racialized, negative operation. The inadequacies and failings of these systems are evident in the configuration of kids in the existing juvenile justice system: overwhelmingly these are poor children, disproportionately children of color, and with a high incidence of a history of abuse or neglect as well as mental health problems.⁶³ This exposes the lack of resources and support, the need to create robust supports, and that those supports must be part of a broad commitment to deal with the overarching factors of poverty and race.

In prior work I have argued that what is needed is a comprehensive New Deal for Children that would include, but not be limited to, the following areas:

Health, including prenatal health, children's health, and family health, focusing on health equity and the determinants of health, not simply treatment; including also nutrition support and supportive family visits

Education, beginning with early childhood education, continuing through primary and secondary education, and postsecondary college or other training; including mental health screening and early identification and support for learning disabilities and other disabilities

Parental support, including economic support, education, skills, services, birth and adoption paid leave, leave to care for sick children or to participate in children's educational activities, and other policies to ensure work-family balance
Universal high-quality childcare and after-school programs

Adolescent youth services support, including work, skills, enrichment, and well-being; fostering positive identities of race and gender; safety, nonviolence, positive

62. Child poverty in the United States overall stands at approximately one in 5 children. Poverty is highest from birth to age five. For Black children, the rate is one in three children for children from birth to age five, and near that rate for children from five to seventeen. The highest rate is for Native American children, who exceed a one in three poverty rate. CHILDREN'S DEFENSE FUND, CHILD POVERTY IN AMERICA 2017: NATIONAL ANALYSIS (2018), <https://www.childrensdefense.org/wp-content/uploads/2018/09/Child-Poverty-in-America-2017-National-Fact-Sheet.pdf> [https://perma.cc/P7C9-HW57] [hereinafter CHILD POVERTY].

63. David R. Katner, *Delinquency, Due Process, and Mental Health: Presuming Youth Incompetency*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM, 104, 104 (Nancy E. Dowd ed., 2015); DOWD, *supra* note 2, at 2; 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 4.

sexuality; and juvenile justice as a system of well-being and rehabilitation with incarceration as a last resort

Child and family well-being and crisis support, prevention to the extent possible of domestic violence and child abuse and neglect by effective interventions, after minimizing factors that contribute to these behaviors, and providing effective systems for children who go into foster care

Resilience support for sources of toxic stress or episodic stress to children, families, and communities

Anti-poverty, economic-stabilization measures including cash transfers, in-kind transfers, services, and support

Housing, either separately or as part of an overall economic policy, ensuring neighborhoods without concentrated poverty or concentrated poor housing or housing conditions

Public safety, including positive relationships between police and children, and peaceful neighborhoods.⁶⁴

A New Deal for Children would be guided by the following principles: that systems be developmentally informed; that system change involves both system abolition or reform as well as system creation; that childhood poverty be eliminated and income inequality be reduced substantially; that systemic and structural change be accompanied by cultural change confronting and dismantling racism; that national standards be combined with local empowerment, flexibility, and variation; that universal goals must be combined with supporting children as we find them; that equality is understood as inclusive of equity and dignity; and that metrics be rigorously developed to accomplish the essential task of reframing systems that actually ensure developmental support of every child to their maximum capacity—in other words, to achieve developmental equality.⁶⁵

III. CONCLUSION

Trayvon Martin would be 25 years old if he was still with us. His death and the lack of accountability for his death due to a skewed judicial system indicts all of us. The trope of the dangerous Black boy/man is at the heart of the ongoing murders of Black men and women, boys and girls, as perceived threats to white supremacy. Trayvon's death is linked to the history of violence against African Americans and has been

64. NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 148–49 (2018).

65. *Id.*

repeated this year in the Georgia case of Ahmaud Arbery,⁶⁶ circumstances that are eerily reminiscent of the slave patrols designed to control Black bodies⁶⁷ and the complicity of communities and authorities in the violence of lynching.⁶⁸ Trayvon Martin's story links private and public systems and actors. In widening our focus and examining the youth equivalent of the adult criminal justice system, the juvenile justice system, we see not only flaws that demand abolition of the juvenile justice system and replacement, but also links to other systems that perpetuate a dysfunctional, racialized ecology.

It reminds us of the depth of the cultural and systemic issues that face us. It also reminds us that our deeply racist beliefs, and their locus in assertions of white supremacy, are not limited to violence against Black adults. As we approach nearly a decade since Trayvon's death, that anniversary should not be met with more lives sacrificed, but with significant, sustained, systemic, widespread change at the local, state, and federal levels to achieve racial justice and equality that values the lives of Black children and youth as well and guarantees to them that their lives matter as adults.

66. On the murder of Ahmaud Arbery, see Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES, Sept. 10, 2020, <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>. Arbery, a 25-year-old Black man, was pursued by two men, a father and son, and a third man who filed the encounter. All three, after month of time and only after extensive media exposure, were indicted after four prosecutors reviewed the case, with the indictment coming from the fourth prosecutor, along with a federal investigation into how local law enforcement and prosecutors handled the case. The father is a former retired police officer and was an investigator with the local district attorney's office. The father and son claimed that Arbery resembled someone responsible for local break-ins, but reporters found that police had no reports filed of any break-ins or attempted break-ins. Georgia has a "citizen's arrest" law.

67. Roberts, *supra* note 58, at 20–21 (slave patrols). Notable about the patrols is the blurring of private versus public policing, a pattern that is of significance given the murders of black youth and adults by both private citizens (often claiming to be fulfilling a public role, such as George Zimmerman claiming to be part of a neighborhood watch when he pursued Trayvon Martin).

68. CHRISTOPHER WALDREP, LYNCHING IN AMERICA: A HISTORY IN DOCUMENTS 1 (Christopher Waldrep ed., 2006); JAMES H. MADISON, A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA 65 (2001); MONICA MUNOZ MARTINEZ, THE INJUSTICE NEVER LEAVES YOU: ANTI-MEXICAN VIOLENCE IN TEXAS (2018).