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An Examination of Racism and Racial Discrimination Impacting Dual Status Youth

Jessica K. Heldman, JD¹ and Hon. Geoffrey A. Gaither²

*Not everything that is faced can be changed; but
nothing can be changed until it is faced.
- James Baldwin³*

INTRODUCTION

Racial disproportionality and disparity⁴ have long been characteristic of both the child welfare and youth justice⁵ systems. Discriminatory policies and practices present at

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³ James Baldwin, *As Much Truth as One Can Bear*, N.Y. TIMES, Jan. 14, 1962, at 1.

⁴ Disproportionality refers to "the overrepresentation or underrepresentation of a racial or ethnic group compared with its percentage in the total population." THE CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 2 (2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf. Disparity describes "unequal outcomes of one racial or ethnic group when compared to another racial or ethnic group." *Id.*

⁵ The juvenile justice system, hereinafter referred to as the youth justice system, is similar to the adult criminal justice system but different in many ways. One of the critical differences is terminology. Where the youth justice system uses terms such as delinquent act, factfinding, and disposition, the adult system uses the terms of crime, trial, and sentencing to describe the same function. LARRY J. SEIGEL & BRANDON C. WELSH, JUVENILE DELINQUENCY, THEORY, PRACTICE, AND LAW 21 (11th ed. 2012). The juvenile court reform movement wanted to "shield children from the stigma of a criminal conviction." *Id.* See also NAT'L RSCH. COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 157 (Joan McCord et al. eds., 2001) (explaining records of the first juvenile court "were to be confidential to minimize stigma"). The reader will note that the term "juvenile" shall be replaced by the terms "youth" or "children" wherever appropriate. In the context of youth justice, the term "juvenile" is nationwide most ordinarily associated with the term of juvenile delinquent. See, e.g., *United States v. Smith*, 851 F.2d 706, 709 (4th. Cir. 1988) (proceeding against respondent as a juvenile delinquent while under the age of 21); *In re J.W.*, 186 Cal. Rptr. 3d 756, 757 (Ct. App. 2015) (involving former juvenile delinquent petitioning to have his records sealed); *C.C.B. v. Florida*, 782 So. 2d 473, 475 (Fla. Dist. Ct. App. 2001) (striking community control condition that juvenile delinquent obey no contact orders); *Bible v. Indiana*, 254 N.E.2d 319, 320 (Ind. 1970) (explaining courts assume jurisdiction over juvenile delinquents for their protection); *In re Detrece H.*, 575 N.E.2d 385, 387

the origin of these systems continue to plague children, families, and communities. The impact of racism⁶ upon dual status youth—children who encounter both the child welfare and youth justice systems—is particularly concerning. Dual status youth tend to experience worse outcomes in a number of domains than youth involved in only one system. Dual status youth are also disproportionately Black⁷—significantly more so than in any single system.⁸

Efforts to reform the youth justice system in recent years have included initiatives to improve outcomes for dual status youth and to interrupt the trajectory of dual system involvement—primarily the movement of youth from the child welfare system into the youth justice system.⁹ Other initiatives have sought to reduce or eliminate the racial disproportionality and disparities within both the child welfare and youth justice systems.¹⁰ This article suggests that each of these reform efforts must inform one another,

(N.Y. 1991) (explaining one purpose of juvenile delinquency proceedings is to decide whether a person is a juvenile delinquent); *Dendy v. Wilson*, 179 S.W.2d 269, 273 (Tex. 1944) (explaining statutes relating to juvenile delinquents); *In re Welfare of Burtt*, 530 P.2d 709, 712-13 (Wash. Ct. App. 1975) (explaining juvenile court *per se* has resources adequate to care for a juvenile delinquent). The concept of stigma continuing to be associated with juvenile delinquency maintains its prevalence in courts of law. *See, e.g.*, *Carrillo v. Texas*, 480 S.W.2d 612, 617 (Tex. 1972) (reasoning there is stigma attached to being adjudged a juvenile delinquent); *In re William A.*, 898 N.Y.S.2d 845, 846 (2010) (explaining the stigma attached to the juvenile delinquency proceedings remain); *Rhode Island v. Day*, 911 A.2d 1042, 1049 (R.I. 2006) (explaining the purpose of the jurisdictional division between juvenile delinquency adjudications in Family Court and criminal adjudications of adults in Superior Court is to guard children against the stigma attaching to criminal proceedings). Accordingly, for the purposes of this article we shall not continue to foster additional stigma upon youth and will avoid the terms juvenile, juvenile delinquent, and juvenile delinquency wherever possible.

⁶ Racism as defined by Ibram X. Kendi is “a marriage of racist policies and racist ideas that produces and normalizes racial inequities.” IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 18 (2019).

⁷ We must note at the outset the concept of race as an artificial construct. It is well understood by scientists as having no basis in biology. *See* Megan Gannon, *Race is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016), <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue>. *See also* Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RES. L. REV. 299, 309 (2018) (“[A]ll racial disparities arise from social realities and legacies of oppression rather than any putative innate racial differences”).

⁸ *See infra* Part I.b.

⁹ *See, e.g.* JANET K. WIIG & JOHN A. TUELL WITH JESSICA K. HELDMAN, ROBERT F. KENNEDY CHILD.’S ACTION CORPS, *GUIDEBOOK FOR JUVENILE JUSTICE & CHILD WELFARE SYSTEM COORDINATION AND INTEGRATION*, at ix-x (3rd ed. 2013), https://www.njjn.org/uploads/digital-library/MfC_Guidebook-for-JJ-CW-Crossover-Youth_March-2014.pdf (detailing the Dual Status Youth Reform framework developed and utilized by the Robert F. Kennedy National Resource Center for Juvenile Justice). *See also* *Crossover Youth Practice Model*, CTR. FOR JUV. JUST. REFORM, GEO., <https://cjjr.georgetown.edu/our-work/crossover-youth-practice-model/> (last visited Aug. 21, 2021) (detailing the Crossover Youth Practice Model, developed at the Georgetown University Center for Juvenile Justice Reform).

¹⁰ *See, e.g.* *Who We Are*, W. HAYWOOD BURNS INST., <https://burnsinstitute.org/who-we-are/> (last visited Sept. 25, 2021); *Eliminating Racial and Ethnic Disparities*, CTR. FOR CHILD.’S L. & POL’Y, <https://www.cclp.org/eliminating-racial-and-ethnic-disparities/> (last visited Sept. 25, 2021); CTR. FOR CHILD.’S L. & POL’Y, *RACIAL AND ETHNIC DISPARITIES REDUCTION PRACTICE MANUAL 10-11* (2015), <https://www.cclp.org/wp-content/uploads/2016/06/RED-Practice-Manual-Chapters-1-7.pdf>.

and to make progress, both systems must acknowledge their shared history of racial discrimination and commit to transformative solutions.

Part I of this article explores the phenomenon of dual status youth by reviewing existing research that identifies risk factors for dual status, including system experiences that too often contribute to dual system involvement, particularly for Black youth. Part II provides context for how racial discrimination affects Black dual status youth by exploring how both the child welfare and youth justice systems have historically interacted with Black children and families, highlighting examples of systematic discrimination in both systems.¹¹ This section provides a brief synopsis of the evolution of child welfare and youth justice policy and the pervasive disenfranchisement of, disregard for, and dehumanization of Black youth and families within that policy context.

Part III reviews evidence demonstrating that the disparate experiences of Black children and families are not simply a vestige of a bygone era, but persist today through multiple points of decision-making within these systems. This review highlights the policies and practices that compound the risk of Black foster youths' initial and deepening involvement with the youth justice system. Part IV offers a starting place for the work of addressing disproportionality and disparities impacting Black dual status youth, challenging jurisdictions to commit to an anti-racist framework based on recognition, reorientation, and responsibility. This framework aims to create a foundation for crafting transformative solutions that positively impact children and families—particularly Black dual status youth.

I. THE PHENOMENON OF DUAL STATUS YOUTH

A. *Pathways and Prevalence*

An expanding body of research offers a preliminary understanding of the population of children who touch both the child welfare system and the youth justice system, generally known as dual status youth.¹² There are two primary pathways to

¹¹ Although this article focuses on the experience of Black youth within the child welfare and youth justice systems, the authors acknowledge the systemic disproportionality and disparity that affects youth and families of other non-white races and ethnicities as well.

¹² Dual status youth may sometimes be referred to by other terminology such as “crossover youth” or “dual jurisdiction youth.” Although researchers draw various distinctions between categories of dual status youth based on when and how extensively they come into contact with the child welfare and the youth justice systems, in this article the reference to dual status youth encompasses the broadest definition—youth who come into contact with both systems to any degree and in any sequence. For a detailed discussion of terminology and categories of dual status youth, see DENISE C. HERZ & CARLY B. DIERKHISING, OJJDP DUAL SYSTEM YOUTH DESIGN STUDY: SUMMARY OF FINDINGS AND RECOMMENDATIONS FOR PURSUING A NATIONAL ESTIMATE OF DUAL SYSTEM YOUTH 46-49 (2018) [hereinafter TECHNICAL REPORT], <https://www.ojp.gov/pdffiles1/ojjdp/grants/252717.pdf>; See also Denise C. Herz et al., *Dual System Youth and their Pathways: A Comparison of Incidence, Characteristics and System Experiences using Linked Administrative Data*, 48 J. YOUTH & ADOLESCENCE 2432 (2019) [hereinafter *Pathways*]. See also DENISE

becoming dual status. Some youth will come into contact with the child welfare system first, subsequently reaching the youth justice system through arrest (either while still involved with the child welfare system or after child welfare involvement has concluded); others will first encounter the youth justice system, at which point child protective issues are identified and contact is initiated with the child welfare system.¹³ Research indicates that the most common pathway begins in the child welfare system.¹⁴

Contributing to the phenomenon of dual status youth is the well-established finding that childhood maltreatment is a risk factor associated with delinquency.¹⁵ It is important to note that most children within the child welfare system will not become involved with the youth justice system.¹⁶ However, studies in various jurisdictions consistently show that a significant number of youth formally entering the youth justice system have had previous child welfare system contact.¹⁷ For example, a recent study using data from the Los Angeles County Probation Department confirmed that 64.1% of youth with an initial youth justice petition between 2014 and 2016 had previous involvement in the child welfare system.¹⁸

Retrospective studies suggest that the deeper a youth is involved in the youth justice system, the more likely they are to have had child welfare system contact. In a 2004 Arizona study, only 1% of youth diverted from the juvenile justice system had

C. HERZ ET AL., THE INTERSECTION OF CHILD WELFARE & JUVENILE JUSTICE: KEY FINDINGS FROM THE LOS ANGELES DUAL SYSTEM YOUTH STUDY 2 (2021) [hereinafter INTERSECTION], <https://www.datanetwork.org/wp-content/uploads/LADS-study.pdf>.

¹³ TECHNICAL REPORT, *supra* note 12, at 48.

¹⁴ TECHNICAL REPORT, *supra* note 12, at 55. *See also Pathways*, *supra* note 12, at 2444-45. In addition to these two pathways, researchers identify several categories of dual status youth based on whether their involvement in the two systems is consecutive or concurrent. TECHNICAL REPORT, *supra* note 12, at 47-48.

¹⁵ WIIG ET AL., *supra* note 9, at xiii. The seminal study conducted by Widom & Maxfield found that among the sample of 1,575 children “being abused or neglected as a child increased the likelihood of arrest as a juvenile by 59 percent” CATHY. S. WIDOM & MICHAEL G. MAXFIELD, U.S. DEP’T OF JUST., AN UPDATE ON THE “CYCLE OF VIOLENCE” 1 (2001), <https://www.ojp.gov/pdffiles1/nij/184894.pdf>. Similar findings emerged from other studies using both self-reports and arrest data to document delinquency and violent behavior. *Id.* at 3.

¹⁶ Studies indicate that between 9-29% of child welfare system-involved youth will have contact with the youth justice system. J.J. Cutuli et al., *From Foster Care to Juvenile Justice: Exploring Characteristics of Youth in Three Cities*, 67 CHILD. & YOUTH SERVS. REV. 84, 84 (2016). One study found a 47% greater risk for delinquency among abused and neglected children. Joseph P. Ryan & Mark F. Testa, *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability*, 27 CHILD. & YOUTH SERVS. REV. 227, 243-44 (2005). There are currently no statistics on the prevalence of dual status youth nationwide.

¹⁷ *See Pathways*, *supra* note 12, at 2433 (citing studies indicating that as many as 67%-83% of youth in juvenile justice samples had current or previous child welfare system involvement); *See also* TECHNICAL REPORT, *supra* note 12, at 131 (indicating study findings that approximately half of youth petitioned to the juvenile delinquency court had also encountered the child welfare system). Rates of maltreatment and child welfare involvement are high among those in the criminal justice system as well. A recent article from the Kansas City Star reported that a survey of almost 6,000 inmates in 12 states revealed that 1 in 4 had been in foster care. Laura Bauer & Judy L. Thomas, *Throwaway Kids*, KAN. CITY STAR (Dec. 15, 2019), at 2, <https://www.kansascity.com/news/special-reports/article238206754.html>. More than half of these individuals also had previous involvement with the youth justice system. *Id.* at 3.

¹⁸ INTERSECTION, *supra* note 12.

previous contact with the child welfare system, while 42% of those in probation placements through the youth justice system had touched the child welfare system.¹⁹ A 2017 study found that 83% of youth exiting from probation group homes and correctional placements in Los Angeles had previous contact with the child welfare system for maltreatment, often in early childhood.²⁰

B. Characteristics and Experiences of Dual Status Youth

Dual status youth tend to have complex needs. The prevalence of trauma and trauma symptoms in these youth is likely to be high in light of the known significant rates of trauma among youth in each individual system.²¹ Dual status youth demonstrate higher rates of substance abuse and mental illness than youth in the youth justice system without child welfare system contact, and are more likely to have parents experiencing the same issues.²² They are often experiencing educational challenges at the time they are arrested, including truancy, poor academic performance, and disciplinary issues.²³ They are often young—several studies show that dual status youth are arrested at a younger age compared to youth in the youth justice system without child welfare involvement.²⁴

Dual status youth experience high rates of referrals to the child welfare system, as well as high rates of placement changes and out of home placements while in foster care.²⁵ This can result in the disruption or loss of protective factors that can mitigate risks

¹⁹ GREGORY J. HALEMBA ET AL., NAT'L CTR. FOR JUV. JUST., ARIZONA DUAL JURISDICTION STUDY FINAL REPORT, at vi (2004), http://www.ncjj.org/pdf/azdual_juri.pdf.

²⁰ JACQUELYN MCCROSKEY ET AL., CHILD.'S DATA NETWORK, CROSSOVER YOUTH: LOS ANGELES COUNTY PROBATION YOUTH WITH PREVIOUS REFERRALS TO CHILD PROTECTIVE SERVICES 3-4 (2017), <https://www.datanetwork.org/wp-content/uploads/CrossoverYouth.pdf>.

²¹ THOMAS GRISSO & GINA VINCENT, TRAUMA IN DUAL STATUS YOUTH: PUTTING THINGS IN PERSPECTIVE 3 (2014), <https://rfknrcjj.org/wp-content/uploads/2014/12/Trauma-in-Dual-Status-Youth-Putting-Things-In-Perspective-Grisso-Vincent-RFKNRCJJ.pdf>.

²² *Pathways*, *supra* note 12, at 2434; *See also* Anne Dannerbeck & Jiahui Yan, *Missouri's Crossover Youth: Examining the Relationship Between their Maltreatment History and their Risk of Violence*, OJJDP J. JUV. JUST., 78, 92 (2011). *See also* DOUGLAS YOUNG ET AL., TRAVERSING TWO SYSTEMS: AN ASSESSMENT OF CROSSOVER YOUTH IN MARYLAND, at i (2015), <https://www.ojp.gov/pdffiles1/nij/grants/248679.pdf> (indicating that the most significant difference between crossover youth and non-crossover delinquent youth was in the level of mental health needs).

²³ *Pathways*, *supra* note 12, at 2434. A study in Los Angeles County found that 37% of crossover youth had attendance issues, 41% were credit deficient, and 93% had reported behavior problems in school. *Id.* (citing Rebecca A. Hirsch et al., *Educational Risk, Recidivism, and Service Access Among Youth Involved in Both the Child Welfare and Juvenile Justice Systems*, 85 CHILD. & YOUTH SERVS. REV. 72, 73 (2018)). *See also* YOUNG ET AL., *supra* note 22, at i, 81-82 (noting the higher rate of school attendance and performance issues among crossover youth as compared to youth with only delinquency involvement).

²⁴ *Pathways*, *supra* note 12, at 2433. *See also* YOUNG ET AL., *supra* note 22, at 58.

²⁵ *Pathways*, *supra* note 12, at 2434. *See also* YOUNG ET AL., *supra* note 22, at 9 (noting the agreement among researchers that the number of placement changes experienced by a child increases risk of youth justice system involvement, particularly among youth who experience placement changes due to behavioral problems or running away from facilities). However, there may be a significant number of dual status youth who were referred to child protection but did not receive services from the agency or experience removal

associated with delinquency.²⁶ There is evidence that youth who experience placement in congregate care (*i.e.*, group homes) are at increased risk of involvement with the youth justice system.²⁷ Among other factors, such circumstances place foster children under a high degree of scrutiny, bringing their behavior to the attention of numerous adults and authorities (*e.g.*, social workers or group home staff) who may react differently than a parent would, such as calling law enforcement to respond to behavioral problems.²⁸ Researchers in a 2019 study posed the crucial question, “[b]e it not for their long involvement in the system and their multiple placements, including placement in a group home, would these youth find themselves taking the same actions that led them into the youth justice system?”²⁹

Once a youth in foster care is referred to the youth justice system, they tend to experience differential treatment. They can be subject to decision-making that reflects what has been referred to as “child welfare bias.”³⁰ A foundational study by the Vera Institute of Justice found that children identified as foster youth were less likely to receive diversion services and more likely to be detained at youth court intake.³¹ Further research provides evidence that dual status youth are more likely to be ordered into out of home placement (rather than receive probation) as a result of their offense than their peers without child welfare involvement.³²

from home. For example, the recent Los Angeles study found that two-thirds of the children referred to child protection who later became involved with juvenile probation had never had a protective services case opened during their childhood. *See* MCCROSKEY ET AL., *supra* note 20, at 6. This raises questions, posed by the study authors for future exploration, regarding whether families are being connected to resources to address any family issues identified early. *Id.*

²⁶ Examples of protective factors include having positive relationships with adults outside the family and feelings of school connectedness. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUST., PROTECTIVE FACTORS AGAINST DELINQUENCY 8-9 (2015), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/protective_factors.pdf.

²⁷ Cutuli et al., *supra* note 16, at 91. *See also* Joseph P. Ryan et al., *Juvenile Delinquency in Child Welfare: Investigating Group Home Effects*, 30 CHILD. & YOUTH SERVS. REV. 1088, 1095 (2008).

²⁸ *See* Karen de Sá et al., *Dubious Arrests, Damaged Lives*, S.F. CHRON., (May 18, 2017), <https://projects.sfchronicle.com/2017/fostering-failure/> (documenting the frequency of calls for service to law enforcement from foster care shelters in California).

²⁹ TECHNICAL REPORT, *supra* note 12, at 131.

³⁰ Joseph P. Ryan et al., *Maltreatment and Delinquency: Investigating Child Welfare Bias in Juvenile Justice Processing*, 29 CHILD. & YOUTH SERVS. REV. 1035, 1039 (2007). The study authors hypothesized that the demonstrated bias resulting in more severe sanctions may reflect negative assumptions regarding foster family willingness to engage with foster youth in the delinquency process as well as the perception that foster youth come from troubled families, making rehabilitation appear less likely. *Id.* at 1038-39.

³¹ DYLAN CONGER & TIMOTHY ROSS, VERA INST. OF JUST., REDUCING THE FOSTER CARE BIAS IN JUVENILE DETENTION DECISIONS: THE IMPACT OF PROJECT CONFIRM 1, 9-10 (2001), https://www.vera.org/downloads/Publications/reducing-the-foster-care-bias-in-juvenile-detention-decisions-the-impact-of-project-confirm/legacy_downloads/Foster_care_bias.pdf. The argument is often made that the child welfare system has no placement for the youth as a result of their offending behavior, which places youth in jeopardy of extended stays in juvenile detention. *Id.*

³² Christina C. Tam et al., *Juvenile Justice Sentencing: Do Gender and Child Welfare Involvement Matter?*, 64 CHILD & YOUTH SERVS. REV. 60, 64 (2016).

Studies confirm that Black youth are disproportionately represented in the population of dual status youth.³³ Disproportionality within child welfare and youth justice systems is already significant, with Black youth accounting for 34% of all delinquency cases and 23% of youth in foster care, while comprising only 14% of the general population.³⁴ Alarming, studies show overrepresentation of Black youth in dual status youth populations can be more than double that in single system populations.³⁵ Furthermore, although females are generally underrepresented in delinquency populations, they are represented at higher levels in the dual status youth population.³⁶ This is particularly true of Black females.³⁷ In an extensive study conducted in Los Angeles, 80% of Black females first petitioned to the delinquency court had experienced child welfare involvement.³⁸ Recent data also indicate high rates of LGBTQ+ youth in the youth justice system with child welfare involvement.³⁹ The population of Black LGBTQ+ girls and non-binary dual status youth warrants increased attention, given the particularly high rates of abuse and trauma they reportedly experience within the systems.⁴⁰

Racial disproportionality within the dual status youth population raises special concern because of the poor outcomes generally experienced by dual status youth. Studies have consistently shown higher rates of recidivism among dual status youth compared to youth without child welfare involvement.⁴¹ In fact, one study found that longer length of stay in the child welfare system correlated to higher rates of recidivism.⁴² Furthermore, researchers uniformly conclude that “[d]ual system involvement is more likely to have a negative effect on youth adulthood outcomes than involvement in only the child welfare or juvenile justice systems.”⁴³ Studies show that dual status youth are more likely to age out of the child welfare system without a permanent home or family (via reunification, adoption, or guardianship) and are more likely to experience homelessness, unemployment, and jail stays in early adulthood than their counterparts without dual system involvement.⁴⁴ Notably, dual status youth who have endured lengthy involvement with the child welfare system and a high number of placements experience the most negative outcomes among all dual status youth.⁴⁵

³³ Karen M. Kolivoski, *Applying Critical Race Theory (CRT) and Intersectionality to Address the Needs of African American Crossover Girls*, CHILD & ADOLESCENT SOC. WORK J. 1, 2 (2020).

³⁴ MADELINE STERN, GEORGETOWN UNIV. CTR. FOR JUV. JUST. REFORM, REDUCING SYSTEM CROSSOVER FOR BLACK LGBTQ+ GIRLS AND NONBINARY YOUTH 6 (March 2021).

³⁵ *Pathways*, *supra* note 12, at 2433.

³⁶ *Id.* at 2433-34; *See also* Kolivoski, *supra* note 33, at 2-3. In the Los Angeles County study, females were more likely than males to be dual status. INTERSECTION, *supra* note 12, at 7.

³⁷ STERN, *supra* note 34, at 3.

³⁸ INTERSECTION, *supra* note 12, at 2.

³⁹ *Pathways*, *supra* note 12, at 2434.

⁴⁰ *See* STERN, *supra* note 34, at 4.

⁴¹ *Pathways*, *supra* note 12, at 2435.

⁴² GREGORY HALEMBA & GENE SIEGEL, NAT'L CTR. FOR JUV. JUST., DOORWAYS TO DELINQUENCY: MULTI-SYSTEM INVOLVEMENT OF DELINQUENCY YOUTH IN KING COUNTY (SEATTLE, WA), at vi (2011).

⁴³ TECHNICAL REPORT, *supra* note 12, at 127.

⁴⁴ *Pathways*, *supra* note 12, at 2435.

⁴⁵ TECHNICAL REPORT, *supra* note 12, at 131.

A key takeaway from this exploration of dual status youth research is a recognition that some of the most marginalized youth—Black youth, females, and LGBTQ+ youth—are overrepresented in a population that experiences the most extensive system entrenchment and the most troubling outcomes. Regarding Black youth, not only do these systems extensively intervene with their families—some assert unnecessarily so⁴⁶—but this intervention in some cases fails to prevent further and deeper system involvement, and may even introduce factors that contribute to it. This is a troubling finding regarding youth at the cross-section of these systems, where the child welfare system should ideally provide them protection and the youth justice system should ideally provide them with guidance. However, these systems have a long history of failing to reach their ideals, particularly with respect to Black youth.

II. THE ORIGINS OF THE SYSTEMS AND THE IMPACT OF RACIAL DISCRIMINATION

Within the systems that impact dual status youth are a complex of private and public entities empowered to intervene in the lives of children and families. This power has historically been wielded with harsh judgment over Black children, families, and communities with devastating effects. The examination of racial discrimination in the child welfare and youth justice systems necessarily begins with the recognition that pre-dating the development of formal systems of intervention, Black families experienced forcible separation resulting from slavery and other sanctioned practices that allowed children to be removed from parents indiscriminately.⁴⁷ As formal family and child-serving systems emerged, discriminatory practices were codified and institutionalized, establishing a foundation that continues to influence policy and practice today.

A. *The “Child Saving” Era*

The United States has a long history of private and public efforts to “save” children from family circumstances that are judged to be harmful or immoral. The first formal child protection agency, the New York Society for the Prevention of Cruelty to Children, was a private organization established in 1875.⁴⁸ This agency, and others that

⁴⁶ A number of scholars, researchers, and advocates have argued that the child protection system functions as a “family policing” or “family regulation” system that relies on surveillance and punishment, harming children through unnecessary removals. See Alan Dettlaff et al., *What it Means to Abolish Child Welfare as We Know it*, IMPRINT (Oct. 14, 2020), <https://imprintnews.org/race/what-means-abolish-child-welfare/48257>. These voices have called for the abolishment of the child protection system as it exists, reframing the system to focus on supporting families and keeping them together. *Id.*

⁴⁷ MARGARET C. STEVENSON ET AL., *THE LEGACY OF RACISM FOR CHILDREN: PSYCHOLOGY, LAW, AND PUBLIC POLICY* 73 (2020).

⁴⁸ *Id.* See also THE NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, 125TH ANNIVERSARY BOOKLET 7 (2000), <https://nyspcc.org/wp-content/uploads/2021/01/booklet.pdf>. The first anti-cruelty laws were enacted on behalf of animals. But the applicability to children was immediately recognized. *Id.* at 4.

followed, investigated reports of abusive or neglectful treatment and removed children from their homes when deemed necessary.⁴⁹ This generally occurred without oversight by public authorities.⁵⁰ Oftentimes there was little a parent could do to retain custody of children who were considered in need of “saving.”⁵¹

There was no separate justice system for youth during this era, therefore children accused of breaking the law, if convicted, were imprisoned with adults.⁵² Reformers of the 19th century endeavored to remove children who committed minor crimes from these adult prisons, instead focusing on the opportunity to engage in “moral retraining” of “potentially harmful deviants” through confinement at institutions specifically designed to educate and discipline children, known as houses of refuge or reformatories.⁵³ These institutions housed not only children accused of breaking the law, but also children considered at risk of destitution or criminality due to conditions of poverty and neglect.⁵⁴ The reformers made no distinction between “pauper, vagrant, and criminal children.”⁵⁵ As a result, impoverished children held in reformatories soon outnumbered those who had committed crimes.⁵⁶ Although entities that intervened with families voiced a commitment to the welfare and best interests of children, their intervention also functioned as a strategy of social control, an attempt to steer society away from social and economic change that threatened the prevailing morality of the time.⁵⁷

The experience of Black children was notably different during this “child saving” era. Many orphanages and reformatories simply refused to house Black children.⁵⁸ While conditions within these institutions were characterized by strictness, labor, and often severe discipline,⁵⁹ children of color who were routinely excluded from these facilities experienced harsher treatment.⁶⁰ Black youth continued to be sent to adult jails and

⁴⁹ STEVENSON ET AL., *supra* note 47, at 73.

⁵⁰ *Id.*

⁵¹ *Id.* at 74.

⁵² Cecile P. Frey, *The House of Refuge for Colored Children*, 66 J. NEGRO HIST. 10 (1981).

⁵³ *Id.* at 11. The terms “houses of refuge” and “reformatories” are both used to refer to the institutions for children developed during this era. See Tamar R. Birckhead, *The Racialization of Juvenile Justice and The Role of the Defense Attorney*, 58 B.C. L. REV. 379, 396 n. 62, 397 (2017).

⁵⁴ Birckhead, *supra* note 53, at 397.

⁵⁵ Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1193 (1970). See also Birckhead, *supra* note 53, at 397 (noting that for the reformers, “living in a state of poverty and committing a criminal offense were virtually synonymous because both conditions were conceived of in strictly moral terms”).

⁵⁶ Birckhead, *supra* note 53, at 397.

⁵⁷ Frey, *supra* note 52, at 10-11. (noting that the early Houses of Refuge in Philadelphia plainly stated that their purpose was to impart “the advantages of a moral and religious life”)

⁵⁸ Birckhead, *supra* note 53, at 398.

⁵⁹ Daniel Macallair, *The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation*, 7 U.C. DAVIS J. JUV. L. & POL’Y 1, 6 (2003). See also ROBERT C. FELLMETH & JESSICA K. HELDMAN, CHILD RIGHTS AND REMEDIES 449 (2019) (excerpt from Marvin Ventrell, *Nineteenth Century America: The Rise of the Parens Patriae System*, in NACC CHILD.’S L. MANUAL SERIES 12, 13 (Nat’l. Ass’n of Counsel for Child. ed., 1999).

⁶⁰ Barry C. Feld & Perry L. Moriearty, *Race, Rights, and the Representation of Children*, 69 AM. U. L. REV. 743, 764 (2020).

prisons.⁶¹ They were arrested in large numbers and used to meet the need for cheap labor through the practice of “convict leasing.”⁶² This brought Black youth into circumstances that mirrored—or were reportedly worse than—slavery.⁶³

Black children residing in the few reformatories open to them, such as the New York House of Refuge, were housed in segregated quarters devoid of the educational services and training available to white children.⁶⁴ The same was true in facilities established for Black youth only.⁶⁵ They were often held within these institutions indefinitely, where there was little to no investment in their development. Efforts to establish programming for the children were met with the sentiment that there was “no use trying to reform a Negro.”⁶⁶

B. The Development of the Juvenile Court

The standard recitation of juvenile court history casts reformers as envisioning a special tribunal providing troubled children with guidance and rehabilitation not afforded them through the criminal courts.⁶⁷ Under the doctrine of *parens patriae*, judges would have the power to separate children from their parents and take decision-making power over their lives under a variety of circumstances.⁶⁸ The proceedings would be informal and the intent was to serve the best interest of the child.⁶⁹ Although the juvenile court system dealt most often with delinquent or pre-delinquent behavior, it was characterized as a child welfare agency.⁷⁰ In recent years, the origin story of the juvenile court has evolved, with scholars emphasizing less altruistic motives for the venue’s establishment.⁷¹ The historical record today includes evidence that the juvenile court served “as a vehicle through which to exercise social control over Black and immigrant

⁶¹ 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 4 (Shadi Rahimi ed., 2008). As a result, even in these early days of American history, jail and prison populations were majority Black, even in communities that were mostly white. *Id.* See also Birkhead, *supra* note 53, at 398.

⁶² BELL & RIDOLFI, *supra* note 61. See also Feld & Moriearty, *supra* note 60, at 764.

⁶³ BELL & RIDOLFI, *supra* note 61, at 4.

⁶⁴ *Id.* at 3.

⁶⁵ Birkhead, *supra* note 53, at 398-99.

⁶⁶ BELL & RIDOLFI, *supra* note 61, at 3. Native American youth were subject to similar fates, with the establishment of Indian boarding schools that functioned as abusive work camps, intended to strip youth of their cultural traditions and force assimilation into white Euro-centric culture. *Id.* at 5.

⁶⁷ Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform*, 86 GEO. WASH. L. REV. 1604, 1614-15 (2018).

⁶⁸ See *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839) (establishing the court’s power to intervene between children and parents under the doctrine of *parens patriae* explaining “[t]he right of parental control is a natural, but not unalienable one”).

⁶⁹ Henning, *supra* note 67, at 1614.

⁷⁰ FELLMETH & HELDMAN, *supra* note 59, at 449.

⁷¹ See Henning, *supra* note 67, at 1615.

youth.”⁷² It is argued that it was largely designed to facilitate the assimilation of immigrant youth and the removal of Black youth from a society that feared them.⁷³

As a result, children of color were overrepresented in juvenile court delinquency matters from the outset.⁷⁴ As urban centers expanded in the early 20th century, police exercised broad discretion in the name of maintaining order. In this permissive law enforcement culture, personal views on children’s attitudes and behaviors were influential in decisions to arrest or not arrest youth, leading to disproportionate rates in arrests of youth of color.⁷⁵ Critics of the juvenile court pointed to the similar discretion exercised by judges and social workers that perpetuated differential treatment of youth of color.⁷⁶ A review of juvenile courts across the country in the 1940s revealed that Black children were referred to the youth justice system more frequently and at a younger age than their white peers, more often resulting in adjudication and institutional commitment.⁷⁷

Facilities for both dependent and delinquent youth remained segregated, with education and vocational training reserved only for white children.⁷⁸ On the child protection side, the few organizations that served Black children created separate orphanages that were far inferior to those operated for white children.⁷⁹ In Black orphanages, dependent and delinquent children were housed together and police officers, rather than judges, provided oversight.⁸⁰ Even Black youth separated from their parents ostensibly for their own protection were criminalized and discounted.⁸¹

C. 20th Century Child Welfare and Youth Justice Systems

During the 20th century, government bodies assumed greater responsibility for intervening with and serving children and families, establishing government-run systems of child welfare and youth justice.⁸² State systems exercised the power to intervene in the interest of protecting children from abuse or neglect. However, Black children and families were often denied public services and Black children continued to come before the juvenile court as delinquents rather than dependents, sent to reformatories or adult prisons when needing care.⁸³

⁷² Feld & Moriearty, *supra* note 60, at 763.

⁷³ See Henning, *supra* note 67, at 1616.

⁷⁴ BELL & RIDOLFI, *supra* note 61, at 6.

⁷⁵ *Id.* at 7.

⁷⁶ Feld & Moriearty, *supra* note 60, at 766.

⁷⁷ BELL & RIDOLFI, *supra* note 61, at 8. See also Bircckhead, *supra* note 53, at 401-02.

⁷⁸ Feld & Moriearty, *supra* note 60, at 764. See also Bircckhead, *supra* note 53, at 398-99.

⁷⁹ STEVENSON ET AL., *supra* note 47, at 74. See also DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 7 (Basic Books, 2002).

⁸⁰ STEVENSON ET AL., *supra* note 47, at 74.

⁸¹ ROBERTS, *supra* note 79, at 7.

⁸² See *id.*; see also STEVENSON ET AL., *supra* note 47, at 74.

⁸³ Jillian Jimenez, *The History of Child Protection in the African American Community: Implications for Current Child Welfare Policies*, 28 CHILD. & YOUTH SERVS. REV. 888, 897 (2006). See also ROBERTS, *supra* note 79, at 7.

By the middle of the 20th century, dependency courts and public child welfare agencies became accessible to Black children, who quickly made up a significant portion of the system's cases.⁸⁴ Black families, particularly Black mothers, experienced growing poverty while economic aid programs established in the early 20th century for poor mothers were made available to white women only, often based on discretionary and discriminatory eligibility standards.⁸⁵ As a result, Black children experienced a higher rate of removal and placement into foster care as compared to other children on grounds that met the nebulous definition of neglect.⁸⁶ This focus on intervention by state agencies and courts conflicted with, and disrupted the reliance on, historic systems of kin and community that had developed within the Black community to ensure child protection and family support.⁸⁷

During the same period, concerns about juvenile court practice, particularly the discretionary and inconsistent treatment of youth and the court's apparent ineffectiveness in preventing recidivism, led to calls to reform the tribunal.⁸⁸ There was also clear evidence that Black youth were disproportionately represented in delinquency cases and received harsher treatment while subject to juvenile court jurisdiction.⁸⁹ In 1967, in the seminal case of *In re Gault*, the U.S. Supreme Court responded to criticisms of the juvenile court by establishing the right of youth accused of crimes to several constitutional protections already afforded adults.⁹⁰ To the extent that criticisms of the juvenile court included racial inequity, they went unaddressed by the Supreme Court with any specificity.⁹¹ Furthermore, the Court's decision in *Gault* only addressed the requirements of due process as they related to adjudication—the phase at which guilt or innocence is determined.⁹² At earlier phases such as court intake and detention, where

⁸⁴ ROBERTS, *supra* note 79, at 7-8.

⁸⁵ *Id.* at 175-76. Examples of such restrictive standards included “suitable home” rules, which permitted disqualification of mothers from aid on the vague basis of “immorality.” Risa E. Kaufman, *The Cultural Meaning of the “Welfare Queen”*: Using State Constitutions to Challenge Child Exclusion Provisions, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 307 (1997).

⁸⁶ Jimenez, *supra* note 83, at 900.

⁸⁷ *Id.* at 892. This system of community oversight provided support for families, discipline for children, and rebuke of poor parenting practices. *Id.* “From the latter decades of the 19th century up to the recent past, it has been common practice for African American families to assume responsibility for the children of relatives who needed a home due to parental death, separation, abandonment, or illness, without the assistance, interference, or sanction of the legal system.” *Id.* at 895.

⁸⁸ Feld & Moriearty, *supra* note 60, at 765-66.

⁸⁹ *Id.* at 765.

⁹⁰ *In re Gault*, 387 U.S. 1, 41 (1967). The Justices concluded that due process required that juveniles receive notice of charges, *id.* at 33-34, and a hearing that afforded them the opportunity to confront and cross-examine witnesses, *id.* at 57. Youth also could invoke the privilege against self-incrimination and had a right to counsel. *Id.* at 41, 55.

⁹¹ Feld & Moriearty, *supra* note 60, at 751, 771. There are scholars who point to evidence that the Warren Court's due process revolution was intended, in large part, to remedy the racial inequality of the criminal justice system. *Id.* at 770. However, when they took on juvenile justice, the Court selected the case of a white youth. *Id.* at 771. This can be viewed as a missed opportunity, if not a deliberate skirting of the racial issue.

⁹² Feld & Moriearty, *supra* note 60, at 768.

probation officers often make largely discretionary decisions,⁹³ the *Gault* decision provided no additional procedural protections.⁹⁴

Following *Gault*, the delinquency court, with its new procedural requirements, more closely resembled the adversarial environment of the adult criminal court.⁹⁵ It was within that context that the “tough on crime” rhetoric, policies, and practices of the 1990s ushered in a more punitive approach to youth justice.⁹⁶ Dire predictions of an impending wave of violence brought about by mythologized young “super predators”—portrayed as Black, inner-city youth⁹⁷—drove policies that expanded criminal court jurisdiction over youth and imposed severe sentences.⁹⁸ Black boys bore the brunt of these policies.⁹⁹ Numerous states passed laws allowing or mandating that juvenile drug offenses—laws disproportionately applied to youth of color—be transferred to adult court.¹⁰⁰

In addition to racialized criminal justice policies, poverty policy in the 1990s, particularly federal welfare reform, perpetuated other discriminatory mythologies, such as that of “welfare queens” gaming the system.¹⁰¹ The stereotype of the “undeserving” Black mother—unemployed, unmarried, and reproductively irresponsible—fueled legislative changes resulting in the elimination of federal aid as an entitlement, thus decreasing financial supports to families and children under a block grant structure.¹⁰² At the same time, payments to states for care and support of children removed from their homes continued as an entitlement.¹⁰³ Some argue that this provided a financial incentive for states to favor removal of children over providing in-home support to families struggling with poverty, many of whom were Black.¹⁰⁴

⁹³ See *infra* Section III.B.

⁹⁴ Feld & Moriearty, *supra* note 60, at 768.

⁹⁵ *Id.* at 772.

⁹⁶ GIUDI WEISS, NAT’L CAMPAIGN TO REFORM STATE JUV. JUST. SYS., THE FOURTH WAVE: JUVENILE JUSTICE REFORMS FOR THE TWENTY-FIRST CENTURY 11-12 (2013).

⁹⁷ Birkhead, *supra* note 53, at 410. The coverage of increased juvenile violent crime focused primarily on Black youth, who became the face of the mythical “superpredators.” White youth were highlighted as the victims of such crime, despite the reality that Black youth were more likely to be victims themselves. *Id.* at 410-11.

⁹⁸ JOSH ROVNER, THE SENT’G PROJECT, HOW TOUGH ON CRIME BECAME TOUGH ON KIDS: PROSECUTING TEENAGE DRUG CHARGES IN ADULT COURT 3 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/12/How-Tough-on-Crime-Became-Tough-on-Kids.pdf>. See also Henning, *supra* note 67, at 1620.

⁹⁹ Birkhead, *supra* note 53, at 411-12.

¹⁰⁰ ROVNER, *supra* note 98. During this era, 40 states passed laws to make it easier to send children to adult court, with drug offense cases the most likely to be judicially waived into adult court. *Id.* As of 2016, 46 states still allowed for transfer on the basis of drug charges. *Id.*

¹⁰¹ Kaufman, *supra* note 85, at 310.

¹⁰² See *id.*

¹⁰³ ROBERTS, *supra* note 79, at 190.

¹⁰⁴ Karen U. Lindell et al., *The Family First Prevention Services Act: A New Era of Child Welfare Reform*, 135 PUB. HEALTH REPS. 282, 283 (2020). See also OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION, U.S. DEP’T OF HEALTH & HUM. SERVS., FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD 2 (2005), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/138206/ib.pdf. In response to this criticism,

This history of child welfare and youth justice, from “child saving” to the “tough on crime” era, illustrates the discriminatory perceptions, policies, and practices that have disadvantaged Black youth for generations. Despite progress made in recent years due in part to increased awareness and efforts to address the resulting disproportionality, the problem persists.¹⁰⁵ This has a significant impact on the likelihood of Black youth becoming dual status.

III. DISPROPORTIONALITY AND DISPARITY AND THE IMPACT ON THE DUAL STATUS TRAJECTORY

A substantial body of research, as well as ongoing data collection, confirms that Black youth today remain more likely to encounter these systems and become more deeply involved than their white counterparts. Why, and what it means about our systems and our society, are more hotly debated and contentious issues. Disproportionality is not proof positive of the existence of bias or discrimination.¹⁰⁶ But it is critical to note that at its foundation, the construct of the juvenile court and related systems relied on a view that one segment of society was entitled to control other segments of society they deemed troubled or deficient by standards of their own making.¹⁰⁷ This underpinning of both the child welfare as well as the youth justice system continues to facilitate state control over Black families and families of low socioeconomic status, as has been the case since the early days of reformatories.¹⁰⁸ In the past, these systems categorically excluded Black families and children. In their current form, they tend to envelop and entrench these families, often with negative results, particularly for dual status youth. The following sections detail the persistent and compounded racial disproportionality and disparities at multiple decision points in today’s child welfare and youth justice systems.

in 2018, Congress enacted the Family First Prevention Services Act, which allows federal funds to be used for prevention services provided to families, not just substitute care for children removed from their families. Lindell et al., *supra* note 104, at 282.

¹⁰⁵ Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253, 254 (2020).

¹⁰⁶ Kathryn Maguire-Jack et al., *Child Protective Services Decision-Making: The Role of Children’s Race and County Factors*, 90 AM. J. ORTHOPSYCHIATRY 48, 49 (2020) (“[W]hether disproportionate representation primarily reflects differential risk exposure—as compared with differential treatment—remains the subject of a large and contested body of research.”). *Id.*

¹⁰⁷ See *supra* Section II.

¹⁰⁸ Birkhead, *supra* note 53, at 414.

A. Child Welfare

In every state, the child welfare system is authorized to receive reports of child abuse or neglect.¹⁰⁹ Studies indicate that Black children are more likely than white children to be the subject of these reports.¹¹⁰ Researchers offer various explanations for this disparity. Some point to the greater likelihood of Black children living in poverty.¹¹¹ Although poverty should not be conflated with abuse or neglect, it is considered a risk factor for child welfare involvement.¹¹² Furthermore, poverty creates the potential for visibility or surveillance bias.¹¹³ This results when higher rates of poverty among families of color increase contact with service providers who are likely to be among those required by law to report suspected abuse or neglect.¹¹⁴ Others point to explicit and implicit bias among community members, particularly mandated reporters,¹¹⁵ and system personnel.¹¹⁶ For example, a 2001 study showed that substantiation of abuse and neglect reports—a determination by an investigating social worker that the alleged maltreatment likely occurred—happened at a higher rate for Black families, even when relevant conditions were controlled.¹¹⁷

If a substantiated abuse or neglect report reaches the dependency court, the judge determines placement of the child during investigation. If the allegations of abuse or neglect are found to be true, a determination is made whether services can be provided in-home or if the child should be placed outside the home.¹¹⁸ Research indicates that Black

¹⁰⁹ For example, in author Gaither's home state of Indiana, this type of action is referred to as a 310 report. See IND. DEP'T OF CHILD. SERVS., INDIANA CHILD WELFARE POLICY MANUAL, Chapter 3, § 4, at 1 (2021), https://www.in.gov/dcs/files/Child_Welfare_Policy_Manual.pdf. The Indiana Department of Child Services will investigate every report of child abuse and make recommendations. *Id.*

¹¹⁰ Emily Putnam-Hornstein et al., *Racial and Ethnic Disparities: A Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 7 CHILD ABUSE & NEGLECT 33, 42 (2013).

¹¹¹ THE CHILD.'S BUREAU, *supra* note 4, at 5.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 14. Mandated reporters are individuals, generally professionals who come in frequent contact with children, who are mandated by law to report instances of confirmed or suspected abuse and neglect. *Id.*

¹¹⁶ See Maguire-Jack et al., *supra* note 106, at 50. See also Dettlaff & Boyd, *supra* note 105, at 264 (detailing evidence of bias among medical professionals and educational professionals. For example, a 2018 study found that “non-White children with head injuries were nearly twice as likely to be reported for abusive head trauma than White children with similar injuries.” *Id.*)

¹¹⁷ STEVENSON ET AL., *supra* note 47, at 76. In addition, a 2008 study found social workers assigned a greater level of risk to Black parents than white parents despite the Black parents having lower scores on a risk assessment. *Id.* See also Maguire-Jack et al., *supra* note 106, at 56. *But see* Putnam-Hornstein et al., *supra* note 110 (indicating that low socioeconomic status Black children were less likely to be referred to child welfare, have allegations substantiated, or enter foster care than white children of similar socioeconomic status.)

¹¹⁸ STEVENSON ET AL., *supra* note 47, at 77.

children are overrepresented in out of home placements.¹¹⁹ Common out of home placements include living with relatives, in foster homes, or in some circumstances, within a residential facility. Studies show that Black children are more likely to be placed in residential facilities (*i.e.*, group homes) than white children¹²⁰—the placement associated with increased risk of dual status involvement.¹²¹ Federal and state law requires agencies to make reasonable efforts to reunify parents and children, but these efforts are time-limited and in some cases children are removed from their home permanently.¹²² Research indicates that Black children reunify less often and wait longer for a substitute permanent home or family compared to white children.¹²³

These decisions, affecting the most important aspects of the lives of children and families, are in the hands of social workers and judges who are directed by law and policy. For example, state dependency law provides definitions of abuse and neglect that guide child welfare agencies and courts.¹²⁴ Under these definitions, most cases that come

¹¹⁹ See John Fluke et al., *Research Synthesis on Child Welfare Disproportionality and Disparities*, in DISPARITIES & DISPROPORTIONALITY IN CHILD WELFARE 36-38 (2011). In addition, a 2008 study found that “Black children were 77 percent more likely than White children to be removed from their homes following a substantiated maltreatment investigation, even after controlling for factors such as poverty and related risks.” Dettlaff & Boyd, *supra* note 105, at 256. More recently, researchers found that Black children had “significantly greater odds of substantiation and out of home placement when compared with non-Hispanic White children.” Maguire-Jack et al., *supra* note 106, at 56.

¹²⁰ STEVENSON ET AL., *supra* note 47, at 77. See also NAT’L ACADS. OF SCIS., ENG’G, & MED., THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH 109 (Richard J. Bonnie & Emily P. Backes eds., 2019), https://www.ncbi.nlm.nih.gov/books/NBK545481/pdf/Bookshelf_NBK545481.pdf.

¹²¹ See *supra*, Part I.B.

¹²² FELLMETH & HELDMAN, *supra* note 59, at 328.

¹²³ STEVENSON ET AL., *supra* note 47, at 77-78. See also Dettlaff & Boyd, *supra* note 105, at 254. A report from the Government Accountability Office (GAO) in 2007 reported that one factor contributing to longer stays in foster care for Black youth is the difficulty that Black potential foster and adoptive families face in meeting licensing requirements because of household members with prior criminal records. U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 26-27 (2007), <https://www.gao.gov/assets/gao-07-816.pdf>. Decades of criminal justice policy leading to mass arrest and incarceration of Black individuals directly intersects with the overrepresentation of Black children in foster care and the disparate amount of time spent in the system. Other factors noted by the GAO include the lack of affordable housing and services available in largely Black communities, which can delay a parent’s ability to comply with a case plan in order to be reunified with their child. *Id.* at 29-31. Furthermore, efforts to place children with kin—the preferred out-of-home placement for a child—can be complicated by the higher number of child protection referrals made of Black individuals. Put succinctly, “if a family of color is more likely to receive a report, more likely to have the report accepted when received, more likely to be substantiated when investigated, and more likely to have children removed when substantiated, then the kin options for children of color are severely limited.” Rakesh Beniwal, *Implicit Bias in Child Welfare: Overcoming Intent*, 49 CONN. L. REV. 1023, 1042-43 (2017). Nevertheless, research has shown that African American children are more likely than white children to be placed with kin. Fluke et al., *supra* note 109, at 39. This has been offered as an explanation for the disproportionality in foster care placements, length of stay, and reunification outcomes—arguing that children living with relatives tend to stay in these placements longer than they would in non-family foster care, thus skewing the data. *Id.* at 41.

¹²⁴ See CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT (2019), <https://www.childwelfare.gov/pubPDFs/define.pdf>.

into dependency court are cases of neglect.¹²⁵ The definition of neglect varies from state to state and some assert that statutory definitions are ambiguous in some jurisdictions, making the determination of neglect largely subjective and vulnerable to bias on the part of both social workers and judges.¹²⁶ The conflation of neglect and poverty is particularly concerning.¹²⁷ With the continued inequities in education, employment, and housing that contribute to higher levels of poverty among Black families, as well as the increased stressors associated with financial instability, there is significant risk that Black children are removed in circumstances that may otherwise be resolvable within communities or with additional resources.¹²⁸

Unfortunately, there is little research closely examining factors that influence attitudes and decisions about dependency cases, making it difficult to determine the extent to which individual biases contribute to decision-making.¹²⁹ However, the history cited above illustrates a long-standing systemic tendency to intervene with families by removing children from impoverished circumstances. Instinctual decision-making by judges, the ultimate decision-makers in the child welfare system, has the potential to reflect such a tendency. Throughout dependency proceedings, various standards of evidence apply—a single case that moves from initial removal to termination of a parent's rights will involve determinations based on probable cause, preponderance of the evidence, and clear and convincing evidence.¹³⁰ Coupled with the complexity of the facts in many dependency cases and the generally fast pace of the calendar, judges must make difficult decisions quickly and efficiently, which can increase the risk that bias will influence decisions.¹³¹ Research indicates that decision-makers in stressful circumstances who are required to make quick judgements are particularly susceptible to bias.¹³²

Researchers in a recent study acknowledged the enduring stereotypes associating Black individuals with traits such as laziness and criminality and the risk that professionals will rely on such assumptions when making decisions.¹³³ Where such bias

¹²⁵ In 2019, 74.9% of substantiated maltreatment victims across the U.S. experienced neglect. CHILD. 'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019, at xi (2021), <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment>. See also STEVENSON ET AL., *supra* note 47, at 79.

¹²⁶ STEVENSON ET AL., *supra* note 47, at 79.

¹²⁷ *Id.* See also Jerry Milner & David Kelly, *It's Time to Stop Confusing Poverty with Neglect*, IMPRINT, (Jan. 17, 2020), <https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222> ("Poverty is a risk factor for neglect, but poverty does not equate to neglect."). Several states have addressed this concern by distinguishing conditions of poverty from the statutory definition of neglect to some extent. See CHILD WELFARE INFO. GATEWAY, *supra* note 124. Twelve states and the District of Columbia have directly exempted poverty from the definition of neglect. *Id.* at 4.

¹²⁸ There is research indicating that maltreatment rates decline among all races when family income increases, even moderately. STEVENSON ET AL., *supra* note 47, at 80.

¹²⁹ *Id.*

¹³⁰ *Id.* at 79.

¹³¹ *Id.*

¹³² NAT'L CTR. FOR STATE CTS., STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 4 (2012), https://cdn.ymaws.com/www.napaba.org/resource/resmgr/2015_NAPABA_Con/CLE_/400s/404_NAPAB A2015CLE.pdf.

¹³³ Maguire-Jack et al., *supra* note 106, at 56.

exists, it could lead to a failure to identify or recognize assets and supports that families may have to help prevent involvement in the child welfare system and the need for removal of the child. It can also result in very different experiences for families of color when trying to navigate the complexities of the child welfare system and dependency court. Research shows that parents' experience within the dependency system reflects a limited understanding of what is happening in their case. Black and Hispanic parents were shown to understand significantly less than white parents, controlling for education and income.¹³⁴ Some issues identified were based on language challenges, but researchers also hypothesized that there may be differences in how professionals communicate with parents of color.¹³⁵ Researchers also suggest that parents bring a historical distrust of the system into their interactions, choosing to ask fewer questions and engage less with professionals they believe harbor biases.¹³⁶

Some scholars argue that disproportionality within the child welfare system is primarily a result of increased risk factors among Black parents, including high rates of poverty, substance abuse, and single parenting.¹³⁷ This, however, does not preclude acknowledgment and examination of the systemic racism that led to the circumstance of poverty as a result of discrimination in housing, employment, and the criminal justice system.¹³⁸ It also does not negate the impact of biases of those working within the system, contributing to a greater likelihood that families of color are investigated and that their children are removed from their home.¹³⁹ Ultimately, the causes are complex and varied. As Dorothy Roberts stated in her seminal work *Shattered Bonds*:

Refining the precise reason for the system's racial disparity—Black child poverty, caseworkers' cultural misconceptions and racist stereotypes, policy makers' insensitivity to Black families, or the structure of the system

¹³⁴ STEVENSON ET AL., *supra* note 47, at 81.

¹³⁵ *Id.* at 82. This suggestion is based on research indicating that implicit bias affects how much time attorneys spend with criminal defendants, with less time being spent with clients of color. *Id.* On the other hand, the single identified study considering the level of caseworker investment with families found no differences in time spent with Black versus white families. Maguire-Jack et al., *supra* note 106, at 50.

¹³⁶ Maguire-Jack et al., *supra* note 106, at 59. Furthermore, this distrust may result in parents opting to not cooperate with system professionals, which can negatively impact a social worker's assessment of the parent's willingness to address protective issues. *Id.*

¹³⁷ See e.g. Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009).

¹³⁸ *Id.* at 877.

“Appropriate reform should also include the fundamental social changes that would address the poverty, unemployment, and related social ills characterizing the lives of so many poor and black people in our society. Recognition of the racially disparate breakup of black families can usefully focus attention on finally taking more effective action to solve some of the results of our societal legacy of slavery and of racial and economic injustice.”

Id. at 878.

¹³⁹ See discussion *supra* section III.A.

itself—might help to develop targeted programs for reducing the imbalance. But trying to isolate a single overriding source of the system's inferior treatment of Black children fails to capture the way institutional racism works. Black children are overrepresented in child protective services because of the interplay of societal, structural, and individual factors that feed into each other to determine which families fall under state scrutiny and supervision. To address the systemic discrimination against Black families, then, it is most helpful to attribute the disparity to a web of racial injustice that includes all of these causes.¹⁴⁰

This racial injustice, resulting in the more frequent and extensive involvement of Black families with the child welfare system, places Black youth at greater risk of youth justice system involvement. As detailed *supra*, longer periods of time in the child welfare system, frequent placement changes, and placement in group facilities increase this risk. Once in contact with the youth justice system, child welfare-involved youth are subject to several additional decisions that can reflect disparate treatment of Black youth.

B. Youth Justice System

Youth arrest rates have significantly decreased overall in recent years, but youth of color continue to be arrested at disproportionate rates.¹⁴¹ While this can be attributed to some degree to differences in the rate of offending, there is also evidence of unequal policing and harsher enforcement and punishment of Black youth.¹⁴² Black youth are more likely, as shown by numerous studies, to be arrested than white youth for the same behavior and arrested more often than white youth for low-level, non-violent offenses.¹⁴³

Following arrest, youth of color are less likely to be diverted from formal processing, and are more likely to be confined, both pre and post-adjudication.¹⁴⁴ Youth confinement rates overall have plummeted in recent years, with half the number of youths in confinement in 2017 as in 2007; however, youth of color continue to be confined at disparate rates.¹⁴⁵ Mirroring the early history of the youth justice system, research

¹⁴⁰ ROBERTS, *supra* note 79, at 97.

¹⁴¹ In 2018, 50% of all juvenile arrests were of Black youth, who make up only 16% of the general population of juveniles. OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., JUVENILE JUSTICE STATISTICS: JUVENILE ARRESTS, 2018, at 8 (2020),

<https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/254499.pdf>.

¹⁴² JOSH ROVNER, THE SENT'G PROJECT, RACIAL DISPARITIES IN YOUTH INCARCERATION PERSIST 4 (2021), <https://www.sentencingproject.org/publications/racial-disparities-in-youth-incarceration-persist/>.

¹⁴³ See Barbara Robles-Ramamurthy & Clarence Watson, *Examining Racial Disparities in Juvenile Justice*, 47 J. AM. ACAD. PSYCHIATRY L. 48, 50 (2019). See also Feld & Moriearty, *supra* note 60, at 788.

¹⁴⁴ ROVNER, *supra* note 142, at 5. See also Robles-Ramamurthy, *supra* note 143, at 48.

¹⁴⁵ ROVNER, *supra* note 142, at 5-7. Recent data indicates that Black youth are about five times more likely than white youth to be incarcerated. *Id.* at 7. See also *United States of Disparities*, W. HAYWARD BURNS

indicates that Black youth have less access to services in the community, contributing to higher rates of secure confinement.¹⁴⁶ In addition, youth of color have been shown to receive harsher dispositions when charged with the same category of offense as their white peers.¹⁴⁷ Detention on the basis of a technical violation of probation conditions¹⁴⁸ is far more likely to impact Black youth rather than white youth.¹⁴⁹ Transfer to criminal court is less common overall than in years past, but Black youth still experience high rates of transfer, and make up a greater portion of those transferred for person offenses than white youth, despite comprising an equal percentage of those charged.¹⁵⁰ There is also evidence that children of color are denied due process protections, such as access to counsel, at disproportionate rates as well.¹⁵¹

As in the child welfare system, decisions in the youth justice system are guided by law and policy and are in the hands of state actors, including probation officers, prosecutors, and judges. As described above, the “tough on crime” era codified and expanded punitive policies toward children, focusing on punishing “behaviors, habits, and life conditions associated with Black youths living in poverty.”¹⁵² Although many of these policies have been dismantled, vestiges of the approach continue to influence

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<https://usdata.burnsinstitute.org/#comparison=2&placement=1&racess=2,3,4,5,6&offenses=5,2,8,1,9,11,10&year=2017&view=map> (last visited Sept. 25, 2021).

¹⁴⁶ See SAMANTHA HARVELL ET AL., URBAN INST., PROMOTING A NEW DIRECTION FOR YOUTH JUSTICE 9, 12 (2019),

https://www.urban.org/sites/default/files/publication/100013/innovative_strategies_for_investing_in_youth_justice_0.pdf. See also BELL & RIDOLFI, *supra* note 61, at 6.

¹⁴⁷ BELL & RIDOLFI, *supra* note 61, at 9. “In 2004, White youth represented 73 percent of total youth adjudicated delinquent for drug offenses. But they were provided far more opportunities for rehabilitation than Black youth. White youth represented 58 percent of youth sent to out-of-home placement and 75 percent of youth who received probation. In contrast, Black youth represented only 25 percent of total youth adjudicated delinquent for drug offenses. But they represented 40 percent of those sent to out-of-home placement, and a slim 22 percent whose case resulted in probation.” *Id.* at 10.

¹⁴⁸ Technical violations are violations of court-approved probation conditions and are not themselves criminal offenses (e.g., failure to report to probation appointment). NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, *Probation and Parole Violations*, in ENHANCED JUVENILE JUSTICE GUIDELINES 1 (2018),

https://www.ncjfcj.org/wp-content/uploads/2019/01/NCJFCJ_Enhanced_Juvenile_Justice_Guidelines_Final.pdf.

¹⁴⁹ Feld & Moriearty, *supra* note 60, at 797. According to a report from The Appeal, in 2017, Black youth were almost four times more likely to be ordered to secure detention for technical violations as white youth. Dawn R. Wolfe, *Thousands of Children on Probation are Incarcerated Each Year for Nonviolent, Noncriminal Behaviors*, APPEAL (Sept. 4, 2020), <https://theappeal.org/thousands-of-children-on-parole-are-incarcerated-each-year-for-nonviolent-noncriminal-behaviors/>.

¹⁵⁰ JEREE MICHELE THOMAS & MEL WILSON, THE COLOR OF JUVENILE TRANSFER: POLICY & PRACTICE RECOMMENDATIONS 1 (2017), <https://www.socialworkers.org/LinkClick.aspx?fileticket=30n7g-nwam8%3D&portalid=0>.

¹⁵¹ See Feld & Moriearty, *supra* note 60, at 752-53.

¹⁵² Birkhead, *supra* note 53, at 411. An example noted by Professor Birkhead is an Illinois statute allowing drug violations in proximity to public housing to trigger mandatory transfer of youth as young as fifteen to adult court. *Id.*

practice within youth justice agencies and courts.¹⁵³ As a result, disparities persist. This is despite legislative efforts at the federal level to acknowledge and address disparities through the Juvenile Justice and Delinquency Prevention Act.¹⁵⁴ Ultimately, states' compliance with requirements under the Act have lacked enforcement and accountability, leaving the legislation largely ineffective.¹⁵⁵

Research suggests that racial bias influences decisions made by many categories of professionals in the youth justice system.¹⁵⁶ The process through which a child experiences the system includes a series of decision points at which significant discretion is allowed—providing an opportunity for explicit and implicit biases to influence decision-making. For example, police officers make quick judgments regarding the need for intervention in behaviors they witness—some youth may be stopped, some may be redirected, and some may be arrested.¹⁵⁷ Once youth are referred to a probation department for intake, a number of additional decisions are made regarding eligibility and appropriateness for diversion (*i.e.*, providing alternatives to formal court involvement), and the need for detention.¹⁵⁸ In most cases prosecutors have the discretion whether to

¹⁵³ Melissa Sickmund, *The Balanced Approach {Revisited}*, 70 JUV. & FAM. CT. J. 7, 34 (2019). In recent years, there has been a strong push toward probation reform based on a developmental approach to youth justice rather than the historically punitive one that particularly disadvantages Black youth. *See, e.g.*, *Probation System Reform*, ROBERT F. KENNEDY NAT'L RES. CTR. FOR JUV. JUST., <https://rfkncrjj.org/our-work/probation-system-review/> (last visited Sept. 15, 2021) (detailing the probation reform work of the Robert F. Kennedy National Resource Center for Juvenile Justice). *See also* ANNIE E. CASEY FOUND., *TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT 14* (2018), <https://assets.aecf.org/m/resourcedoc/aecf-transformingjuvenileprobation-2018.pdf>. Judicial leadership for promoting such reform has been highlighted. *See* NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *THE ROLE OF THE JUDGE IN TRANSFORMING JUVENILE PROBATION: A TOOLKIT FOR LEADERSHIP 12-13* (2021), https://www.ncjfcj.org/wp-content/uploads/2021/07/AECF_Juvenile_Probation_Toolkit.pdf.

¹⁵⁴ 34 U.S.C. § 11101(a)(10).

¹⁵⁵ The Act first required states to make “specific efforts to reduce the proportion of the youth detained or confined in secure detention facilities, secure correctional facilities, jails and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population.” BELL & RIDOLFI, *supra* note 61, at 13. The provision had little impact as state funding was not tied to compliance. *Id.* Reauthorization in 1992 made efforts to reduce disproportionate minority confinement (DMC) a core requirement for funding, but without further guidance on what this entailed and lax enforcement, the provision has failed to effect change. *Id.* at 14. This remained true through the reauthorization in 2002, which broadened the provision to include disproportionate contact with the youth justice system, not just confinement. *Id.* But the legislation continued to lack meaningful enforcement. The 2018 reauthorization of the Act included additional strategies for combating disparities including simplified data collection requirements and the mandate for states to identify disparities at various contact points within the youth justice system, including arrest, diversion, pre-trial detention, disposition commitments, and adult transfer. *See Racial and Ethnic Disparities*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Oct. 7, 2019), <https://ojjdp.ojp.gov/programs/racial-and-ethnic-disparities>. States must also develop an action plan to reduce disparities and evaluate the impact of the plan. *Id.*

¹⁵⁶ Feld & Moriearty, *supra* note 60, at 790. *See also* Bireckhead, *supra* note 53, at 412.

¹⁵⁷ Rod K. Brunson & Kashea Pegram, “*Kids Do Not So Much Make Trouble, They Are Trouble*”: *Police-Youth Relations*, 28 FUTURE CHILDREN 83, 83 (2018).

¹⁵⁸ Michael J. Leiber & Katerhine M. Jemieson, *Race and Decision Making Within Juvenile Justice: The Importance of Context*, 11 J. QUANTITATIVE CRIMINOLOGY 363, 372-73 (1995).

file a formal petition on a youth or not,¹⁵⁹ and judges preside over adjudication and disposition decisions. It is argued that biases have influence at every step of this process.¹⁶⁰

In a 1998 study, researchers found significant differences in how probation officers viewed the causes of youth offending in the cases of white youth and youth of color.¹⁶¹ Offending by Black youth was attributed to negative attitude and personality defects whereas offending by white children was viewed as a product of external environmental factors such as drug abuse or negative peer influence.¹⁶² These differing assessments influenced how probation officers determined risk to reoffend and dispositional recommendations.¹⁶³ More broadly, there is research demonstrating that white individuals in general tend to view Black boys as older and therefore more responsible for their actions than white boys, which can contribute to harsher treatment in the youth justice system.¹⁶⁴ Similarly, research reveals that Black girls are subject to gendered racial bias in which they are perceived as more adult-like, and ultimately less innocent, than white girls.¹⁶⁵ Scholars point out that court professionals today use terminology that is racially coded, reinforcing racial stereotypes within the court structure.¹⁶⁶

¹⁵⁹ However, in Indiana, where author Gaither presides over youth court, there is a rather unique system where judges must approve the filing of delinquency petitions. IND. CODE § 31-37-10-2(2) (2019) (stating the juvenile court shall approve the filing of the delinquency petition if there is probable cause to believe that the child is a delinquent child and that it is in the best interest of the child **or** the public that the petition be filed)(emphasis added). *See, e.g.*, J.R. v. Indiana, 820 N.E.2d 173, 175 (Ind. Ct. App. 2005) (explaining the juvenile court stated in the order that there was probable cause to believe that the juvenile had committed delinquent acts and authorized the State to file a delinquency petition).

¹⁶⁰ Birkhead, *supra* note 53, at 420. External sources of implicit bias, including mental health professionals and school personnel, also make determinations that can be influential in the handling of youth within the youth legal system. *Id.* at 423-24.

¹⁶¹ NAT'L RSCH. COUNCIL & INST. OF MED., *supra* note 3, at 251 (citing George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOCIO. REV. 554, PAGE (1998)).

¹⁶² *Id.*

¹⁶³ *Id.* at 252. *See also* MODELS FOR CHANGE, JUST. POL'Y INST., KNOWLEDGE BRIEF: ARE MINORITY YOUTHS TREATED DIFFERENTLY IN JUVENILE PROBATION? 1 (2011).

¹⁶⁴ Birkhead, *supra* note 53, at 428. In contrast, a study among three jurisdictions representing both urban and rural communities in different regions of the U.S. in 2011 found that there were "no clear patterns of systematic discrimination among juveniles on probation." MODELS FOR CHANGE, *supra* note 163, at 5.

¹⁶⁵ REBECCA EPSTEIN ET AL., GEORGETOWN L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 1 (2017), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf>. "Given established discrepancies in law enforcement and juvenile court practices that disproportionately affect Black girls, the perception of Black girls as less innocent and more adult-like may contribute to more punitive exercise of discretion by those in positions of authority, greater use of force, and harsher penalties." *Id.* Research indicates that Black girls have been less likely to have cases dismissed, they receive diversion less often, and are more likely to be placed out of home in secure facilities than white girls. *Id.* at 12.

¹⁶⁶ Birkhead, *supra* note 53, at 412. "Coded language" is defined as "substituting terms describing racial identity with seemingly race-neutral terms that disguise explicit and/or implicit racial animus." *Coded Language*, NAT'L EDUC. ASS'N, <https://neaedjustice.org/social-justice-issues/racial-justice/coded-language/>

C. The Compounded Risks for Black Youth

The impact of continued disproportionality and disparities on the likelihood of Black children becoming dual status and the troubling outcomes this status can produce is rarely emphasized. One study in 2011 examined the interplay between disproportionality within the child welfare and youth justice systems, examining the extent to which one influenced the other.¹⁶⁷ After reviewing eight years of arrest data in the state of Illinois, researchers determined that “child welfare involvement is an even higher risk for African-American youths than is juvenile justice involvement; thus, any additional risks for delinquency associated with the child welfare system will contribute to overrepresentation of these youths in the juvenile justice system.”¹⁶⁸ In fact, researchers found that once in contact with the youth justice system, a youth’s involvement with the child welfare system more than doubled the risk of a formal delinquency petition being filed.¹⁶⁹ The study concluded that the child welfare system is “a significant pathway” for Black children into the youth justice system and recommended it be a target for prevention.¹⁷⁰

The graphic below unpacks the research on racial disproportionality and disparity in both systems and adds to the equation the disparate outcomes for foster youth. This illustrates the compounded risks for initial and continuing involvement in the youth justice system experienced by Black youth, as well as the increased likelihood that they will experience negative outcomes in adulthood.¹⁷¹

(last visited Aug. 20, 2021). Examples of racially coded language in juvenile court include descriptions of a youth as being from a “bad” neighborhood or prone to “running the streets.” Birkhead, *supra* note 53, at 387. Such phrasing may not be racially-based on its face, but rather is encoded with stereotypes that can lead to biased decision-making. *Id.* at 412.

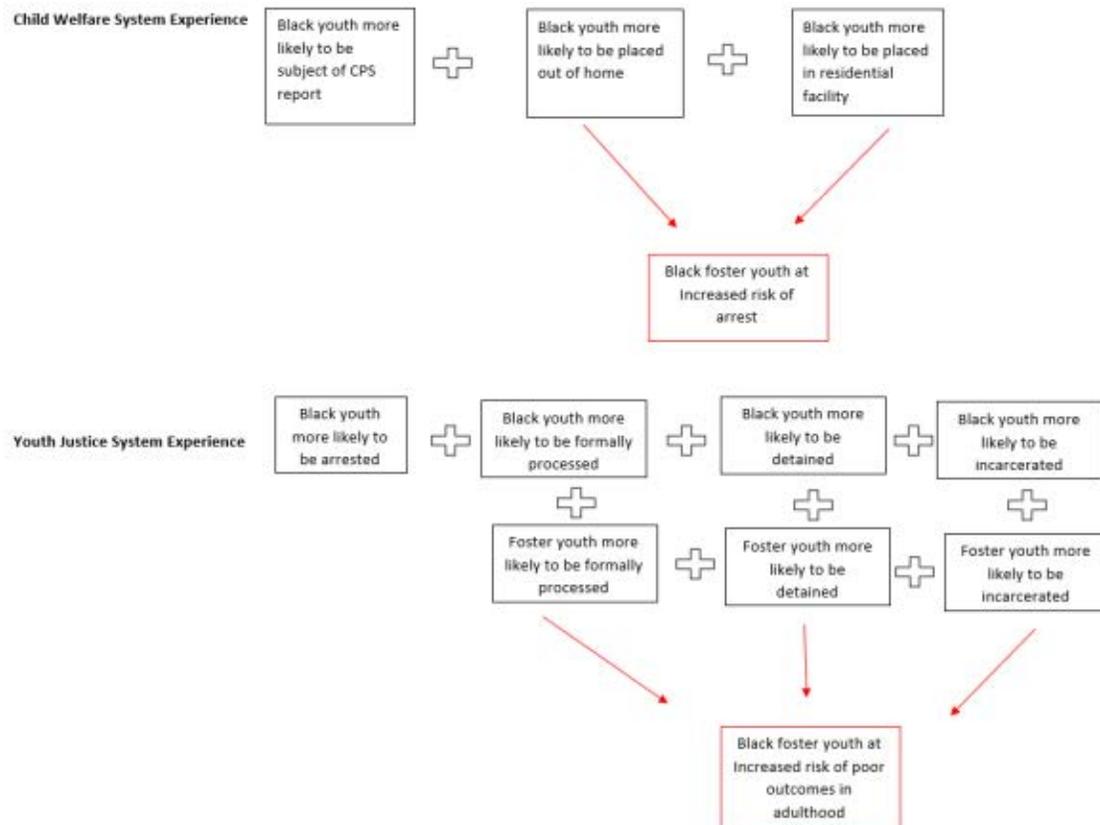
¹⁶⁷ MODELS FOR CHANGE, JUST. POL’Y INST., KNOWLEDGE BRIEF: IS THERE A LINK BETWEEN CHILD WELFARE AND DISPROPORTIONATE MINORITY CONTACT IN JUVENILE JUSTICE? 1 (2011), https://www.njjn.org/uploads/digital-library/Knowledge_Brief_Is_There_a_Link_between_Child_Welfare_and_Disproportionate_Minority_Contact_in_Juvenile_Justice_Models_for_Change_12.1.11.pdf.

¹⁶⁸ *Id.* at 2.

¹⁶⁹ *Id.* at 3.

¹⁷⁰ *Id.* at 4.

¹⁷¹ *See supra* Section I.B.



Given the poor outcomes experienced by dual status youth, it is imperative that the child welfare and youth justice systems promote transformative solutions to not only reduce the risk of foster youth entering the youth justice system, but also to eliminate the systemic racism that compounds the risk of Black foster youth entering and more deeply penetrating the youth justice system.

IV. A TRANSFORMATIVE APPROACH

Efforts to reform how the child welfare and youth justice systems address the issue of dual status youth have primarily focused on how to identify and respond when youth first contact the second system—generally the youth justice system.¹⁷² The goal is to interrupt the trajectory into—or deeper into—the system. This article poses an additional challenge, calling on the systems, including the juvenile court, to examine their functioning through the lens of historic and persistent racism and rooting the prevention of dual status in this understanding. This requires an acknowledgement of the damage done to Black communities and a commitment to restructuring to avoid damage in the future. Otherwise, we risk that future generations of Black youth will continue to struggle against structures and biases that drive a dual status trajectory.

¹⁷² See sources cited *supra* note 9.

To embrace this challenge, this article proposes that each system adopt an anti-racist¹⁷³ approach to reform, which requires deliberate efforts to identify and transform the racist policies and practices—both internal and external to the systems—that contribute to inequality and disparate treatment at numerous decision points in each system.¹⁷⁴ This article proposes a framework for beginning these efforts on behalf of dual status youth: recognition, reorientation, and responsibility.¹⁷⁵ These strategies require using an anti-racist lens¹⁷⁶ to explore policy, practice, and organizational culture; shifting traditional power dynamics to empower and elevate the voices of historically subjugated families and communities; and holding system partners accountable for achieving transformation.

¹⁷³ According to legal scholar Kimberlé Crenshaw, “[a]nti-racism is the active dismantling of systems, privileges, and everyday practices that reinforce and normalize the contemporary dimensions of white dominance.” Minhae Shim Roth, *What Anti-Racism Really Means – and How to Be Anti-Racist* GOOD HOUSEKEEPING (July 6, 2020), <https://www.goodhousekeeping.com/life/a32962206/what-is-anti-racism/>. See also KENDI, *supra* note 4.

¹⁷⁴ In documenting the development of an anti-racist approach adopted by The Jewish Board of Family and Children’s Services, Mary Pender Greene noted that, “[t]he core of anti-racist work is to seek to recognize institutional bias and to make structural changes that are supported by policies and procedures that are accountable with outcomes of equity.” Mary Pender Greene, *Beyond Diversity and Multiculturalism: Towards the Development of Anti-Racist Institutions and Leaders*, J. NONPROFIT MGMT. 9, 10-11 (2007).

¹⁷⁵ This framework is informed by more than a decade of successful dual status youth reform initiatives led by the Robert F. Kennedy National Resource Center for Juvenile Justice. See *Dual Status Youth Reform*, ROBERT F. KENNEDY NAT’L RES. CTR. FOR JUV. JUST., <https://rfknrcjj.org/our-work/dual-status-youth-reform/> (last visited Nov. 13, 2021). The Dual Status Youth Initiative Framework, developed with the assistance of author Heldman, emphasizes the following: 1) the need to identify the prevalence and characteristics of dual status youth as well as the decision-making processes that perpetuate the dual status youth trajectory (*i.e.* recognition); 2) the understanding that youth and families will rarely be successful if viewed as at the bottom of a hierarchy of power rather than engaged as experts and decision-makers in their own lives (*i.e.* reorientation); and 3) the obligation to ensure the work being done by systems on behalf of the youth and families is effective, meeting set objectives, and not causing additional harm (*i.e.* responsibility). See WIIG & TUELL., *supra* note 9.

¹⁷⁶ One description of using an “anti-racist lens” notes:

When looking through an anti-racist lens, I am able to see how skin color, shade, texture of hair and shape of eyes influence the opportunities we have in life, the rights we enjoy, the access we have to resources and the representation and respect we receive. The anti-racist lens helps me to bring a historical and political perspective to solving problems and to understanding the roots of these problems. I can see how the ways in which we have organized our lives and our institutions, around race and other identities, have brought us to our present positions.... The anti-racist lens helps me to get at the ideas that support and justify practices which treat some people, based on their skin color, as superior and more deserving, while treating other people as inferior and less deserving. The most important feature of the anti-racist lens is that it leads me to see how situations can be transformed and how injustices can be reversed. It draws my attention to the ways in which power can be used and is used at the individual, community and institutional levels for change.

Enid Lee, *Looking Through an Anti-Racist Lens*, in BEYOND HEROES & HOLIDAYS 404, 404 (2007).

The first component of this framework is recognition. This article endeavored to provide a brief synopsis of the origin and evolution of the child welfare and youth justice systems through a lens focused on identifying how racial discrimination has shaped the systems even as they function today. This simply provides a starting point, establishing a shared understanding from which individual agencies and communities can proceed. In a recent article discussing how Critical Race Theory (CRT)¹⁷⁷ can be applied to the exploration of Black female dual status youth, the author argued that system professionals, “need to possess knowledge, including knowledge of race, racial history and treatment of children by the child welfare and youth justice systems and to acknowledge the unique experience of African American youth”¹⁷⁸ CRT argues that racism is so entrenched in American society that it can be difficult to identify, and therefore difficult to remedy.¹⁷⁹ Thus, “a race-conscious, critical lens needs to be applied” when addressing issues related to dual status youth.¹⁸⁰

Rather than using an anti-racist lens, analysis of and efforts to combat disproportionality and disparities have suffered from continued focus on the contentious debate over whether disproportionate need or disproportionate offending is the cause of overrepresentation of Black children and families in these systems, or whether bias and discrimination within institutions are to blame.¹⁸¹ This conversation will not move the needle on disparities. As noted by the National Research Council:

We know that racial/ethnic disparities are not reducible to either differential offending or differential selection [*e.g.*, enforcement, prosecution]... DMC [Disproportionate Minority Contact] exists in the broader context of a “racialized society” in which many public policies, institutional practices, and cultural representations operate to produce and maintain racial inequities.”¹⁸²

In order to move past this debate, the child welfare and youth justice systems must concede that racial discrimination has produced both the societal conditions that give rise to disproportionate risks and needs as well as systems that were rooted in, and remain subject to, explicit and implicit biases. It is only when this is acknowledged at the highest levels of each system—including judges, child welfare directors, probation

¹⁷⁷ Critical Race Theory (CRT) is described as “a theoretical framework that examines race, racism, and power structures...to guide critical analysis of issues to inform action strategies.” Kolivoski, *supra* note 33, at 3.

¹⁷⁸ *Id.* at 8.

¹⁷⁹ *Id.* at 3.

¹⁸⁰ *Id.* at 5.

¹⁸¹ Dettlaff & Boyd, *supra* note 105, at 266. *See also* NAT’L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 212 (Richard J. Bonnie et al. eds., 2013). “Despite a research and policy focus on this matter for more than two decades, remarkably little progress has been made on reducing the disparities themselves or in reaching scholarly consensus on the root source of these disparities.” *Id.*

¹⁸² NAT’L RSCH. COUNCIL, *supra* note 181, at 239.

chiefs, police chiefs, and leaders of service provider organizations—and when the issue of race is made primary that transformation can begin.¹⁸³

Recognition also means identifying,¹⁸⁴ understanding, and accepting one's own biases.¹⁸⁵ This recognition must be accomplished by all community partners in the child welfare and youth justice systems.¹⁸⁶ Bias is something we all have. Use of stereotypes and other mental shortcuts is how we process information quickly.¹⁸⁷ The problem is when we incorporate beliefs in practice and extend individual characteristics to groups. We cannot eliminate bias, but we have a duty to understand and recognize when it creeps into the work of decision-makers.¹⁸⁸ This alone can have a positive impact. For example, one study highlighting the existence of racial bias among trial judges indicated that when they became aware of their biases and worked to monitor them, their biases ceased to influence their decisions.¹⁸⁹

The second component is reorientation. In both the child welfare and youth justice system, relationships are designed to be hierarchical. Social workers, judges, and probation officers engage in decision-making regarding restricting the liberty and mandating behaviors of others, resulting in an extreme imbalance of power.¹⁹⁰ Although there will always be a degree of intervention necessary to protect children and communities, a reframing of the value and assets of communities and families as well as the primacy of their perspective and leadership in crafting solutions must become the

¹⁸³ See ERIKA BERNABEI, GOV'T ALL. ON RACE & EQUITY, RACIAL EQUITY: GETTING TO RESULTS 6 (2017), https://www.racialequityalliance.org/wp-content/uploads/2017/09/GARE_GettingtoEquity_July2017_PUBLISH.pdf.

“When we fail to name and center race, though we may be well-intentioned, we will reinforce racial inequities.” *Id.* at 6. See also Kolivoski, *supra* note 33, at 6-7.

¹⁸⁴ The Implicit Association Test was created by Harvard University to help identify implicit bias. To take the test, go to <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Nov. 13, 2021).

¹⁸⁵ Resources providing strategies for addressing bias within the child welfare system can be found at <https://www.childwelfare.gov/topics/systemwide/cultural/disproportionality/reducing/bias/> (last visited Oct. 20, 2021).

¹⁸⁶ See, e.g., Krista Ellis, *Race and Poverty Bias in the Child Welfare System: Strategies for Child Welfare Practitioners*, CHILD L. PRAC. TODAY (Dec. 17, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/race-and-poverty-bias-in-the-child-welfare-system---strategies-f/.

¹⁸⁷ See Annie Murphy Paul, *Where Bias Begins: The Truth about Stereotypes*, PSYCH. TODAY (May 1, 1998), <https://www.psychologytoday.com/us/articles/199805/where-bias-begins-the-truth-about-stereotypes>.

¹⁸⁸ For example, the Model Code of Judicial Conduct Rule 2.3 states: “[a] judge shall perform the duties of judicial office, including administrative duties, *without bias* or prejudice.” MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS’N 2020) (emphasis added), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/.

¹⁸⁹ CTR. FOR CHILD.’S L. & POL’Y, *supra* note 10, at 23-24.

¹⁹⁰ See JOAN PENNELL ET AL, CTR. FOR JUV. JUST. REFORM, GEO., SAFETY, FAIRNESS, STABILITY: REPOSITIONING JUVENILE JUSTICE AND CHILD WELFARE TO ENGAGE FAMILIES AND COMMUNITIES, 15-16 (2011), <https://www.njjn.org/uploads/digital-library/SafetyFairnessStability.FamilyEngagementPaper.CJJR.May2011.pdf>.

norm.¹⁹¹ The harms and poor outcomes associated with foster care and youth justice system involvement, and particularly dual system involvement, necessitate a radical reorientation that avoids prescriptive solutions proposed solely by those in a position of privilege, and instead seeks to empower those with lived experience in constructing strategies to address individual as well as systemic concerns.¹⁹²

One model that can be used to guide the process of reorientation is the Privilege and Subjugated Task (PAST) Model, described as “a power/privilege-sensitive framework designed to defuse contentious conversations and to facilitate constructive engagement across the divides of race and other dimensions of diversity.”¹⁹³ The PAST Model provides guidance on how to communicate with families and communities in a manner that furthers productive conversations about race, with the goal of transforming systems.¹⁹⁴ To achieve this, conversations must focus not on the intentions of the privileged, but on the consequences experienced by the subjugated.¹⁹⁵ Those in the position of privilege must resist issuing prescriptions, as doing so sends a devaluing message, implying that “those in the privileged position know the needs of those in the subjugated position better than they do themselves.”¹⁹⁶

An additional component of reorientation must be to support solutions that invest in and originate within the communities themselves. One example is the establishment of resource centers based in communities. These programs are designed as a primary prevention strategy, helping to support families in communities that traditionally have lacked government investment in adequate support and services.¹⁹⁷ Ideally before a

¹⁹¹ See Vivek Sankaran, *Changing the Child Welfare System Starts with Reframing Our View of Families*, IMPRINT (July 1, 2021), <https://imprintnews.org/opinion/changing-the-child-welfare-system-starts-with-reframing-our-view-of-families/56633>.

¹⁹² See Lexi Grüber, *Child Welfare Policymakers Need to Learn User Centered Design*, IMPRINT (May 27, 2020), <https://imprintnews.org/opinion/child-welfare-policymakers-need-to-learn-user-centered-design/43938>. See also Brian Samuels, *Family and Child Well-Being: An Urgent Call to Action*, 21 CHILDREN'S BUREAU EXPRESS (2020) <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=218§ionid=2&articleid=5602> (“New partnerships with communities, parents, kin, and youth with lived experience will be necessary to rebalance the power dynamic and build a system that reflects the priorities and meets the needs of its constituents.”). See also CHILD.'S BUREAU, U.S. DEP'T OF HEALTH AND HUM. SERVS., 2021/2022 PREVENTION RESOURCE GUIDE 41 (2021) (providing guidance on embracing community input and lived experience), https://www.childwelfare.gov/pubPDFs/guide_2021.pdf.

¹⁹³ Kenneth V. Hardy, *Antiracist Approaches for Shaping Theoretical and Practice Paradigms*, in ANTI-RACIST STRATEGIES FOR THE HEALTH AND HUMAN SERVICES 125, 126 (Mary Pender Greene & Alan Siskin eds., 2016).

¹⁹⁴ *Id.* at 125.

¹⁹⁵ *Id.* at 128.

¹⁹⁶ *Id.* at 132.

¹⁹⁷ CASEY FAM. PROGRAMS, DO PLACE-BASED PROGRAMS, SUCH AS FAMILY RESOURCE CENTERS, REDUCE RISK OF CHILD MALTREATMENT AND ENTRY INTO FOSTER CARE? 2 (2019), https://caseyfamilypro-wpengine.netdna-ssl.com/media/SComm_Family-Resource-Centers.pdf. In line with this recommendation is the work of the Los Angeles County Dual Status Workgroup, established in 2018 by the County Board of Supervisors. INTERSECTION, *supra* note 12, at 13. The workgroup identified supporting resource centers as an Action Area and key strategy for preventing dual system involvement of child welfare-involved youth.

family experiences a crisis, these centers can provide a variety of resources to help stabilize situations and promote protective factors. Such centers generally utilize a strength-based approach that is culturally and linguistically reflective of the community in which they exist.¹⁹⁸ In contrast to the history of ignoring or excluding low-income communities and communities of color, this reorientation invests in these communities. Furthermore, this approach builds bridges between families experiencing challenges and their communities, empowering both, rather than continuing to support a power dynamic that relies on subordination. Preliminary research suggests that these programs produce positive outcomes and provide a significant return on investment.¹⁹⁹

Finally, systems must be held responsible for change. Leaders at the local, state, and federal levels all have roles to play in creating system accountability. The National Committee on Assessing Juvenile Justice Reform of the National Research Council suggests that local leaders must be responsible for identifying the scope of the issue in their community while state leaders must prioritize reform to eliminate disparities and provide oversight of and funding for local efforts to reform policy and practice.²⁰⁰ In addition, the federal government must strengthen requirements designed to address disparities and hold states accountable for compliance.²⁰¹

Among the characteristics of promising reform strategies is increased transparency regarding the scope of disparities and the effectiveness of efforts to reduce them.²⁰² As a preliminary matter, this requires the collection of local and state data highlighting disparities in the experience of Black youth and families in both the child welfare and youth justice systems.²⁰³ Additionally, there must be consistent reporting and review of data indicating whether reform efforts have been effective in reducing these disparities. The importance of data collection, analysis, and reporting cannot be overstated, yet local jurisdictions typically struggle to ensure routine consideration of data points that can effectively illustrate problems and provide evidence of what may or may not be working to address those problems.²⁰⁴ Oftentimes, system leaders and

Id. at 13-14. Furthermore, the Workgroup identified several action items centered on reorienting the power structure between families and systems, including prioritizing “the voices of children, youth, and families at all stages of child welfare decision-making;” keeping “children and youth with their families whenever possible;” and “when out-of-home care is necessary, ensur[ing] that decisions are informed by children, youth, parents and family members . . .” *Id.* at 14.

¹⁹⁸ CASEY FAM. PROGRAMS, *supra* note 197, at 3.

¹⁹⁹ *Id.* at 4.

²⁰⁰ NAT'L RSCH. COUNCIL, *supra* note 181, at 240.

²⁰¹ *Id.* at 300.

²⁰² *Id.* at 237-38.

²⁰³ One example of a data-driven reform effort is the Juvenile Detention Alternative Initiative (JDAI). See *JDAI Core Strategies*, ANNIE E. CASEY FOUND., <https://www.aecf.org/work/juvenile-justice/jdai/jdai-core-strategies> (last visited Sept. 25, 2021). JDAI guides jurisdictions in “improving racial and ethnic equity by examining data to identify policies and practices that may disadvantage youth of color at various stages of the process, and pursuing strategies to ensure a more level playing field for youth regardless of race or ethnicity”. *Id.*

²⁰⁴ NAT'L RSCH. COUNCIL, *supra* note 181, at 299.

personnel simply lack the understanding of how to interpret and use data effectively.²⁰⁵ Other times either the will or the resources necessary to institute and maintain data collection and analysis practices are lacking. A commitment to centering reform efforts around the elimination of disparities is necessary to overcoming resistance or remedying underinvestment.

Although some states and local agencies have engaged in analysis of race and ethnicity data to identify the existence and scope of disproportionality and disparity,²⁰⁶ there must also be responsibility for eliminating those conditions. Jurisdictions are urged to set goals and measure progress toward those goals.²⁰⁷ This can be aided by the creation of structures or bodies to oversee and guide these efforts, and to hold leaders accountable for results.²⁰⁸ The results for which leaders are accountable must reflect the values of child well-being; connection to family, community, and culture; and the elimination of racial disparities at every stage within the child welfare and youth justice systems.²⁰⁹ Government funding should reflect these priorities and some measure of funding should be made contingent on systems achieving positive outcomes in these domains.

Most importantly, this article proposes that the duty of systems and leaders extends beyond the data collection, analysis, reporting, and oversight of reform efforts—all of which have been key aspects of reform efforts for many years, while disparities persist. What is suggested by the research and the potential consequences for Black dual status youth explored above is the urgent need for communities to reckon with the racism that exists within their structures and engage in anti-racist work to disrupt them. Government leaders must require, and communities must demand, that the systems of law

²⁰⁵ CTR. FOR CHILD. 'S L. & POL'Y, *supra* note 10, at 26-27. Extensive guidance on the strategic use of data in reducing disparities is provided in the Center's Racial and Ethnic Disparities Reduction Practice Manual. *Id.*

²⁰⁶ ORONDE MILLER & AMELIA ESENSTAD, STRATEGIES TO REDUCE RACIALLY DISPARATE OUTCOMES IN CHILD WELFARE 1, 8-9 (2015), <https://cssp.org/wp-content/uploads/2018/08/Strategies-to-Reduce-Racially-Disparate-Outcomes-in-Child-Welfare-March-2015.pdf>.

²⁰⁷ BERNABEL, *supra* note 183, at 5.

²⁰⁸ For example, Senate Bill 758 passed in Texas in 2007 established Disproportionality Specialist positions throughout the state as well as a Disproportionality Manager under the Assistant Commissioner for Child Protective Services. *See* MILLER & ESENSTAD, *supra* note 206, at 8. Among the duties of the Disproportionality Specialists is coordinating regional committees and supporting extensive training on racial equity. *Id.* A Minnesota effort included the convening of a Statewide Advisory Committee that for years routinely reviewed local jurisdiction data trends and policy and practice reforms and identified challenges requiring support from state officials. *Id.* at 9. Creation of the Advisory Committee was mandated by the state legislature. *Id.*

²⁰⁹ For example, the Dually-Involved Youth Initiative in Santa Clara County early in its work identified a set of guiding values for its efforts to better serve dual status youth, including the statement that “[o]ur work is guided through the lens of reducing racial disparities within the juvenile justice and child welfare systems.” *See* JOHN A. TUELL ET AL., ROBERT F. KENNEDY, CHILD’S ACTION CORPS, DUAL STATUS YOUTH – TECHNICAL ASSISTANCE WORKBOOK 60 (2013), <https://rfknrcjj.org/images/PDFs/Dual-Status-Youth-TA-Workbook-Cover.pdf>.

enforcement, child welfare, and youth justice adopt and incorporate anti-racist policies and practices and that system leaders be accountable for implementing them.²¹⁰

CONCLUSION

Dual status youth provide the most comprehensive view into the issue of disproportionality and disparities that have plagued child-serving systems since their inception. Rather than viewing each system in isolation, the plight of dual status youth forces us to recognize the shared history of exclusion, dehumanization, and mistreatment of Black youth by our government systems. To be sure, other systems are similarly culpable, including the school system in no small part. Nevertheless, the examination of racial discrimination and the part it has played in our child welfare and youth justice systems is a powerful starting point for the discussion and actions necessary to disrupt the persistent problem of racial inequities for youth. To approach system reform with an understanding of the deleterious effects of this trajectory disproportionately experienced by Black dual status youth provides a pathway beyond reformation into true transformation.

²¹⁰ See MILLER & ESENSTAD, *supra* note 206, at 16. See also Jessica Pryce, *What Will It Take for the Child Welfare System to Become Anti-Racist?*, IMPRINT (June 25, 2020), <https://imprintnews.org/child-welfare-2/what-will-take-for-child-welfare-system-become-anti-racist/44702>.