

STRAIGHT OUT OF COMPTON: DEVELOPMENTAL EQUALITY AND A CRITIQUE OF THE COMPTON SCHOOL LITIGATION

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Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) and its core standard of serving “the best interests of the child” is closely interlinked with the Article 2 guarantee of equality and non-discrimination for all children.¹ The best interests of children are the interests of all children in growth, support, development, and becoming adult citizens who maximize their own potential as well as contribute to the community and the broader society.² The universal language of Article 3, then, must be read in conjunction with the strong guarantee in Article 2 that ensures attention to outcomes and opportunities for all children.

One way in which the concept of best interests takes on real meaning is to link it to a developmental measure.³ This ensures that best interests are normatively nuanced, as well as individually meaningful.⁴ So, for example, the needs of an infant and a teenager are quite different in terms of the

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¹ G.A. Res. 44/25, at 2–4, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter UNCRC], <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [<https://perma.cc/CW4M-95FK>]. Also critical to equality rights is Article 4, which requires states to implement all rights in the Convention but states in particular, “[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources” *Id.*

² See U.N. Comm. on the Rights of the Child, *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration*, ¶¶ 32–35, 41–45, U.N. Doc. CRC/C/GC/14 (May 29, 2013), http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf [<https://perma.cc/BV6R-A9TM>] (discussing the flexible and contextual nature of the range of factors necessarily considered to determine the best interests of a particular child and the specific correlation of a child’s best interests and his or her rights to life, development, non-discrimination, and to be heard).

³ See *id.* ¶¶ 84–87 (discussing the importance of continued monitoring and analysis of child development in relation to assessing best interests).

⁴ See *id.*

structures and policies that maximize developmental opportunity and potential.⁵ If a particular child has developmental or physical disabilities, that child has needs that also may require different support structures to maximize development.⁶

American law has increasingly recognized the value of the developmental perspective.⁷ The United States Supreme Court has cited to developmental scholarship as the basis for a series of decisions on punishment of juvenile offenders, reasoning that state consequences should take account of youth brain development to determine both culpability and the potential for rehabilitation.⁸ At the same time, in the reproductive realm, the Court has recognized the maturity of youth to make decisions about contraceptives and abortion.⁹ American state courts also commonly incorporate developmental insights when framing custody and parenting plan orders, recognizing the different needs of children at various ages and stages, and therefore the need for flexible and supportive arrangements that meet developmental needs over time.¹⁰

This Article argues that this progressive use of interdisciplinary research to incorporate a developmental perspective nevertheless requires attention to persisting inequalities among children.¹¹ The developmental lens must be adjusted to serve developmental equality. Otherwise, well-meaning

⁵ This is reflected in common developmental stages and indicators used to evaluate children and to provide guidance to parents. *See, e.g., Developmental Milestones*, CTRS. FOR DISEASE CONTROL & PREVENTION [hereinafter *Developmental Milestones*], <http://www.cdc.gov/ncbddd/actearly/milestones> [<https://perma.cc/YDL2-3XU4>].

⁶ The UNCRC recognizes this in Article 23. UNCRC, *supra* note 1, at 6–7. Such differential needs are also the foundation of American legislation including the “Individuals with Disabilities Education Act.” 20 U.S.C. § 1400(d)(1)(A) (2012).

⁷ *See, e.g., Miller v. Alabama*, 132 S. Ct. 2455, 2464–65 (2012) (citing *Graham v. Florida*, 560 U.S. 48, 68 (2010) and *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)).

⁸ *See id.*

⁹ *See Hodgson v. Minnesota*, 497 U.S. 417, 423 (1990); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 426 (1983); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 681 (1977).

¹⁰ For example, the Florida custody statute includes developmental considerations as a factor to craft parenting plans. FLA. STAT. § 61.13(3)(s) (2016).

¹¹ This article draws on my prior work on African-American boys. Nancy E. Dowd, *Unfinished Equality: The Case of Black Boys*, 2 IND. J.L. & SOC. EQUALITY 36, 36–37 (2013) [hereinafter *Unfinished Equality*]; Nancy E. Dowd, *What Men? The Essentialist Error of the “End of Men,”* 93 B.U. L. REV. 1205, 1205–07 (2013). The life circumstances of African-American boys and the developmental equality model is developed in greater detail in Nancy E. Dowd, *Black Boys Matter: Developmental Equality*, 45 HOFSTRA L. REV. 47 (2016) [hereinafter *Black Boys Matter*]. Extended treatment of the developmental equality model, the life course of Black boys, and the policy implications of both is the subject of my work in progress, NANCY E. DOWD, EQUALITY REIMAGINED: THE CASE OF BLACK BOYS [hereinafter EQUALITY REIMAGINED] (forthcoming New York University press).

“neutral” measures to foster development replicate subordination by failing to address the enormous developmental challenges placed in the path of children who are the objects of inequality. It is critical that a developmental perspective, essential to meaningful best interests, should incorporate developmental equality, meaning that each child should have the same opportunity to maximize their developmental capabilities.¹² The developmental perspective must incorporate what we know of inequalities that persist among children.

The equality principle of Article 2, then, is the trigger to infuse Article 3 best interests with developmental perspectives that serve all children. The purpose of this developmental equality lens is twofold: (1) to identify risks and challenges that must be immediately addressed, but more importantly, (2) to trigger an obligation by the state to eliminate its role in supporting, directly or indirectly, identifiable challenges that create or exacerbate developmental inequality for children that perpetuate their potential for, or reality of, subordination.¹³

In this Article I frame the concept of developmental equality and show how it can be used to impose concrete obligations on the state, consistent with the purposes of Articles 2 and 3 and the affirmative obligations of Article 4.¹⁴ In other words, the Convention by its terms provides the mechanism for implementation of the theory, because of its goals of achieving children’s equality as well as maximizing their developmental potential.¹⁵ In the United States, the failure to ratify the Convention means that while this UNCRC analysis may be persuasive authority, additional and different strategizing is necessary to implement a litigation strategy or a proactive public policy.¹⁶ Those strategic and theoretical issues are part of a larger project to implement developmental equality.¹⁷ I begin that project in this Article by using a developmental equality model to evaluate the 2015 lawsuit brought against the Compton Unified School District.¹⁸

¹² See *Unfinished Equality*, *supra* note 11, at 50 (discussing the inequality of developmental opportunity for young black men and boys).

¹³ This model might also inform our perspective on how race, gender and class privilege is generated and replicated. See, e.g., Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, in RACE, CLASS, AND GENDER: AN ANTHOLOGY 74–78 (Margaret L. Anderson & Patricia Hill Collins eds., 9th ed. 2015); BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW 27 (1993).

¹⁴ See *infra* Part II.

¹⁵ See UNCRC, *supra* note 1.

¹⁶ On the failure of the United States to ratify the UNCRC, see BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE 6–13 (2010).

¹⁷ See EQUALITY REIMAGINED, *supra* note 11.

¹⁸ See *infra* Section II.A.

In Part I, I set out my developmental equality model in three sections.¹⁹ First, I briefly explore the ecological perspective on child development, a broadly accepted developmental model, and its relation to best interests.²⁰ Second, I consider the limitations of a “neutral” ecological perspective, using as my example data about the life course of African-American boys from birth to age 18.²¹ Finally, I suggest how to shift the lens to one of developmental equality, using the theoretical models of Cynthia García Coll and Margaret Beale Spencer.²² While linked to the experience of children of color in the United States, these models are valid starting points, I would argue, for similar explorations of inequalities among other groups of subordinated children in the U.S. as well as children in other countries.²³ I conclude by suggesting the benefits of the developmental equality perspective, and what obligations it should trigger for the state.²⁴

In Part II, I use this lens to evaluate the Compton litigation.²⁵ In 2015, a landmark lawsuit was filed against the Compton Unified School District alleging the system-wide failure of the district to respond to the widespread disabilities of its students. It was alleged the pattern of disabilities was due to trauma linked to living in a community with high rates of poverty, violence, and victimization from racism and gender difference.²⁶ The lawsuit used developmental science based on research about Adverse Childhood Experiences (ACEs) and neuroscience to argue that the district, with knowledge of the circumstances of its students and the impact of those circumstances on achievement and behavior, failed to provide students with appropriate accommodations. Moreover, the district allegedly re-traumatized students by using harsh and exclusionary disciplinary policies as well as denying them the opportunity to achieve.²⁷ Through the lens of the developmental equality model, I evaluate whether the Compton litigation holds promise as a strategy to accomplish developmental equality.²⁸

¹⁹ See *infra* Part I.

²⁰ See *infra* Section I.A.

²¹ See *infra* Section I.B.

²² See *infra* Section I.C.

²³ See *infra* Section I.B.

²⁴ See *infra* Section I.B.

²⁵ See *infra* Part II.

²⁶ Complaint at 4–5, 7–8, P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d. 1126 (C.D. Cal. 2015) (No. CV 15-3726-MWF (PLAx)).

²⁷ See *id.* at 52–56.

²⁸ See *infra* Part II.

I. DEVELOPMENTAL EQUALITY

A. *The Ecological Perspective*

The best interests standard necessarily requires a developmental perspective in order to meaningfully implement the standard.²⁹ Children are dynamic, moving targets in terms of their needs and necessary support, as well as their competence and capability.³⁰ This is recognized in the most fundamental way by familiar developmental charts that identify physical, mental, cognitive, and social skills, as well as labeling different stages in a more general way.³¹ Based on those charts that distill multidisciplinary research, particularly neuroscience research, the most critical periods of neurological development are in infancy and adolescence.³² Within those periods, change is dramatic.³³ So, for example, some of the developmental hallmarks at six months are sitting up with support, rolling over, and saying two-syllable words.³⁴ At three years children are climbing, running, going up and down stairs; understanding simple words, communicating well; and exhibiting a range of emotions.³⁵ At adolescence, developmental goals include separation from parents and greater interest in peer relationships, more future orientation and independent work habits, and dealing with sexuality.³⁶ At the same time, adolescents experience incomplete brain development, identity development and maturation, creating a perfect storm

²⁹ See Margaret Beale Spencer et al., *A Phenomenological Variant of Ecological Systems Theory (PVEST): A Self-Organization Perspective in Context*, 9 DEV. & PSYCHOPATHOLOGY 817, 828 (1997).

³⁰ See WOODHOUSE, *supra* note 16, at 24–27, 111.

³¹ *Developmental Milestones*, *supra* note 5.

³² For the importance of development at birth (and pre-birth) to age three, see data available at *Early Development & Well-Being, ZERO TO THREE*, <https://www.zerotothree.org/early-development> [<https://perma.cc/RUG7-9D9V>]. For the importance at adolescence see available data. *The Teen Brain: Still Under Construction*, NAT'L INST. MENTAL HEALTH (2011), http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/index.shtml?utm_source=LifeSiteNews.com+Daily+Newsletter&utm_campaign=2c0fa9560b-LifeSiteNews_com_Intl_Full_Text_12_18_2012 [<https://perma.cc/XHS8-ZPKH>].

³³ See *Early Development & Well-Being*, *supra* note 32.

³⁴ *Child Development Milestone Chart*, <https://s-media-cache-ak0.pinimg.com/736x/12/7c/6e/127c6effd2170ff8c987ffb289628040.jpg> [<https://perma.cc/2DNG-K6KV>].

³⁵ *Important Milestones: Your Child by Three Years*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/actearly/milestones/milestones-3yr.html> [<https://perma.cc/PS87-MQEJ>].

³⁶ *Teenagers (15–17 Years of Age)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/childdevelopment/positiveparenting/adolescence2.html> [<https://perma.cc/BE2X-DYNF>].

of risk, including lack of judgment, susceptibility to peers, and separation from parents.³⁷

A child does not move through these stages in isolation; rather, they function within an ecology.³⁸ Urie Bronfenbrenner's ecological model captures the complex pieces of this interaction, with his identification of microsystems, mesosystems, exosystems and macrosystems, and the interconnections between elements of each level, and the levels with each other.³⁹ Microsystems are those that most immediately and directly affect the child, including family, school, peers, and neighborhood.⁴⁰ Mesosystems are the next level of the ecology that interact with those most direct connections, including, for example, the workplace and school systems or structures.⁴¹ Exosystems are the systemic levels that impact children and their parents, including the educational system, political system, religious organizations, healthcare systems, and the legal system.⁴² Finally, the macrosystem is the mix of ideas, principles, biases, and theories that drive the systemic level and impact through various levels to the child.⁴³

The component pieces of the ecology may act functionally or dysfunctionally within each level and between levels.⁴⁴ For example, a child may have a highly supportive and positive family situated within a dangerous neighborhood, or linked to a failing school or even a single inadequate teacher. On the other hand, a child may have a family that is internally dysfunctional but the other direct microsystems reinforce positive outcomes and provide support for developmental outcomes. A good example of this is home nursing visiting programs that ensure very young mothers are provided with support and education to care for newborns.⁴⁵ Another example is programs supporting father involvement for young or low-income fathers who might otherwise drop out of their children's lives

³⁷ See Mark R. Fondacaro, *Why Should We Treat Juvenile Offenders Differently than Adults? It's Not Because the Pie Isn't Fully Baked!*, in *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* 129, 130 (Nancy E. Dowd ed., 2014).

³⁸ URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* 21, 26 (1979).

³⁹ See *id.* at 22, 25.

⁴⁰ See *id.* at 22.

⁴¹ See *id.* at 25.

⁴² See *id.*

⁴³ See *id.* at 26.

⁴⁴ See *id.* at 21.

⁴⁵ *Implementing Early Intervention Program for Adolescent Mothers*, U.S. DEP'T HEALTH & HUM. SERVS. (Apr. 2013), <http://homvee.acf.hhs.gov/Implementation/3/Early-Intervention-Program-for-Adolescent-Mothers-/39/1> [<https://perma.cc/AL36-QJ4V>].

because the meso and exosystems fail to provide structural or ideological support for non-marital fatherhood.⁴⁶

This model also makes clear the interaction of macrosystem ideas on direct microsystem functioning.⁴⁷ An ideological system that views families as private and problems within families, or with children, as personal responsibilities, tends towards a lack of support services for families.⁴⁸ Differences, especially economic ones, are viewed as a product of personal choices.⁴⁹ On the other hand, an ideological system of solidarity and mutual support is often reflected in institutional supports for families grounded in the belief that providing supports for children and their families provides long-run benefits to the social good.⁵⁰ Law is a mechanism that reflects ideological beliefs and norms, and functions throughout the systems to reinforce values and beliefs.⁵¹

In a well-functioning ecology, the immediate actors at the micro level are systemically supported, and this provides essential structural and cultural support to the child, and to those who most directly influence her well-being.⁵² If, for example, families and neighborhoods mutually reinforce positive development, this provides a secure and stimulating context in which children can grow and be ready to begin school.⁵³ On the other hand, if systems are in conflict, it creates stress, or even trauma, either directly to the child or indirectly, through the lack of support of their most essential interactions.⁵⁴ So, for example, if work and family exosystems of parents (employment demands, the availability of high quality child care, income support where needed) are in conflict, making it difficult for parents to provide time and quality nurture to their children, that impacts parental and family dynamics, and thus affects the child.⁵⁵

⁴⁶ Programs based on empirical data are critical. See, e.g., Constance M. Dallas, *Paternal Involvement of Low Income AA Fathers of Children in Multiple Households*, U. ILL. CHI., C. NURSING (June 30, 2015), <https://www.nursing.uic.edu/research/paternal-involvement-low-income-aa-fathers-children-multiple-households> [https://perma.cc/5SL2-TQ24].

⁴⁷ See BRONFENBRENNER, *supra* note 38, at 18.

⁴⁸ See Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 414 (2005).

⁴⁹ See BRONFENBRENNER, *supra* note 38, at 290.

⁵⁰ See, e.g., Woodhouse, *supra* note 48, at 438.

⁵¹ WOODHOUSE, *supra* note 16, at 31–32; Woodhouse, *supra* note 48, at 410.

⁵² See BRONFENBRENNER, *supra* note 38, at 211.

⁵³ See *id.*

⁵⁴ See KATHRYN EDIN & TIMOTHY J. NELSON, DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY 18 (2013); CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 40 (2014).

⁵⁵ See, e.g., Nancy E. Dowd, *Essay: (Re)Constructing the Framework of Work/Family*, 16 WASH. & LEE J. C.R. & SOC. JUST. 331, 336 (2010).

The macrosystem of ideas and ideologies are critical to how the entire ecosystem works, and law is a critical component of the macrosystem that also implements and affects critical players at each level of the ecosystem.⁵⁶ A system of mutual support and solidarity, for example, supports the concept that all children are our children, and provides for each child in a child-centered, individually appropriate way.⁵⁷ A system dominated by ideas of private responsibility and non-intervention in families, on the other hand, may provide little support and rationalize inequalities as privately created rather than publicly structured.⁵⁸

B. Limitations of the Ecological Perspective

The ecological perspective is enormously important to understanding development contextually, identifying the important factors in development and how systems and structures impact the life of individual children and communities.⁵⁹ If the child at the center of this inquiry is a neutral child, a generic child, the model, if used in that way, may unintentionally exacerbate or perpetuate inequalities.⁶⁰

An example of this is the case of African-American boys from age 0–18.⁶¹ In prior work focusing on this group, defined by race and gender, I have presented a detailed demographic portrait.⁶² Rather than being supported to achieve their developmental potential, they are set up to fail—to be subordinated as adults, by virtue of poverty, lack of education, and involvement in the criminal justice system.⁶³ Three critical statistics substantiate this powerful negative picture: one in three is born in poverty;⁶⁴ one in two will not graduate from high school;⁶⁵ and one in three will be incarcerated in their lifetime,⁶⁶ and if they come from a lower socioeconomic status, the risk is doubled.⁶⁷

⁵⁶ *Id.* at 335.

⁵⁷ WOODHOUSE, *supra* note 16, at 30; *see generally* BARBARA BENNETT WOODHOUSE, *THE ECOLOGY OF CHILDHOOD: SMALL WORLDS IN PERIL* (forthcoming New York University Press).

⁵⁸ WOODHOUSE, *supra* note 57. *See also* WOODHOUSE, *supra* note 16, at 29–47.

⁵⁹ *See Unfinished Equality*, *supra* note 11, at 45.

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See id.* at 45–59.

⁶³ *See id.* at 45.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* At the 2016 Wells Lecture, corresponding data were presented for Columbus to contextualize these national data patterns. Columbus, located in Franklin County, Ohio, is 61.5% white, 28% Black, and 5.6% Hispanic. *QuickFacts Columbus City, Ohio*, U.S. CENSUS

These stark statistics are devastating to the life circumstances of black boys. And as recent events continue to demonstrate, they also run the risk of simply not surviving their childhood; of becoming another statistic in an ongoing pattern of racialized violence whether public (police) or private.⁶⁸

A remarkable amount of social science research, until recently, has responded to these patterns with the question, “What is wrong with African-

BUREAU, <http://www.census.gov/quickfacts/table/PST045215/3918000> [https://perma.cc/D5YG-HKV7]. According to diversity data collected by Brandeis University, Columbus schools and housing reflect a high degree of racial segregation/isolation, and disproportionality by race patterns of poverty that are reflected in the school populations of particular schools. See *Columbus, OH Profile: Education*, DIVERSITYDATA.ORG, <http://diversitydata.org/Data/Profiles/Show.aspx?loc=360> [https://perma.cc/3CZP-86L5]. The data of More Than My Brother’s Keeper, a Kirwan Institute program, shows that 59% of Black males 6–14 live in poverty, or nearly two-thirds; the south side of Columbus is notorious for gun violence, with black males the most likely victims; and only one-third of the students at Southside High School graduate on time. *2015 Champion of Children Report: Boys of Color, Boys at Risk*, KIRWAN INST. 27 (2015), http://kirwaninstitute.osu.edu/wp-content/uploads/2015/06/UWO-023-ChampionOfChildrenReport.FALR3_.pdf [https://perma.cc/77HP-3NR3]. A report on the juvenile justice system for Ohio indicates racial disparities statewide. *Juvenile Justice Fact Sheet Series: African-American Youth*, OHIO JUV. JUST. ASS’N 1 (Mar. 2015), <http://www.cdfohio.org/research-library/2015/black-youth-fact-sheet.pdf> [https://perma.cc/7MG6-SFHE]. Black youth who are 17% of the youth population make up 49% of those adjudicated delinquent due to felony conviction; are 57% of those incarcerated, and 82% of those transferred to adult court. *Id.* at 2. They are four times more likely to be arrested than white youth, and six times more likely to be transferred to adult court. *Id.* In the schools, they are more likely to be disciplined and suspended, with the most common offense “disobedient or disruptive behavior,” a category ripe for the playing out of implicit bias. Cheryl Staats & Danya Contractor, *Race and Discipline in Ohio Schools: What the Data Say*, KIRWAN INST. 1–2 (May 2014), <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/05/ki-data-report.pdf> [https://perma.cc/Z6QH-SQZ8]. The racial achievement gap persists, and remains, even when economic disadvantage is not a factor. Collin Binkley, *Wide Racial Gap Persists in Education Testing*, COLUMBUS DISPATCH (Sept. 22, 2013, 8:05 AM), <http://www.dispatch.com/content/stories/local/2013/09/22/wide-racial-gap-persists-in-testing.html> [https://perma.cc/HEB7-VHC9].

⁶⁸ Beginning with the death of Trayvon Martin, there have been highly publicized deaths and injuries of young black men particularly as a result of police shootings that have been captured in videos and pictures. See *George Zimmerman Trial & Trayvon Martin Case*, CBS NEWS, <http://www.cbsnews.com/feature/george-zimmerman-trial-trayvon-martin-case> [https://perma.cc/HV5X-Y5FV]. This visual evidence vividly shows the persistence and lethality of racism at its most violent. *Id.* These tragedies are the tip of the iceberg. While they seem to have begun to move consciousness, they undeniably also demonstrate the daily risks of life for that begin even for quite young black boys, and increase with age. See, e.g., *Freddie Gray Case Trials*, BALT. SUN (Sept. 11, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray> [https://perma.cc/J4ZZ-LR2Q]; Joseph P. Williams, *Tamir Rice Shooting: Not Just a Tragedy*, U.S. NEWS & WORLD REP. (Dec. 29, 2015, 6:48 PM), <http://www.usnews.com/news/articles/2015-12-29/tamir-rice-shooting-not-just-a-tragedy> [https://perma.cc/CK2Z-B8CJ].

American boys?”⁶⁹ Or the variant, “What is wrong with African-American families? Communities?”⁷⁰ Within the developmental literature, the focus has long been on the causes of “deviance” and risky behaviors.⁷¹ As critics have noted, this ignores the structural factors that have an impact on the lives of black boys.⁷² Indeed, the very norms against which children of color have been measured are white norms; virtually all child development theory and research has been either exclusively or predominantly focused on white children.⁷³ As one scholar put it, “even the rat was white.”⁷⁴

A focus on the child that does not take race and gender into account when those factors trigger structural and cultural challenges and differential supports means the wrong questions are asked.⁷⁵ Policy aims at “fixing” what is deemed a deviation from the norm, rather than uncovering why structures, institutions, and policies continue to replicate inequality.⁷⁶ Instead, if there is evidence of discrimination, as the voluminous data and significant social science literature on implicit bias, stereotypes, and structural discrimination substantiate, then the developmental model itself must be reframed to take that into account.⁷⁷ In order to achieve children’s developmental equality, we must use a model that is raced and gendered in order to identify the structural and cultural barriers that children face and that must be eliminated.⁷⁸

Although I have used the American example of African-American boys, the phenomenon of inequalities among children is by no means limited to the U.S.⁷⁹ One prominent European example is Roma or Romani children,

⁶⁹ See Margaret Beale Spencer, *Revisiting the 1990 Special Issue on Minority Children: An Editorial Perspective 15 Years Later*, 77 CHILD DEV. 1149, 1153 (2006).

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² Cynthia García Coll et al., *An Integrative Model for the Study of Developmental Competencies in Minority Children*, 67 CHILD DEV. 1891, 1893–95 (1996).

⁷³ See *id.*

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

⁷⁵ See Stephen M. Quintana et al., *Race, Ethnicity, and Culture in Child Development: Contemporary Research and Future Directions*, 77 CHILD DEV. 1129, 1138 (2006).

⁷⁶ See generally DARYL MICHAEL SCOTT, *CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880–1996* (1997).

⁷⁷ *Unfinished Equality*, *supra* note 11, at 59.

⁷⁸ See *id.* This also suggests that such a model would expose how privilege is conferred on white children in the U.S.; by failing to include racial identity and racial/gender context in current models, it ignores how children acquire a sense of self that replicates hierarchies. See *id.* at 44, 59.

⁷⁹ Lilla Farkas, *Report on Discrimination of Roma Children in Education*, EUR. COMMISSION 5 (2014), http://ec.europa.eu/justice/discrimination/files/roma_child_discrimination_en.pdf [<https://perma.cc/N8ZX-MSYW>].

who have been the focus of significant efforts to improve their life circumstances in the face of devastating demographics that defy normative developmental possibilities.⁸⁰ Roma children are subordinated in almost every developmental demographic—they experience a high poverty rate, including suffering from hunger; many do not go to school, even as compared with other impoverished children, and they are often segregated in schools.⁸¹ Roma children, their families, and their communities suffer intense discrimination that transcends national borders.⁸² Another example of inequality is the treatment of children of Muslim immigrants, whether the children are themselves immigrants or citizens.⁸³ For example, these children have been the object of discrimination in France and Sweden.⁸⁴ The movement of Muslim immigrants throughout the E.U., and into the E.U. zone, continues to trigger strong reactions that inevitably entangle children.⁸⁵ Yet another example is the segregated educational treatment of Palestinian Arab children in Israel.⁸⁶

The litany of examples of discrimination among children unfortunately is a long list. Added to that is a global comparison that finds disadvantage and exploitation concentrated along race, gender, and class lines.⁸⁷ The persistence of those patterns should generate a shift in our developmental lens in order to achieve the goal of children's equality. Where inequalities

⁸⁰ *See id.*

⁸¹ *See id.*

⁸² *See id.*

⁸³ Melissa Eddy, *In Sweden, the Land of the Open Door, Anti-Muslim Sentiment Finds a Foothold*, N.Y. TIMES (Jan. 2, 2015), http://www.nytimes.com/2015/01/03/world/in-sweden-the-land-of-the-open-door-anti-muslim-sentiment-finds-a-foothold.html?_r=0 [<https://perma.cc/NN3L-A6MA>]; Alessandria Masi, *France's Secularism Is Driving Young Muslims Out of School, Work and French Culture*, INT'L BUS. TIMES (Jan. 21, 2015, 10:11 AM), <http://www.ibtimes.com/frances-secularism-driving-young-muslims-out-school-work-french-culture-1789258> [<https://perma.cc/WQ2Z-ASNU>].

⁸⁴ Eddy, *supra* note 83; Masi, *supra* note 83.

⁸⁵ This is evident in a photo essay on the Mediterranean immigration crisis. Alan Taylor, *The Mediterranean Migrant Crisis: Risking Everything for a Chance at a Better Life*, ATLANTIC (May 11, 2015), <http://www.theatlantic.com/photo/2015/05/the-mediterranean-migrant-crisis-risking-everything-for-a-chance-at-a-better-life/392957> [<https://perma.cc/A8F2-5B9U>].

⁸⁶ *See generally* Zama Coursen-Neff, *Discrimination Against Palestinian Arab Children in the Israeli Educational System*, 36 N.Y.U. J. INT'L L. & POL. 749 (2004).

⁸⁷ *See, e.g., The State of the World's Children 2006: Excluded and Invisible*, UNICEF 17–18 (2005), http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf [<https://perma.cc/FA7S-RVAV>]; *Children in the States Factsheets 2015*, CHILD. DEF. FUND (Oct. 21, 2015), <http://www.childrensdefense.org/library/data/state-data-repository/children-in-the-states.html> [<https://perma.cc/U2WU-3U9Q>]. *See also* *News on Millennium Development Goals*, UNITED NATIONS, <http://www.un.org/millenniumgoals> [<https://perma.cc/YV73-Y5NS>].

exist among children, Article 2 should trigger examination of the developmental consequences of those inequalities and the role of the state in perpetuating inequality, in order to ensure that children's Article 3 best interests are served by maximizing their developmental potential. Where there are demonstrable differences in children's developmental outcomes that fall along race, gender, and/or class lines, a developmental lens informed by the consequences of those developmental challenges should be used not only to counter the effects of discrimination, but—more importantly—to trigger obligations and responsibilities to dismantle those structures in the ecology that generate those disproportionate challenges, and implement systems that support children's equal development.

In the following section, I present two models that can be used to adjust the developmental lens to a developmental equality lens, the work of Cynthia García Coll and Margaret Beale Spencer.

C. *Dealing with the Limitations: Shifting the Lens*

To incorporate the perspective of children of color, and to acknowledge that a neutral developmental perspective ignores critical differences among children that are constructed by structural and cultural factors the state may create, implement, or foster, it is essential to use a developmental lens that is explicitly raced and gendered, to determine how those factors impact development. Using this lens should focus on the role of the state and should mandate the end of the state creating differential developmental challenges for children. In place of dismantled structures of subordination, the state should create egalitarian ones.

This is a dramatically different approach than that fostered under typical risk/resilience models commonplace in public health policy making.⁸⁸ In those models, policy focuses first on children with demonstrated problems, then those who are at risk, and finally all children (primary, secondary, and tertiary interventions).⁸⁹ The risk/resilience model is important because it is responsive to current realities.⁹⁰ But it does not necessarily target structural,

⁸⁸ The public health model is comprised of typical risk/resilience models. See *What Researchers Mean by . . . Primary, Secondary and Tertiary Prevention*, INST. FOR WORK & HEALTH [hereinafter *What Researchers Mean*], <http://www.iwh.on.ca/wrmb/primary-secondary-and-tertiary-prevention> [https://perma.cc/989Z-4TVJ]; *The Public Health Approach to Violence Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 25, 2015) [hereinafter *Public Health Approach*], <http://www.cdc.gov/violenceprevention/overview/publichealthapproach.html> [https://perma.cc/7X29-XAVL].

⁸⁹ *What Researchers Mean*, supra note 88; *Public Health Approach*, supra note 88.

⁹⁰ Liam Delaney & Orla Doyle, *Socioeconomic Differences in Early Childhood Time Preferences*, 33 J. ECON. PSYCHOL. 237, 246 (2012).

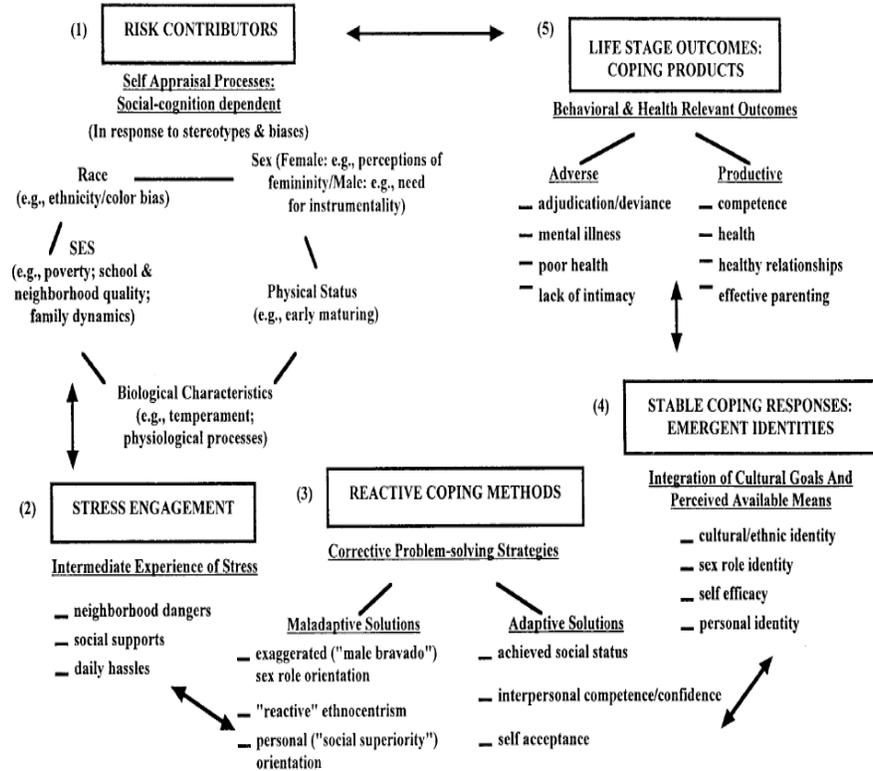
state-created, or state-supported factors that create or exacerbate risk.⁹¹ It may focus, for example, on interventions for children in poor neighborhoods with low-functioning schools, but it does not trigger actions to address poverty and its consequences, nor its institutional manifestations in schools.⁹²

Using the two models described below, a developmental equality approach would identify the factors that create developmental challenges that significantly contribute to differential developmental outcomes along lines of race, gender, and class. Developmental equality would require the state to do something about identified barriers and challenges to development, as well as to provide the supports for every child to reach their developmental potential. The models, therefore, provide a measurable metric to impose state responsibility for children's equality.

⁹¹ *See id.*

⁹² *See id.*; Margaret Beale Spencer et al., *Understanding Hypermasculinity in Context: A Theory-Driven Analysis of Urban Adolescent Males' Coping Responses*, 1 RES. HUM. DEV. 229, 229 (2004).

Margaret Beale Spencer



Margaret Beale Spencer's model,⁹³ the phenomenological variant of ecological systems theory (PVEST), captures the individual's experience and engagement with the ecology within which the child develops, from the perspective of children of color.⁹⁴ The model captures individual responses

⁹³ Spencer et al., *supra* note 29, at 819 (graphic model).

⁹⁴ See Spencer et al., *supra* note 92, at 230. The description of Spencer's model in this segment is based on Spencer et al., *supra* note 92; Margaret Beale Spencer et al., *A Theoretical and Empirical Examination of Identity as Coping: Linking Coping Resources to the Self Processes of African American Youth*, 7 *APPLIED DEVELOPMENTAL SCI.* 181 (2003) [hereinafter *Identity as Coping*]; Margaret Beale Spencer & Carol Markstrom-Adams, *Identity Processes Among Racial and Ethnic Minority Children in America*, 61 *CHILD DEV.* 290 (1990); Margaret Beale Spencer et al., *African American Adolescents: Adaptational Processes and Socioeconomic Diversity in Behavioural Outcomes*, 11 *J. ADOLESCENCE* 117 (1988) [hereinafter *African American Adolescents*].

within structural factors that operate at the micro, meso, exo and macro levels of the ecological model.⁹⁵ Each of the key aspects of the model interacts with the other in a dynamic process of development and identity formation; this happens not in a linear progression, but rather interactively.⁹⁶ The five major subdivisions in the model are: risk contributors; stress engagement; reactive coping methods (to stresses), which can be adaptive or maladaptive; stable coping response/emergent identities; and life stage outcomes/coping products, which can be adverse or productive.⁹⁷

Risk contributors included in the model are described as self-appraisal processes dependent on social cognition, meaning responses to stereotypes and biases.⁹⁸ Inherent in this part of the model is the idea that identity characteristics trigger risks.⁹⁹ The risk factors Spencer includes are: race, sex, socio-economic status, physical status (level of maturity/age/perceived maturity), and biological characteristics, like temperament.¹⁰⁰ Within this category are distilled factors that alone or in combination generate risk for the child.¹⁰¹ The inclusion of race, gender, and socio-economic status distills a wealth of information that indicates these characteristics generate the risk of adverse situations and stresses that may confront the child.¹⁰² Recognition and validation of this part of the model is critical to its use as a guiding lens to achieve developmental equality. As long as these factors are identifiable risks, then they should trigger evaluation of structural and cultural factors that foster that risk, and the responsibility to dismantle that toxic ecology while building a supportive ecology.

Risks in this model identify what may cause harm or pose challenges.¹⁰³ Spencer links this to two pieces of the model: stresses that create situations that must be dealt with by the child, and overall life stage outcomes, where risk can generate either positive or negative outcomes.¹⁰⁴ The link to stress engagement in the model includes neighborhood dangers, social supports, and daily hassles.¹⁰⁵ This captures individual interaction with the microsystems of family, neighborhood, peers, and schools that are most

⁹⁵ See Spencer et al., *supra* note 92, at 231.

⁹⁶ See *id.*

⁹⁷ *Id.* at 232–33.

⁹⁸ See Spencer et al., *supra* note 29, at 818; *Identity as Coping*, *supra* note 94, at 181.

⁹⁹ See Spencer et al., *supra* note 29, at 818; *Identity as Coping*, *supra* note 94, at 181.

¹⁰⁰ See *Identity as Coping*, *supra* note 94, at 181; Spencer et al., *supra* note 92, at 236.

¹⁰¹ See Spencer et al., *supra* note 92, at 237.

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.* at 236.

¹⁰⁵ See *id.*

direct for children and youth.¹⁰⁶ The model includes both positive and negative factors, recognizing that even if there are neighborhood dangers, such as a high rate of violence or minimal healthcare in the event of illness, family and neighborhood can also provide social support.¹⁰⁷ The experience of stress is a common phenomenon of development; the accumulation of stressors, however, is harmful to development.¹⁰⁸ This part of the model also incorporates the wealth of data on microaggressions—the daily insults that persist in the lives of children and adults of color, as well as the culture of negative images and messages in media and the general culture.¹⁰⁹ It captures the cost of microaggressions particularly for children, as well as the development of social supports to counter those messages in families, community, and religious organizations.¹¹⁰

Risks are also linked to overall life stage outcomes, meaning behavioral and health outcomes, which may be mediated by the response to stressors, the development of solidified identities, and their effect at each developmental stage.¹¹¹ It is important to note that this links psychological and developmental well-being to physical/health well-being.¹¹² But Spencer's model also suggests that the risk factors impact life stage outcomes.¹¹³ These can be positive or negative outcomes, but importantly, these are stages, so they may be positive for one stage, negative for another, or some combination.¹¹⁴ Positive outcomes include competence, health, healthy relationships, and effective parenting.¹¹⁵ Adverse outcomes include adjudication/deviance, poor health, lack of intimate relationships, and mental illness.¹¹⁶ These life stage outcomes, the products of this experiential process, are themselves generated by, and generate, coping responses, as well as being affected by risk factors.¹¹⁷ This complex interaction is critical to understanding the impact of structural and cultural factors on development, and therefore the essential role of the state in facilitating the positive development of each child.¹¹⁸ What Spencer's model clearly

¹⁰⁶ *See id.*

¹⁰⁷ *See Identity as Coping, supra* note 94, at 182.

¹⁰⁸ *See id.*

¹⁰⁹ *See* Spencer et al., *supra* note 92, at 236.

¹¹⁰ *See id.*

¹¹¹ *See Identity as Coping, supra* note 94, at 182.

¹¹² *See African American Adolescents, supra* note 94, at 123–24.

¹¹³ *See* Spencer et al., *supra* note 92, at 233.

¹¹⁴ *See id.* at 231.

¹¹⁵ *Identity as Coping, supra* note 94, at 182.

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ *See id.* at 183–84.

demonstrates is how the risk factors generate developmental challenges and potential adverse outcomes because of race, gender and class, and therefore, should trigger the state's obligation not to create or be complicit in creating those challenges, and to affirmatively intervene to ensure positive development.¹¹⁹

How the dynamic works in specific situations is illustrated in the parts of the model that deal with reactions to stressful situations, and the emergence of a stable identity, including stable coping methods.¹²⁰ This part of the model captures the process of development, in the sense of the movement of children and youth through experiences where they experiment, make mistakes, learn and grow, but that very process is highly dependent on the ecology and what responses it reinforces and what consequences flow from experience.¹²¹ In addition, it is affected by the perception of one's context, whether one can recover from mistakes or if one will be judged as fitting within a stereotype.¹²² If deviance and conformity to a negative stereotype is assumed, then outcomes that lead to lack of achievement, high rates of discipline and school suspension, and harsh justice system involvement are predictable.¹²³

Spencer sees reactive coping strategies as problem solving strategies, ones that ultimately work and those that do not.¹²⁴ Adaptive strategies are achieved social status, interpersonal competence, and self-acceptance.¹²⁵ Maladaptive strategies are exaggerated sex role orientation (male bravado), "reactive" ethnocentrism, and personal "social superiority" orientation.¹²⁶ What is interesting about the maladaptive categories is that each of these strategies, according to Spencer, is likely to generate behavior and systemic response to behavior that is highly negative.¹²⁷ Spencer and others have noted the cycle of hyper-vigilance of young men of color, generating a hyper-masculine response likely to trigger more oppressive responses from police, teachers, and community members.¹²⁸

¹¹⁹ See *id.* at 185.

¹²⁰ See *id.* at 183.

¹²¹ See *id.* at 182.

¹²² See Spencer et al., *supra* note 92, at 236.

¹²³ See *id.* at 252.

¹²⁴ See *Identity as Coping*, *supra* note 94, at 182.

¹²⁵ Spencer et al., *supra* note 92, at 230.

¹²⁶ *Id.* at 239.

¹²⁷ See *id.*

¹²⁸ See VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 144 (2011).

This is apparent when looking at the final part of the model, stable coping responses.¹²⁹ The outcome of positive coping methods/problem solving is the solidification of a positive identity that can contribute to positive life outcomes, despite ongoing risks.¹³⁰ The aspects identified here are integration of cultural goals and perceived available means, including cultural/ethnic identity, sex role identity, personal identity, and self-efficacy.¹³¹ This part of the model encapsulates robust recent scholarship exploring the affirmative development of children of color, and in particular, African-American boys.¹³² What this scholarship includes is the complex process of achieving positive development in the face of the risk factors and challenges that Spencer identifies, but also focuses on the positive process of development for children of color because of the strength of their families and communities.¹³³ There is much to be gained by drawing on these strengths particularly to suggest how white families can move toward supporting development of their children without replicating hierarchy.¹³⁴ And in the process of identifying what developmental equality would look like, it provides a vision of that outcome, unencumbered by the need for parents to protectively arm their children to survive the current developmental gauntlet.

Spencer's model is particularly focused on individual level interaction with systemic factors and reminds us of how this intersects with all layers of the ecology.¹³⁵ Her work has been focused on reducing the consequences of risk and facilitating supportive resilience and success, but this model can be applied to require the identification and removal of challenges, triggering a responsibility of support until the demographic data indicate developmental equality, a place that would remove not only the three stark factors mentioned earlier but others as well that indicate challenges to the development of every child to their maximum potential.¹³⁶

¹²⁹ See *Identity as Coping*, *supra* note 94, at 182.

¹³⁰ See *id.* at 185.

¹³¹ See *id.* at 182.

¹³² See *id.* at 181.

¹³³ See *id.*

¹³⁴ See Spencer & Markstrom-Adams, *supra* note 94, at 305.

¹³⁵ See *id.* at 290.

¹³⁶ See *id.* at 306.

Cynthia García Coll

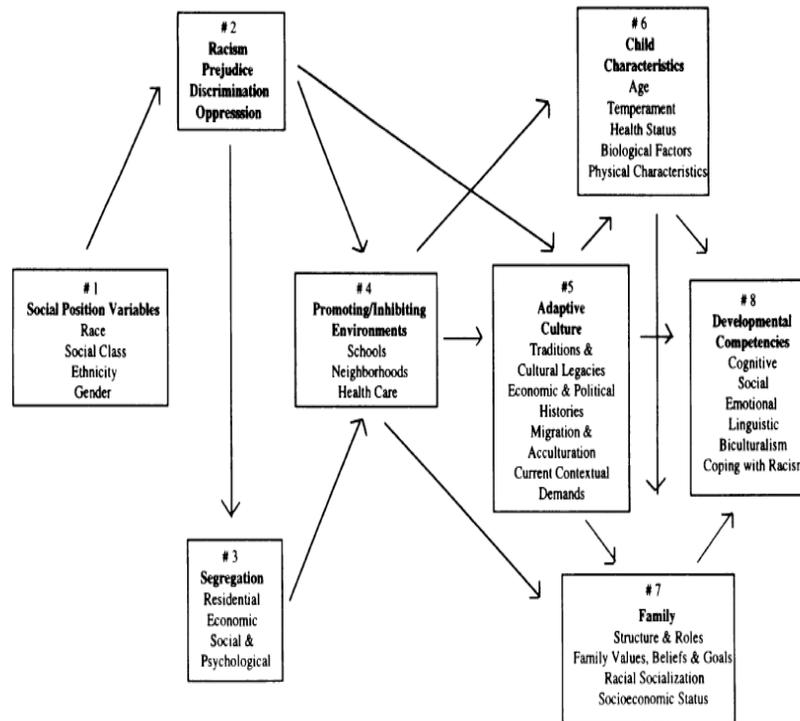


FIG. 1.—Integrative model for the study of developmental competencies in minority children.

Spencer's model particularly captures the individual child's experience in the developmental process of structural and cultural discrimination that creates developmental challenges.¹³⁷ García Coll focuses on the same dynamic, but even more strongly captures what is happening in the ecology structurally and culturally.¹³⁸ García Coll's model,¹³⁹ the integrative model for the study of developmental competencies in minority children, is grounded, like Spencer's, in Bronfenbrenner's ecological model.¹⁴⁰

¹³⁷ See *id.* at 305.

¹³⁸ See García Coll et al., *supra* note 72, at 1892.

¹³⁹ *Id.* at 1896 (graphic model).

¹⁴⁰ This section is based on García Coll's model as described in Cynthia García Coll & Katherine Magnuson, *Cultural Differences as Sources of Developmental Vulnerabilities and Resources: A View from Developmental Research*, in HANDBOOK OF EARLY CHILDHOOD INTERVENTION 94 (Jack P. Shonkoff & Samuel J. Meisels eds., 2d ed. 2000); Cynthia García Coll & Laura A. Szalacha, *The Multiple Contexts of Middle Childhood*, 14 FUTURE CHILD.

García Coll's model has eight component parts: social position, oppression factors (racism, sexism, prejudice, oppression), segregation, promoting or inhibiting environments, adaptive cultures, family, child characteristics, and developmental competencies.¹⁴¹ These are conceptualized in an interactive but linear fashion; each of the factors has an impact on developmental capacities.¹⁴² The first three factors create developmental challenges or hurdles; then a variety of pieces of the ecology can help or hurt in meeting those challenges, along with the individual characteristics of the child, resulting in achieving normative developmental categories or having an impact on those categories.¹⁴³ Rather than focusing on the individual dynamic, García Coll's model is particularly helpful in identifying the systemic and cultural dynamics.¹⁴⁴ Her model also identifies the critical supportive role of families and communities, and the development of cultural adaptations to confront and deal with the developmental challenges wrought by inequality.¹⁴⁵

The first three parts of García Coll's model develop the factors that impact on development based on social position.¹⁴⁶ Included within the social position variable is race, social class, ethnicity, and gender.¹⁴⁷ The relevance of these factors, as with Spencer's similar risk variables, is that these factors generate challenges.¹⁴⁸ Again, this suggests the necessity of monitoring the challenges generated by these factors to ensure children's equality.¹⁴⁹ The next two factors expand on particular ways social position impacts children.¹⁵⁰ The second factor includes racism, prejudice, discrimination, and oppression.¹⁵¹ These categories attempt to encompass the dynamic of inequality inclusively rather than, for example, limiting it to "discrimination," a term that in the United States has tended to be narrowly construed.¹⁵² García Coll links this second factor not only to the characteristics of the child, but also to its impact on the development of

80 (2004); García Coll et al., *supra* note 72; Cynthia García Coll, *Developmental Outcome of Minority Infants: A Process-Oriented Look into Our Beginnings*, 61 CHILD DEV. 270 (1990).

¹⁴¹ García Coll et al., *supra* note 72, at 1896.

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *See id.* at 1892.

¹⁴⁵ *See id.* at 1908.

¹⁴⁶ *See id.* at 1897.

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 1899.

¹⁵¹ *See id.* at 1896, 1899.

¹⁵² *See, e.g.,* Washington v. Davis, 426 U.S. 229, 239 (1976).

adaptive cultures.¹⁵³ Families and communities respond and react in ways to promote the well-being of their children as impacted by these forces in their lives.¹⁵⁴ Her third factor, segregation, encompasses the importance of spatial characteristics for children, including residential, economic, and social/psychological segregation.¹⁵⁵ These three factors (social position, the dynamic of inequality, and segregation) distill rich scholarship of inequality and point to important factors that generate structures that reinforce cultural norms of inequality.¹⁵⁶

At the next phase, García Coll focuses on promoting and inhibiting environments, specifically schools, neighborhoods, and healthcare.¹⁵⁷ In addition to the role of the state with respect to the factors that create social position (versus a society where each child is equally valued and supported irrespective of social position), here she identifies two critical systems—schools and healthcare—that have an impact on children’s development, as well as neighborhoods.¹⁵⁸ Neighborhoods can also be conceptualized as a system heavily influenced by state action, in terms of their ability to promote or inhibit child development.¹⁵⁹ García Coll sees these promoting or inhibiting environments interacting with the child and their particular characteristics apart from social position (age, temperament, physical characteristics, health status, biological characteristics), as well as the child’s family and its characteristics (structure and roles, values, beliefs and goals, socio-economic status, racial socialization).¹⁶⁰ Family and child also interact directly with each other.¹⁶¹

Promoting or inhibiting environments also interact more broadly with communities, affecting what García Coll calls adaptive cultures, meaning the cultural response to promoting development, or inhibiting it based on social position factors.¹⁶² Within the category of adaptive cultural response she includes traditions and cultural legacies, economic and political histories, migration and acculturation, and current cultural demands.¹⁶³ One of the strongest implications of García Coll’s research is paying attention to the actions and beliefs of communities of color and immigrant communities

¹⁵³ García Coll et al., *supra* note 72, at 1904.

¹⁵⁴ *See id.* at 1896, 1905.

¹⁵⁵ *See id.* at 1900–01.

¹⁵⁶ *See id.* at 1908.

¹⁵⁷ *See id.* at 1896, 1902.

¹⁵⁸ *See id.* at 1902.

¹⁵⁹ *See id.* at 1903.

¹⁶⁰ *See id.* at 1905–06.

¹⁶¹ *See id.* at 1906.

¹⁶² *See id.* at 1904.

¹⁶³ *See id.*

and understanding their actions as adaptive responses to support their children, rather than constructing them as negative or deviant.¹⁶⁴

The end result of these complex reactions, triggered by social position and context, fed by the interaction of promoting and inhibiting environments and adaptive cultures, as well as specific characteristics of particular children and families, are developmental outcomes, identified as cognitive, social, emotional, linguistic, bi-cultural, and coping with racism.¹⁶⁵ Included with the familiar and normative “neutral” developmental categories are developmental competencies fostered by communities and families and also necessary to children of color—linguistic competency, the ability to function in their culture and majority culture, and the ability to deal with a context of ongoing racism.¹⁶⁶

García Coll’s model is especially helpful for identifying the structural pieces that intersect to affect children, their families, and their communities.¹⁶⁷ These structures are created and sustained by the state.¹⁶⁸ Therefore, the state is implicated in this model and this should trigger state responsibility to dismantle challenges and support families and communities, as well as to provide promoting environments for all children to reach their developmental capacities.¹⁶⁹

Together, Spencer and García Coll provide concrete theoretical and practical frameworks for developmental equality. These models can be used to identify concrete metrics to measure not only conventional measures of normative development, but to measure whether developmental support is provided for all children.¹⁷⁰ They also incorporate developmental factors that matter for all children: race or ethnicity, gender, and class.¹⁷¹ Such a modification of the developmental model is critical to make equality meaningful for all children.¹⁷²

The embrace of the developmental model in implementing the best interests of the child is an important positive step to link legal rules and public policy outcomes to a multidisciplinary model aimed to best support children and youth.¹⁷³ In an era where children’s inequalities remain, and where those inequalities fall along lines of race, gender, and class, it is essential that the model itself recognize the developmental challenges

¹⁶⁴ *See id.*

¹⁶⁵ *See id.* at 1907.

¹⁶⁶ *See id.*

¹⁶⁷ *See id.* at 1896.

¹⁶⁸ García Coll & Szalacha, *supra* note 140, at 92.

¹⁶⁹ *See id.*; García Coll et al., *supra* note 72, at 1893.

¹⁷⁰ García Coll et al., *supra* note 72, at 1908.

¹⁷¹ *See id.* at 1892.

¹⁷² *See id.* at 1908.

¹⁷³ García Coll & Szalacha, *supra* note 140, at 92.

created by those identity factors alone and in combination. It is also essential that these aspects of identity be affirmatively supported. This model can provide a mechanism to trigger more responsibility on the part of the state to dismantle those challenges and provide support for all children to reach their developmental capacity.

Where would a developmental equality model lead? One potential direction is litigation, as a means to establish the entitlement of every child to equality of opportunity to develop to their potential. In the following section, I critically evaluate the landmark Compton school litigation as a possible strategy.

II. DEVELOPMENTAL EQUALITY AND COMPTON: A STRATEGY FOR CHANGE?

A. *The Lawsuit*

The developmental equality model points to the necessity of systemic change as well as a more nuanced application of developmental principles throughout legal regimes affecting children in order to achieve the equality of all children.¹⁷⁴ This would include, for example, family law, juvenile law, education law, and constitutional law. In the United States, the failure to adopt the UN Convention on the Rights of the Child would necessitate parallel arguments without the benefit of the convention.¹⁷⁵ The filing of an innovative lawsuit in Compton, California aimed at system-wide reform to provide developmental support to students so they can learn raises the question of whether American statutory frameworks already exist to achieve those ends.¹⁷⁶ If so, then developmental equality can utilize those frameworks as a starting point.

Compton, located in Los Angeles County, south of Los Angeles, is a dominantly working-class city of roughly 100,000.¹⁷⁷ The city is notorious for danger and crime, but also famous as the birthplace of rap musicians, and

¹⁷⁴ See *supra* Part I.

¹⁷⁵ See *supra* notes 7–10, 16 and accompanying text.

¹⁷⁶ See Complaint, *supra* note 26, at 1–2.

¹⁷⁷ *Compton*, L.A. TIMES, <http://maps.latimes.com/neighborhoods/neighborhood/compton> [<https://perma.cc/22T7-XJVZ>]. The racial makeup of the city is 56.7% Latino, 39.8% Black, 1.4% Asian, and 0.8% White. *Id.* The website states that this rate of Black and Hispanic residents is “high for the county.” *Id.* The median income is approximately \$43,000, which is low for the county; the proportion of households earning under \$20,000, and earning between \$20,000 to \$40,000 is high for the county. *Id.* The median age in the city is 24, which is young for the county; 22.4% of households are headed by single parents, which is high for the county. *Id.* The city has a higher rate of violent crime and property crime than the average U.S. city. *Id.*

was popularized in the movie, *Straight Outta Compton*.¹⁷⁸ The city is served by one unified school district, the Compton Unified School District.¹⁷⁹

Peter P. v. Compton Unified School District, filed May 18, 2015, in the District Court for the Central District of California, was brought by the Public Counsel Law Center and Irell & Manella, LLP.¹⁸⁰ Five students and three teachers are the named plaintiffs suing individually as well as on behalf of a class of similarly situated students and teachers.¹⁸¹ The defendants are Compton Unified School District, the superintendent of the district, and the board of trustees of the district.¹⁸² The lawsuit asserts that the district, with knowledge of the circumstances of the community that it serves, and the experiences confronted by many of its students, has a duty to take those ecological factors into account system-wide to fulfill its obligation to provide an adequate public education to the students.¹⁸³ Federal disability statutes are the primary basis for the claims, as those statutes require that students with disabilities be accommodated and provided services so that they can be educated.¹⁸⁴ The student-plaintiffs stand for all students in the district for whom the district has failed to provide an education; the teachers stand for all teachers who have been secondarily affected by working with students within a system that ignores student needs.¹⁸⁵

The *Compton* claims rest on a foundation of developmental science as applied to the particular circumstances of the named plaintiffs, as well as the pervasiveness of such experiences given the ecology of the community.¹⁸⁶ The developmental research, grounded in neuroscience and the ACEs framework, as well as work detailing the impact of poverty, racism, and

¹⁷⁸ Aimee Kuvadia, *The Hidden History of Compton Hip-Hop: Part One*, KIND LAND (Mar. 17, 2016), <http://www.thekindland.com/the-hidden-history-of-compton-hip-hop-part-one-1118> [https://perma.cc/5GHM-4H8B].

¹⁷⁹ *School Sites*, COMPTON UNIFIED SCH. DISTRICT, <http://www.compton.k12.ca.us/Pages/Administration/SchoolSites.aspx> [https://perma.cc/2CTJ-DYKN]. The CUSD provides public education for grades K–12. The district operates 22 elementary schools, 9 middle schools, 5 high schools, and 1 adult school. *Id.* The district maintains 3 alternative learning schools. *Id.*

¹⁸⁰ Complaint, *supra* note 26, at 1.

¹⁸¹ *Id.* at 1. See also *Historic Ruling in Landmark Complaint on Unique Learning Needs of Children Affected by Trauma*, PUB. COUNS. (Sept. 30, 2015), <http://www.publiccounsel.org/stories?id=0172> [https://perma.cc/C4UJ-RQXB].

¹⁸² Complaint, *supra* note 26, at 1.

¹⁸³ *Id.* at 3–4.

¹⁸⁴ See *id.* at 67–72 (alleging violations of Section 504 of the Rehabilitation Act, Department of Education regulations regarding “Location and Notification,” “Procedural Safeguards,” and “Free Appropriate Public Education,” and the Americans with Disabilities Act of 1990).

¹⁸⁵ See *id.* at 15–19.

¹⁸⁶ See *id.* at 35–37.

community violence, is the basis for asserting that the experience of trauma due to individual and community-wide factors affects children as they develop, and therefore their ability to learn, because of its impact on their cognitive, socio-emotional, and physical development.¹⁸⁷ For the children in Compton, trauma is not only linked to unique, singular, traumatic events, but also to persistent, daily trauma, creating conditions of complex trauma.¹⁸⁸ Exposure to complex trauma affects learning abilities and behavior in ways that conflict with achievement goals and expectations about discipline; it can also generate mental health issues that create needs for therapy and particular mental health interventions to support individual children.¹⁸⁹

The knowledge that these conditions exist in Compton is a given and, according to the complaint, so too is the knowledge of their impact.¹⁹⁰ In order to educate children in such a community, what is needed is a holistic, whole-school approach that is trauma-sensitive.¹⁹¹ According to the complaint, this would include three key components: training all staff, establishing supportive practices framed around resilience for all students, and providing specifically focused mental health services as needed for individual students.¹⁹² The obligation to engage in such an approach, the complaint alleges, is linked to the school district's duty to provide an appropriate education to the students of its community under the conditions in the community, and its duty to inform parents of their child's right to support in order to learn.¹⁹³ Failure to provide such support is analogized to the segregated school systems struck down in *Brown v. Board of Education*: failure to support students who experience complex trauma translates into a denial of education because the school fails to deal with the known disabilities of a disproportionate number of students.¹⁹⁴ Just as a student with a hearing or sight disability would be denied an education without support, or a student with a physical disability who is excluded from buildings and classrooms would be denied an education, so too are students who come to school with unaddressed complex trauma effectively excluded from an education.¹⁹⁵ Moreover, not only are students who have experienced complex trauma not provided with support, they are also subject to harsh

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.* at 3.

¹⁹² *See id.* at 4.

¹⁹³ *See id.* at 58–67.

¹⁹⁴ *See id.* at 5 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

¹⁹⁵ *See id.* at 5.

disciplinary policies, suspension, and expulsion.¹⁹⁶ In “alternative” schools they are treated harshly and often excluded again.¹⁹⁷ The school district by such policies and practices exacerbates and re-traumatizes students.¹⁹⁸

Since the lawsuit was filed, the plaintiffs have had one huge victory: surviving a motion to dismiss.¹⁹⁹ At the same time, they were unsuccessful in class action certification²⁰⁰ or in obtaining a preliminary

¹⁹⁶ *See id.* at 67.

¹⁹⁷ *See id.*

¹⁹⁸ *See id.* at 58–67.

¹⁹⁹ *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1102 (C.D. Cal. 2015). The defendants argued that trauma is not a physical or mental impairment and no facts show the impact of trauma on a major life activity. *Id.* at 1107–08. Defendants also argued systemic disadvantages are excluded from being considered physical or mental impairment. *Id.* at 1108. They also claimed plaintiffs are “effectively request[ing] this Court to assume that students systematically endure a physical or mental impairment because they reside in a certain zip code.” *Id.* Plaintiffs responded it is the impact of the trauma, not the trauma itself, that is the focus, and analogized to an individual shot due to neighborhood violence who needed a wheelchair. *Id.* at 1109. Impairment exists because trauma generates states that become traits, when trauma is severe or chronic. *Id.* at 1110. The Court accepted the plaintiffs’ argument that complex trauma can cause neurobiological effects, and therefore a physical impairment. *Id.* at 1110–11.

²⁰⁰ *P.P. v. Compton Unified Sch. Dist.*, No. CV 15-3726-MWF (PLAx), 2015 WL 5752770, at *24 (C.D. Cal. Sept. 29, 2015). The court found the plaintiffs had not met their burden on numerosity; while the plaintiffs estimated that the number of students with complex trauma was over 5000, the court held that this did not show how many of those students had been exposed to complex trauma and developed symptoms that interfered with learning. *Id.* at *5–*10. Furthermore, the plaintiffs did not meet their burden on the typicality of named plaintiffs, as to whether they fit in membership of the proposed class. *Id.* at *19. However, the court rejected defendant’s argument that each student is unique and that class certification was impossible. *Id.* The plaintiffs presented data that the school district has 22,000 students and an estimated 24.6% have complex trauma, or 5412 students. *Id.* at *5. According to expert testimony, 54.2% of children are estimated to have experienced one or more ACEs; one in four or 24.6% are estimated to have 2 or more ACEs. *Id.* at *6. The court expressed a desire to know, of the kids exposed to two or more ACEs, how many are “actually suffering from cognizable trauma-induced disabilities” and “have been denied meaningful access to their education.” *Id.* at *8. Commonality can be satisfied, but only if the only resolution is to require system-wide policies and procedures. *Id.* at *10. Finally, the court sees the typicality issues as interconnected to the commonality and remedy issues as well as what constitutes a sufficient evaluation, because “the disability issues before the Court are somewhat novel” and it is not clear what professional standards are with respect to this kind of claimed disability. *Id.* at *19.

injunction,²⁰¹ but neither certification nor eventual injunctive relief is foreclosed.²⁰²

The demographic and community data about Compton are irrefutable facts about poverty, violence, and the rate of other traumatic events. The linchpin of the lawsuit, however, is the persuasiveness of the data that relates the impact of that data to students.²⁰³ For it is the theory of this lawsuit that because these are known toxic factors, and their impact on students is also known, the school is obligated to approach the education of their students differently, or otherwise those students are functionally excluded from an education, and thus excluded from an opportunity critical to their life chances that is guaranteed by the state.²⁰⁴ Because the conditions in the community are so pervasive, the school's response must not be particular and individual, but system-wide.²⁰⁵ In essence, the suit is aiming at structural change, one as massive as *Brown v. Board of Education*. Its potential, therefore, is enormous. As suggested below, however, the lawsuit also has its limits and potential downsides. My critique does not argue for pulling back from *Compton*, but rather to consider it as only a first step, using a very blunt but available instrument to begin to address a much broader set of problems.

B. The Science: The Foundation for Compton

It is important to remember that *Compton* is not unique. Indeed other public interest litigators are in the process of considering or framing actions

²⁰¹ P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1126 (2015). The court's decision notes the difficulty and novelty of the claim, as well as the proposed system-wide relief. *Id.* at 1148. Moreover, the plaintiffs were seeking a mandatory injunction, not a prohibitory one, and such injunctions are held to a higher standard because mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Id.* at 1134 (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009)). While the plaintiffs were arguing for systemic solutions to systemic problems, the defendants argued that if there are issues that merit resolution, then they were all individualized. *Id.* at 1139. In the end, the Court was not willing to say plaintiffs have met this higher standard, which is that their position is "clearly favor[ed]," not just "likely to succeed" on the merits. *Id.* at 1144–45. This also dovetails with the refusal to find class certification, because with no certified class they now have to ground the injunction solely on the cases of the named plaintiffs, which seems like an impossible task. *Id.* at 1144. Finally, defendants argue that plaintiff's request could create more harm than good if a remedy were not well researched and based in evidence. *Id.* at 1150.

²⁰² See *id.* at 1148–49; Compton Unified Sch. Dist., 2015 WL 5752770, at *24.

²⁰³ See Compton Unified Sch. Dist., 2015 WL 5752770, at *5–6.

²⁰⁴ See Complaint, *supra* note 26, at 3–7.

²⁰⁵ *Id.* at 3.

like *Compton* in other school districts with similar profiles.²⁰⁶ The segregation of children by race and poverty makes it particularly likely that some school districts will present similar characteristics.²⁰⁷ A number of states are attempting to use some of the same types of data and research as that presented in *Compton* to proactively engage with the issues presented in the case, and even to engage in preventive programs.²⁰⁸ In the analysis below, I evaluate the primary sources of data for the *Compton* litigation: (1) the ACEs framework and (2) neuroscience research.²⁰⁹

1. Adverse Childhood Experiences (ACEs)

A critical foundation for the *Compton* case is the use and application of ACEs research.²¹⁰ ACE stands for Adverse Childhood Experiences and research using ACEs connects childhood adversity to long term outcomes—first in connection to health, and, more broadly, to developmental impacts that affect learning, achievement, and educational opportunity.²¹¹ The original ACE study published in 1998 was a collaboration between the Centers for Disease Control and Prevention (CDC) and Kaiser Permanente, the large health maintenance organization (HMO) centered in California.²¹² The study was designed to explore the possible links between childhood experiences and adult health outcomes and behaviors.²¹³ The original study was exploratory, asking a series of questions to the HMO's clients about

²⁰⁶ For example, there has been robust education litigation under state constitutional frameworks. See, e.g., Elizabeth A. Harris, *Judge, Citing Inequality, Orders Connecticut to Overhaul Its School System*, N.Y. TIMES (Sept. 7, 2016), http://www.nytimes.com/2016/09/08/nyregion/connecticut-public-schools-inequality-judge-orders.html?_r=0 [https://perma.cc/HA2Z-ZFMH].

²⁰⁷ See Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare?*, CIV. RTS. PROJECT 21–22 (Jan. 2004), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-50-king2019s-dream-or-plessy2019s-nightmare/?searchterm> [https://perma.cc/34K5-EJ5L].

²⁰⁸ See *Adverse Experiences: Indicators on Children and Youth*, CHILD TRENDS, 4–5 (July 2013) [hereinafter *Adverse Experiences*], <http://www.childtrends.org/?indicators=adverse-experiences> [https://perma.cc/6UDE-X5HV] (for state-by-state approach); *supra* note 67 and accompanying text (for Ohio's approach); *infra* Section II.C.3 (for Washington's approach).

²⁰⁹ By no means is this a comprehensive review of all the research, but instead considers an overall view of the research used in the *Compton* case.

²¹⁰ Complaint, *supra* note 26, at 80–100.

²¹¹ Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. PREVENTATIVE MED. 245, 245–46 (1998).

²¹² *Id.* at 245.

²¹³ *Id.* at 246.

their childhood.²¹⁴ The mean age of study participants was 56 years old.²¹⁵ The demographics of the participants in the initial study between 1995 and 1997 were that they were dominantly white (75%), middle class (39% were college graduates), and were roughly equally divided between women and men (9,367 women; 7,970 men).²¹⁶ The questions participants were asked focused on households and families, particularly whether individuals had been victims of maltreatment.²¹⁷ These categories were chosen because of past evidence connecting maltreatment to health outcomes.²¹⁸

The study found a dramatic and remarkable connections between adverse child experiences in the first eighteen years of life and negative physical and mental health outcomes later in life, and those findings have been replicated by other subsequent studies.²¹⁹ The ACE factors that emerged from this initial study continue to be used, grouped under categories of abuse, neglect, and household dysfunction. The factors are as follows: abuse includes emotional, physical, and sexual abuse; neglect includes emotional and physical neglect; and household dysfunction includes the largest group of factors—mother treated violently, household substance abuse, household mental illness, parental separation or divorce, and incarcerated household member.²²⁰ An individual's ACE score is the total number of ACEs *present* in their childhood.²²¹ In the original ACEs study, two-thirds of the participants had at least one ACE; one out of five reported three or more ACEs.²²² In the original and subsequent studies, as the number of ACEs increase, the risk for negative health outcomes increases, including the following: alcoholism and alcohol abuse, chronic obstructive pulmonary disease, depression, fetal death, health-related quality

²¹⁴ Robert Anda, *The Health and Social Impact of Growing Up with Alcohol Abuse and Related Adverse Childhood Experiences: The Human and Economic Costs of the Status Quo*, NAADAC 5, http://www.naadac.org/assets/1959/andar2012_the_health_and_social_impact.pdf [<https://perma.cc/LRS5-SYPK>].

²¹⁵ *Id.* at 5.

²¹⁶ *About the CDC-Kaiser ACE Study*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 14, 2016) [hereinafter *About CDC-Kaiser*], <http://www.cdc.gov/violenceprevention/acestudy/about.html> [<https://perma.cc/LJ2E-EBWC>].

²¹⁷ *Adverse Childhood Experiences and the Lifelong Consequences of Trauma*, AM. ACAD. OF PEDIATRICS 3 (2014) [hereinafter *Lifelong Consequences of Trauma*], https://www.aap.org/en-us/Documents/ttb_aces_consequences.pdf [<https://perma.cc/QS8A-G7Z8>].

²¹⁸ See Anda, *supra* note 214, at 5.

²¹⁹ More than 50 articles have been published using the ACEs study (CDC), and the original study is ongoing after more than a decade. *Id.*

²²⁰ *About CDC-Kaiser*, *supra* note 216.

²²¹ See Anda, *supra* note 214, at 8.

²²² *About CDC-Kaiser*, *supra* note 216.

of life, illicit drug use, ischemic heart disease, liver disease, risk of intimate partner violence, multiple sexual partners, sexually transmitted diseases, smoking, suicide attempts, unintended pregnancy, early smoking, early sexual activity, and adolescent pregnancy.²²³

In terms of the prevalence of particular factors within the Kaiser Permanente dataset, from highest to lowest frequency, the study found as follows within the three overall categories: household dysfunction—substance abuse 27%; divorce or separation 23%; mental illness 17%; domestic violence of mother 13%; criminal behavior/incarcerated parent 6%; abuse—physical 28%, sexual 21%, psychological 11%; neglect—emotional 15%, physical 10%.²²⁴ The study found a high rate of co-occurrence of multiple factors.²²⁵ The likelihood of having an additional ACE was high for household substance abuse—81% for one additional ACE and a majority had 2 or more additional ACEs.²²⁶ It is important to remember that one's score is based on totaling experiences one has had with a factor; there is no further scoring based on frequency.²²⁷ So, for example, one incident of domestic violence is treated the same as a pattern of domestic violence.²²⁸

One of the most important consequences of the ACEs study was to change the thinking of healthcare professionals about how an individual is viewed when they present with health problems.²²⁹ By extension, other individuals, like teachers or daycare providers, similarly might think differently and approach things differently when a child presents with problems.²³⁰ Instead of asking, “*What’s wrong with you?*” the ACEs framework encourages us to ask “*What happened to you?*”²³¹ This refocuses the evaluation from what is wrong with the individual to their environment and experiences, and changes the explanation and understanding from individual bad choices and responsibility to understanding the impact of context on a reasonable child or adult’s behavior.²³²

In addition, the ACEs framework focuses attention on the difference between experiencing *some* trauma (a relatively common experience) and

²²³ *Id.*

²²⁴ Anda, *supra* note 214, at 6.

²²⁵ *See id.* at 8.

²²⁶ *See id.*

²²⁷ *Id.*

²²⁸ *See id.*

²²⁹ *See Lifelong Consequences of Trauma, supra* note 217, at 2.

²³⁰ Anda, *supra* note 214, at 14.

²³¹ *Lifelong Consequences of Trauma, supra* note 217, at 1.

²³² *See id.*

experiencing *toxic* trauma or *complex* trauma.²³³ It differentiates between some stress, which can be positive, and stress that can be negative or toxic.²³⁴ Toxic stress is due to “strong, frequent, or prolonged activation of the body’s stress response systems in the absence of the buffering protection of a supportive, adult relationship.”²³⁵ When toxic stress is prolonged and involves multiple factors, it is termed “complex trauma.”²³⁶ The National Child Traumatic Stress Network (NCTSN) differentiates between episode-specific reaction to threatening circumstances (simple trauma) and complex trauma, where the stresses continue, generating an adaptive response, which becomes maladaptive as the stressors continue.²³⁷ The worst outcomes can come from “strong” stress (such as the loss of a parent); frequent stress (such as a pattern of intimate partner violence); or prolonged adversity (such as physical neglect that might arise from circumstances of persistent poverty or the disruptive circumstances of homelessness).²³⁸ The ability of the individual to be resilient in the face of stress is affected most critically by the immediate family structure, as well as the potentially mediating effect of other immediate adults, such as other family members, neighbors, community members, teachers, etc.²³⁹

The impact of toxic levels of stress is not limited to health outcomes later in life.²⁴⁰ Rather, a higher ACE score also has an impact on the likelihood of “learning and behavioral issues.”²⁴¹ The impact of ACEs is significant because, as with health effects, the negative outcomes are linked to development, especially brain development.²⁴² As one of the principal investigators on the original ACE study, Dr. Robert Anda, has noted, “ACEs disrupt neurodevelopment and can have lasting effects on brain structure and function—the biologic pathways that likely explain the strength of the findings from the ACE Study.”²⁴³ Anda summarizes the key findings of the ACEs research as follows: ACEs are common; multiple ACEs have a very detrimental impact, or can have that impact in the absence of resilience, due

²³³ See *id.* at 2.

²³⁴ See *id.*

²³⁵ *Id.*

²³⁶ *Complex Trauma*, NAT’L CHILD TRAUMATIC STRESS NETWORK, www.nctsn.org/trauma-types/complex-trauma [https://perma.cc/G7CB-ASD7].

²³⁷ See *id.*

²³⁸ *Lifelong Consequences of Trauma*, *supra* note 217, at 3.

²³⁹ See *id.* at 4–5.

²⁴⁰ See *id.* at 2.

²⁴¹ *Id.*

²⁴² Donna Jackson Nakazawa, *7 Ways Childhood Adversity Changes a Child’s Brain*, ACES TOO HIGH (Sept. 8, 2016), <https://acestoohigh.com/2016/09/08/7-ways-childhood-adversity-changes-a-childs-brain> [https://perma.cc/9UE4-SKK5].

²⁴³ Anda, *supra* note 214, at 2.

to neurodevelopmental consequences; and the problems that are linked to high ACEs are themselves also linked.²⁴⁴

2. Neuroscience and Developmental Trajectories

The ACEs framework is intimately intertwined with increasing understanding, largely based in neuroscience, of the development of the brain.²⁴⁵ Neuroscience research explains the link between ACEs and the higher risk of adult negative outcomes for health and overall development.²⁴⁶ This does not mean that ACEs are determinative and irreversible.²⁴⁷ To the contrary, as the American Association of Pediatrics notes, early experiences have an impact on multiple systems: social/behavioral, neuroendocrine, and genetic.²⁴⁸ But they are not determinative: “The ability of an individual to successfully overcome negative experiences from trauma depends on many factors related to the complex interaction between these systems.”²⁴⁹ Importantly, “[c]hildren survive and even thrive despite the trauma in their lives.”²⁵⁰ Resilience factors include “cognitive capacity, healthy attachment relationships (especially with parents and caregivers), the motivation and ability to learn and engage with the environment, the ability to regulate emotions and behavior, and supportive environmental systems, including education, cultural beliefs, and faith-based communities.”²⁵¹ Programs designed for children who have experienced ACEs focus on building resilience by working indirectly through parents as well as directly with children.²⁵²

²⁴⁴ *Id.* at 4. For further research see the works of Dr. Bruce D. Perry. See generally Bruce D. Perry, *Memories of Fear: How the Brain Stores and Retrieves Physiologic States, Feelings, Behaviors and Thoughts from Traumatic Events*, CHILD TRAUMA ACAD. (1999), https://childtrauma.org/wp-content/uploads/2014/12/Memories_of_Fear_Perry.pdf [<https://perma.cc/Z4U9-53UN>]; Bruce D. Perry, *Stress, Trauma and Post-Traumatic Stress Disorders in Children*, CHILD TRAUMA ACAD. (2007), https://childtrauma.org/wp-content/uploads/2013/11/PTSD_Caregivers.pdf [<https://perma.cc/XHT3-7AL7>]; Bruce D. Perry et al., *Childhood Trauma, the Neurobiology of Adaptation, and “Use-Dependent” Development of the Brain: How “States” Become “Traits,”* 16 INFANT MENTAL HEALTH J. 271 (1995). See also *About CDC-Kaiser*, *supra* note 216.

²⁴⁵ See Emily Wilson, *ACEs, ACEs Everywhere . . . But Are We on the Brink?*, HEALTH FED’N PHILA., <http://www.instituteforsafefamilies.org/aces-aces-everywherebut-are-we-brink> [<https://perma.cc/47V4-D2SG>].

²⁴⁶ See *Lifelong Consequences of Trauma*, *supra* note 217, at 4.

²⁴⁷ See *id.*

²⁴⁸ See *id.* at 3.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 4.

²⁵¹ *Id.* at 4–5.

²⁵² Nevertheless, these programs focus on family factors rather than the systemic factors causing harm to the families. See *id.* at 5.

The interaction of ACEs and development is linked to several neuroscience research findings.²⁵³ First, the brain is not complete at birth, but rather is developing rapidly particularly from 0–3.²⁵⁴ Factors like good nutrition and the absence of toxins are critical at this stage of development.²⁵⁵ The Flint water crisis was, therefore, particularly harmful to very young children.²⁵⁶ Second, how the brain architecture continues to develop is strongly affected by the child’s environment (a nurturing, loving, and stimulating environment is key).²⁵⁷ Third, caregivers are critical.²⁵⁸ Fourth, early life experience with trauma affects the response system to stress and can cause epigenetic modification, so the person’s genetic blueprint is modified with respect to stress.²⁵⁹ Fifth, there is interaction and reinforcement of these realms that can produce negative outcomes.²⁶⁰ Therefore, the social and physical environment have an impact on biology and development and changes in the neuroendocrine system can affect brain architecture, what pediatrics calls the ecobiodevelopmental model.²⁶¹

Given the critical importance of the early years of development, adverse experiences translate into excessive stress that interferes with development.²⁶² In utero and in the early years, the neural circuits that deal with stress are very plastic and malleable.²⁶³ Stress affects the circuits and hormonal systems, making them excessively reactive or slow to shut down.²⁶⁴ Overly engaging the stress mechanisms of the brain makes one more vulnerable to mental or physical negative outcomes (for example, depression or anxiety; or diabetes and stroke), producing higher amounts of

²⁵³ See *id.* at 2.

²⁵⁴ Nat’l Sci. Council on the Developing Child, *A Science-Based Framework for Early Childhood Policy: Using Evidence to Improve Outcomes in Learning, Behavior, and Health for Vulnerable Children*, CTR. ON DEVELOPING CHILD HARV. U. 8 (Aug. 2007) [hereinafter *Science-Based Framework*], http://46y5eh11fhgw3ve3ytpwxt9r.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/Policy_Framework.pdf [<https://perma.cc/JXD2-LJ9B>].

²⁵⁵ See *id.* at 26.

²⁵⁶ See *id.*

²⁵⁷ See *id.* at 8.

²⁵⁸ See *id.*

²⁵⁹ See *id.* at 9.

²⁶⁰ See *id.* at 10.

²⁶¹ See *Lifelong Consequences of Trauma*, *supra* note 217, at 4.

²⁶² See *id.* at 2.

²⁶³ Nat’l Sci. Council on the Developing Child, *Excessive Stress Disrupts the Architecture of the Developing Brain*, CTR. ON DEVELOPING CHILD HARV. U. 2 (Working Paper No. 3, Jan. 2014) [hereinafter *Excessive Stress Disrupts*], http://developingchild.harvard.edu/wp-content/uploads/2005/05/Stress_Disrupts_Architecture_Developing_Brain-1.pdf [<https://perma.cc/V46B-XNQJ>].

²⁶⁴ See *id.*

adrenaline and cortisol, affecting brain structure.²⁶⁵ Sustained stress affects learning, memory, and regulation of stress responses.²⁶⁶ Critical factors are a child's relationship with a caregiver, the quality of care and education, and factors that cause stress like poverty.²⁶⁷

The importance of the neuroscience goes beyond providing an explanatory link for the correlation between ACEs and adverse outcomes. The strong bottom line of the neuroscience literature is that the years from 0–3, or even further, 0–5, are critical to development and to equality in development.²⁶⁸ A differential in development might arise not because of a concentration of ACEs with negative implications for development, but rather due to the lack of resources or more limited resources that impact a child's development.²⁶⁹ This research identifies the factors that affect development along with programs or interventions that can close the gap, equalizing developmental support and therefore developmental opportunity.²⁷⁰

The importance of early childhood to development and the impact of adversity and stress is captured in a summary fashion by the Harvard Center on the Developing Child in its “Five Numbers to Remember About Early Childhood Development”: 700 per second; eighteen months; 90-100%; three-to-one odds; and four to nine dollars.²⁷¹ Here is the meaning of the numbers: 700 per second are the number of neural connections made in the early years;²⁷² eighteen months is the age by which vocabulary disparities emerge among children when compared by class and education of their parents;²⁷³ 90-100% is the degree of likelihood of developmental delay if a child has six to seven ACEs;²⁷⁴ three-to-one are the odds of heart disease linked to seven to eight ACEs;²⁷⁵ four to nine is the dollar rate of return for every dollar invested in early childhood development support.²⁷⁶

²⁶⁵ *See id.* at 2–3.

²⁶⁶ *See id.* at 3.

²⁶⁷ *See id.* at 7.

²⁶⁸ *See Science-Based Framework, supra* note 254, at 6–7.

²⁶⁹ *See Excessive Stress Disrupts, supra* note 263, at 7.

²⁷⁰ *See id.*

²⁷¹ *Five Numbers to Remember About Early Childhood Development*, CTR. ON DEVELOPING CHILD HARV. U., <http://46y5eh11fhgw3ve3ytpwxt9r.wpengine.netdna-cdn.com/wp-content/uploads/2015/06/Five-Numbers-to-Remember-About-Early-Childhood-Development.pdf> [https://perma.cc/4MQ8-3BTD].

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

What is most promising about the neuroscience research is that its bottom line is clear: “Four decades of data from a small number of intensive programs demonstrate that it is possible to improve a wide range of outcomes for vulnerable children well into the adult years, as well as generate benefits to society that far exceed program costs.”²⁷⁷ A strong surrounding environment provides the basis for the best development of brain architecture because the brain is developing at a fast rate; the rate of development and the nature of development depends on experiences, and on interaction and relationships with others.²⁷⁸ The research identifies “effectiveness factors” in the first five years of life as well as specific successful programs in some areas: (1) medical care during pregnancy and proactive care for children; (2) early and strong support for vulnerable families, particularly home visiting programs that benefit both the parents and the child (like the Nurse Family Partnership); (3) high quality childcare and preschool programs (like the Abecedarian Program); (4) support programs for families with significant adversity that target both the child and the parent, with full services organized around the provision of childcare and early education (like the Perry Preschool and Head Start programs); (5) intensive services for children who have experienced toxic stress from abuse, neglect, parental depression, or domestic violence; (6) income supplements for families below the poverty line, linked to parental employment; (7) reducing environmental neurotoxins; and (8) delivering supports that are responsive to the child and to the community.²⁷⁹

This work emphasizes that development from 0–3 is intensive in multiple domains: cognitive, linguistic, social, emotional, and motor.²⁸⁰ The environment of development is critical: “When inadequate stimulation is provided or barriers to opportunities for productive learning exist, these can lead to early disparities in capability that generally persist in the absence of effective intervention.”²⁸¹ These differences appear by eighteen months and the gap widens if the environmental differential goes unaddressed.²⁸² Between three and five, “increasingly complex social behaviors, emotional capacities, problem-solving abilities, and pre-literacy skills In the absence of intervention, early social class disparities in language and social-

²⁷⁷ *Science-Based Framework*, *supra* note 254, at 2.

²⁷⁸ *See id.* at 3.

²⁷⁹ Additional factors noted by the research are that scaling up model programs is challenging, and monitoring standards need development. Additionally, the return on investment far exceeds the cost of programs. *See id.* at 3–5.

²⁸⁰ *See id.* at 6.

²⁸¹ *Id.* at 7.

²⁸² *See id.*

emotional development can become increasingly apparent during this period and grow with age.”²⁸³

Neuroscience research thus emphasizes that the process of development makes one’s caregivers and community critical.²⁸⁴ Inequality starts here and is replicated here.²⁸⁵ Even in the absence of any ACEs, this plays a huge role.²⁸⁶ Investing in changing this sharp inequality reaps astounding returns.²⁸⁷

There is not a simple, one-size-fits-all solution that emerges from these core findings, but there are clear principles to follow.²⁸⁸ For example, childcare and early education programs that provide the most benefit have highly skilled teachers, small class sizes, great curricula that stimulate children in a safe environment, language-rich and nurturing interactions with staff, and high child participation.²⁸⁹ Interestingly, one of the most exemplary childcare programs is the U.S. military system.²⁹⁰

The research also demonstrates the clear impact of poverty: low-income kids are far more likely to be unsuccessful in school, less productive as adults, have health problems, and commit crimes.²⁹¹ Interestingly, the studies tend to focus on associated behaviors, not on poverty itself.²⁹² “Nevertheless, many of the most sophisticated studies point to the early childhood period as the stage in which children are most vulnerable to economic deprivation.”²⁹³ The necessary policy implications are both income support and strong work-family policies that support all children and all families.²⁹⁴

The policy implications of this research are suggested in the landmark study *From Neurons to Neighborhoods* as two paths: first, using this knowledge to maximize the development of human capital; and second,

²⁸³ *Id.*

²⁸⁴ *See id.* at 3, 8.

²⁸⁵ *See id.* at 3.

²⁸⁶ *See id.*

²⁸⁷ The Perry Preschool dollar return is \$16.14 for every dollar spent; the Abecedarian Project return is \$4.10 for every dollar spent. *Id.* at 19.

²⁸⁸ *See id.* at 10.

²⁸⁹ *See id.* at 16.

²⁹⁰ This is in contrast to the roughly 20% of child care centers that do not meet basic standards for infants in their care. *Id.* at 17.

²⁹¹ *See id.* at 23.

²⁹² *See id.*

²⁹³ *See id.*

²⁹⁴ *See id.* at 23–24.

focusing immediately to provide support for kids as we find them.²⁹⁵ As the study points out, the policy agenda and rationale is economic, but also moral and human.²⁹⁶

C. Critiquing Compton

1. Overview

The *Compton* lawsuit is an attempt to take this developmental research and apply it to ensure educational access and opportunity, and developmental equality.²⁹⁷ It is inevitably limited by functioning within an imperfect articulation of claims using existing statutory mechanisms. Evaluating the *Compton* case against the model of developmental equality, there are several critiques of the litigation. First, the use of a disability framework is troubling as the basis for claims. It has the potential to feed into persistent racial and ethnic stereotypes of incapability, lack of intellectual capacity, and dangerousness. In many respects responses to trauma are reasonable and rational; they are simply adaptations.²⁹⁸ But more importantly, the disability framework may render invisible the causes of incapability, difficulty, delay, or behavior. Or it may tend toward identifying causes or laying blame on the individual or their family, rather than on structural harm.

Second, the lawsuit treats outcomes long after harm—unnecessary harm—has occurred.²⁹⁹ In other words, it focuses on resilience without reaching systemic discrimination. Changing systems would be a much more powerful outcome. System change is needed beyond the educational system. This litigation only modifies; it does not dismantle the system, nor does it lead back to early childhood and circumstances during pregnancy and at birth.

Third, the science used in the lawsuit has its limits.³⁰⁰ The ACEs framework, while potentially a helpful tool to explain and reimagine inequality, as originally conceptualized and most frequently articulated, is a model that merits very careful use, critique and conceptualization for several reasons. The origin of the model and its uses began far from the environment of districts like Compton. The factors that are part of the ACEs framework

²⁹⁵ See COMM. ON INTEGRATING THE SCI. OF EARLY CHILDHOOD DEV., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 4 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000).

²⁹⁶ See *id.*

²⁹⁷ P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1126, 1144 (C.D. Cal. 2015).

²⁹⁸ See *Science-Based Framework*, *supra* note 254, at 9.

²⁹⁹ Compton Unified Sch. Dist., 135 F. Supp. 3d at 1149.

³⁰⁰ See *id.* at 1131.

focus strongly on the family.³⁰¹ They, therefore, ignore the impact of structural factors like poverty, community violence, and racism. Some have suggested ACEs be used in conjunction with research on poverty and community or neighborhood.³⁰² Not only should the factors be considered, but in addition, we should ask whether an adjusted ACEs framework or ACEs in conjunction with race would ensure that the powerful potential of ACEs would be used in a way that it would reach race and gender when those factors are such powerful predictors of inequality.

2. ACEs Factors: Expand the Factors?

The promise and the limits of ACEs are well worth examining carefully. ACEs are an incredibly powerful framework that can make a remarkable difference for developmental equality. Their positive contribution is making the developmental process—and the consequences of negative factors or challenges in that process—visible, understandable, and transparent.³⁰³ The logic is apparent for all because all or many of us have ACEs.³⁰⁴ The research also demonstrates the impact of cumulative, complex, and sustained ACEs.³⁰⁵ ACEs have the potential to not only be used to trigger essential resiliency programs to counter adverse effects but they might also be used to identify systemic factors that cause ACEs, which are caused by, or should be solved, minimized, or diminished by, the state.³⁰⁶

As ACEs are configured in the original ACEs model still used by many advocates, however, the framework is limited: the focus is on families and the consequences are particularly linked to child maltreatment.³⁰⁷ The factors in the model need to be expanded to take into account what we know to be additional adverse experiences that affect children that were not considered for the original sample in part because of the focus of the original research, and in part because of the identity of the subjects in the original research.³⁰⁸ Two promising efforts to do exactly this are recent studies led by David Finkelhor and Peter Cronholm.

³⁰¹ See *Science-Based Framework*, *supra* note 254, at 12.

³⁰² See *id.* at 23.

³⁰³ See *id.* at 24.

³⁰⁴ See *id.* at 3.

³⁰⁵ See Vincent J. Felitti, *The Relation Between Adverse Childhood Experiences and Adult Health: Turning Gold into Lead*, 6 PERMANENTE J. 44, 45 (2002).

³⁰⁶ See *id.* at 44, 46.

³⁰⁷ Peter F. Cronholm et al., *Adverse Childhood Experiences: Expanding the Concept of Adversity*, 49 AM. J. PREVENTATIVE MED. 354, 355 (2015).

³⁰⁸ See *id.*

Finkelhor, Shattuck, Turner and Hamby explored ACE limitations in a 2013 article.³⁰⁹ As they note, the original ACE study asked adults retrospectively what they had experienced, with respondents ranging in age from 55–57.³¹⁰ This raised the issues of bias in recollection.³¹¹ Second, based on developmental scholarship, more factors might have been included, such as “peer rejection, exposure to violence outside the family, low socioeconomic status, and poor academic performance.”³¹² Combining these insights, they suggest adversity should be measured in childhood to improve the use of ACEs and to better explore the interaction of ACEs.³¹³ In addition, it would expose short-term effects and perhaps better expose the pathways that generate the long-term effects.³¹⁴ “[C]hildhood behavioral and emotional symptoms very likely represent a crucial mediator linking adverse childhood experiences and the longer term health-related problems found in the ACE substudies.”³¹⁵ These researchers replicated the ACE study in a group of youth to see if they could refine the factors using psychological distress as an outcome measure.³¹⁶ They measured the significance of both old and new ACE factors and found some factors in the original scale dropped out and some new factors had significance, creating a revised scale of factors: emotional abuse, physical abuse, sexual abuse, physical neglect, emotional neglect, household mental illness, property victimization, peer victimization, exposure to community violence, socioeconomic status, someone close had a bad accident or illness, below-average grades, parents always arguing, and no good friends.³¹⁷ One of the most notable aspects of this revision is its expansion away from the household/family focus to a broader relational focus (friends, neighbors, and community) as well as including school and socioeconomic status, which brings in the impact of poverty.³¹⁸

What is the value of adding factors? It incorporates developmental knowledge of what has an effect on children’s development and the authors suggest additional factors that might be considered, including low IQ,

³⁰⁹ See David Finkelhor et al., *Improving the Adverse Childhood Experiences Study Scale*, 167 JAMA PEDIATRICS 70 (2013).

³¹⁰ *Id.*

³¹¹ *See id.*

³¹² *Id.*

³¹³ *See id.* at 71.

³¹⁴ *See id.*

³¹⁵ *Id.*

³¹⁶ *See id.*

³¹⁷ *Id.* at 72.

³¹⁸ *See id.* at 73.

parental death, and food scarcity.³¹⁹ Some of the additional factors that were significant were a variety of forms of victimization or interpersonal violence and better capture cumulative effects.³²⁰

The authors also caution about the use of ACEs as a risk assessment tool, versus as a tool for prevention.³²¹ For the latter use, it would require evidence of causation, rather than simply correlation.³²² Secondly, the authors caution there are reasons to intervene and prevent harms even if they do not have the long-term effects that are captured by ACEs.³²³ In other words, the harm itself is inherently a reason for action, rather than limiting action only to long term effects. Finally, they point out, there is already consensus on the harms; ACEs are simply a new tool to identify harms.³²⁴

The second study, by Peter Cronholm and his colleagues, focuses not only on expanding or changing the ACEs categories, but also changing the demographics of the group studied, shifting from white middle-class adults and home-based experiences to a more diverse socio-economic status and racially diverse urban population in Philadelphia.³²⁵ This study had 1,784 respondents, all eighteen or older, who were asked about ACEs using both the conventional ACEs framework and an expanded ACEs framework.³²⁶ The expanded framework included the following additional factors: witnessed violence, felt discrimination, unsafe neighborhood, experienced bullying, and lived in foster care.³²⁷ The data collected were used both to compare the existence of ACEs to the Kaiser study and to determine if the added factors were relevant.³²⁸ The factors and demographics of participants go beyond those studied by the Finkelhor study, relating in particular to known health disparities by race and ethnicity as well as socio-economic status, and known impacts of community factors for Black and Latino youth.³²⁹

The added domains or factors were generated by a review of the literature as well as community-specific information, with questions adapted from other existing surveys.³³⁰ Demographically, the study participants

³¹⁹ *See id.*

³²⁰ *See id.*

³²¹ *See id.* at 74.

³²² *See id.*

³²³ *See id.*

³²⁴ *See id.*

³²⁵ Cronholm et al., *supra* note 307, at 355–56.

³²⁶ *See id.* at 355.

³²⁷ *See id.* at 358.

³²⁸ *See id.* at 357.

³²⁹ *See id.* at 356.

³³⁰ *See id.* at 355–56.

were 45.2% White, 43.6% Black, 3.6% Latino, 3.7% Asian, and 3.9% other—a composition significantly different from the Kaiser study and representative of Philadelphia census categories.³³¹ The Philadelphia group were younger as well, almost a reverse of the age percentages in the Kaiser Permanente study.³³²

The conventional ACEs score for the Philadelphia respondents were higher than the Kaiser group for every ACE factor other than the factors for sexual abuse, emotional neglect, and physical neglect.³³³ For the Expanded ACE categories, the participants' experience was quite high for witnessing community violence (40.5%), racial discrimination (34.5%) and unsafe neighborhood (27.3%).³³⁴ Higher expanded ACEs were more prevalent for certain groups, particularly males and persons of color.³³⁵ “Together these findings support the long-standing notion that higher levels of adversity exist in minority and lower-income populations.”³³⁶

Gender, race, and poverty are associated with the expanded ACEs, but not with conventional ACEs.³³⁷ So if you only use conventional ACEs, adversity is underreported, and that underreporting is specific to certain groups: men, people of color, divorcees, and those below 150% of the poverty level.³³⁸ As the authors remind us, the pathways and links between experiences and outcomes are still being sorted out, and how they lead to impairments and negative behaviors.³³⁹ However, what is critical is understanding how they function in different populations.³⁴⁰ “Large, enduring, macrosocial factors such as poverty, racism and classism have been associated with poorer health and health disparities but have proven resistant to mitigation as economic gaps widen in the U.S.”³⁴¹ This study and its expanded ACEs is the first to incorporate community level adversity.³⁴²

One final example of modification of the original ACEs is represented in the 2013 data report from Child Trends on adverse indicators, which uses

³³¹ *Id.* at 357.

³³² *Id.*

³³³ *Id.* at 358.

³³⁴ *Id.*

³³⁵ The other groups are being divorced, working full-time, and those having income levels 150% below the poverty line. *Id.* at 359.

³³⁶ *Id.* at 357.

³³⁷ *See id.* at 358.

³³⁸ *Id.* at 359.

³³⁹ *See id.*

³⁴⁰ *See id.*

³⁴¹ *Id.*

³⁴² *Id.* at 360.

nine adverse indicators developed for the 2011/12 National Survey of Children's Health.³⁴³ They include economic hardship, divorce or separation, death of a parent, parental incarceration, witnessing intimate partner violence, neighborhood violence, mental illness, substance abuse, and being treated unfairly due to race or ethnicity.³⁴⁴ This set of ACEs includes both household and community factors by incorporating poverty, racism, and community violence.³⁴⁵

It is notable how widespread ACEs are in the Child Trends data—twelve percent of children had three or more ACEs.³⁴⁶ The most common ACEs are economic hardship (25.7%) and parental divorce/ or separation (20.1%).³⁴⁷ Surprisingly, only 4% had experienced race/ethnic discrimination.³⁴⁸ When further examined by race, Black children are more likely to experience ACEs, but not by a significant degree (15% versus 11% for whites have had three or more ACEs); but white children are most likely to have experienced no ACEs (56%).³⁴⁹

These examples of critique of the ACEs model point to the importance of refining it. One under-represented trauma in the model is racism.³⁵⁰ Even to the extent that it is (sometimes) included, it is not representative or inclusive.³⁵¹ Other possible factors for inclusion might include juvenile justice system involvement, encounters with police in school or on the street, or school discipline, including school exclusion.³⁵²

3. *Using ACEs: The Washington State Example*

A second improvement to ACEs is not the metric itself but rather its use. The primary focus of ACEs research and scholarship is its usefulness to identify populations with high ACEs and then link them to programs that build resilience and healing.³⁵³ A different, expanded use of ACEs is suggested, for example, by the state of Washington, which has made an effort to use ACEs to find out both about children and communities, to

³⁴³ *Adverse Experiences*, *supra* note 208, at 3.

³⁴⁴ *See id.* at 2.

³⁴⁵ *See id.* at 3.

³⁴⁶ *See id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 4.

³⁵⁰ *See id.* at 3.

³⁵¹ Roy Wade, Jr. et al., *Adverse Childhood Experiences of Low-Income Urban Youth*, 134 PEDIATRICS 13, 14 (2014), <http://pediatrics.aappublications.org/content/pediatrics/early/2014/06/10/peds.2013-2475.full.pdf> [<https://perma.cc/U47G-V5FY>].

³⁵² *See id.* at 16.

³⁵³ Cronholm et al., *supra* note 307, at 355.

understand the context in which the child is functioning ecologically.³⁵⁴ An additional critical piece of the Washington model is its inclusion of poverty, community violence, and race or ethnicity in its focus.³⁵⁵ By comparing poverty and ACEs, it separates them as independent developmental factors creating challenges.³⁵⁶

Washington is involved in a broad, groundbreaking strategy to achieve developmental success for all the children in the state.³⁵⁷ It is statewide, but community centered.³⁵⁸ It uses ACEs in a more expanded way by gathering data not only on children, but also on adults; so examining the range and intensity of ACEs in youth but also in the adults of the surrounding community, linking the use of ACEs to supports for the adults as well as for kids, and seeing the links of children and families, and of both to community.³⁵⁹ In addition, poverty is treated as an interrelated but independent source of adversity; race or ethnicity is tracked as another source of adversity.³⁶⁰ The use of ACEs scores, poverty measures (such as free school lunch data), and the demographic data of ethnicity (here,

³⁵⁴ Christopher Blodgett, *No School Alone: How Community Risks and Assets Contribute to School and Youth Success*, WASH. ST. OFF. FIN. MGMT. 3 (Mar. 2015), <http://ext100.wsu.edu/cafru/wp-content/uploads/sites/65/2015/02/No-School-Alone-Final-3-15.pdf> [<https://perma.cc/2NBM-PYLB>]. The Washington state initiative emerged from legislation. *Id.* It represents a possible model for proactive action by the State that reaches beyond Compton. *Id.* In 2014, the Washington legislature enacted a provision mandating a review of factors influencing academic success and child well-being using public data. *Id.* Community is defined by school building or school district; the project looked at school demographics, teacher qualifications, census data on socio-economic status, risk profiles of Washington Department of Social and Health Services, and measures of adult well-being from the Behavioral Risk Factor Surveillance System. *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 3–6.

³⁵⁷ *Id.* at 3. See also Christopher Blodgett, *ACEs in Head Start Children and Impact on Development*, WASH. ST. U. 1 (Jan. 2014), <http://ext100.wsu.edu/cafru/wp-content/uploads/sites/65/2015/03/ACEs-in-Head-Start-Children-and-Impact-on-Development-1-14.pdf> [<https://perma.cc/KJ5E-4KR5>]. In this study, parents filled out ACEs for themselves and their children. *Id.* at 1–2. Blodgett used a modified ACE with nine factors, adding child protection services (CPS) involvement and homelessness to the original ACE factors (so the factors were: emotional abuse, CPS involvement, homelessness, emotional neglect, separation/divorce, intimate partner violence, substance abuse, mental health, incarceration). Christopher Blodgett, *Adopting ACEs Screening and Assessment in Child Serving Systems*, WASH. ST. U. 3, 6–7 (July 2012) [hereinafter *Adopting ACEs*], <http://ext100.wsu.edu/cafru/wp-content/uploads/sites/65/2015/03/Complex-Trauma-Research-ACE-Screening-and-Assessment-in-Child-Serving-Systems-7-12-final.pdf> [<https://perma.cc/J6VK-MLZS>].

³⁵⁸ See *Adopting ACEs*, *supra* note 357, at 1.

³⁵⁹ See *id.* at 10; Blodgett, *supra* note 354, at 3.

³⁶⁰ See *Adopting ACEs*, *supra* note 357, at 10; Blodgett, *supra* note 354, at 3–4.

Hispanic children, as they are the largest non-white group and outcomes are racialized) represents a more sophisticated and expansive approach to supporting kids and their families. These factors are mapped by school district, which defines the relevant community.³⁶¹ The policy focus is particularly on community building and engagement that goes beyond resilience building to poverty interventions.³⁶²

The researchers found three focal points or themes: the nature of the school, the assets or challenges of the community, and the degree of social support and disruption in community.³⁶³ Using those focal points, they mapped communities, and three factors stood out: the severity of adult ACEs, the level of poverty, and school size and ethnic diversity.³⁶⁴

These translated into ten findings.³⁶⁵ Adult ACEs are common, but not evenly distributed; one in four adults has three or more ACEs.³⁶⁶ The patterns are not uniform if you compare communities; high ACEs adults range from 11–51% of the communities.³⁶⁷ As the number of adults with high ACEs rises, the outcomes for kids get worse.³⁶⁸ They found that “poverty and ACEs are only modestly related,” but that poverty is an independent factor.³⁶⁹ “Poverty is a powerful independent influence on academic, youth and community success distinct from the impact of ACEs which occur across all income levels.”³⁷⁰ The ACEs impact shows up in elementary school and is highly correlated to suspension.³⁷¹ Poverty is strongly linked to unexcused absences, failure to graduate from high school, and going to postsecondary education.³⁷² Higher ACEs in the community correlate with higher scores for risky behavior by youth (low attachment to neighborhood, positive on drug use, lower social skills to succeed in school), and when youth report their ACEs, there is a correlation between high ACEs and reduced achievement, less connection with positive factors such as peers and community for well-being.³⁷³

³⁶¹ See Blodgett, *supra* note 354, at 3.

³⁶² See *id.* at 5.

³⁶³ *Id.* at 3.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 4.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ See *id.*

³⁷² *Id.*

³⁷³ *Id.*

Finally, the research identified ethnicity as functioning like poverty, as an independent factor related to outcomes.³⁷⁴ In Washington, both ACEs scores and rate of poverty are highest among Hispanics, and schools with high Hispanic enrollment are high on both factors.³⁷⁵ “Hispanic school enrollment represents a third factor that has its own distinct set of influences on community and school risk and protective factors, while at the same time is associated directly with our measures of both poverty and adversity in communities.”³⁷⁶ Race and poverty have enormous impacts.³⁷⁷ “The impact of ethnicity and poverty on academic success is systematic and significant. Race and ethnicity define the character of communities and are important to understand as characteristics that mediate academic success.”³⁷⁸

The Washington initiative suggests the potential for a broader use of ACEs to evaluate community resources and needs.³⁷⁹ To that extent, it represents a more ecological approach. The addition of race or ethnicity and poverty as independent factors is critical, consistent with the developmental equality model.³⁸⁰

4. Neuroscience: Systemic Discrimination and Starting Early

ACEs and neuroscience might be used to focus on systemic pieces that determine developmental outcomes for groups of children.³⁸¹ If so, this effort must begin at birth, and even to evaluate conditions prior to birth.³⁸² A significant downside to the *Compton* litigation is that it starts too late, by starting when kids begin school. This is not to say kids from kindergarten onward do not merit support; rather it suggests the early impact of ACEs, as well as the early impact of inequalities, if unaddressed, can have a significant impact on children’s education, even assuming their school is adequately resourced.³⁸³

By eighteen months, if not sooner, the separation, segregation, and hierarchy have already begun.³⁸⁴ The lesson from neuroscience and early

³⁷⁴ See *id.* at 37.

³⁷⁵ *Id.* at 36.

³⁷⁶ *Id.* at 37.

³⁷⁷ See *id.* at 40.

³⁷⁸ *Id.*

³⁷⁹ See *id.* at 59.

³⁸⁰ See *id.* at 36, 62.

³⁸¹ See *Baby’s Brain Begins Now: Conception to Age 3*, URBAN CHILD INST. [hereinafter *Baby’s Brain*], <http://www.urbanchildinstitute.org/why-0-3/baby-and-brain> [https://perma.cc/TE6J-BPXT].

³⁸² See *id.*

³⁸³ See Complaint, *supra* note 26, at 3–4.

³⁸⁴ See *Baby’s Brain*, *supra* note 381.

childhood researchers is that the period of 0–3 years is critical because of the developmental significance of this time frame.³⁸⁵ If ACEs as currently defined could be reduced to the level that is present for many, if not most children (one or two ACEs), inequality would still remain.³⁸⁶ The early childhood literature identifies the differences in inputs linked especially to poverty, education, and neighborhood that differentiate children as a group so that gaps present at eighteen months begin to widen by three years and are even greater by the start of school.³⁸⁷ Inequality among children is a predictable developmental outcome if this pattern remains unaddressed.

What is distinctive about this early age frame is the remarkable lack of policy rather than its presence.³⁸⁸ Interventions would aim to prepare children for school as well as prevent or intervene and provide resilience support regarding ACEs. It would mean children arriving equally at the kindergarten door. What we know of the schoolhouse door is that it is the entry into a strongly unequal system.³⁸⁹ This highlights the difference in the systemic approaches needed. Early childhood is an area of little public policy.³⁹⁰ In early childhood, therefore, a system can be built. In contrast, in the public educational structure, the system in place has to be dismantled and reformed.³⁹¹ Finally, comparative data suggests what might be needed to build an egalitarian start as suggested by the developmental equality model.³⁹² The United States has a high rate of child poverty, a low rate of spending and money transfers to ameliorate poverty, and a limited safety

³⁸⁵ See *id.*

³⁸⁶ See Complaint, *supra* note 26, at 4–5.

³⁸⁷ See Stephen M. Quintana et al., *Ethnic and Racial Disparities in Education: Psychology's Contributions to Understanding and Reducing Disparities*, AM. PSYCHOL. ASS'N 12 (Aug 3, 2012), <https://www.apa.org/ed/resources/racial-disparities.pdf> [<https://perma.cc/NG8K-A8N2>]; *Baby's Brain*, *supra* note 381.

³⁸⁸ See Complaint, *supra* note 26, at 10.

³⁸⁹ See Quintana et al., *supra* note 387, at 11–12.

³⁹⁰ Greg J. Duncan & Katherine Magnuson, *Early Childhood Interventions for Low-Income Children*, 31 INST. RES. POVERTY 1 (2014), <http://www.irp.wisc.edu/publications/focus/pdfs/foc312.pdf> [<https://perma.cc/26GT-PFYK>].

³⁹¹ Insuring that children have critical resources in early childhood is recognized globally; The World Bank as an institution is very active in this area, collecting key research on the long-range impact of early childhood intervention. Jeffrey C. Tanner et al., *Later Impacts of Early Childhood Interventions: A Systematic Review*, WORLD BANK GROUP. xi, 33–34 (Working Paper No. 3, 2015), https://ieg.worldbankgroup.org/Data/reports/ImpactsofInterventions_EarlyChildhoodonLaterOutcomes.pdf [<https://perma.cc/HN6E-H2Z6>]. This report includes a summary of the U.S. research, but is focused on the best interventions in less developed countries. *Id.* at 34. Solutions are by no means universal, but highly contextual, a point also emphasized in domestic U.S. settings regarding applications of the basic research. *Id.*

³⁹² See *Black Boys Matter*, *supra* note 11.

net.³⁹³ The Organisation for Economic Co-operation and Development (OECD) countries, by contrast, have the concept of “social protection” policies addressing risk, chronic poverty, and vulnerability.³⁹⁴ The World Bank identifies the OECD safety net as including the following: minimum income, housing benefits, family benefits, lone parent benefits, being able to work without losing supports, and childcare benefits.³⁹⁵

Some view early childhood programs as, if nothing else, a rational economic investment.³⁹⁶ A recent White House report on early childhood uses the rubric of economic analysis; early childhood is a good time to “invest” in children.³⁹⁷ Such investment is touted as good economics for all, and on the other hand as a way of closing achievement gaps that similarly will benefit all.³⁹⁸ “In total, the existing research suggests expanding early learning initiatives would provide benefits to society of roughly \$8.60 for every \$1 spent, about half of which comes from increased earnings for children when they grow up.”³⁹⁹ This would include home visiting programs to help parents, early childhood education, and high-quality childcare.⁴⁰⁰ Investment into high-quality childcare is similarly argued to help work-family balance, and help achievement, and therefore create economic benefit.⁴⁰¹ In addition to earnings benefits, there would be savings from reduced criminal justice system involvement and reduced need for remedial education.⁴⁰²

III. CONCLUSION

What are the chances for dramatic reform to achieve developmental equality? Paul Butler writes about the limits of criminal justice reform amidst a time of seemingly intense pressure for change captured in particular

³⁹³ Elise Gould & Hilary Wething, *U.S. Poverty Rates Higher, Safety Net Weaker than in Peer Countries*, ECON. POL’Y INST. (July 24, 2012), <http://www.epi.org/publication/ib339-us-poverty-higher-safety-net-weaker> [<https://perma.cc/D2AU-6MGJ>].

³⁹⁴ *See id.*

³⁹⁵ *Types of OECD Social Safety Nets Programs*, WORLD BANK, <http://go.worldbank.org/OW1ITVWRK0> [<https://perma.cc/FX4D-V4R2>].

³⁹⁶ *See* Paul Solman, *It Pays to Invest in Early Education Says a Nobel Economist Who Boosts Kids’ IQ*, PBS NEWSHOUR (Feb. 22, 2013, 10:29 AM), <http://www.pbs.org/newshour/rundown/it-pays-to-invest-in-early-education-says-a-nobel-economist-who-boosts-kids-iq> [<https://perma.cc/W7TU-2FQ7>].

³⁹⁷ EXEC. OFFICE OF THE PRESIDENT, *THE ECONOMICS OF EARLY CHILDHOOD INVESTMENTS* 3 (Dec. 2014).

³⁹⁸ *See id.*

³⁹⁹ *Id.*

⁴⁰⁰ *See id.* at 3–4.

⁴⁰¹ *Id.* at 4.

⁴⁰² *See id.*

by the Black Lives Matter and Say Her Name advocacy.⁴⁰³ Butler begins with the proposition that the system is working the way it's supposed to.⁴⁰⁴ Butler uses the insights of critical race theory, distilled in the following propositions: law reinforces power and white supremacy; racism is permanent and integral to our legal, political and social systems; and racial progress is cyclical, linked to white self-interest or interest convergence.⁴⁰⁵ He argues law can be a "ratchet"⁴⁰⁶ for changing racial injustice, but he urges us to focus on effects and unintended consequences because of the pervasiveness of racism.⁴⁰⁷ Press for legal reforms, but know they are limited.⁴⁰⁸ Legal reform, Butler argues, can be a ratchet; reform may help some people, even if it will not resolve systemic problems.⁴⁰⁹ So the ratchets are essential, but stopgaps.⁴¹⁰ They will not achieve transformation.

For developmental equality, we need both: ratchets and transformation.⁴¹¹ The potential and limitations of the *Compton* case suggest the possibility to move in the right direction but underscore the importance of systemic change. Otherwise, we risk reinscribing inequality by rendering it invisible or focusing too narrowly. A broader focus and vision is essential. ACEs and neuroscience, while important, must be challenged themselves, lest they recreate more structural problems. Rather, they must be used to identify and dismantle structural barriers.

The Flint water crisis triggered visceral and strong responses to the deliberate indifference and massive consequences of permitting a daily necessity—water—to be a source of harm and lifelong loss for the children of Flint.⁴¹² The barriers that we place in the way of allowing every child to develop to their utmost potential, targeted to their identities and the

⁴⁰³ See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1426 (2016).

⁴⁰⁴ *Id.* at 1419.

⁴⁰⁵ See *id.* at 1442–43.

⁴⁰⁶ "Ratchets are mechanisms that . . . limit either rotary or linear motion to only one direction." *Engineering Mechanisms: Ratchets*, CREATIVE MECHANISMS, <https://www.creativemechanisms.com/ratchets> [<https://perma.cc/3JBQ-KQQE>]. As a tool, it is a device consisting of a bar or wheel with a set of angle teeth in which a pawl, cog, or tooth engages, allowing motion in one direction only. See *id.*

⁴⁰⁷ See Butler, *supra* note 403, at 1445–46.

⁴⁰⁸ See *id.* at 1425.

⁴⁰⁹ See *id.* at 1446.

⁴¹⁰ See *id.* at 1466.

⁴¹¹ See *id.* at 1419, 1446.

⁴¹² Ryan Felton, 'It's Affected Everybody': Flint Children on the Frontline of the Water Crisis, *GUARDIAN* (Mar. 24, 2016, 3:01 PM), <https://www.theguardian.com/us-news/2016/mar/24/flint-children-water-crisis-lack-of-data-lead> [<https://perma.cc/B9JV-MQCR>].

circumstances of their families, divide and separate children just as much as the toxic water of Flint.

Inequality is a sickness on the body of democracy and humanity. We have for too long treated this as a chronic, insoluble condition despite our awareness of its causes. Resilience approaches treat only the symptoms, not the illness or the source of the illness. Inequality can and should be eradicated.

