

2018

## ***Trapped in Tragedies: Childhood Trauma, Spatial Inequality, and Law***

David Dante Troutt

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David Dante Troutt, *Trapped in Tragedies: Childhood Trauma, Spatial Inequality, and Law*, 101 Marq. L. Rev. 601 (2018).

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## TRAPPED IN TRAGEDIES: CHILDHOOD TRAUMA, SPATIAL INEQUALITY, AND LAW

DAVID DANTE TROUTT\*

*Each year, psychological trauma arising from community and domestic violence, abuse, and neglect brings profound psychological, physiological, and academic harm to millions of American children, disproportionately poor children of color. This Article represents the first comprehensive legal analysis of the causes of and remedies for a crisis that can have lifelong and epigenetic consequences. Using civil rights and local government law, this Article argues that children's reactions to complex trauma represent the natural symptomatology of severe structural inequality—legally sanctioned environments of isolated, segregated poverty. The sources of psychological trauma may be largely environmental, but the traumatic environments themselves are caused by spatial inequality. This Article sets forth a theory of structural inequality that demonstrates the importance of place-based differences in institutional functioning and the role of such disparities in producing the neurobiological, psychological, and behavioral outcomes comprehensively described in the literature from those disciplines (including*

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*the results of an original study of Newark, New Jersey school children). International analogies show how similarly human beings process traumatic events. This alternative legal analysis of child trauma compels a different remedial approach to both intervention and prevention. It argues that interventions like special education reform are necessary but problematic because they risk pathologizing the African American poor and exhausting institutional capacity. Instead, it provides a framework for prevention focused upon increasing mobility options and reforming local institutions.*

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## I. INTRODUCTION

Gunshots and other psychologically traumatic experiences reveal a lot about the structure of inequality in the United States. In economically marginalized environments, a single gunshot can live on indefinitely, beginning with the flesh it tears, the memories it traumatizes, and the stereotypes it confirms in the minds of distant others. That lone traumatic event can travel from barrel to bone and beyond over the space of generations, marking and defining the places where opportunity dies or thrives. Violence begets violence and also efforts to ensure its absence. Thus, the child witness who fears, sees, and relives violence may react to the experience with post-traumatic stress disorder (PTSD) or other conditions that potentially re-wire her brain, impair cognitive abilities, imperil learning, and condition her body for an array of life-threatening addictions and illnesses over time.<sup>1</sup> On the other hand, many people who learn about the gunshot from local TV news may see a sad but distant routine of murders by young black men of other young black men. They often react to the shooting by supporting policy decisions that maintain the safe distance between the world of shootings and their own, such as rejecting affordable housing or new bus lines that cross poor neighborhoods.<sup>2</sup> These dichotomous reactions organize this legal analysis of the child trauma crisis.

In the last two decades, the myriad harms from psychological trauma have garnered considerable attention from neuroscience, the therapeutic professions, and educators. The public is discovering the crippling effects of PTSD on returning combat veterans, victims of international rape and sex trafficking, and the children of war and natural disaster. Psychological trauma reflects our species' natural reactions to atrocity.<sup>3</sup> Its effects can linger intergenerationally through the descendants of Holocaust survivors<sup>4</sup> and African-American slaves.<sup>5</sup> It is experienced through various forms of violence, abuse, and neglect.<sup>6</sup> Yet it is far more common among children than many of us believed. Privacy rules and beliefs make precise numbers impossible, and uniform metrics do not exist. Based on reported child abuse, domestic violence, and the numbers of children in traumatic placements such as foster care, "the most moderate estimates

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1. See *infra* Part III.

2. See *infra* Section II.C.

3. See JOY DEGRUY, POST TRAUMATIC SLAVE SYNDROME: AMERICA'S LEGACY OF ENDURING INJURY AND HEALING 13 (2005).

4. See Rachel Yehuda et al., *Holocaust Exposure Induced Intergenerational Effects on FKBP5 Methylation*, 80 BIOLOGICAL PSYCHIATRY 372, 375, 379 (2016).

5. See DEGRUY, *supra* note 3, at 4.

6. *Id.* at 13.

suggest that at any given time, more than eight million American children suffer from serious, diagnosable, trauma-related psychiatric problems. Millions more experience less serious but still distressing consequences.”<sup>7</sup>

However, children—mostly black and Latino—who live in areas of concentrated poverty are vastly overrepresented in the incidence of trauma. The chronic and unpredictable traumas to which they are exposed are deemed “complex,” the most disabling kind.<sup>8</sup> In 2015, families in Chicago’s poorest neighborhoods were exposed to 2,939 shootings, including 468 murders, in which several of the victims were children.<sup>9</sup> In 2017, the city was on pace to exceed the 4,300 shootings and 750 murders there in 2016.<sup>10</sup> The shocking effects of the resulting trauma on children are reflected in neurobiological changes during formative periods of growth, psychological injury such as PTSD, socio-emotional development, academic difficulties, and lives shortened by related illnesses, substance abuse or more violence.<sup>11</sup> As psychiatrist Judith Herman wrote, “[T]he person with unrecognized post-traumatic stress disorder is condemned to a diminished life, tormented by memory and bounded by helplessness and fear.”<sup>12</sup> Yet despite the clear crisis presented by so much trauma, these effects on children are often missed.<sup>13</sup>

7. BRUCE D. PERRY & MAIA SZALAVITZ, *THE BOY WHO WAS RAISED AS A DOG AND OTHER STORIES FROM A CHILD PSYCHIATRIST’S NOTEBOOK: WHAT TRAUMATIZED CHILDREN CAN TEACH US ABOUT LOSS, LOVE, AND HEALING* 3 (2006). “In focus groups held at two inner city schools, in the Spring of 1999, by the Task Force on Children Affected by Domestic Violence, teachers and counselors estimated that as many as 80% of the students at their schools suffered from trauma.” Susan F. Cole & M. Geron Gadd, *Uncovering the Roots of School Violence*, 34 NEW ENG. L. REV. 601, 608–09 (2000).

8. See Alexandra K. Margevich, *A Critical Review of the Psychological Literature*, RUTGERS CTR. FOR LAW, INEQ. AND METROPOLITAN EQUITY 4–6 (December 2016), <https://static1.squarespace.com/static/57ea97dc1b631be847761c93/t/5890ad2044024360fd200370/1485876513912/CLiME+TSP+A+Critical+Review+of+the+Psychological+Literature.pdf> [<https://perma.cc/NT4P-NFND>].

9. Jeremy Goner, *Chicago Violence, Homicides and Shootings Up in 2015*, CHI. TRIB. (Jan. 2, 2016, 2:45 PM), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-violence-2015-met1-20160101-story.html> [<https://perma.cc/3C2W-K39C>].

10. Jeremy Goner, *Few Answers as Chicago hit with Worst Violence in Nearly 20 years*, CHI. TRIB. (Dec. 30, 2016, 7:44 AM), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-violence-2016-met-20161229-story.html> [<https://perma.cc/W8DA-9A4F>].

11. See *infra* Part III.

12. JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 49 (1992).

13. Many professionals, even in the child welfare system, may miss the signs of violence exposure in children. See, e.g., Gayla Margolin & Elana B. Gordis, *Children’s Exposure to Violence in the Family and Community*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 152, 152–55 (2004) (“Children’s exposure to violence frequently goes unnoticed and unattended by parents and by professionals who work with children. . . . Children exposed to violence tend to exhibit symptoms

This Article offers an alternative analysis by demonstrating the legal construction of this crisis and arguing that childhood psychological trauma is the symptomatology of legally sanctioned inequality. The scant attention paid to the child trauma crisis by legal scholars and practitioners defies the clear evidence that traumatic experiences disproportionately proliferate in isolated, segregated areas.<sup>14</sup> The multidisciplinary literature will show that the severest conditions of structural (or place-based) inequality are internalized by human beings through complex psychological trauma, with devastating effects on health as well as social capital and personal mobility.<sup>15</sup> Therefore, the crisis and its remedies should be re-framed within the rules of spatial context commonly encountered in legal analysis—particularly, civil rights and local government law.

This reframing begins with a theoretical understanding of structural inequality. Structural inequality is the institutional organization of spatial inequality.<sup>16</sup> In the United States, the legal norm of equality is understood in terms of equal access to opportunity.<sup>17</sup> Structural denials of opportunity come about through the decisions and policies of institutions—e.g., schools, housing policy, transportation spending, and law enforcement.<sup>18</sup> Yet the same institutions function very differently to produce or deny opportunity depending on where a person (especially a child) lives. Thus, personal opportunities are often mediated by place, or residency, because of the differences in rules and resources by which key institutions operate.

From this premise, legal analysis can bring to a multidisciplinary crisis important distinctions between the *sources* and *causes* of trauma and the remedial differences between *intervention* and *prevention* approaches. Psychologists and public health professionals detail the sources of psychological injury in repeated exposure to, for example, child abuse and neglect, domestic violence, rape, and community violence.<sup>19</sup> Criminologists have long attributed the cause of such injury to predatory individuals and volatile circumstances. I argue that the spatial context for these recurring events

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associated with common types of maladjustment. Thus, professionals may not be aware when violence plays a role in the etiology of those symptoms.”).

14. Gorner, *supra* note 9.

15. See *infra* Part III.

16. See Daniel T. Lichter et al., *The Geography of Exclusion: Race, Segregation, and Concentrated Poverty*, 59 SOC. PROBS. 364, 365–69 (2012).

17. See *id.* at 367.

18. See *generally id.* at 367, 384.

19. Complex trauma exposure typically refers to chronic exposure to different types of childhood maltreatment. See Alexandra Cook et al., *Complex Trauma in Children and Adolescents*, 35 PSYCHIATRIC ANNALS 390, 390 (2005).

is at least as important in assigning causation for the devastating effects on people's minds and bodies. The causes of psychological trauma are those forces that make particular environments chronically traumatic. These are the forces of racial and economic isolation that structure and reproduce fundamental inequality—the residential and institutional segregation of people by place and resources.

This distinction between source and causation should inform legal approaches to remediating the epidemic of childhood psychological trauma in poor areas. As we will see, many fields have long been thinking about the problem of trauma, especially among children. Dr. Susan Cole was among the first to recognize that state law changes in the mid-90s designed to facilitate zero-tolerance disciplinary policies in poor schools were inadvertently criminalizing children who were acting out the trauma of witnessing domestic violence.<sup>20</sup> Rather than treat them for the horrors they had experienced, many were being punished.<sup>21</sup> Schools, she and others argued, had an obligation to do more on behalf of these children.<sup>22</sup> I share the assumption that schools are the correct institutional actor for initial intervention; schools see all children and have longstanding legal duties of care.<sup>23</sup> Schools are also institutions whose rules and practices are central to both civil rights law (e.g., federal equal protection, state constitutional requirements, and federal and state disability law) and local government (e.g., police powers and taxing authority). Designing effective interventions to address the developmental and behavioral effects of childhood trauma is a complex pedagogical and therapeutic challenge that must be undertaken. I will assess many legal approaches, including classroom accommodations and teacher training passed into law in states like Massachusetts.<sup>24</sup>

Yet interventions may be both too limited and too problematic to address the scope of the trauma problem, which also demands emphatic prevention efforts. Borrowing from public health, we do not seek merely to reduce or contain a devastating outbreak of disease. We aim to prevent its transmission entirely, if possible. A focus on intervention may tax the institutional capacity of already overtaxed institutions, such as high-poverty schools. Efforts to train teachers in “trauma-sensitive” pedagogy have their place, but the paradigm shift

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20. Cole & Gadd, *supra* note 7, at 608–09.

21. *Id.*

22. *Id.* at 609–10 (“Because schools are communities for children, they provide the greatest opportunity for children to learn the skills necessary for functioning in society.”).

23. *See id.* at 610–11.

24. *See infra* Section IV.C.

risks becoming the focus, giving rise to a cottage industry of trainers and training. Meanwhile, the causes of psychological trauma may continue unabated. The continuation of widespread misery can have severe unintended consequences. Depending on the intervention, school-based efforts to treat young people exposed to trauma may pathologize them instead. I examine a history of well-intentioned efforts by child welfare institutions that perpetuated harmful notions of African American mental dysfunction in the name of protection.<sup>25</sup>

However, the strongest basis for combining prevention with intervention is the command to address causation. If structural, or spatial, inequality is the leading cause of the sources of traumatic experience among U.S. children, we must address spatial inequality. This is a mandate for which law is uniquely qualified. It entails a theoretical understanding of structural inequality as being rooted in the inequitable distribution of institutional resources that is a feature of our racially and economically stratified regions. The control of these institutions—their rules and their resources—are functions not merely of school policy or access to therapeutic services or trauma-sensitive policing. Rather, they are functions of local government law and the relationship among local governments.

My argument proceeds as follows. In Part II, I develop the connection between complex childhood trauma and spatial inequality. This entails discussion of the sources and incidence of trauma that concentrate in economically disadvantaged communities as well as the frameworks for examining these sources offered by the public health and criminological fields. I conclude this Part by distinguishing these disciplines from the legal analysis compelled by a theory of structural inequality. I then set out that theory as the appropriate frame for both the problem and proposed solutions.

In Part III, I describe the problem of childhood traumatic injury in greater detail. This includes a review of the psychological literature and the results of an original study performed in conjunction with my colleagues at University Behavioral Health Services at Rutgers University. To further demonstrate how unstable environments produce lasting trauma reactions in children, I examine the international literature on child trauma during war and natural disaster. Human beings are designed to process traumatic events in strikingly similar ways.

Part IV turns to remedies, beginning with school-based legal interventions, such as special education classification, litigation, and trauma-sensitive learning environments. I analyze legal interventions under the Individuals with

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25. See *infra* Section IV.D.

Disabilities Education Act (IDEA),<sup>26</sup> Section 504 of the Rehabilitation Act,<sup>27</sup> and Title II of the Americans with Disability Act (ADA).<sup>28</sup> Despite the considerable promise of these approaches, I conclude this Part with a lengthy critique of interventions based on the risks of pathologizing (or “Othering”) already marginalized groups and the lack of institutional capacity.

Finally, in Part V the argument comes full circle. By then I will have shown that complex trauma is the severe psychological symptomatology of structural inequality. Recognition of this epidemiological fact directs approaches to prevention. While structural inequality is too complex and long-lasting a condition to remedy in a single article, I offer new ways to think about ameliorating it in order to address the crisis facing so many children. The approach is rooted in civil rights and local government law, including a rethinking of the latter’s scope to include the institutions with which poor children and their families interact the most. The analysis reveals common “set-backs” that stress and complicate fragile families and may reflect both the inputs and outputs of traumatic experience. Then, I outline two paths to prevent these destabilizing “set-back dynamics.” One is to promulgate more mobility options—that is, “untrapping” families, many of whom would naturally move away from traumatic environments if they could. The other is to think about institutional reform advocacy through the lens of trauma reduction—here, “unencumbering” poor and working-class families from the rules and practices that either engender trauma or compound it for children. The hope for now is not elixir but elucidation—of the connections between law and a growing public health crisis and toward the path of equitable change.

## II. THE LINK BETWEEN CHILDHOOD TRAUMA AND STRUCTURAL INEQUALITY: DEFINITIONS, COMMON SOURCES, AND LEGAL THEORY

In this Part, I set out an overview of both the incidence of psychological trauma and a legal theory of structural inequality in order to show the connection between the two. This is to establish an argument relevant to the discussion of trauma’s consequences and possible remedies in the remaining Parts. That argument is straightforward: environments provide the *sources* of complex psychological trauma, but structural inequality is the *cause*.

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26. 20 U.S.C. § 1400 (2012).

27. 29 U.S.C. § 701 (2012).

28. 42 U.S.C. § 12101 (2012).

### A. Incidence and Sources of Complex Trauma

As a term, “trauma” is used clinically and metaphorically, a distinction that can blur its meaning or open it to broader understandings.<sup>29</sup> Sometimes “trauma” is a catch-all for stressors. Chronic stress has long been understood as an impediment to cognitive functioning and good health.<sup>30</sup> Sub-clinical disorders<sup>31</sup> that are related to traumatic events and chronic stress, such as anxiety disorders, have also been recognized in the psychological literature as having lasting effects on individual functioning.<sup>32</sup> Yet in the resulting hierarchy of disorders, psychological trauma has the most devastating effects on humans’ ability to learn, form healthy relationships, and thrive.<sup>33</sup> Although the full spectrum of conditions is relevant to this Article, this analysis focuses on clinically recognized psychological trauma.<sup>34</sup>

Trauma is “an emotional response to a terrible event like an accident, rape or natural disaster.”<sup>35</sup> Traumatic events are not innate weaknesses in capacity, but rather things that happen to a person within the environments where they are. Traumas represent the unspeakable, and our reactions are the very human, yet ordinary, responses to atrocities.<sup>36</sup> Our psyches and bodies respond to the

29. In the educational realm, thoughtful scholars have argued that a field of “trauma studies” should understand “trauma as difficult life experiences that enter classrooms” and the “mundanely catastrophic,” so that the universality of traumatic experience can be more readily embraced in the classroom and children struggling with trauma need not feel submerged in “Otherness.” See Elizabeth Dutro & Andrea C. Bien, *Listening to the Speaking Wound: A Trauma Studies Perspective on Student Positioning in Schools*, 51 AM. EDUC. RES. J. 7, 7, 23, 26 (2014).

30. Poverty, for example, represents a stress condition that can greatly impair cognitive functioning. See, e.g., Anandi Mani et al., *Poverty Impedes Cognitive Function*, 341 SCI. 976 (2013) (discussing studies showing impaired cognition among poor but not rich respondents when finance thoughts were induced and showing impaired cognition among farmers before harvest, when poor, but not after harvest, when rich).

31. That is, those not characterized in the Diagnostic and Statistical Manual of Mental Disorders, or DSM-V, as primarily induced by trauma.

32. See Cole & Gadd, *supra* note 7, at 604–05.

33. *Id.* at 606.

34. This choice reflects a certain expediency at the expense of a broader lens. Colloquial understandings of trauma, even of toxic stress, are important and no less real than conditions that have been clinically tested as deriving from trauma. Expanding this Article to those uses would greatly extend its scope. I chose instead to focus on the most easily diagnosed and most severe trauma-related conditions, such as PTSD, in order to center the discussion. However, readers should recognize that children suffer a great many more serious psychological reactions associated with trauma exposure, and that including them here would greatly increase the scope of the crisis at the heart of this work.

35. *Trauma*, AM. PSYCHOL. ASS’N, <http://www.apa.org/topics/trauma/index.aspx> [https://perma.cc/VG5B-Z3EZ] (last visited Mar. 1, 2017).

36. HERMAN, *supra* note 12, at 1.

intrusion, but often in ways that are not easily explained.<sup>37</sup> One sibling's reaction to a murder may be radically different from his sister's simultaneous reaction. Because of the sensitivity of the subject matter and the variations in responses, trauma studies are diffuse and incremental, especially involving children.<sup>38</sup>

Measuring the incidence of traumatic experiences is difficult, based primarily on self-reporting. We suppress traumatic experiences for many reasons. Childhood exposures are assessed through developmentally appropriate, structured diagnostic interviews.<sup>39</sup> Many studies, including original research conducted in connection with this Article, suffer from the limitation that parents at risk of losing their children on grounds of neglect do not give consent for their children to participate in studies; on their own, children sometimes fail to report traumas for fear of being separated from caregivers.<sup>40</sup> Nonetheless, the consensus is that about 25% of American children have had at least one significant exposure to a traumatic experience before reaching adulthood.<sup>41</sup> For low-income children, estimates of exposure to *multiple* traumatic events range between 40%–74%.<sup>42</sup> One of the standard diagnostic tools was developed by Vincent Felitti and a team of researchers in the Adverse Childhood Experiences (ACE) Study in 1998.<sup>43</sup> This approach uses a 17-question questionnaire.<sup>44</sup> Adverse childhood experiences are correlated with psychological and physiological health issues among adults, such as depression, heart disease, diabetes, emphysema, alcohol and drug dependency, and sexually transmitted disease.<sup>45</sup> Children scoring at least four ACEs are considered to have been exposed to “complex trauma,” the focus of

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37. See *Trauma*, *supra* note 35.

38. See generally Heather A. Turner et al., *Poly-Victimization in a National Sample of Children and Youth*, 38 AM. J. PREVENTIVE MED. 323 (2010).

39. See, e.g., *id.* at 324.

40. See ALICIA LUKACHKO & LISA JENKINS, ASSESSMENT OF TRAUMA IN SCHOOL-AGED CHILDREN WITH SIGNIFICANT EMOTIONAL AND BEHAVIORAL CHALLENGES: A PILOT STUDY (2018). The study was conducted in conjunction with *The Trauma, Schools and Poverty Project*, Rutgers Law School Center for Law, Inequality and Metropolitan Equity (CLiME).

41. See E. Jane Costello et al., *The Prevalence of Potentially Traumatic Events in Childhood and Adolescence*, 15 J. TRAUMATIC STRESS 99, 107, 110 (2002).

42. Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MED. 245, 249 (1998).

43. *Id.* at 245.

44. *Id.* at 249. Some practitioners instead use a 10-question questionnaire.

45. *Id.* at 245.

this Article.<sup>46</sup> By that definition, one study estimated that nationally, almost a quarter (22%) of low-income children are exposed to complex trauma in a one-year period.<sup>47</sup>

Psychologists characterize these traumatic experiences according to type—direct vs. indirect, acute vs. chronic, interpersonal (e.g., physical or sexual abuse), and vicarious (e.g., the witnessing of or hearing about trauma to someone close to you).<sup>48</sup> Each kind may represent a different severity for an individual.<sup>49</sup> Frequency of exposure almost always compounds severity for the victim.<sup>50</sup> While all trauma matters, we are most concerned here with trauma deemed complex. Complex trauma may combine multiple sources of trauma with varying degrees of severity, leaving the child to contend with the effects of “poly-victimization.”<sup>51</sup> Research indicates that the most debilitating traumas to overcome are the chronic, often unavoidable complex traumas that may accumulate as poly-victimization.<sup>52</sup>

46. David Finkelhor et al., *Polyvictimization and Trauma in a National Longitudinal Cohort*, 19 DEV. & PSYCHOPATHOLOGY 149, 154 (2007).

47. *Id.* at 157.

48. *See generally id.* at 156.

49. *See id.* at 151.

50. *See* Matthew Kliethermes et al., *Complex Trauma*, 23 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 339, 341 (2014).

51. Complex trauma exposure typically refers to chronic exposure to different types of childhood maltreatment. *See* Cook et al., *supra* note 19, at 390; Margevich, *supra* note 8, at 5–6. Dr. Cook and colleagues state:

The term complex trauma describes the dual problem of children’s exposure to traumatic events and the impact of this exposure on immediate and long-term outcomes. Complex traumatic exposure refers to children’s experiences of multiple traumatic events that occur within the caregiving system - the social environment that is supposed to be the source of safety and stability in a child’s life. Typically, complex trauma exposure refers to the simultaneous or sequential occurrences of child maltreatment—including emotional abuse and neglect, sexual abuse, physical abuse, and witnessing domestic violence—that are chronic and begin in early childhood. Moreover, the initial traumatic experiences (e.g., parental neglect and emotional abuse) and the resulting emotional dysregulation, loss of a safe base, loss of direction, and inability to detect or respond to danger cues, often lead to subsequent trauma exposure (e.g., physical and sexual abuse, or community violence). Complex trauma outcomes refer to the range of clinical symptomatology that appears after such exposures.

*Id.* at 6 (quoting ALEXANDRA COOK ET AL., *COMPLEX TRAUMA IN CHILDREN AND ADOLESCENTS* 5 (2003)). The phrase “complex trauma” has also been used to refer to both repeated exposure to multiple potentially traumatic events and resulting trauma symptoms. Kliethermes et al., *supra* note 50, at 339–40.

52. *See* Laura J. Hickman et al., *How Much Does “How Much” Matter? Assessing the Relationship Between Children’s Lifetime Exposure to Violence and Trauma Symptoms, Behavior Problems, and Parenting Stress*, 28 J. INTERPERSONAL VIOLENCE 1338, 1341, 1355–56 (2012) (noting

The major sources of complex trauma in children occur in their home, school, and neighborhood environments: Domestic or intimate partner violence, maltreatment (abuse and neglect), death or serious illness/injury of a loved one, separation from family members due to incarceration or other child welfare removals, car accidents, fires, terrorism, and very significantly, community violence.<sup>53</sup> These trauma sources tend to cluster sociodemographically.<sup>54</sup> Children living in isolated, concentrated poverty are at highest risk for exposure to complex trauma.<sup>55</sup> As poverty increases the risks of a child being exposed to traumatic events, it also tends to increase the severity of the traumas themselves.<sup>56</sup> For instance, a longitudinal study of children found that “vulnerability factors” such as poverty, are associated with a greater prevalence of exposure to “high magnitude events” like sexual abuse or death of a loved one.<sup>57</sup> Since poorer children also lack access to therapeutic services, their heightened risks for trauma exposure are compounded by fewer resources to cope with post-traumatic effects.<sup>58</sup>

### *Incidence in Spatial and Racial Context*

The spatial and racial characteristics of psychological trauma may be inferred from comprehensive meta-analyses of a diverse literature. A single study of trauma in children cannot account for all racial differences in exposure, but significant trends become apparent from a cross-section of research.<sup>59</sup> African-American children (who generally live in the most concentrated

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that only poly-victimization predicted child behavior problems, PTSD, and parenting stress); Turner et al., *supra* note 38, at 323; Finkelhor et al., *supra* note 46, at 159.

53. See Judith A. Cohen et al., *Childhood Traumatic Grief: Concepts and Controversies*, 3 TRAUMA, VIOLENCE, & ABUSE 307 (2002); see also Eva Alisic et al., *Rates of Post-Traumatic Stress Disorder in Trauma-Exposed Children and Adolescents: Meta-Analysis*, 204 BRIT. J. PSYCHIATRY 335, 336 (2014).

54. Margevich, *supra* note 8, at 3.

55. *Id.* See generally Shelley E. Taylor et al., *Early Adversity and Adult Health Outcomes*, 23 DEV. & PSYCHOPATHOLOGY 939 (2011).

56. See Costello et al., *supra* note 41, at 105, 109.

57. *Id.* at 100, 105, 108–10.

58. See Eugene Aisenberg & Ferol E. Mennen, *Children Exposed to Community Violence: Issues for Assessment and Treatment*, 17 CHILD & ADOLESCENT SOC. WORK J. 341, 347–48 (2000); Linda C. Gallo et al., *Socioeconomic Status and Health: What is the Role of Reserve Capacity?*, 18 CURRENT DIRECTIONS IN PSYCHOL. SCI. 269, 272 (2009).

59. Further, the majority of studies simply control for known demographic risk factors such as age, gender, and ethnic-racial identity without rigorously testing their direct and indirect effects on trauma outcomes. See, e.g., Finkelhor et al., *supra* note 46; Costello et al., *supra* note 41, at 110; see also Felitti, et al., *supra* note 42, at 251.

poverty, followed by Latino children)<sup>60</sup> tend to experience significantly more complex trauma from their environments than white or Asian children in theirs, as measured by studies using the ACE screening instrument and others.<sup>61</sup> While racial associations with some forms of trauma are still inconclusive, there is significant evidence that isolated, concentrated poverty is itself—regardless of race—a strong predictor of the worst violence.<sup>62</sup>

*Confirming Child Trauma in Greater Newark, New Jersey*

I was able to generally confirm these relationships in a study of childhood trauma among school children in the Greater Newark, New Jersey region.<sup>63</sup> A team of researchers from the Rutgers University Behavioral Health Center (UBHC) and the Rutgers Law School Center on Law, Inequality and Metropolitan Equity (CLiME) studied disproportionate exposure to traumatic events among school children in a partial hospitalization program at UBHC, using a small sample of 8- to 17-year-old children primarily from the Newark, Irvington and East Orange school districts, who were referred to the program for behavioral problems.<sup>64</sup> Employing multiple diagnostic instruments as well as the children's clinical records, we found that the subjects—80% of them African American with family incomes below poverty—reported significant levels of exposure to highly stressful life events.<sup>65</sup> Among the most commonly cited traumatic events were exposure to community violence, separation from a caregiver or loved one, death of a loved one, and incarceration of a family member.<sup>66</sup> Our results showed that just over 40% met full or partial criteria for PTSD, in addition to other potentially trauma-related psychological diagnoses warranting intensive treatment.<sup>67</sup> All of the subjects also suffered from lowered school achievement performance.<sup>68</sup> The connection between trauma and spatial disadvantage was confirmed: If you live where traumatizing events are more prevalent, you are more at risk for experiencing trauma and its after effects.

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60. See Lichter et al., *supra* note 16, at 364, 381, 383.

61. See Finkelhor et al., *supra* note 46, at 157; Felitti, et al., *supra* note 42, at 251.

62. See Matthew R. Lee, *Concentrated Poverty, Race, and Homicide*, 41 SOC. Q. 189, 202 (2000) (“[T]he actual spatial isolation of poor city residents from nonpoor residents is a strong, consistent, and primary determinant of homicide levels . . . and concentrated poverty is a more important predictor of race-specific homicide rates than overall city-level disadvantage.”).

63. See Lukachko & Jenkins, *supra* note 40.

64. *Id.* at 4.

65. *Id.* at 8.

66. *Id.*

67. *Id.*

68. The study was limited by the number of families participating in the research ( $n = 30$ ) and the fact that the children had already been referred for treatment. *Id.* at 4.

Children from low-income urban neighborhoods experience disproportionate levels of trauma that lead to significant behavioral and performance problems in school.<sup>69</sup>

*Why Some Communities Are Prone to Traumatic Events*

Why would spatial disadvantage and the racial make-up of people disproportionately living in such environments be a predictor of trauma exposure? We do not have a precise answer. However, a variety of structural explanations point to the confluence of poverty, isolation and segregation to produce violence, weak parenting attachments, and the myriad chronic household instabilities that lay the foundation for disruptive behaviors.<sup>70</sup> In this view, the structure of governmental arrangements, agency policies, and discrimination trap people in places where family relationships are tested and social disorganization undermines stable growth.<sup>71</sup> For example, the sociologist Ronald Kramer drew on the work of criminologists Elliott Currie<sup>72</sup> and Deborah Prothrow-Stith<sup>73</sup> to show how inequality conditions youth violence.<sup>74</sup> In healthier environments, informal social control through family relationships instills the social capital that helps young people avoid violence and delinquency.<sup>75</sup> Poverty, inequality, and social exclusion indirectly undermine informal social controls, preventing families from mediating violence.<sup>76</sup> The behaviors leading to traumatic events may even reflect

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69. See Margevich, *supra* note 8, at 3, 9; Cole & Gadd, *supra* note 7, at 604–08.

70. See Claudia J. Coulton et al., *Community Level Factors and Child Maltreatment Rates*, 66 CHILD DEV. 1262, 1262 (1995).

71. See *id.* at 1262–63. “[C]hild maltreatment is but one manifestation of community social organization and that its occurrence is related to some of the same underlying macro-social conditions that foster other urban problems.” *Id.* at 1262.

72. See ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 135–39 (1998) ((1) “[E]xtreme deprivation inhibits children’s intellectual development”; (2) “extreme deprivation breeds violence by encouraging child abuse and neglect”; (3) “extreme poverty creates multiple stresses that undermine parents’ ability to raise children caringly and effectively”; and (4) “poverty breeds crime by undermining parents’ ability to monitor and supervise their children.”).

73. See generally DEBORAH PROTHROW-STITH WITH MICHAEL WEISSMAN, *DEADLY CONSEQUENCES* (1991).

74. Ronald C. Kramer, *Poverty, Inequality, and Youth Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 123, 125, 133, 135 (2000).

75. *Id.* at 128–29, 133.

76. *Id.* at 133 (“[T]he evidence shows that poverty, inequality, and exclusion decisively undermine the ability of those close-in institutions to provide the social support and informal social control that produce healthy, well-functioning children and prevent serious violent crime.”).

assimilation to neighborhood norms not seen in other environments, according to the authors.<sup>77</sup>

However, few of these studies take traumatic experience into account in asking what characteristics of marginalized neighborhoods contribute to a greater frequency of traumatic events. Apart from structural dynamics, people have personal agency. They also have resiliency, often in inestimable abundance. It is likely that traumatic experience is itself a contributor to traumatizing behavior, affecting some victims very differently than others, but collectively impacting the environments in which everyone nearby must navigate. Several factors support this notion. First, psychological reactions to trauma are adaptive; they reflect how the human species was designed psychologically and physiologically to respond to profoundly adverse threats and circumstances.<sup>78</sup>

Second, psychological research shows that the experience of trauma does not remain locked within individual agency.<sup>79</sup> It spreads.<sup>80</sup> Just as studies show cumulative risks of traumas among those exposed to a single trauma, so do studies demonstrate transmission of trauma-related behaviors from one child to his or her own children later in life.<sup>81</sup> Children who grow up in homes exposed to domestic violence are at greater risk of growing up to become either batterers or victims of intimate partner violence.<sup>82</sup> These behavioral ripple effects from

77. See generally PROTHROW-STITH WITH WEISSMAN, *supra* note 73.

78. See Bruce D. Perry & Ronnie Pollard, *Homeostasis, Stress, Trauma, and Adaptation: A Neurodevelopmental View of Childhood Trauma*, 7 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 33, 33–51 (1998). “Our physiology and neurophysiology are characterized by a continuous, dynamic process of modulation, regulation, compensation, and activation designed to keep our body’s systems in some state of equilibrium or homeostasis.” *Id.* at 35.

79. See Carlton D. Craig & Ginny Sprang, *Trauma Exposure and Child Abuse Potential: Investigating the Cycle of Violence*, 77 AM. J. ORTHOPSYCHIATRY 296, 296 (2007).

80. Craig & Sprang, *supra* note 79, at 296. See generally Finkelhor et al., *supra* note 46.

81. For example, one study demonstrated in a sample of 1,680 child-abusing caregivers, that any history of potentially traumatic events (PTE) exposure in childhood, adulthood, or both predicted significantly higher child abuse potential compared to no PTE exposure. Craig & Sprang, *supra* note 79, at 296, 301–03.

82. See Joel S. Milner et al., *Do Trauma Symptoms Mediate the Relationship Between Childhood Physical Abuse and Adult Child Abuse Risk?*, 34 CHILD ABUSE & NEGLECT 332, 333 (2010). Research investigated the relation between childhood physical abuse specifically and higher child abuse potential in a sample of 5,394 U.S. Navy recruits and 716 college students. *Id.* at 334. In both samples, the authors demonstrated that greater childhood history of physical abuse predicted significantly higher child abuse potential, above and beyond other types of childhood violence exposure including childhood sexual abuse and interpersonal violence exposure. *Id.* at 341. Related, looking specifically at childhood physical or sexual abuse and growing up with a battered mother, higher individual and cumulative childhood ACEs predicted a 3.5-fold and 3.8-fold increased risk of being the perpetrator or victim of intimate partner violence in adulthood for men and women, respectively. Charles L.

an initial wounding extend beyond close-in institutional relationships, like the family, to community institutions like school classrooms.<sup>83</sup> The consequences of an individual's traumatic life therefore affect the lives of other students, teachers, co-workers, neighbors, and acquaintances. Without effective intervention or prevention, individual traumas can go unresolved and proliferate within a closed social environment.

Third, sociological research shows that people who grow up in segregated areas rarely leave segregated areas.<sup>84</sup> This suggests how traumatic events can have concentrated power in isolated communities. Imagine living indefinitely in a refugee camp among one's own abusers where, without help to prevent abuse or to deal with its psychological effects, one is simply left to cope with the daily risks and reminders, including possible contact with abusers. Then multiply this scenario over time until it is a not uncommon experience in the camp. In this way, trauma may be both structural and cyclical. The cumulative conditions that produce it in individuals can fuel its reproduction for others in closed environments.

This reflexive relationship between individual child trauma and the long-term maladaptive consequences of trauma exposure complicates the idea of "incidence." Traumas do not remain contained within the individual, yet areas prone to traumatic events are often contained relative to the rest of us.<sup>85</sup> The question of why some communities experience disproportionate trauma is thus answered in part by recognizing a boundary problem. As incidence of complex trauma is disproportionately contained within segregated boundaries, the problem with our collective response to it may be to see it as some kind of tragically aberrant normalcy that happens only to distant Others. This raises a normative and equitable issue for law: How should a society responsibly address the treatment of children whose adaptive reactions to traumatic experience inadvertently put them at greater risk for experiencing even more trauma?

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Whitfield et al., *Violent Childhood Experiences and the Risk of Intimate Partner Violence in Adults: Assessment in a Large Health Maintenance Organization*, 18 J. INTERPERSONAL VIOLENCE 166, 176 (2003).

83. See N.J. DEP'T OF EDUC., RESOURCE MANUAL FOR INTERVENTION AND REFERRAL SERVICES (I&RS) 1 (2008), <http://www.state.nj.us/education/students/irs/manual.pdf> [<https://perma.cc/45UF-9W9Z>] ("The educational mission is made more complex by the increased incidence, prevalence and intensity of problems students bring to schools.").

84. See PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY 9 (2013).

85. See Lukachko & Jenkins, *supra* note 40, at 2.

### *B. Complex Trauma and Public Health*

One answer is to see the convergence of socioeconomic place and incidence of childhood psychological trauma as a public health concern. The inordinate levels of violence and abuse that occur in neighborhoods of high, often concentrated poverty, produce inordinate exposure to traumatic experiences.<sup>86</sup> Where there is an epidemic of violence, there is also an epidemic of trauma.<sup>87</sup> Traumatic responses engender other responses in behavior and health, leading to the reproduction of violence and commonly experienced health problems over time across similar populations.<sup>88</sup> These public health claims have variants across two disciplines, public health and criminology.

In the public health literature, trauma belongs to the broader crisis in community violence that first gained traction as a matter of public health in the mid-80s under the stewardship of U.S. Surgeon General C. Everett Koop.<sup>89</sup> The social science of disease containment and prevention informed the public health approach to violence by relying on five main components. Public health is population-based, systemic, broad in its exploration of interventions (such as law reform or changing social norms), emphasizes shared responsibility, and, most importantly, focuses on prevention.<sup>90</sup> Place-based or environmental factors figured prominently.<sup>91</sup> The early literature covered most forms of violence, including child abuse (but not suicide).<sup>92</sup> The justifications for entering what was traditionally the realm of law enforcement ranged from the

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86. See PROTHROW-STITH WITH WEISSMAN, *supra* note 73.

87. See Theodore Thompson, Jr. & Carol Rippey Massat, *Experiences of Violence, Post-Traumatic Stress, Academic Achievement and Behavior Problems of Urban African-American Children*, 22 CHILD & ADOLESCENT SOC. WORK J. 367 (2005).

88. See Joy E. Lin et al., *Associations of Childhood Adversity and Adulthood Trauma with C-Reactive Protein; A Cross-Sectional Population-Based Study*, 53 BRAIN, BEHAVIOR, & IMMUNITY 105 (2016); see also *infra* note 138 and accompanying text.

89. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, DHHS Pub. No. HRS-D-MC 86-1, SURGEON GENERAL'S WORKSHOP ON VIOLENCE & PUB. HEALTH (1986).

90. David Hemenway & Matthew Miller, *Public Health Approach to the Prevention of Gun Violence*, 368 N. ENG. J. MED. 2033, 2033 (2013). The authors analogize to reducing traffic accidents through a combination of stronger laws, safer technologies, altered norms of behavior (wearing seat belts), and better roadways, rather than simply focusing on punishment of bad drivers. *Id.* at 2033–34.

91. *Id.* at 2033 (“It is often more effective to change the agent and the environment in which the problem occurs than it is to focus on trying to change the individual with the last clear chance to prevent the problem (e.g., victim or perpetrator).”).

92. See Liana Winett, *Constructing Violence as a Public Health Problem*, 113 PUB. HEALTH REP. 498, 503 (1998).

pervasiveness of violent deaths in the United States to reducing societal costs and protecting children.<sup>93</sup>

Public health scholarship on violence influenced criminological approaches. Many criminologists believed that law enforcement has been too focused on reactive, rather than proactive, approaches.<sup>94</sup> They contend that changing perspective from the traditional deterrence through apprehension of criminals to public health's prevention through reduction in injuries means embracing community-oriented strategies that alter environmental norms and conditions.<sup>95</sup> This turn complicates ideas about what causes youth violence, for example, and subjects prevention to a more medical model.<sup>96</sup>

[J]ust as disease can be viewed in a multicausation model, where risk is seen to emanate from several sources, violent juveniles tend to have other co-occurring problems and generally face a cumulative package of risks. The need to unravel the etiology of the observed problem—in order to develop a sense of the process that gives rise to it—is an essential part of the public health approach.<sup>97</sup>

As a result, public-health informed approaches to preventing various types of violence have proliferated across the country, often independent of law enforcement strategies.<sup>98</sup>

For our purposes, public health approaches to many sources of childhood trauma ask the right questions. The focus on environment and risk factors rather than individuals and blame helps to frame how psychological injury recurs in resource-poor places. Looking at populations at risk of trauma exposure informs a more systemic search for remedies, including interventions like law reform and changing social norms. The early rationales for seeing violence as a public health issue—pervasiveness, lowering costs to society, and

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93. See *id.* at 502–03. Winett's literature review examined all English-language scholarship on public health from 1985 through 1995 in order to comprehend the rationale for the connection and how causes and remedies were conceptualized. *Id.* at 500.

94. See, e.g., Brandon C. Welsh et al., *Serious Youth Violence and Innovative Prevention: On the Emerging Link Between Public Health and Criminology*, 31 JUST. Q. 500, 513 (2014) (“Unfortunately, criminal justice agencies have been traditionally oriented towards reactively resolving individual crime incidents or processing individual offenders rather than proactively seeking to halt recurring violence problems.”).

95. DAVID HEMENWAY, PRIVATE GUNS: PUBLIC HEALTH 8–10 (2004).

96. See Welsh et al., *supra* note 94, at 501–02.

97. *Id.* at 502 (citations omitted).

98. See, e.g., Jeffrey A. Butts et al., *Cure Violence: A Public Health Model to Reduce Gun Violence*, 36 ANN. REV. PUB. HEALTH 39, 40–48 (2015) (describing Gary Slutkin's Cure Violence model and reviewing evaluations of similar programs in multiple U.S. cities).

protecting children from irreparable harms—are no different for psychological trauma.<sup>99</sup> Perhaps most importantly, public health approaches emphasized prevention, rather than merely treatment or punishment.<sup>100</sup> The public health field views prevention from three levels: *primary* (systemic interventions that try to stop the traumatic experience from ever occurring), *secondary* (early interventions that prevent the sources of trauma from spreading), and *tertiary* (after-the-fact efforts to mitigate further damage).<sup>101</sup> Primary prevention efforts have been the most elusive in the public health field<sup>102</sup> because they demand isolating those aspects of spatial inequality that bear the most causal responsibility.<sup>103</sup>

Law offers a broader observation. From both a theoretical and practical perspective, public health's claims about the sources of psychological trauma suggests that the epidemiological crisis among poor children reflects the systematic failures of multiple place-based institutions to keep them safe. What keeps some people in the vortex of traumatic environmental events and what prevents them from gaining the resiliency for a healthier life represents a kind of intersectionality among key institutions in their lives. The job of the law, of course, is to correct that—the subject of approaches I offer in Parts IV and V. But first, institutional intersectionality must be theoretically framed. The next section elaborates on the theoretical link between trauma-as-public-health crisis and spatial, or structural, inequality.

### C. *The Theory of Structural Inequality*

The theory begins with a simple, place-based fact of life: Where we live determines the range and quality of opportunities we encounter, and Americans live in unequal places. Our spatial inequality is organized institutionally by structural inequality.<sup>104</sup> As a legal inquiry, we can understand social and economic inequalities through a comparative analysis of institutional rules, norms, and procedures. The key question is: How much does my institutional environment determine, or structure, my opportunities in life? And typically

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99. See Winett, *supra* note 92, at 501–03.

100. See Mark H. Moore, *Public Health and Criminal Justice Approaches to Prevention*, in 19 BUILDING A SAFER SOCIETY: STRATEGIC APPROACHES TO CRIME PREVENTION 237 (Michael Tonry & David P. Farrington eds., 1995).

101. *Id.* at 247.

102. Winett, *supra* note 92, at 506 (“We make reference to the social predictors of violence—principally poverty, inequality, and racism—without providing substantive discussion of how public health might contribute to society’s solutions for these problems.”).

103. See generally *id.*

104. See generally Margevich, *supra* note 8.

the answer is, a great deal. As I demonstrated above, these institutional arrangements can facilitate the experience of traumas. Complex psychological trauma represents the most severe symptomatology of the most severe structural inequality—the disparities in institutional functioning between the very poorest and the very wealthiest communities.<sup>105</sup> How is this expressed in theoretical terms? As I set out in an earlier article, the following chart displays the theory.<sup>106</sup>

### Theoretical Elements of Place-Based Inequality

Interest	Equal access to opportunity
Source of Opportunity	Public and private institutions
Measures of Inequality	Resources (fiscal, in/tangible)
Lens	Comparative formal and informal rules and customs
Standard	Equity (appropriate fairness)
Units of Analysis	PLACE: Metropolitan regions, race, and class
Outcomes	Fairer rules, lower disparities

Analysis begins with the *interest* in equality—more specifically, in equal access to opportunity—derived from constitutional norms. Other than our families, the primary resources for developing this interest in each of us are the *basic public and private institutions* with which we interact. They are typically local, such as schools, housing policy, healthcare, law enforcement, transportation, infrastructure, and also private markets, such as real estate and food. The stronger these institutions are, the more likely we are to experience opportunity or to gain social and economic mobility. Enjoying wealth-maximizing housing policies, attending good schools, and having access to preventive health care are all demonstrated institutional benefits associated with greater life prospects.<sup>107</sup> To understand whether we have equal access to opportunity, we look comparatively at the *resources*—fiscal, tangible, intangible—of these commonly found community-based institutions. Some unequal outcomes might be a manifestation of benign differences between residential areas such as proximity to a river. Yet many unequal outcomes are legally problematic because they result from *inequitable processes* (rules,

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105. See David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFF. L. REV. 5, 12 (2017).

106. *Id.* at 60.

107. See *id.* at 12.

practices, norms, discrimination), such as school funding formulas that favor wealthier municipalities or predatory lending practices that hasten widespread foreclosures.<sup>108</sup> Therefore, the analytic focus is on institutional processes. The standard for evaluating them is *fairness or equity*. Because inequality is necessarily a comparative construct, we compare similar institutions across a relevant geography—the towns and cities of a relevant *region*. We compare the rules and processes that govern similar institutions differently in order to establish standards of what may be fair as well as what may be possible.

In the case of childhood trauma, the sources of trauma exposure begin to corroborate the theory of structural inequality. The social science research examined thus far showed that people in low- and very low-income communities are exposed to greater numbers of traumatic events from community violence (including violence at school), higher rates of domestic violence, domestic child maltreatment, parental separations, removals to foster care, and death of a loved one from illness and car accidents.<sup>109</sup> As the next Part makes clear, these exposures have a devastating effect on access to opportunity, especially for one's immediate welfare and human capital development. But which *institutions* are implicated in trauma? Each of us knows that there is not a more consequential institution in our psychological lives than our family. Yet a structuralist approach necessarily focuses on every other institution, and tests assumptions about how these institutions interact with family dynamics to produce life chances.<sup>110</sup> Most are the same place-based public institutions involved in access to opportunity. In fact, it's the centrality of institutions like schools, housing policy, health care, child welfare, and law enforcement that supports the assertion that community violence (a leading cause of trauma) is a public health issue. That claim critiques the institutional rules, norms, and processes that currently operate in these environments. As we saw, public health and criminological researchers argue that public institutions and public policy would respond differently to problems such as violent crime, child endangerment, and drug abuse if they were seen as a public health crisis.<sup>111</sup> They would certainly receive different resources to treat the problems.<sup>112</sup> Often implicit in these critiques is the observation that the same institutions operate more effectively in middle-class and wealthier communities. For example, the deployment of different, less punitive

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108. See generally *id.* at 90–91.

109. See *supra* Section II.A.

110. See Troutt, *supra* note 105, at 12.

111. See *supra* Section II.B.

112. See Welsh et al., *supra* note 94, at 505.

approaches already occurs in more affluent communities where institutional responses to, say, juvenile delinquency,<sup>113</sup> questionable parenting practices,<sup>114</sup> and even drug addiction,<sup>115</sup> can differ greatly from the responses in poor and working-class areas. According to the theory, these differences are distinguishable based on place or residency, as much as they are on race and class differences.<sup>116</sup> This powerfully suggests inequity at work, an inequity that sustains disproportionate exposure to debilitating traumatic events. What is occurring in poorer communities, therefore, reflects what can happen when people with limited resources are concentrated in areas where institutions offer only limited resources. Poor places get poorer institutions. As a consequence, the problems that all people face are compounded and intensified for people who are poor.

Although these resource limitations sometimes reflect structural racism, political capture by elites or other undemocratic processes, they almost always demonstrate an imbalance of needs and resources. For instance, if the only places low-income people can find housing in a region are located in poor inner-city neighborhoods, the institutions that interact with them will always be severely challenged to advance their interests. This will be true for even well-run child welfare offices, progressive police forces, and innovative schools. Further, if low-income families are displaced into inner-ring suburbs, then those municipalities—never built for robust social services institutions—will likely be overwhelmed. Thus, population concentrations lead to resource imbalances that reproduce unequal outcomes.

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113. See Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 157–58 (1991).

114. Mark E. Courtney et al., *Race and Child Welfare Services: Past Research and Future Directions*, 75 CHILD WELFARE 99, 101–02 (1996); see DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 33 (2002) [hereinafter ROBERTS, *SHATTERED BONDS*]; see also U.S. DEP'T OF HEALTH & HUM. SERV., *FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS* (2010), [https://www.acf.hhs.gov/sites/default/files/opre/nis4\\_report\\_congress\\_full\\_pdf\\_jan2010.pdf](https://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf) [<https://perma.cc/8JG2-3UMV>].

115. See Julie Netherland & Helena B. Hansen, *The War on Drugs That Wasn't: Wasted Whiteness, "Dirty Doctors," and Race in Media Coverage of Prescription Opioid Misuse*, 40 CULTURE, MED., & PSYCHIATRY 664, 667–70 (2016); Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. TIMES (Oct. 30, 2015), <https://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html> [<http://perma.cc/ML8U-6CUQ>]; Associated Press, *Chris Christie Tackles Drug Crisis 'Ravaging the State and Our People'*, N.Y. TIMES (Jan. 10, 2017), [https://www.nytimes.com/2017/01/10/nyregion/new-jersey-chris-christie-drug-crisis-state-of-the-state-address.html?\\_r=0](https://www.nytimes.com/2017/01/10/nyregion/new-jersey-chris-christie-drug-crisis-state-of-the-state-address.html?_r=0) [<http://perma.cc/9BXW-QP8Z>].

116. See Netherland & Hansen, *supra* note 115, at 677–78.

But what causes concentration to occur so regularly? Well, first we have to recognize that concentrated, resource-poor populations are spatially trapped. People who live in or near isolated areas of concentrated poverty usually cannot afford to leave for safer places with more responsive institutions. This dilemma of immobility implicates Charles Tiebout's notion of social sorting,<sup>117</sup> an economic theory of local government law that is very well-known in that scholarship.<sup>118</sup> Tiebout explained that people are "consumer-voters" who will shop for the community that contains the right balance of preferred amenities.<sup>119</sup> If over time that chosen community fails to deliver, consumer-voters will exit.<sup>120</sup> Thus, Tiebout explains in economic terms something that world events (and especially U.S. history) demonstrate every day: for preferences or survival, people will migrate to what they perceive to be greater safety and opportunity elsewhere.<sup>121</sup> In the context of American local government, this dynamic gives local decision makers clear policy incentives about what to promote in their communities and what to exclude.<sup>122</sup>

Tiebout's theory of social sorting gives rise to two obvious problems for children at greatest risk of psychological trauma. First, they typically do not come from the families of consumer-voters and lack the choice to be mobile.<sup>123</sup> Second, any choice they come to possess will be constrained by the incentives among decision makers in less trauma-prone environments to keep them out.<sup>124</sup>

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117. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 420 (1956).

118. Charles Tiebout's theory of social sorting and local government law has been critiqued by numerous legal scholars, including Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000). Cashin argues for the necessity of improving accommodations for minority populations which have been oppressed by local governments and engaging in a critical discussion of Tiebout's theory of social sorting by stating, "Tiebout's theory that people would sort themselves according to their preferences for public goods has much less force in a society where racial and socioeconomic associational preferences appear to loom so large." *Id.* at 1994; see also Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 1 (2000) (engaging Charles Tiebout's theory of localism and defining it as "the view that the existing system of a large number of relatively small governments wielding power over such critical matters as local land use regulation, local taxation, and the financing of local public services out to be preserved").

119. Tiebout, *supra* note 117, at 418.

120. *Id.* at 419.

121. See *id.* at 418–19.

122. *Id.* at 417–20.

123. *Id.* at 419; SHARKEY, *supra* note 84, at 9.

124. See Tiebout, *supra* note 117, at 418–21 (suggesting that local government decision makers will make decisions to attract the consumers that help the city grow, but then try to maintain their targeted consumers, thus restricting less mobile individuals from moving to wealthier, resource-rich

The local governmental tools of exclusion are institutionalized and well canvassed in the legal literature (e.g., zoning, policing, transportation policies).<sup>125</sup> The competition among places seeking the optimal residents sets a course for concentrations of certain kinds of people across a given region.<sup>126</sup> Cumulatively, these institutional processes of exclusion produce concentrations—of wealth and poverty.<sup>127</sup> Tools used deliberately in Tiebout's high-resource community to keep low-income people out interact with tools used in resource-poor communities like zero-tolerance school discipline policies to keep them in.<sup>128</sup> Each is an institutional lever in reproducing spatial concentrations. Each is an instrument of structural inequality that works in predictable and systematic ways. The theory describes how law structures social sorting among many kinds of communities. Inequality crosses a broad spectrum of differences.<sup>129</sup> Here, at its extreme, it demonstrates how structural inequality produces trauma. Most importantly, it shows how the institutional disadvantages are cumulative, intersectional, and place-based. This argument is fundamental. Beyond the individual aggressor, the *sources* of psychological trauma may be largely environmental, but the traumatic environments themselves are *caused* by spatial inequality.

In order to understand how legal approaches can work to either intervene or prevent the cycle from continuing, we turn next to the psychological

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locations); see also Cashin, *supra* note 118, at 1993–94 (suggesting that local government decision makers are able to exclude people based on income and race).

125. See generally Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990) [hereinafter Briffault, *Part I*] (discussing the extent of local zoning autonomy and exclusionary land use as one of the most important local regulatory powers); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 354–55 (1990) [hereinafter Briffault, *Part II*] (analyzing the relationship between local government power and local needs and discussing local exclusionary policies from suburban areas); Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837, 1898 (2010) (advancing that exclusionary zoning from suburban development have created barriers to economic advancements); Cashin, *supra* note 118, at 1993 (“By delegating ‘nearly complete authority to control land use to the lowest incorporated governmental units,’ state governments have created a social, fiscal, and political environment in which suburban jurisdictions are rationally motivated to use highly exclusionary zoning and developmental policies . . . .” (footnote omitted) (quoting PAUL KANTOR, *THE DEPENDENT CITY REVISITED: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT AND SOCIAL POLICY* 163 (1995))).

126. See generally Tiebout, *supra* note 117, at 418 n.12, 419–20.

127. Cashin, *supra* note 118, at 1993–95.

128. *Id.* at 1993; see Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 9, 9–11 (2003) (discussing school-to-prison pipeline policies and their comparative absence in wealthier white districts). See generally Tiebout, *supra* note 117; Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 341–43 (2003).

129. Cashin, *supra* note 118, at 2019 n.172, 2022, 2025–26.

literature on the consequences of these structural arrangements to further understand what must be remedied.

### III. TRAUMA'S EFFECTS ON THE CHILD: PSYCHOLOGICAL, SOCIAL, AND PHYSIOLOGICAL

The unpredictable effects of exposure to traumatic events take myriad forms, as each human being's mind and body processes experience uniquely. However, here I briefly lay out the evidence of how children are generally affected psychologically, cognitively, and physiologically by trauma. The three are inextricably related. A child who manifests anxiety and depression after an event will often suffer in performance at school.<sup>130</sup> Particular traumas may be powerful enough to alter a very young child neurologically, even before they enter school.<sup>131</sup> Traumas that alter brain development not only contribute to cognitive impairment, but also to conduct disorders which in turn affect a child's social interactions—including with school authorities.<sup>132</sup> The physiological stress responses associated with certain kinds of trauma—the fight, flight, or freeze reactions—may lead cumulatively to allostatic load, a kind of hormonal breaking point where adaptive mechanisms become dangerous to health and longevity.<sup>133</sup> In fact, the biosocial pathways that begin at the point of psychological exposure are for some children the core explanation for the “school-to-prison pipeline.”<sup>134</sup> That policy metaphor summarizes how the cumulative effects of childhood traumas can predispose a child to problems at school, disciplinary action, dropping out, and the hypervigilance or substance abuse (and often both) that may lead to incarceration or worse. In each institutional contact, very little is usually known about the child's internal battle with trauma.<sup>135</sup>

#### *Neurobiological pathways*

Neuroscientists have developed a rich body of research that shows how traumatic events can alter the brain's architecture, sometimes in ways that reach the gene pool and live on in our descendants. This array of disturbing findings includes several categories of post-traumatic harm, studied through distinct

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130. Margevich, *supra* note 8, at 9–10.

131. *Id.* at 10.

132. *Id.* at 3, 20.

133. *Id.* at 15.

134. See Wald & Losen, *supra* note 128, at 11–13.

135. See Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 28 (2003).

“biomarkers of stress from the neuroendocrine, immunological, metabolic and cardiovascular systems.”<sup>136</sup> As children’s brains react to traumatic stressors, processes are triggered that affect different systems in the body.<sup>137</sup> The effects range from behavioral self-regulation problems and mental illness, predisposition to certain diseases,<sup>138</sup> risk of alcohol or substance abuse<sup>139</sup> and accelerated biological aging.<sup>140</sup> Poverty and crime are environmental elements that significantly increase the biological risks.<sup>141</sup>

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136. Margevich, *supra* note 8, at 16.

137. See Lin et al., *supra* note 88, at 109–10.

138. For example, Lin, Neylan, Epel, and O’Donovan investigated the relation between childhood adversity (repeating a year of school, household dysfunction related to parent alcohol or drug abuse, physical abuse by parent), adult adversity (death of child; fire, flood, earthquake, or natural disaster; combat exposure; family member addicted to drugs/alcohol; victim of a serious physical attack or assault; self, spouse or child experienced life-threatening illness or accident) and levels of an inflammatory biomarker, high sensitive C-reactive protein in 11,198 adults aged 50 or older. *Id.* at 107, 109. The authors found that the presence of any childhood or adult adversity and their greater frequency (continuous) each predicted significantly higher blood levels of hsCRP. *Id.* at 109. This finding and another study comparing participants with no adult or childhood adversity, childhood but no adult adversity, adult but no childhood adversity, and childhood and adult adversity, points to the relation between childhood adversity, even more so than adult adversity, and inflammation, which is a pathway through which chronic stress is believed to increase risk of disease. *Id.* at 110.

139. See Barbara A. Lucenko et al., *Childhood Adversity and Behavioral Health Outcomes for Youth: An Investigation Using State Administrative Data*, 47 CHILD ABUSE & NEGLECT 48, 52–53 (2015).

140. Aoife O’Donovan et al., *Childhood Trauma Associated with Short Leukocyte Telomere Length in Posttraumatic Stress Disorder*, 70 BIOLOGICAL PSYCHIATRY 465, 465, 468 (2011).

141. Making a particularly compelling case for the specific role of childhood PTE exposure in the context of poverty in creating biological risk for disease development, Blair, Raver, Granger, Mills-Koonce, and Hibel investigated the relation between poverty-related early adversity (i.e., length of time in poverty, housing quality, perceived economic strain, perceived economic sufficiency, adult exits from the home) and baseline salivary cortisol levels in a sample of 1,135 children from the Family Life Project (FLP). Clancy Blair et al., *Allostasis and Allostatic Load in the Context of Poverty in Early Childhood*, 23 DEV. PSYCHOPATHOLOGY 845, 845, 855 (2011). Poverty-related adversity was measured prospectively at 7 months of age, and children’s salivary cortisol was measured at 4 time points between 7 months and 4 years of age. *Id.* at 847. Uniquely, the FLP sample was constructed to allow for the comparison between African American and white children living in high poverty areas in the United States. *Id.* at 853. Results revealed that longer time in poverty and poorer housing quality predicted significantly higher levels of salivary cortisol across the four-year period. *Id.* at 851. With respect to ethnic-racial identity, African-American children had significantly higher levels of cortisol than white children even after statistically controlling for variation in cortisol explained by a number of household risk factors. *Id.* at 854. For instance, cortisol, a hormone like adrenaline that is released to aid the body during stressful moments, has been used as a measure of trauma’s effects on stress physiology. *Id.* at 848. Overproduction of cortisol—as when a person’s fight-or-flight responses are chronically triggered and rarely return to rest—can have devastating impacts on cognitive, mental, and physical health in a condition known as allostatic load. *Id.* at 845; Bruce S. McEwen & Eliot Stellar, *Stress and the Individual: Mechanisms Leading to Disease*, 153 ARCHIVES INTERNAL MED. 2093,

The first risk of psychological trauma is that it occurs early and often, given the neurobiology of developing brains. According to Dr. Bruce Perry, the brain's architecture is "use-dependent"—meaning what is activated frequently becomes normal, and what is not goes less developed.<sup>142</sup> Persistent fear of chronic but unpredictable violence in childhood, a "state," may condition brain functioning, the "trait."<sup>143</sup> "[E]xposure to violence activates a set of threat-responses in the child's developing brain; in turn, excess activation of the neural systems involved in the threat responses can alter the developing brain; finally, these alterations manifest as functional changes in emotional, behavioral and cognitive functioning."<sup>144</sup> This interaction between external experience, neurobiology, and behavior typically occurs across a spectrum with hyperarousal at one end and dissociation at the other.<sup>145</sup> Hyperarousal (or "fight or flight") is associated with more aggressive, externalizing symptoms and disorders (e.g., PTSD, ADHD, and conduct disorder).<sup>146</sup> Dissociation is associated with "defeat reaction[s]," internalizing symptoms like numbing and withdrawal and related disorders (e.g., dissociative disorders, anxiety disorders, and major depression).<sup>147</sup> Continued exposure to threats may result in neurobiological alteration that favors one or the other.<sup>148</sup> Very young children

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2094–96 (1993). Increased cortisol levels in the blood have been found to increase the severity of PTSS in children who suffer from the disorder. See Sarah A. Ostrowski et al., *Acute Child and Mother Psychophysiological Responses and Subsequent PTSD Symptoms Following a Child's Traumatic Event*, 20 J. TRAUMATIC STRESS 677 (2007). These studies of the cortico-limbic system demonstrate how early exposure to traumatic events can have profound lasting effects on the brain's ability to sustain emotional well-being, Akiko Suzuki et al., *Long Term Effects of Childhood Trauma on Cortisol Stress Reactivity in Adulthood and Relationship to the Occurrence of Depression*, 50 PSYCHONEUROENDOCRINOLOGY 289, 290 (2014), and manage stress, James Elsey et al., *Childhood Trauma and Neural Responses to Personalized Stress, Favorite-Food and Neutral-Relaxing Cues in Adolescents*, 40 NEUROPSYCHOPHARMACOLOGY 1580, 1581 (2015); see also Katie A. McLaughlin et al., *Child Maltreatment and Neural Systems Underlying Emotion Regulation*, 54 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 753, 759 (2015).

142. Bruce D. Perry, *The Neurodevelopmental Impact of Violence in Childhood*, in TEXTBOOK OF CHILD AND ADOLESCENT FORENSIC PSYCHIATRY 221–238 (D. Schetky and E.P. Benedek eds., 2001), <https://pdfs.semanticscholar.org/9339/a48365eed02cafd7c32487bf001c86117ccf.pdf> [<https://perma.cc/Q46Z-BBH4>]. For the reader's convenience, the pincited pages listed below correlate with the PDF appended to this source.

143. *Id.* at 8.

144. *Id.* at 5.

145. *Id.*

146. *Id.* at 5, 8. In terms of the central nervous system, hyperarousal is associated with the reticular activating system, the locus coeruleus, the hippocampus, the amygdala and hypothalamic-pituitary-adrenal axis. *Id.* at 5–6.

147. *Id.* at 7–8.

148. *Id.* at 8.

and girls tend toward more dissociative-related symptoms; boys tend toward hyperarousal.<sup>149</sup> “The specific symptoms a child develops following exposure to violence . . . can vary depending upon the nature, frequency, pattern and intensity of the violence, the adaptive style of the child and the presence of attenuating factors such as a stable, safe and supportive home.”<sup>150</sup>

### *Psychological effects*

Although the pervasiveness of PTSD among children exposed to trauma has received a lot of attention (and was confirmed in our small New Jersey study<sup>151</sup>), the psychological effects of trauma can take many forms.<sup>152</sup> Psychologists sometimes refer to “potentially traumatic events” (PTE).<sup>153</sup> The more frequent the exposure—a hallmark of complex trauma—the greater the likelihood of significant psychological injury.<sup>154</sup> For example, research on 12- to 17-year-old adolescents has shown a significant relationship between the presence of individual childhood PTE categories and a doubling of risk for having substance abuse and mental health problems in adolescence.<sup>155</sup> Similarly, elementary school children’s exposure to multiple types of PTEs was significantly related to greater severity of posttraumatic stress symptoms.<sup>156</sup> A large study of 1.5- to 18-year-olds showed escalating odds of scoring in the clinical range for externalizing problems (e.g., physical aggression, cheating, disobeying rules) and internalizing problems (e.g., withdrawal, feeling sad, fearfulness, difficulty concentrating), based on each additional PTE exposure.<sup>157</sup> Finally, using ACE scores, considerable research suggests that cumulative childhood PTEs are significantly related to increased risk of lifetime

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149. *Id.* at 5, 8.

150. *Id.* at 8.

151. See Lukachko & Jenkins, *supra* note 40, at 8.

152. Margevich, *supra* note 8, at 9–10.

153. *Id.* at 4.

154. *Id.* at 11.

155. See Lucenko et al., *supra* note 139, at 50, 52–53.

156. See Araceli Gonzalez et al., *Trauma Exposure in Elementary School Children: Description of Screening Procedures, Level of Exposure, and Posttraumatic Stress Symptoms*, 8 SCH. MENTAL HEALTH 77, 83 (2016).

157. See Johanna K. P. Greeson et al., *Traumatic Childhood Experiences in the 21st Century: Broadening and Building on the ACE Studies with Data from the National Child Traumatic Stress Network*, 29 J. INTERPERSONAL VIOLENCE 536, 544–46 (2014). The National Child Traumatic Stress Network’s (NCTSN) Core Data Set (CDS) demonstrated a strong dose-response relation between childhood PTEs and mental health, with each additional type of PTE exposure accounting for a 1.11- to 1.16-fold (11%–16%) and 1.07- to 1.15-fold (7%–15%). *Id.*

psychiatric illness, such as Major Depressive Disorder, PTSD, and anxiety disorders.<sup>158</sup>

*Cognitive, socio-emotional, and academic effects*

Research consistently shows that childhood exposure to traumatic events can profoundly disturb cognitive functioning, especially academic performance. Early achievement difficulties—especially if their sources are not discovered and effectively addressed—often lead to cumulative academic deficits from which children may not recover.<sup>159</sup> Verbal development,<sup>160</sup> reading ability,<sup>161</sup> and IQ<sup>162</sup> have all been shown to be negatively affected by different types and severity of PTEs. For example, Thompson and Massat examined the relationship between violence exposure in the past year, including behavior problems, PTSD symptoms, and academic achievement (as measured by the Iowa Test of Basic Skills, a nationally normed achievement test) in a high-risk sample of 110 eleven to thirteen-year-old African-American students from four inner-city Chicago neighborhoods.<sup>163</sup> The authors demonstrated that

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158. See Robert F. Anda et al., *Adverse Childhood Experiences, Alcoholic Parents, and Later Risk of Alcoholism and Depression*, 53 PSYCHIATRIC SERV. 1001, 1005 (2002); Daniel P. Chapman et al., *Adverse Childhood Experiences and the Risk of Depressive Disorders in Adulthood*, 82 J. AFFECTIVE DISORDERS 217, 222 (2004); R. C. Kessler et al., *Childhood Adversity and Adult Psychiatric Disorder in the US National Comorbidity Survey*, 27 PSYCHOL. MED. 1101, 1115 (1997).

159. Margevich, *supra* note 8, at 9–10.

160. For example, Graham-Bermann, Howell, Miller, Kwek, and Lilly investigated the relation between childhood PTE exposure and verbal ability, as measured by the Wechsler Preschool and Primary Scale of Intelligence, in a sample of 87 pre-school aged children exposed to intimate partner violence (IPV) in the past two years. Sandra A. Graham-Bermann et al., *Traumatic Events and Maternal Education as Predictors of Verbal Ability for Preschool Children Exposed to Intimate Partner Violence (IPV)*, 25 J. FAM. VIOLENCE 383, 385–86 (2010). The IPV exposed sample demonstrated significantly lower verbal ability scores compared to a national sample of 1,700 same-aged children not assessed for IPV exposure. *Id.* at 388–89.

161. Duplechain, Reigner, and Packard found a significant relation between severity of childhood PTE exposure and reading ability in a sample of 162 children in grades 2 through 5 from the Metropolitan Area Child Study. Rosalind Duplechain et al., *Striking Differences: The Impact of Moderate and High Trauma on Reading Achievement*, 29 READING PSYCHOL. 117, 120–21 (2008). They found that children with moderate and high violence exposure (vs. no exposure) demonstrated decrements in reading ability scores over the three-year period. *Id.* at 128. Another study found that children exposed to interpersonal PTEs (vs. none) in the first two years of life (infancy) scored significantly lower on developmentally appropriate cognitive assessments administered at 24, 64, and 96 months. Michelle Bosquet Enlow et al., *Interpersonal Trauma Exposure and Cognitive Development in Children to Age 8 Years: A Longitudinal Study*, 66 J. EPIDEMIOLOGY & COMMUNITY HEALTH 1005, 1008 (2012).

162. Bosquet Enlow et al., *supra* note 161, at 1005.

163. See Thompson, Jr. & Rippey Massat, *supra* note 87, at 379–81.

exposure to community violence, family violence, and witnessing violence were each significantly related to lower academic achievement.<sup>164</sup> Each type of violence exposure was also significantly related to higher PTSD symptoms, and in turn, higher PTSD symptoms were significantly related to lower academic achievement.<sup>165</sup> These findings suggest that children's PTE exposure directly and indirectly (through PTSD symptoms) places them at disparate risk for academic underachievement and later socioeconomic disadvantage.

Research using child and adolescent samples has also supported the relation between early exposure to traumatic events and socio-emotional functioning, suggesting that experiences in childhood can increase children's vulnerability to stressors encountered later in life.<sup>166</sup> Memory, facial recognition, and significantly impaired automatic emotion regulation during an emotional conflict task may all be negatively affected.<sup>167</sup> Early PTE exposure can take a particular toll on adolescents, exacerbating the risk of problem behaviors with each traumatic experience.<sup>168</sup> For instance, in a sample of 3,785 thirteen- to eighteen-year-old children and adolescents from the National Child Traumatic Stress Network Core Data Set, the authors found a powerful link between higher childhood exposure to PTEs and higher adolescent problem behaviors.<sup>169</sup> Specifically, they found that each additional childhood PTE exposure predicted a 22% increased likelihood for attachment difficulties, a 6% increased likelihood of skipping school, a 14% increased likelihood of running away from home, a 13% increased likelihood of criminal activity, an 11% increased likelihood of self-injurious behavior, an 8% increased likelihood of substance abuse, a 12% increased likelihood of suicidality, an 11% increased likelihood of alcohol use, and an 18% increased likelihood of being a victim of sexual exploitation.<sup>170</sup>

The cumulative psychosocial consequences for young people exposed to traumatic events is quantifiable in school achievement terms, measured in the starkest way: Increased risk of dropping out.<sup>171</sup> Using a national sample and the most comprehensive psychiatric data, Dr. Michelle V. Porche and her

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164. *Id.* at 387.

165. *Id.*

166. Margevich, *supra* note 8, at 10.

167. *Id.* at 8, 10.

168. *Id.* at 9–10.

169. *Id.* at 10–11; see also Christopher M. Layne et al., *Cumulative Trauma Exposure and High Risk Behavior in Adolescence: Findings from the National Child Traumatic Stress Network Core Data Set*, 6 PSYCHOL. TRAUMA: THEORY, RES. PRAC., & POL'Y S40, S42, S45 (2014).

170. See Layne et al., *supra* note 169, at S44.

171. Margevich, *supra* note 8, at 8–9.

colleagues set out to show whether “the psychological consequences of trauma will lead to school dropout, not the trauma experience in and of itself.”<sup>172</sup> About 38% of their sample of young adults had experienced at least one major childhood trauma before age 16.<sup>173</sup> Of those, about 20% dropped out of school.<sup>174</sup> However, the dropout risk increased depending on the type of trauma, the presence of a psychological condition (which may have been triggered by traumatic experience), and, somewhat surprisingly, race and ethnicity.<sup>175</sup> Childhood physical abuse, rape, and violence predicted higher dropout rates, as did the presence of early conduct disorders or childhood depression.<sup>176</sup> However, simply being black or Latino amplified the dropout risk for any variable.<sup>177</sup>

Both educational and therapeutic professionals have criticized the way schools interpret the disruptive behaviors of some traumatized students, contributing to severe discipline, alienation, and ultimately dropping out.<sup>178</sup> Professor Susan Cole has argued that students are frequently misdiagnosed or misclassified,<sup>179</sup> then disciplined accordingly.<sup>180</sup>

#### *A. International Analogies*

The international context reveals childhood trauma reactions along a different measure of inequality: those who are exposed to horrific life events, such as war and natural disaster (often because of poverty), and those who are not. Researchers sometimes distinguish between “Type I trauma,” which “refers to a one time, horrific and clear cut life-endangering experience” and

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172. Michelle V. Porche et al., *Childhood Trauma and Psychiatric Disorders as Correlates of School Dropout in a National Sample of Young Adults*, 82 CHILD DEV. 982, 985 (2011).

173. *Id.* at 990.

174. *Id.* at 989.

175. *Id.* at 988–90.

176. *Id.* at 989–90.

177. *Id.* at 982.

178. Cole & Gadd, *supra* note 7, at 606–09.

179. *Id.* (“Sometimes these children are labeled as having attention deficit hyperactivity disorder (ADHD). While striking rates of ADHD have been found in samples of traumatized children, there also exists a considerable margin for misdiagnosis of hypervigilance as ADHD given the symptom overlap between the two. Moreover, school psychologists rarely look beyond the ADHD diagnosis to identify a child’s symptoms of and need for treatment of both ADHD and trauma.” (footnotes omitted))

180. *Id.* at 601–02 (“Lacking proper information and supportive services, teachers, principals, and superintendents are often forced into the position of using shortsighted remedies, including suspension and expulsion, to deal with disruptive behavior. Such forms of punishment fail to address the underlying causes of the problem and often merely replace the guidance students may have received in school with that of the street.” (footnotes omitted)); *see also* Tulman, *supra* note 135, at 28–39.

“Type II trauma,” meaning “chronic stress and adversities . . . are a part of [a child’s] daily life.”<sup>181</sup> Over time, the former may become the latter. Protracted warfare presents the growing helplessness, fear, and uncertainty of threats that cannot be managed or changed, up-ending children’s fundamental expectations about their safety.<sup>182</sup> Children suffer from indirect consequences as well, including “malnutrition, ill health, and lack of education.”<sup>183</sup> Like children in dangerous U.S. neighborhoods, the children of armed conflict have a difficult time concentrating, appear irritable, and experience nightmares and anxiety dreams.<sup>184</sup> Sometimes they internalize, avoiding “painful and shameful memories, to numb their trauma-related feelings and to deny the importance of trauma,”<sup>185</sup> while others remain in a continuous state of hyper-arousal.<sup>186</sup> Children amid conflict may externalize their trauma through “posttraumatic play,” acting in ways that rely on “repetition, thematic narrowness, and ritualistic play scheme.”<sup>187</sup> These behaviors are consistent with PTSD. In fact, one study of Palestinian children showed that in 2004, 25% suffered from PTSD as a result of war conflict.<sup>188</sup> Children in Sarajevo during the Bosnian war had a PTSD prevalence rate of 41%<sup>189</sup> and 44% of Rwandan orphans a decade after the genocide there were still suffering from PTSD.<sup>190</sup>

The trauma of natural disasters reveals a key distinction in the reactions of children depending on whether or not the instability continues. In a study conducted two and a half years after the earthquake in Haiti, PTSD was

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181. Samir Qouta et al., *Child Development and Family Mental Health in War and Military Violence: The Palestinian Experience*, 32 INT’L J. BEHAV. DEV. 310, 311 (2008).

182. See *id.* at 316.

183. Claudia Catani et al., *War Trauma, Child Labor, and Family Violence: Life Adversities and PTSD in a Sample of School Children in Kabul*, 22 J. TRAUMATIC STRESS 163, 163 (2009) (citation omitted); see also *id.* at 164 (citing Robert S. Pynoos et al., *A Developmental Psychopathology Model of Childhood Traumatic Stress and Intersection with Anxiety Disorders*, 46 BIOLOGICAL PSYCHIATRY 1542, 1546 (1999)).

184. Qouta et al., *supra* note 181, at 314, 316.

185. *Id.* at 314.

186. *Id.*

187. *Id.* at 316.

188. Catani et al., *supra* note 183, at 164 (citing Abdel Aziz Mousa Thabet, et al., *Comorbidity of PTSD and Depression Among Refugee Children During War Conflict*, 45 J. CHILD PSYCHOL. & PSYCHIATRY 533 (2004)).

189. *Id.* (citing Maureen A. Allwood et al., *Children’s Trauma and Adjustment Reactions to Violent and Nonviolent War Experiences*, 41 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 450, 452 (2002)).

190. *Id.* (citing Susanne Schaal & Thomas Elbert, *Ten Years After the Genocide: Trauma Confrontation and Posttraumatic Stress in Rwandan Adolescents*, 19 J. TRAUMATIC STRESS 95, 101 (2006)).

prevalent in about 40% of children, with 41.58% of girls and 30.18% of boys.<sup>191</sup> Additionally, about 46% of children experience depression, distributed between girls and boys at 52.14% and 38.58%, respectively.<sup>192</sup> In comparison, similar studies conducted 18 months after the Sichuan, China earthquakes found a rate of about 12% for PTSD and 40.8% for depression.<sup>193</sup> In Greece, a PTSD rate of 8.8% and a depression rate of 13.7% was found 32 months after the earthquake there.<sup>194</sup> The higher rates of PTSD and depression in Haiti compared to those in other areas that experienced earthquakes may be explained “by the fact that [Haitian] children continue to live their day-to-day lives amid the chaos, which the earthquake ha[d] left.”<sup>195</sup> Thirty months after the earthquake in 2010, an estimated 400,000 people “were still living in camps, children were going hungry and poverty levels . . . had reached an all-time high.”<sup>196</sup> These studies demonstrate that the horror, ongoing helplessness, and prolonged instability of environments impoverished by armed conflict and natural disaster provoke the same or similar trauma reactions that affect U.S. children mired in chronic community violence and concentrated poverty.

### B. Risks and Resiliency

The psychological and biosocial research demonstrates that severe childhood trauma reflecting the symptomatology of deep inequality has devastating, often life-long, consequences. Acute traumatic experiences like witnessing the horror of seeing a mother beaten, feeling the desperate helplessness of molestation, or coming upon the dying body of a murder victim happen with too much regularity in some communities, exposing children to complex sources of fear, mistrust, and guardedness. Their entire bodies respond to both the presence and the expectation of threat.<sup>197</sup> Some children go inward, subject to the quiet distractions of aloof depression.<sup>198</sup> Some children externalize, performing a protective toughness with disruptive, often aggressive

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191. Jude Mary Cénat & Daniel Derivois, *Long-Term Outcomes Among Child and Adolescent Survivors of the 2010 Haitian Earthquake*, 32 DEPRESSION & ANXIETY 57, 60 (2015).

192. *Id.*

193. *Id.* at 61 (citing Zhiyong Qu et al., *The Impact of the Catastrophic Earthquake in China's Sichuan Province on the Mental Health of Pregnant Women*, 136 J. AFFECTIVE DISORDERS 117, 119 (2012)).

194. *Id.* (citing Armen K. Goenjian et al., *Longitudinal Study of PTSD, Depression, and Quality of Life Among Adolescents After the Parnitha Earthquake*, 133 J. AFFECTIVE DISORDERS 509, 513 (2011)).

195. *Id.*

196. *Id.* (footnote omitted).

197. Cole & Gadd, *supra* note 7, at 607.

198. *Id.* at 606.

behaviors.<sup>199</sup> It is exhausting work that takes a toll on children's healthy development.<sup>200</sup> They often struggle academically. They may be challenged socially. They are tested emotionally. And many become physiologically overloaded by the hormonal strains of adapting to the prevalence of dangers around them, developing illnesses long associated with the poor.<sup>201</sup> John Rich, a physician who studies and treats young men traumatized by violence, calls them "injured."<sup>202</sup>

In the often hostile environments in which these young men live, trauma looms even larger. It drives their reactions and decisions and disrupts the normal supportive relationships that all of us depend on. In this same environment, there is great pressure to 'be a man' and not acknowledge these traumas, lest they appear weak. The pressure not to be seen as weak piles on even more pressure to prove that they are strong. All of these pressures prime the pump for the cycle of violence.<sup>203</sup>

Rich concludes that we must imagine their safety from their perspective and strive to secure it.<sup>204</sup>

Of course, not everybody in low- and very low-income neighborhoods suffer any of the ill effects of complex trauma described in this Part. Many do not. And even many who do nevertheless demonstrate profound resiliency in navigating challenges to their safety, succeeding in school, developing strong interpersonal relationships, and living healthy and productive lives. Research on resiliency is emerging as an important complement to trauma studies.<sup>205</sup> In any event, common experience teaches us that many, if not most, people in the hardest circumstances develop strong coping resources among family, religious faith, and other close-in supports.<sup>206</sup> It is ironic to note that many people who

199. *Id.* at 607.

200. Margevich, *supra* note 8, at 8; *see* Cole & Gadd, *supra* note 7, at 604–07.

201. *See* BRUCE S. MCEWEN WITH ELIZABETH NORTON LASLEY, *THE END OF STRESS AS WE KNOW IT* 58–59 (2002) (describing the correlations to asthma, diabetes, and high blood pressure).

202. JOHN A. RICH, *WRONG PLACE, WRONG TIME: TRAUMA AND VIOLENCE IN THE LIVES OF YOUNG BLACK MEN*, at xvi, 198 (2009).

203. *Id.* at 198–99.

204. *Id.* at 201.

205. *See* Maria Konnikova, *How People Learn to Become Resilient*, *NEW YORKER* (Feb. 11, 2016), <http://www.newyorker.com/science/maria-konnikova/the-secret-formula-for-resilience> [<http://perma.cc/FL6W-2L7H>]. *See generally* Suniya S. Luthar & Edward Zigler, *Vulnerability and Competence: A Review of Research on Resilience in Childhood*, 61 *AM. J. ORTHOPSYCHIATRY* 6 (1991); THE RESILIENCE CENTRE, <http://www.resilienceresearch.org/> [<https://perma.cc/D8U9-NMJ6>] (last visited Apr. 23, 2018).

206. Luthar & Zigler, *supra* note 205, at 16.

cope effectively against great odds may suffer serious health problems *because* of the strain involved in overcoming expectations, a phenomenon researchers dubbed “John Henryism.”<sup>207</sup>

What is clear is that there is a crisis of trauma exposure that concentrates in isolated resource-poor communities and is delivering devastating consequences for its children. It is not determinism, however. Trauma-related disorders are not irreversible.<sup>208</sup> They can be treated effectively with a variety of therapeutic interventions.<sup>209</sup> Describing those is beyond the scope of legal scholarship.<sup>210</sup> Instead, I undertake a two-part inquiry into what remedies the law can provide next.

#### IV. INTERVENTIONIST APPROACHES: TRAUMA, SCHOOLS, AND POVERTY

There are two broad remedial approaches to child psychological trauma as a public health crisis: *interventions* to lessen the harmful effects of symptoms and improve coping capacity and *preventive strategies* to limit the very incidence of traumatic events in the first place. In this Part, I address the first one, possible legal interventions to the broad symptomatology of psychological trauma presented in the last Part. I focus only on schools, the primary public institution with which all children interact and the focus of the few approaches already in practice. Two primary questions frame the analysis. First, what legal duty, if any, do schools have in recognizing and positively addressing the prevalence of trauma among children? As we’ll see, psychological trauma and its effects on learning present a grey area under the federal IDEA, Section 504 of the Rehabilitation Act, and Title II of the ADA.<sup>211</sup> I focus, therefore, on the most limited duty of identifying signs of trauma exposure, though there are state laws that go further. A duty to identify is particularly important for problems of psychological injury that parents and caregivers often cannot or will not disclose to third parties.<sup>212</sup>

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207. See Alicia Lukachko et al., *Structural Racism and Myocardial Infarction in the United States*, 103 SOC. SCI. & MED. 42, 47 (2014); Marcellus M. Merritt et al., *How Much Striving is Too Much? John Henryism Active Coping Predicts Worse Daily Cortisol Responses for African American But Not White Female Dementia Family Caregivers*, 19 AM. J. GERIATRIC PSYCHIATRY 451, 452–53 (2011); Anita F. Fernander, et al., *John Henry Active Coping, Education, and Blood Pressure Among Urban Blacks*, 96 J. NAT’L MED. ASSOC. 246, 246–47 (2004).

208. See HERMAN, *supra* note 12, at 133–54.

209. See *id.*

210. For an excellent discussion of some of the therapies psychologists and psychiatrists have used effectively to treat children with trauma see HERMAN, *supra* note 12, at 266–76.

211. See *infra* Section IV.A.

212. David Finkelhor et al., *Poly-Victimization: A Neglected Component in Child Victimization*, 31 CHILD ABUSE & NEGLECT 7, 22 (2007).

The second question asks how this technical duty might be discharged given the significant practical and philosophical entanglements that arise from norms governing the relationship between poor children and public institutions. For instance, most applicable legal duties treat disabilities.<sup>213</sup> Is exposure to complex trauma properly considered a “disability” with corresponding institutional duties to people with disabilities? Would classification in special education help or hinder low-income students who are already disproportionately classified? What is the risk that any regime of legal intervention around trauma will ultimately pathologize a population that many Americans already consider a “broken” people? And even if schools—especially poor schools—could have the institutional capacity to do intervention effectively, *should* they? Finally, what is the best means for delineating and imposing such a duty on schools to intervene—litigation, legislation, or something else?

This Part concludes that interventions are required but risky, and argues that any legal approach to the crisis of childhood trauma is compelled simultaneously to seek prevention, using instruments of local government and other law to disrupt the cycle of structural inequality. I take up prevention in Part V.

#### *A. Special Education under Federal Law*

The most obvious place to begin is with the web of federal statutes that comprise our legal system of special education, since these impose the most robust legal duties on schools to provide for children whose ability to learn is impaired by circumstance. Special education is confusing, but it is best understood as overlapping civil rights laws designed to increase access and prohibit discrimination against people with enumerated “disabilities” or “handicaps.” The IDEA, Section 504, and the ADA respond to a long history of disregard for the special needs of people often born with physical or mental limitations preventing them from keeping up with their less-challenged peers.<sup>214</sup> Thus, the laws follow the pattern of other civil rights regimes, defining eligible categories for protection and demanding methods of accommodation in the name of equal opportunity.<sup>215</sup> However, the school-based effects of trauma exposure do not necessarily lend themselves to easy categorical evaluation and

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213. See *infra* Section IV.A.

214. See generally John W. Maag & Antonis Katsiyannis, *School-Based Mental Health Services: Funding Options and Issues*, 21 J. DISABILITY POL’Y STUD. 173, 174–75 (2010).

215. *Id.* at 175.

identification, which means that even established disorders like PTSD have to fit into an expanding list of statutory disabilities.<sup>216</sup>

### 1. The Individuals with Disabilities Education Act

The primary special education law is the IDEA, a rights-based statute first passed in 1975 to ensure a “free appropriate public education” (FAPE) for children with disabilities.<sup>217</sup> The IDEA covers children with a range of intellectual, physical, and other learning disabilities “who, by reason thereof, need special education and related services.”<sup>218</sup> Of the three federal Acts, the IDEA’s disability criteria are the most stringent with respect to psychological trauma.<sup>219</sup> Children suffering emotionally from severe or prolonged exposure to trauma may express the behavior that qualifies for a “serious emotional disturbance” classification.<sup>220</sup> Emotional disturbance is

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance: . . . [a]n inability to learn that cannot be explained by intellectual, sensory, or health factors[;] . . . [a]n inability to build or maintain satisfactory interpersonal relationships with peers and teachers[;] . . . [i]nappropriate types of behavior or feelings under normal circumstances[;] . . . [a] general pervasive mood of unhappiness or depression[;] . . . [a] tendency to develop physical symptoms or fears associated with personal or school

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216. See William Dikel & Daniel Stewart, *Emotional/Behavioral Disorders and Special Education: Recommendations for System Redesign of a Failed Category*, 34 HAMLINE L. REV. 589, 591–92 (2011).

217. 20 U.S.C. § 1400(d) (2012).

218. *Id.* § 1401(3)(A)(i).

The term ‘child with a disability’ means a child—(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.

*Id.* § 1401(3)(A). The “specific learning disabilities” mentioned here expressly excludes problems resulting from “emotional disturbance, or of environmental, cultural, or economic disadvantage.” *Id.* § 1401(30)(C).

219. 34 C.F.R. § 300.8(c)(4) (2017); see also 20 U.S.C. § 1400(d); 29 U.S.C. § 701 (2012); 42 U.S.C. § 12101 (2012).

220. 34 C.F.R. § 300.8(a), (c)(4)(i).

problems.<sup>221</sup>

The existence of any of these factors is subject to professional evaluation.<sup>222</sup> Nevertheless, many of the trauma-related psychological disorders such as PTSD and Major Depressive Disorder as well as sub-clinical conditions described earlier in Part III would ostensibly satisfy the second, fourth, and fifth factors above.<sup>223</sup> Thus, the IDEA's language offers a potential intervention for those trauma-exposed students who may be classified as suffering from a clinically diagnosed emotional disturbance that substantially affects their ability to learn.<sup>224</sup> The diagnosis specifically entitles the child to psychological help as a "related service" under the Act.<sup>225</sup>

Assuming a child is emotionally disturbed as a result of traumatic experience, several school duties are triggered under the Act, including a guaranteed FAPE,<sup>226</sup> a duty to identify children in need, and a combination of evaluation<sup>227</sup> and placement or accommodation.<sup>228</sup> These are what are commonly thought of as special educational services.<sup>229</sup> The guaranteed FAPE means not only that the services are free to the child's family, but also to the local school district, traditionally paid for with federal funds.<sup>230</sup> Identification

221. *Id.* § 300.8(c)(4)(i). Emotional disturbance includes a carve out, which excludes "socially maladjusted" students, however, there is no definition for what the term "socially maladjusted" means. *See id.* § 300.8(c)(4)(ii); *see also* 34 C.F.R. § 300.8(c)(4)(i).

222. 34 C.F.R. § 300.8(a).

223. *See Muller v. Comm. on Special Educ. of the E. Islip Union Free Sch. Dist.*, 145 F.3d 95, 102–04 (2d Cir. 1998) ("[T]he regulation does not require that the student be clinically or medically depressed.").

224. *See N.C. ex rel. M.C. v. Bedford Cent. Sch. Dist.*, 473 F. Supp. 2d 532, 543–44 (S.D.N.Y. 2007).

225. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 991–92 (1st Cir. 1990); 20 U.S.C. § 1401(3) (2012) (defining the term "child with a disability").

226. 20 U.S.C. § 1415(a).

The term 'free appropriate public education' means special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

*Id.* § 1401(9).

227. *See* 20 U.S.C. § 1414(a); *see also id.* § 1412(a)(3)(A); *Moorestown Twp. Bd. of Educ. v. S.D. & C.D. ex rel. M.D.*, 811 F. Supp. 2d 1057, 1066 (D. N.J. 2011).

228. 20 U.S.C. § 1414(d)–(e).

229. *Id.* § 1414(d)(1)(A)(IV).

230. *Id.* § 1412(a).

comes under the “Child Find” obligation,<sup>231</sup> a duty that also extends to children in nonpublic school settings.<sup>232</sup> Finally, the IDEA requires that students be evaluated by trained personnel through a variety of tools,<sup>233</sup> and requires development of an individualized education program (IEP) that considers a child’s strengths, weaknesses, and goals and is reevaluated at least once a year.<sup>234</sup> The Act further provides for parental consent<sup>235</sup> and inclusive instruction in the “least restrictive environment” possible.<sup>236</sup>

If IDEA-based interventions are pursued on behalf of students academically affected by psychological trauma, then a school’s legal duty to them will extend to some definable standard of educational benefit, not simply the identification of need. Determining that substantive standard was an issue recently before the Supreme Court in *Endrew F. v. Douglas County School District RE-1*.<sup>237</sup> The issue was whether the Act’s requirement that special education students receive “some educational benefit” is indeed substantive, requiring a measure more than *de minimis* progress, or procedural, discharged primarily by following the steps of an IEP.<sup>238</sup> The plaintiff parents of a severely autistic child saw little educational improvement in their son until they enrolled him in an expensive private school.<sup>239</sup> If the district could not provide that level of benefit, they argued, and provide a FAPE that affords substantially equal educational opportunity as that for children without disabilities, the IDEA required it to

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231. *Id.* § 1412(a)(3)(A) (“All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.”).

232. *Id.*; see also *Moorestown*, 811 F. Supp. 2d at 1066.

233. 20 U.S.C. § 1414(b).

234. *Id.* § 1414(d). A special IEP team is assembled for this reason, including parent, teacher, special education teacher, representative of a local overseeing agency, optional added expert, someone (perhaps already included), who can “interpret the instructional implications of evaluation results,” and the child, as appropriate. *Id.* § 1414(d)(1)(B)(v).

235. Parental consent is required by § 1414 for an IEP; however, withheld schools *may* follow procedures under § 1415. 20 U.S.C. § 1414(a)(1)(D)(i)–(ii); see also 34 C.F.R. §§ 300.301–306 (2017). In the absence of consent, the school is no longer under an absolute duty to provide a FAPE. See 20 U.S.C. § 1414(a)(1)(D)(ii).

236. Preferably in general classrooms alongside nondisabled students. 20 U.S.C. § 1412(a)(5).

237. 137 S. Ct. 988, 993 (2017).

238. *Id.* at 997–98.

239. *Id.* at 996.

reimburse them the \$70,000 tuition.<sup>240</sup> In a unanimous opinion by Chief Justice Roberts, the Court ruled in favor of plaintiffs with respect to the requirement of making educational progress.<sup>241</sup> “The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>242</sup> However, the Court declined to accept a strict equality-of-opportunity standard.<sup>243</sup>

It remains unclear whether in application *Endrew F.* imposes significant costs on school districts unable to achieve more than *de minimis* educational benefit for children with severe trauma-related disorders, or even if those districts may be compelled to send those disabled students to very expensive alternative placements. If students with trauma-related disorders remain in regular public schools, the “related services” requirement for children with psychological disabilities might entail much greater expenditures on, say, partial hospitalization (partial day) programs like those attended by the students we studied in Newark. These psychological services can exceed \$60,000 a year (often payable by Medicaid, in the case of low-income students).<sup>244</sup> Thus, the legal question of what kind of substantive educational adequacy, if any, is required by the IDEA may have significant practical and financial implications for trauma intervention strategies.<sup>245</sup>

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240. *Id.* at 997; see Laura McKenna, *How a New Supreme Court Ruling Could Affect Special Education*, THE ATLANTIC (Mar. 23, 2017), <https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662/> [https://perma.cc/J88V-5SG6].

241. 137 S. Ct. at 999.

242. *Id.* at 1001.

243. *Id.*

244. The costs to schools may already be substantial. According to one principal discussing costs associated with his school of 478 students:

[I]t is well documented that the need for special education services is directly proportional to the frequency and diverse types of trauma to which a child is subjected. Our Special Education population ranges from 15%-to-20% of our total student body. Approximately 80% of our Special Education students also receive counseling for socio-emotional issues. The combined annual cost for special education and mental health services is about \$120,000. This is over and above the aforementioned \$240,000 expense, and does not include the cost of the external therapy many students receive outside the school, for those lucky enough to have access to such services.

Lamont W. Browne, *Toxic Stress Among Children in Urban Schools*, DEL. LAW., Winter 2014/2015, at 19.

245. The issue goes back to the substantive standard left unresolved in the Court’s seminal special education case, *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 202 (1982). In *Rowley*, the Court recognized that some standard of substantive benefit was implied by the Act’s requirement of a FAPE. *Id.* at 200–01. The Court held that “the congressional

The IDEA has unquestionably transformed educational opportunity for many disabled children and adults,<sup>246</sup> but it is not clear that its cramped definitions—particularly the stigmatizing label “emotionally disturbed” or “ED”—will effectively reach the myriad psychological conditions that impair learning as a result of trauma exposure.<sup>247</sup> It may even be counterproductive if the main statutory door open to them is ED. For several reasons, children classified for special education services under ED may become trapped by practical institutional constraints. First, ED-classified students often do not receive the mental health services and classroom accommodations they need.<sup>248</sup> Only a small percentage of teachers are trained to teach such children, who may also be conflict prone.<sup>249</sup> The requirements for seeking additional funding to provide psychological services to children with ED sometimes tax the capacity of many schools, so they go without the necessary resources.<sup>250</sup> Second, the ED (and social maladjustment) classification bears the stigma of juvenile

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purpose of providing access to a ‘free appropriate public education’” implies “that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Id.* at 200. In amending the IDEA in 1997 and 2004, Congress recognized a need to provide students with special needs more than access to general education in regular classrooms to the maximum extent possible, but also to higher substantive expectations of progress. 20 U.S.C. §§ 1400(c)(5)(A)(i)–(ii) (2012). The question of what expectations must be met figures centrally in the analysis of psychological disability as a result of environmental traumas because it goes to life chances, an issue Congress addressed in the statute. The Act says that “national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” *Id.* § 1400(c)(1). This language indicates an equity standard—that is, a substantive standard of adequacy not based on equality but on meeting the unique needs of disabled students for the goal of equipping them with the tools for an independent life in today’s world.

246. See 20 U.S.C. § 1400(d). See generally Maag & Katsiyannis, *supra* note 214, at 174–75.

247. 34 C.F.R. § 300.8(4)(i) (2017); see Dikel & Stewart, *supra* note 216, at 595–96.

248. See Mary Wagner et al., *Educating Students with Emotional Disturbances: A National Perspective on School Programs and Services*, 14 J. EMOTIONAL AND BEHAV. DISORDERS 12, 19 (2006) [hereinafter Wagner, *Educating Students*]. Dikel and Stewart note that “the ED category is based on outdated concepts; is tautological; lacks a connection to any specific disability; has no mandate to accommodate to mental health disabilities when they are present; is based on behavioral conceptualizations that are inappropriate for many psychiatrically disabled students; and has very poor outcomes.” Dikel & Stewart, *supra* note 216, at 601.

249. Wagner, *Educating Students*, *supra* note 248, at 22. E.D. students require “teachers with a strong repertoire of behavior-management skills to decrease inappropriate behaviors and increase prosocial behaviors.” *Id.* at 13–14. The lack of qualifications that teachers who instruct E.D. students possess makes them reluctant to teach these students; in fact, these students are referred to as “among the least desirable to have in general education classrooms.” *Id.* at 14, 24.

250. See Maag & Katsiyannis, *supra* note 214, at 175–76. Even though federal funds are available through the IDEA, some school districts do not take the time and effort to create services for E.D. students that meet the minimum requirements for federal funding under the IDEA. *Id.* at 175.

delinquency,<sup>251</sup> with a distinct bias toward classifying only boys.<sup>252</sup> Behavioral issues can be significant.<sup>253</sup> Third, and perhaps as a consequence, ED-classified students are at greatest risk of dropping out of school altogether.<sup>254</sup> Although more research is needed to understand how well schools currently use the ED label to intervene effectively in the lives of trauma-exposed children, the risk of stigmatizing an already traumatized student population with ED classification could limit the appeal of this approach. I expand upon this critique in the analysis that concludes this Part.

## 2. The Rehabilitation Act Section 504 and Americans with Disabilities Act

The second federal special education law applicable to psychological trauma is Section 504 of the Rehabilitation Act.<sup>255</sup> Section 504 works in conjunction with the third relevant federal law, the Americans with Disability

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251. See Mary M. Wagner, *Outcomes for Youths with Serious Emotional Disturbance in Secondary School and Early Adulthood*, 5 FUTURE CHILD. 90, 101–03 (1995) [hereinafter Wagner, *Outcomes for Youth*].

252. See Martha J. Coutinho & Donald P. Oswald, *State Variation in Gender Disproportionality in Special Education: Findings and Recommendations*, 26 REMEDIAL & SPECIAL EDUC. 7, 7, 9 (2005). It is estimated that “boys are nearly 3½ times as likely as girls to be identified . . . with a label of [E.D].” *Id.* at 9.

253. See Linda A. Reddy & Laura Richardson, *School-Based Prevention and Intervention Programs for Children with Emotional Disturbance*, 29 EDUC. & TREATMENT CHILD. 379, 380 (2006).

254. Wagner, *Outcomes for Youth*, *supra* note 251, at 99; see also Carol Ann Baglin, *Maryland’s Children in Special Education with Emotional Disturbance: An Overview of Data and Current Outcomes*, MD. ST. DEP’T EDUC. 36, 38 (2008).

255. 29 U.S.C. § 701 (2012).

Act (ADA)<sup>256</sup>; it overlaps with the IDEA in some respects,<sup>257</sup> while often requiring distinct analyses.<sup>258</sup> Section 504 was the first civil rights law on behalf of people with disabilities and is enforceable through the Department of Education's Office of Civil Rights.<sup>259</sup> If the IDEA requires only a floor of adequate instruction for school districts to meet, Section 504 and Title II requires equality.<sup>260</sup> The "as adequately" comparative standard as opposed to the IDEA's "some benefit" minimum standard<sup>261</sup> has implications for trauma victims. Its eligibility requirements are not as stringent as the IDEA's. Section 504 defines disability in terms of "impairment": One "who (i) has a physical or

256. 42 U.S.C. § 12101 (2012) (incorporating Title II, Part A – Public Services for public schools and Title III – Public Accommodations for private schools). For purposes of the Rehabilitation Act, "individual with a disability" is defined as it is in the Americans with Disabilities Act of 1990 (ADA). See 29 U.S.C. § 794(a); see also 42 U.S.C. § 12101. He or she must have a "physical or mental impairment that substantially limits one or more major life activities[,] . . . a record of such an impairment[,] . . . or [is] being regarded as having such an impairment." 42 U.S.C. § 12102(1). The term "disability" shall be interpreted broadly, in favor of coverage where possible. 42 U.S.C. § 12102(4)(A); see also 42 U.S.C. § 12131(2) (defining qualified person with a disability in public schools). ADA protection extends to individuals "subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A). "There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act." *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999); 42 U.S.C. § 12133 ("The remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights [applicable to ADA claims] . . ."). Consequently, "courts have applied the same analysis to claims brought under both statutes." *Zukle*, 166 F.3d at 1045 n.11; see also *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002).

257. See *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013) ("Congress has specifically and clearly provided that the IDEA coexists with the ADA and other federal statutes, rather than swallowing the others.").

258. *C.G. v. Pa. Dep't of Educ.*, 734 F.3d 229, 232, 234–35 (3d Cir. 2013).

259. ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, *SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS* 12, 15 (Corwin 3d. ed. 2014).

260. As the Ninth Circuit said in *K.M. v. Tustin Unified School District*:

[T]he IDEA and Title II differ in both ends and means. Substantively, the IDEA sets only a floor of access to education for children with communications disabilities, but requires school districts to provide the individualized services necessary to get a child to that floor, regardless of the costs, administrative burdens, or program alterations required. Title II and its implementing regulations, taken together, require public entities to take steps towards making existing services not just accessible, but *equally* accessible to people with communication disabilities, but only insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs.

725 F.3d at 1097.

261. 34 C.F.R. § 104.33(b)(1)(i) (2017) (noting that schools must "meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met").

mental impairment which *substantially limits one or more of such person's major life activities*, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.”<sup>262</sup> Impairment is clearly broader than disability. “[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>263</sup> The duty imposed upon schools for qualified students under Section 504 is “reasonable accommodation” to participate at an equivalent level as nondisabled students.<sup>264</sup> As the list of major life activities suggests, these are typically accommodations related to sensory limitations, the need for more time to complete tasks or using specialized curricular materials,<sup>265</sup> not accommodations associated with chronic psychological conditions. Section 504 also guarantees a FAPE,<sup>266</sup> making accommodation a free right for the child, but the right does not come with federal funding.<sup>267</sup> Additionally, the Act includes a duty of making professional evaluations and offering service plans.<sup>268</sup>

The lack of obvious psychological accommodations may simply mark an area for law reform, but Section 504 allows school districts defenses for non-compliance that the IDEA does not. School officials can deny accommodations

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262. 42 U.S.C. § 12102(1) (2012) (emphasis added).

263. *Id.* § 12102(2)(A); 34 C.F.R. § 104.3(j)(2)(ii).

264. 34 C.F.R. § 104.39; *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1046 (9th Cir. 1999).

265. See generally OSBORNE & RUSSO, *supra* note 259, at 14; Alfred Souma et al., *Academic Accommodations for Students with Psychiatric Disabilities*, DO-IT, [http://www.washington.edu/doit/sites/default/files/atoms/files/Academic\\_Accom\\_Psych.pdf](http://www.washington.edu/doit/sites/default/files/atoms/files/Academic_Accom_Psych.pdf) [<https://perma.cc/6MW9-7HQF>] (last visited Mar. 1, 2017). It is recommended that students with psychiatric disability be afforded reasonable accommodations including classroom accommodations, examination accommodations, and assignment accommodations including: preferential seating, assigned classmate as volunteer assistant, beverages permitted in class, prearranged or frequent breaks, tape recorder use, note taker or photocopy of another student's notes, early availability of syllabus and textbooks, private feedback on academic performance, exams in an alternate format, use of assistive computer software, advance notice of assignments, substituted assignments, assignments completed in dramatic formats (such as demonstration or role-play) and extended time to complete assignments. *Id.* at 3.

266. 29 U.S.C. § 794(a) (2012); 34 C.F.R. § 104.33 (providing regulatory support). The ADA does not. This is not an oversight, as FAPE is mentioned in regulations: “[D]oes not require a private school to provide a free appropriate education or develop an individualized education program in accordance with regulations of the Department of Education implementing Section 504 of the Rehabilitation Act of 1973, as amended (34 CFR part 104), and regulations implementing the Individuals with Disabilities Education Act (34 CFR part 300).” 28 C.F.R. pt. 36, app. C (2017).

267. See OSBORNE & RUSSO, *supra* note 259, at 14.

268. *Id.* at 14–15.

on grounds of “undue financial . . . burden[]”<sup>269</sup> and curricular alteration.<sup>270</sup> This relatively untested legal terrain gives rise to questions of litigation strategy to which I turn next.

*B. Litigation Approaches: Peter P. v. Compton Unified School District*

The strategic benefit of focusing on educational institutions as the appropriate target of legal interventions is revealed by the nascent legal literature and test-case litigation on trauma in schools. The disability rubric is expanding as fertile ground for rights-based approaches.<sup>271</sup> Amendments to the ADA, for instance, have added new understandings to what constitutes a cognizable disability.<sup>272</sup> Though classifications under the IDEA have become more stringent, legal commentators have begun calling for litigation strategies under both Section 504 of the Rehabilitation Act and Title II.<sup>273</sup> Courts and commentators have noted how the due process apparatus of the IDEA put litigation into the evolution of reforms around adequacy.<sup>274</sup> That statute’s individualized approach—each IEP, for instance, suggests the unique remedies

269. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412 (1979).

270. *Id.* at 409–10.

271. *See Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 277–78 (1987).

272. *See* 42 U.S.C. § 12101 (2012). “[I]t is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations . . . [rather than] whether an individual’s impairment is a disability under the ADA[,]” thereby broadening the scope of viable claims and shifting the burden away from plaintiffs. Pub. L. No. 110-325, § 2, 122 Stat. 3553 (codified at 42 U.S.C. § 12101).

273. *See* Ruth Hocker, *More Than a Consolation Prize: Using § 504 to Advance Special Education Rights*, 38 T. JEFFERSON L. REV. 71, 74 (2015) (explaining how Section 504 has been significantly expanded in recent years and is considered to be “the next battleground for special education rights”); Mark C. Weber, *Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. NAT’L ASS’N ADMIN. L. JUDICIARY 611, 612–14 (2012); Perry A. Zirkel, *The Public Schools’ Obligation for Impartial Hearings Under Section 504*, 22 WIDENER L.J. 135, 138–41 (2012).

274. *See, e.g.,* Kevin J. Lanigan et al., *Nasty, Brutish . . . and Often Not Very Short: The Attorney Perspective on Due Process*, in *RETHINKING SPECIAL EDUC. FOR A NEW CENTURY* 213 (Chester E. Finn et al. eds., 2001), <http://www.cesa7.org/sped/Parents/ASMT%20Advocacy/wl/spedfinl.pdf> [<https://perma.cc/7NBN-8AQG>]. The authors advocate that in some cases “[d]ue process hearings can be a source of valuable information . . . [leading to school] districts closely monitor[ing] the outcomes of due process hearings and special education litigation and mov[ing] quickly to correct any deficiencies that may be contributing to adverse outcomes.” *Id.* at 225. Hocker, *supra* note 273, at 74–75 (citing to the incorporation of much of the language from *Mills v. Board. of Education*, 348 F. Supp. 866 (1972), into the IDEA and asserting that “[h]istorically, litigation has been the driving force behind special education reforms, and legislation has tended to follow litigation”); *see also* NAT’L COUNCIL ON DISABILITY, *INDIVIDUALS WITH DISABILITIES EDUCATION ACT BURDEN OF PROOF: ON PARENTS OR SCHOOLS?* (Aug. 9, 2005), <http://www.ncd.gov/publications/2005/08092005> [<https://perma.cc/P7VU-B7AT>].

for any particular child—has led to calls for broader, perhaps class-based programmatic reforms under Section 504 as the push for more responsive school policies.<sup>275</sup> They cite the compounding traumatic effects of school disciplinary responses that punish, rather than accommodate students suffering from the effects of exposure to traumatic events.<sup>276</sup> Further, the difference between IDEA’s educational impact standard of a disability and Section 504’s major life function means that claims brought under Section 504 probably satisfy the IDEA but not vice versa.<sup>277</sup> There are other differences, such as exhaustion of administrative remedies<sup>278</sup> and restricted class action rules,<sup>279</sup> that favor Section 504 and Title II claims over the IDEA. Perhaps the most significant observation made by lawyers is simply that clear disparities in educational outcomes between educationally disabled and nondisabled students at least suggests grounds for civil rights litigation.<sup>280</sup>

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275. In other words, since school reform has historically responded to litigation, advocates and the courts are pushing for more claims under Section 504 rather than the IDEA. *See, e.g.,* *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 486 (7th Cir. 2012) (rejecting a class action under IDEA because “IDEA claims . . . are highly individualized and vastly diverse”). *But see* Hocker, *supra* note 273, at 97 (“Section 504 actions bypass the individualized claims under IDEA, and provide a common question that can be answered ‘in one stroke.’” (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011))).

276. *Cole & Gadd, supra* note 7, at 601–02. Traumatized students often display psychological effects of trauma through what appears to be disruptive behavior which leads to “teachers, principals, and superintendents . . . using shortsighted remedies, including suspension and expulsion, to deal with disruptive behavior.” *Id.* (footnotes omitted).

277. *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, U.S. DEPT. OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html> [<https://perma.cc/BV8E-RJZK>] (last visited Mar. 1, 2017) (“Students who meet the eligibility criteria under the IDEA are also covered by Section 504 and Title II if they have a disability as defined under those laws. However, coverage under Section 504 and Title II of the ADA is not limited to students who meet the IDEA eligibility criteria.”).

278. JAMES A. RAPP, *EDUCATION LAW*, § 10C.13(3)(a)(ii) (Matthew Bender & Co. 2017) (footnote omitted) (“Unlike IDEA, neither ADA nor Section 504 require exhaustion of administrative remedies in non-employment cases before proceeding with a court action. . . . [but] [w]here there is overlap in application of the statutes, the exhaustion requirement will apply at least to those issues.”); *Ass’n for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1044–45 (10th Cir. 1993) (holding that the lower court lacked jurisdiction where appellant failed to exhaust administrative remedies or establish that it fell in one of the exceptions as required under the IDEA).

279. *See Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992) (holding that exhaustion of administrative remedies was required before pursuing class action); *Jamie S.*, 668 F.3d at 486 (holding that the IDEA claims were highly individualized and therefore not suitable for class action treatment).

280. One advocate summed up this argument as follows:

Two recent cases illustrate the move toward using special education as a way to address the educational effects of early trauma, both rooted in the Child Find identification, notification, and location duty. The first is *DL v. District of Columbia*,<sup>281</sup> a class action in which plaintiffs sued under both the IDEA and Section 504, alleging that the district failed to adequately identify disabled preschool children for special education and related services.<sup>282</sup> The district court noted that the school district should have provided special education to 8.5% of its preschoolers and was missing hundreds of children.<sup>283</sup> This violated FAPE, the court held, though the litigation itself had already prompted the District to initiate some reforms.<sup>284</sup>

The second case is perhaps the first lawsuit to use Section 504 and Title II squarely on behalf of young people exposed to trauma in poor, segregated school districts. In *P.P. v. Compton Unified School District*<sup>285</sup> (*Peter P.*), plaintiffs included several high school students from the poor and working-class Southern California municipality as well as teachers.<sup>286</sup> As a result of their exposure to multiple traumatic experiences—complex traumas that included witnessing shootings, molestation, stabbings, and removals to foster care—all of the teenage plaintiffs had acted out in ways that attracted severe discipline by school authorities, including serial suspensions and expulsions.<sup>287</sup> The teacher plaintiffs alleged secondary trauma.<sup>288</sup> Their Section 504, ADA Title II action rests on the recognition that exposure to the kinds of traumas that prevail in low-income, urban communities produces a spectrum of harms that

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Assume the overall graduation rate in your State is 72%, but the graduation rate of kids with disabilities who are not intellectually disabled is 52%. So, twenty percent fewer kids with disabilities graduate with a high school diploma. Are the needs of disabled children being met as adequately as the needs of nondisabled children? If they are not, aren't these children being discriminated against as a result of their disabilities?

*Live Blogging from the Institute of Special Education Advocacy – Please Join Us!*, THE WRIGHTSLAW WAY (July 23, 2012), <http://www.wrightslaw.com/blog/w-m-institute-of-special-education-advocacy-day-1/> [https://perma.cc/N8VS-7YFY] (quoting Jim Comstock-Gallagan's lecture on Section 504 and the Americans with Disabilities Amendments Act of 2008 at the Institute of Special Education Advocacy).

281. 194 F. Supp. 3d 30 (2016).

282. *Id.* at 34.

283. *Id.* at 48.

284. *Id.* at 47.

285. *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098 (C.D. Cal. 2015) (denying defendants' motion to dismiss).

286. *Id.* at 1103.

287. *Id.* at 1104–06.

288. *Id.* at 1106.

ultimately impair learning, especially if they go undetected, unaddressed and, very often, punished by school policies.<sup>289</sup> Plaintiffs sought recognition of these harms as cognizable disabilities under the Acts,<sup>290</sup> with a corresponding duty by schools to implement “school-wide trauma-sensitive accommodations.”<sup>291</sup> As of this writing, no court has ruled on the merits of *Peter P.*

*Peter P.* is an extraordinary case of systemic litigation, squarely presenting the theory that a school’s failure under federal law to identify and address trauma-related injuries results in denials of educational opportunity that violate the civil rights of marginalized children.<sup>292</sup> The sources of trauma detailed in the plaintiffs’ claims include both nonschool-centered harms and school-centered harms.<sup>293</sup> The harms, therefore, are local and environmental, acting upon the student from outside her mind and body. However, plaintiffs directly alleged that the effect of their traumatic harms followed the patterns described in the psychological and neurological research in Part II.<sup>294</sup> They submitted numerous affidavits from psychiatric experts to describe the scope of trauma harms.<sup>295</sup> Together these pleadings argue that the effects of trauma do not result in a single definition of disability that is capable of easy classification under existing statutory definitions.<sup>296</sup> Nor do they seek a new trauma disability classification. Rather, the theory of disability in *Peter P.* is spectral, ranging from the types of subclinical traumatic reactions that chronically distract students or create tensions in school to clinically diagnosable conditions like PTSD, depression, and anxiety disorders.<sup>297</sup>

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289. *Id.* at 1105 (“The Complaint alleges that the neurobiological effects of the complex trauma to which Student Plaintiffs have been subjected impair the ability to perform activities essential to education—including, but not limited to, learning, thinking, reading, and concentrating—and thus constitute a disability under Section 504 of the Rehabilitation Act (“Section 504”) and the Americans With Disabilities Act (“ADA”). The Complaint details the body’s response to trauma, including how trauma affects the brain.”) (citations omitted) (citing Complaint at ¶¶ 2, 4, 54–66, 71, 107–22, *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098 (C.D. Cal. 2015) (No. LA CV-15-3726) [hereinafter *Peter P. Complaint*]).

290. *See id.* “The Student Plaintiffs and class members have experienced complex trauma, the effects of which ‘will, at a minimum, substantially limit [the] major life activities,’ 29 C.F.R. § 1630.2(j)(3)(iii), including ‘learning, reading, concentrating, thinking, [and] communicating.’ 42 U.S.C. § 12102(2)(A).” *Peter P. Complaint*, *supra* note 289, at ¶ 65 (alteration in original).

291. *P.P.*, 135 F. Supp. 3d at 1106.

292. *Id.* at 1105.

293. *Id.* at 1104–06.

294. *Id.* at 1108–09.

295. *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1126, 1145–47 (C.D. Cal. 2015).

296. *P.P.*, 135 F. Supp. 3d at 1098–99.

297. *Id.* at 1104–06.

The lack of a discernible trauma disability is one of several possible criticisms of the *Peter P.* plaintiffs' case. The Compton School District rejoined that, in effect, plaintiffs were trying to shoehorn disadvantage into disability, a condition that must constitute a diagnosable mental or physical impairment.<sup>298</sup> "Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments."<sup>299</sup> Although complex trauma may include diagnosable psychological disorders that by themselves might qualify as disabilities, the plaintiffs were attempting to broaden the definition of disability to include complex trauma itself.<sup>300</sup> Next, defendants argued that the remedial demand for specific steps to "trauma-sensitive" school environments undermined the expert discretion of school districts to determine educational policy.<sup>301</sup> Though the District did not raise it directly, a third argument against the proposed remedy is that, in the name of accommodation, it suggests a pooling of disability under a statutory regime that is premised on an individual student's unique needs.<sup>302</sup> While traumas may be pervasive among children in Compton's schools, their particular reactions call for their own interventions.<sup>303</sup> That argument might also raise the District's incapacity to provide within the educational environment the kind of professional help students suffering serious psychological harm may need. Unclear from the plaintiffs demand for relief was how to prevent high-poverty schools from becoming poorly resourced mental facilities, or at least regarded as such.

### *C. Trauma-Sensitive Schooling: Massachusetts and New Jersey*

Whole-school interventions in the model of trauma-sensitive schools are gaining attention nationally, having been pioneered by collaborations between lawyers and educators in Massachusetts and recently passed into law there.<sup>304</sup> The Trauma and Learning Policy Initiative is a partnership among a public-interest advocacy group (Massachusetts Advocates for Children), a law school clinic (Harvard's Education Law Clinic), and a teaching college (Lesley

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298. *Id.* at 1108.

299. 29 C.F.R. app. § 1630.2(h) (2017).

300. *P.P.*, 135 F. Supp. 3d at 1108.

301. *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1126, 1132, 1136 (C.D. Cal. 2015) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 208 (1982)).

302. *See id.* at 1142–43.

303. *See Peter P. Complaint*, *supra* note 289, ¶¶ 107–22.

304. *See* MASS. GEN. LAWS ch. 69, § 1N (2004).

University).<sup>305</sup> It came together in the early 2000s to produce working papers and advocacy strategies in response to increasing numbers of school expulsions of children suffering from traumatic exposure to domestic violence.<sup>306</sup> The partnership authored two popular reports on flexible schooling methods for schools with high numbers of students struggling with trauma.<sup>307</sup> In 2008 and 2014, their lobbying efforts helped pass two state laws that gave grant funding to developing trauma-sensitive schools<sup>308</sup> and later imposed standards on how school staff should identify the signs of trauma and accommodate students with or without diagnosable trauma-related disorders.<sup>309</sup> The legislatively created Massachusetts model is the statewide equivalent of the district-wide trauma intervention model sought by the plaintiffs in *Peter P.*<sup>310</sup> It is not yet clear what measurable impact the reforms have had on children's health or educational outcomes.

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305. See *History and Background*, TRAUMA & LEARNING POLICY INITIATIVE, <https://traumasensitiveschools.org/about-tlpi/> [<https://perma.cc/7NSP-P6WN>] (last visited Apr. 23, 2018).

306. See *id.*

307. See SUSAN F. COLE ET AL., HELPING TRAUMATIZED CHILDREN LEARN: SUPPORTIVE SCHOOL ENVIRONMENTS FOR CHILDREN TRAUMATIZED BY FAMILY VIOLENCE (2005).

308. MASS. GEN. LAWS ch. 69, § 1N. The first law funded evaluative programs for schools interested in developing the infrastructure of teacher training, supportive counseling and specific classroom accommodations. It provides in relevant part:

(b) The department shall establish a grant program . . . to assist school districts with the development and establishment of in-school regular education programs and services to address within the regular education school program the educational and psycho-social needs of children whose behavior interferes with learning, particularly those who are suffering from the traumatic effects of exposure to violence. . . . [S]tudents suffering from the traumatic effects of exposure to violence shall include, but not be limited to, those exposed to abuse, family or community violence, war, homelessness or any combination thereof. The grants shall support the development of school based teams with community ties that: (1) collaborate with broadly recognized experts in the fields of trauma and family and community violence and with battered women shelters; (2) provide ongoing training to inform and train teachers, administrators, and other school personnel to understand and identify the symptoms and trauma; and (3) evaluate school policy and existing school and community programs and services to determine whether and to what extent students identified as suffering from exposure to trauma can receive effective supports and interventions that can help them to succeed in their public school programs, and where necessary be referred quickly and confidentially to appropriate services.

*Id.*

309. MASS. GEN. LAWS ch. 69, § 1P (2016).

310. Compare MASS. GEN. LAWS ch. 69, § 1N, with *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1105–06 (C.D. Cal. 2015).

There are also state education law provisions that could serve as a basis for a school's duty of trauma identification without requiring a formal disability evaluation.<sup>311</sup> State education departments in the late 1990s and early 2000s officially recognized the growing incidence of troubled behaviors students were manifesting in school based on their experiences at home.<sup>312</sup> New Jersey, for example, revised its regulations to require that each district implement a multidisciplinary Intervention & Referral Service (I&RS) team in each school building to "[i]dentify learning, behavior and health difficulties of students," develop action plans, train school staff, coordinate services, and involve parents.<sup>313</sup> Trauma was not among the recognized problems leading to the reform.<sup>314</sup> The aim was to reach non-classified students more effectively and to avoid overclassification of students whose behavioral problems interfered with academic performance.<sup>315</sup> Like many other such programs, the coordinated approach includes school, home, and community.<sup>316</sup> Integrating both the *Peter P.* district-specific focus and the Massachusetts state-wide policy approach, the New Jersey I&RS program envisions broad district policy-setting, flexibly implemented by teams reflecting the needs of individual school buildings.<sup>317</sup>

If the existence of I&RS and other state policies demonstrate a recognition that behavioral health has long been a focus of school-based interventions in the lives of traumatized children, then their mixed record of addressing trauma-related disorders may belie weaknesses in the whole-school approach so far. First, there is enormous inconsistency in the way programs like I&RS are implemented (or not) across New Jersey school districts as well as schools within those districts. Their flexibility for local conditions may hide underutilization and cloud enforcement. Second, they risk creating a new school bureaucracy whose child-centered responsibilities may become diluted by administrative obligations. Third, they may not actually be child-focused. The I&RS, for example, seems more focused on improving the staff resources

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311. See, e.g., N.J. ADMIN. CODE §§ 6A:16-7, 6A:16-8 (2016).

312. See, e.g., N.J. DEP'T OF EDUC., *supra* note 83, at 1 ("The educational mission is made more complex by the increased incidence, prevalence and intensity of problems students bring to schools."). The New Jersey manual then goes on to describe many of the behaviors chronicled in the last Part that are associated with trauma exposure, such as absenteeism, erratic behavior, loss of affect, acting out, fighting, defying authority, violating rules, and dropping out of school. *Id.*

313. N.J. ADMIN. CODE § 6A:16-8.2.

314. N.J. DEP'T OF EDUC., *supra* note 83, at 20–21.

315. *Id.*

316. *Id.*

317. N.J. ADMIN. CODE § 6A:16-8.2(a)(1)–(11).

to deal with troubled students than with the troubled students directly.<sup>318</sup> Lastly, the research on trauma has been known to educators for some time. The failure to address trauma with whole-school, legally required interventions already in place is not fatal, but it is telling.

*D. Intervention Risks: Pathologizing “Broken” Black People, Othering “Disability,” and Institutional Incapacity*

Although the duty to intervene immediately on behalf of children suffering the disabling effects of trauma exposure is morally, if not legally, unquestionable, it is not beyond serious critique. The gulf between formal legal doctrine and the informal administration of law is often wide, and, in particular, the history of unintended consequences that harm the impoverished constituents of public laws is long and painful. Legal intervention strategies trigger these risks in significant ways. Therefore, in the final section of this Part, I offer three arguments against intervention: the risk of pathologizing people (especially black people) in poverty; the social construction of disability that might result from making trauma exposure a formal disability under the IDEA; and the practical problem of a school’s institutional incapacity to provide more than palliative benefit at the expense of stronger remedies. As Part IV argues, the greatest risk of intervention approaches is the concomitant disregard for prevention approaches, the result of redirecting focus to schools and mental health providers rather than environmental conditions, and enduring structural inequality.

False yet authoritative beliefs about African-American character traits have shaped public law and institutions, such as criminal justice, since the dawn of social science.<sup>319</sup> Historically, race and poverty have colluded to produce systems whose targets were often pathologized in the legal and public imagination. Child welfare law and practice may offer the clearest example of this pattern. Poor African Americans have been particularly stigmatized by the perception that their families are pathologically dysfunctional under our child welfare regimes.<sup>320</sup> Why then wouldn’t even clearer evidence of psychological

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318. According to the state manual, “[c]hild study teams primarily provide services to students. I&RS teams primarily provide services to staff for the benefit of students.” N.J. DEP’T OF EDUC., *supra* note 83, at 4.

319. See, e.g., KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 1–5 (2010) (demonstrating how the revolution in sociology and other fields of social science during the late 19th and early 20th centuries informed harsh criminal penalties for blacks while assuming that European immigrant criminality could be rehabilitated); DEGRUY, *supra* note 3 (exploring the traumatizing effects of multiple institutions’ rules upon the integrity of African-American families).

320. ROBERTS, *SHATTERED BONDS*, *supra* note 114, at 7–10.

harms arising disproportionately from conditions of poverty simply confirm, rather than complicate and refute, further notions of pathological dysfunction among the black poor? Specifically, why wouldn't legally imposed policy interventions to reach a broad, sometimes vague array of mental impairments, merely feed a weakly regulated child welfare system that according to critics presumes dysfunction among black children, their parents, and others?

Few legal writers have analyzed the pathologizing effects of child welfare law on black families with the thoroughness of Dorothy Roberts. In *Shattered Bonds*, her exhaustive analysis of race and foster care, Professor Roberts portrays a public system that shifted from a child welfare system to a child protection system in the late 1970s—with a corresponding shift in impact on black families.<sup>321</sup> White children fell out of a system increasingly dominated by black families.<sup>322</sup> Across the country, child protection policies called for fewer in-home services and more out-of-home care.<sup>323</sup> In practical and political terms, this meant the removal to foster care of children at risk of maltreatment, and it overwhelmingly and punitively focused on black parenting.<sup>324</sup> From state to state, black children were removed from their families and placed into foster care (often indefinitely) at rates many times greater than white families.<sup>325</sup>

The move toward pathologizing black parenting capacity worked not only through a change in emphasis from child welfare to child protection. Pathological views of poor black people were embedded in legal and administrative standards that tracked the life circumstances of blacks in poverty, such as inadequate housing.<sup>326</sup> Vague legal definitions of neglect (a common basis for removal),<sup>327</sup> inordinate administrative discretion, poorly

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321. *Id.* at 14–15.

322. *Id.* at 15.

323. *Id.*

324. *Id.*

325. *Id.* at 17 (“A national study of child protective services by the U.S. Department of Health and Human Services reported that ‘minority children, and in particular African-American children, are more likely to be in foster care placement than receive in-home services, *even when they have the same problems and characteristics as white children.*’”); *see also id.* at 23 (citing research study that concluded, “The lower [chances] of favorable discharge for African American children indicate that, once in care, many of these children are likely to remain indefinitely.” (alteration in original)).

326. *See id.* at 33.

327. *See, e.g.,* N.J. STAT. ANN. § 9:6-1 (West 2017) (“Neglect of a child shall consist in any of the following acts . . . (a) willfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper home, or (b) failure to do or permit to be done any act necessary for the child’s physical or moral well-being. . . . [and] the continued inappropriate placement of a child in an institution . . . with the knowledge that the placement has resulted and may continue to result in harm to the child’s mental or physical well-being.”); 22 VA. ADMIN. CODE § 40-705-30 (2016) (“Physical neglect occurs when

trained caseworkers from culturally distinct backgrounds, and psychologists who sometimes had financial incentives to reach particular conclusions about children *and* parents, all fed a system in which removal—a severely traumatizing condition in its own right—became too easy and return became very difficult.<sup>328</sup> The effect, Professor Roberts argues, has been to penalize families for being poor.<sup>329</sup>

Neglect is usually better classified as child maltreatment *defined* by poverty rather than maltreatment *caused* by poverty. The main reason child protection services deal primarily with poor families is because of the way child maltreatment is defined. The child welfare system is designed to detect and punish neglect on the part of poor parents and to ignore most middle-class and wealthy parents' failings. Although the meaning of child maltreatment shifted from a social to a medical model, it retained its focus on poor families. The system continues to concentrate on the effects of childhood poverty, but it treats the damage as a symptom of parental rather than societal deficits.<sup>330</sup>

Professor Roberts and other scholars have found that little has changed in the years since *Shattered Bonds* was released, except that black mothers and fathers have been targets of more punitive criminal policies that have dramatically increased separation from their children resulting from mass incarceration.<sup>331</sup> That is, officially determined dysfunction is more often criminalized today.<sup>332</sup>

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there is the failure to provide food, clothing, shelter, necessary medical treatment, or supervision for a child to the extent that the child's health or safety is endangered. This also includes abandonment and situations where the parent's or caretaker's own incapacitating behavior or absence prevents or severely limits the performing of child caring tasks . . . . This also includes a child under the age of 18 years whose parent or other person responsible for his care knowingly leaves the child alone in the same dwelling as a person, not related by blood or marriage, who has been convicted of an offense against a minor for which registration is required as a violent sexual offender . . . ."). The statute also provides that physical neglect may include failure to thrive, and a separate definition for medical neglect, and mental abuse or neglect. *Id.*; see also MO. REV. STAT. § 210.110(12) (2016) ("Neglect [is the] failure to provide, by those responsible for the care, custody, and control of the child, the proper or necessary support, education as required by law, nutrition or medical, surgical, or any other care necessary for the child's well-being.").

328. See ROBERTS, *SHATTERED BONDS*, *supra* note 114, at 16–26.

329. *Id.* at 33.

330. *Id.*

331. See Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476 (2012).

332. See *id.* at 1484; Andrea Freeman, "First Food" Justice: Racial Disparities in Infant Feeding as Food Oppression, 83 FORDHAM L. REV. 3053, 3058 n.243 (2015) ("This criminalization

What the experiences of poor blacks in the child welfare system demonstrate is that legal regimes established for crisis intervention may pathologize their constituent populations in devastating—and traumatizing—ways at virtually every stage of the process.<sup>333</sup> I am not suggesting that child protection is not the legal duty of government. Of course it is. A great many children's lives are saved by effective intervention by child protection authorities. Yet child welfare administration has given rise to consistent costs that fall disproportionately on the black poor, whose crises have yielded as much powerlessness as protection.<sup>334</sup> For children, these costs include removals to foster care, household transiency and, most importantly, the loss—sometimes permanently—of parental affection. For parents, the costs include constant intrusion into their privacy by state agents and the obligations they impose, expensive and time-consuming transaction costs in compliance and a fundamental sense of mistrust between themselves as citizens and the state as an often all-powerful intervenor.<sup>335</sup> For poor communities, the costs include the stigma of being considered presumptively dysfunctional people and the resulting punishments imposed by a system that should instead be delivering resources to families that help stabilize them, reunite them, and make them stronger. Trauma intervention shares similar goals—improved family resources, more emotional stability, and greater resiliency<sup>336</sup>—as child welfare. Yet the public has generally supported the administration of the nation's collective child welfare laws, which shows acquiescence in, if not endorsement of, its pathological view of poor families.<sup>337</sup> The objective of treating widespread psychological trauma could invite an even stronger association between the black poor and pathological dysfunction.<sup>338</sup>

A second argument against legal intervention through a school-based duty under special education focuses specifically on that regime's pre-requisite finding of a "disability." This one follows from the risk of pathologizing certain

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[of black mothers] begins in pregnancy and continues throughout motherhood, justifying the prosecution and punishment of black mothers."); Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363, 374 (2016) (discussing how "black children are greatly overrepresented in the child welfare system" and how the "troubling cycle, the destructive effects of government intervention into black families . . . reinforce stereotypes of poor mothering").

333. See generally Roberts, *supra* note 331, at 1474 (examining the systems of foster care and prison and how government intervention punishes black mothers).

334. See generally *id.* at 1483–85.

335. See *id.* at 1484.

336. See Luthar & Zigler, *supra* note 205. See generally Konnikova, *supra* note 205.

337. See ROBERTS, SHATTERED BONDS, *supra* note 114, at 10.

338. Margevich, *supra* note 8, at 20.

children. Disabilities arise from a wide array of causes and are classified in many different ways.<sup>339</sup> Disability therefore means different things in different contexts. These meanings are socially constructed. A factory worker who has been grievously injured in a workplace accident and can no longer perform his physical duties goes on disability because injury prevents him from working. Society attaches certain meanings to that kind of disability, and it is governed by particular worker compensation laws. Or a child is born with a developmental disability preventing her from the same cognitive path as other children in her classes. This kind of intellectual disability is understood another way in society and easily falls into the categories and rationales for which we have special education laws. These examples show a relative lack of stigma and an uncontroversial societal interest in the meanings constructed around such disabilities.

However, a child who is rendered educationally disabled by disadvantage occupies no clear category of disability, and creating one under the disability rubric risks a range of social constructions, many of them negative. Indeed, the IDEA categorically excludes learning impairments based on disadvantaged environments.<sup>340</sup> I earlier discussed the one promising category under the Act, severe emotional disturbance, and that designation is the most controversial.<sup>341</sup> Qualifying trauma-exposed children for special education services under the IDEA, then, requires fitting them into a new category—an outlier of an outlier. Evaluation and classification of such an unclear status (really, a spectrum of statuses) will undoubtedly be performed inconsistently. Distinctions will be hard to make. A system for individualized care will likely be forced to make collective care decisions. There will be overinclusion and underinclusion. During research for this Article, I have often heard social workers describe the problem of traumatic experience as “these children’s normal.” Some schools will determine that most of their students suffer from trauma exposure, making students without trauma outliers. Others will err in the other direction. Schools and their student bodies may become marked by this broad classification. Parents will seek evaluation for trauma, with or without a clear understanding of its parameters. Thus, by the vagaries of assessment, administrative norms in a categorical system and social process, “trauma” could too easily become the new name for pathology.

A third and related argument is that a bureaucracy will be born (rarely ever to be dismantled) that relies upon the existence of continuing exposure to trauma as a condition to be planned for, accommodated and absorbed into

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339. See 34 C.F.R. §§ 300.8(a)(1), (c) (2017).

340. See *id.* § 300.8.

341. See *supra* Section IV.A.1.

normalcy. On its face, this has no negative valence. As a normative matter, the duty of intervention to reach childhood disability should be ready with appropriate services, whatever they are, psychological or otherwise. But we quickly confront the normative when we raise the practical and are compelled to ask, do these institutions have the capacity to act effectively upon this problem? This is impossible to know, even taking into consideration the systemic problems with child welfare systems. Some schools will do it very well, and many surely will not. The answer also depends on how the problem is framed. The education statutes require a problem with learning in order to trigger action.<sup>342</sup> The psychological research, on the other hand, suggests that pervasive childhood trauma is more of a public health crisis.<sup>343</sup> Schools may rightly answer that being charged as first responders in a public health crisis is not the job of already beleaguered educators. This debate cannot be resolved here. What is clear is that as a bureaucratic problem, psychological trauma—especially among low-income children—will inevitably become part of the morass of educational reform controversies. That offers little solace to a generation struggling with it.

For these reasons, I conclude that legal interventions can at best be a partial solution to what is a significant and under-researched public health crisis. More importantly, what the discussion clearly shows is that if I have at least proved the thesis of this Article—that psychological trauma is the severe symptomatology of structural inequality—prevention lies in legal strategies that focus directly upon that inequality, rather than indirectly through school-based methods of accommodation and treatment. That is the subject of the next Part.

## V. PREVENTION APPROACHES: LOCAL LAW AND STRUCTURAL INEQUALITY

My central argument has been that complex trauma is the severe psychological symptomatology of structural inequality. Specifically, the various trauma-related conditions and disorders discussed in Part III are each a painful example of what happens to the minds and bodies of human beings with limited financial and social resources who are systematically trapped amid failing or severely under-resourced local institutions. Those institutions got that way because of the forces of structural inequality, especially racial segregation and institutional racism.<sup>344</sup> This level of inequality is, like the trauma reactions

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342. See 34 C.F.R. § 300.8(a).

343. Margevich, *supra* note 8, at 3.

344. See Troutt, *supra* note 105, at 12.

themselves, cumulative.<sup>345</sup> Consider that virtually any systemic approach to local governance is based on maintenance, not transformative change.<sup>346</sup> Poor and working-class communities of color rarely change without gentrification and displacement.<sup>347</sup> Instead, they maintain their status, hoping not to get poorer, more dangerous, more marginalized. Similarly, middle-income areas are governed by an unstated maintenance norm, too. They try to hold taxes and services steady and preserve the quality of local institutions.<sup>348</sup> Sometimes they get wealthier (also through market gentrification); many have slipped.<sup>349</sup> So long as neither type of community absorbs significant exogenous shocks, the status quo is maintained cumulatively. However, because poorer communities contain more crises within their borders, the cumulative impact on children trapped there can be disastrous.<sup>350</sup> Stronger institutions would help, but stronger institutions lie across impassable lines.<sup>351</sup> Thus, economic and racial segregation is a process of stratification as well as demarcation, delineating the boundaries between strong community institutions and weak ones.<sup>352</sup> This common fact of our social and regional landscapes explains the fundamentally different reactions to traumatic events described by the hypothetical gunshot in Part I: internalization where traumas happen frequently and externalization where they don't. The two reactions are connected along a spectrum of concentrations.<sup>353</sup>

Sociologists who write about poverty speak of “concentration effects”—a combination of ills, including low-wage service employment, community disinvestment, out-of-wedlock births and an isolated drug economy.<sup>354</sup> Similarly, local government law scholars might speak of *institutional* concentration effects. That is, when the functions for which a public institution was created cannot be accomplished because the institutional resources have been overwhelmed by a concentration of deficits. This is the kind of concentration effect that psychological trauma represents for both the

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345. Cook et al., *supra* note 19, at 390.

346. See *supra* notes 123–29 and accompanying text.

347. See Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699, 757 (1993).

348. See Tiebout, *supra* note 117, at 419–20.

349. See Schragger, *supra* note 125, at 1885.

350. See Turner et al., *supra* note 38, at 328.

351. See *supra* Section II.C.

352. See *supra* Section II.C.

353. See *supra* Part I.

354. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 57–58 (1987).

individuals struggling with it and any single institution charged with addressing it. That institution will be overmatched. If the municipality's population has too many poor households, local government's capacity to govern will be compromised. This is the final reason why schools alone cannot be the focal point for trauma prevention.<sup>355</sup>

*A. Preventive Remedies Compelled by the Theory of Structural Inequality*

Structure reproduces the kind of destabilizing inequality that predictably puts poor children at risk of suffering repeated exposure to traumatic events—complex trauma. Now I will show how the theory of structural inequality compels certain kinds of approaches to legal prevention. The particular areas of law I have in mind reflect the theory and the times: civil rights and local government law. Civil rights laws have long been associated with reducing inequality, and my focus here may not seem especially innovative. However, the connection to local government law is less obvious, so I will begin there.

The intellectual history of local government law might be divided into the doctrinal law of municipal corporations that has long been a staple of law schools on one hand and the more theoretical law of local government critically championed by scholars such as Gerald Frug on the other.<sup>356</sup> Frug's *City as a Legal Concept* in 1980 signaled a broader, structuralist view of local power relative to state and federal power.<sup>357</sup> His work consistently interrogated the source and scope of local power.<sup>358</sup> It was arguably Frug's alternative, often critical examination of what local governments are and are not empowered to do that invited a range of structuralist analyses by local government law scholars such as Richard Briffault,<sup>359</sup> Richard Thompson Ford,<sup>360</sup> David

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355. Perry, *supra* note 146, at 11 (“Today the number of children that would benefit from intervention far outstrips the meager resources our society has dedicated to children exposed to violence. Even as we develop more effective and accessible intervention models, we must focus on prevention.”).

356. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 *passim* (1980) [hereinafter Frug, *Legal Concept*]; Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553, 553–55 (1987); GERALD E. FRUG, LOCAL GOVERNMENT LAW 1–2 *passim* (1988).

357. See Frug, *Legal Concept*, *supra* note 356.

358. See *id.* at 1120–28.

359. See Briffault, *Part I*, *supra* note 125; Briffault, *Part II*, *supra* note 125.

360. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

Barron,<sup>361</sup> Clayton Gillette,<sup>362</sup> and Richard Schragger,<sup>363</sup> as well as the more social justice-oriented approaches of John Powell,<sup>364</sup> Sheryll Cashin,<sup>365</sup> Keith Aoki,<sup>366</sup> Myron Orfield,<sup>367</sup> Michelle Wilde Anderson,<sup>368</sup> Laurie Reynolds,<sup>369</sup> and Chris Tyson.<sup>370</sup> My goal is not to lump these authors<sup>371</sup> together ideologically—some disagree with each other—but to show how structuralist approaches to the study of local power went beyond the practice of municipal law to broader questions of residential organization, regional inequities, and a deconstruction of local government functions. Most remarkable about these collective works is the extent to which they could mine a range of unseen meanings from the state delegations of police power to localities.<sup>372</sup>

I wish to take that notion a step further in order to re-think the equitable scope of local government power and responsibility. Police power may be the core of local authority, but its exercise—especially in the context of cities—clearly exceeds the usual conceptions of police, schools, land use, parks, and sanitation. Moving beyond the implicitly suburban model of local government power takes us to this era’s “progressive federalism” by which cities have assumed power over functions once reserved to the federal and state government. Thus, scholars have examined sanctuary cities<sup>373</sup> (immigration

361. See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003).

362. See Clayton P. Gillette, *Voting with Your Hands: Direct Democracy in Annexation*, 78 S. CAL. L. REV. 835 (2005); Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057 (2007).

363. Schragger, *supra* note 125, at 1898.

364. See John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655 (2001).

365. Cashin, *supra* note 118, at 2047–48.

366. See Aoki, *supra* note 347.

367. See MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* (2002); Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1754–1763 (2005) [hereinafter Orfield, *Racial Integration*].

368. See Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095 (2008).

369. See Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93 (2003).

370. See Christopher J. Tyson, *Localism and Involuntary Annexation: Reconsidering Approaches to New Regionalism*, 87 TUL. L. REV. 297 (2012).

371. See generally Lee Anne Fennell, *Co-Location, Co-Location, Co-Location: Land Use and Housing Priorities Reimagined*, 39 VT. L. REV. 925 (2015); Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367 (2010).

372. See Frug, *Legal Concept*, *supra* note 356, at 1062.

373. See Rose Cuison Villazor, “Sanctuary Cities” and Local Citizenship, 37 FORDHAM URB. L.J. 573, 574–77 (2010).

policy), living wage ordinances<sup>374</sup> (employment), the sharing economy<sup>375</sup> (macroeconomics), and healthcare<sup>376</sup> as examples of municipal attempts to legislate where either national decision makers have gridlocked or failed to represent the interests of local democratic constituencies. Recent litigation before the Supreme Court illustrates how the banking industry has challenged assertions of city power in another realm typically reserved to federal power.<sup>377</sup>

There is a practical side to this, too. Public health law, for instance, has no obvious conceptual home.<sup>378</sup> Yet public health issues are frequently handled by local health agencies exercising local and state authority. Social service agencies that serve a region's poorest people may answer to particular federal rules and fiscal grants, but they are just as often controlled by local contracts, local policy preferences and local—county or state—rules of eligibility and administration. More people understand American justice through municipal courts than any other venue.<sup>379</sup> We don't always think of these critically important institutions as part of local government, but in both legal and practical effect they are.

### *Set-back Dynamics*

Understanding the structure of institutional authority in this way helps us come down to the person—especially the traumatized young person—from an aerial view of regional relationships. I have asserted that structural inequality theory entails a spatially comparative examination of the institutions that govern access to opportunity.<sup>380</sup> In the context of this Article, I have argued that those institutions include some of the institutions with which the poor (and

374. See Scott L. Cummings & Steven A. Boucher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 U. CHI. LEGAL F. 187, 187–90.

375. See Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 903–05 (2015).

376. See Brian P. Goldman, *The San Francisco Health Care Security Ordinance: Universal Health Care Beyond ERISA's Reach?*, 19 STAN. L. & POL'Y REV. 361, 361–62 (2008).

377. See *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017).

378. For an excellent compilation of law-related research in public health, see *Injury and Violence Prevention*, PUBLICHEALTHRESEARCH.ORG, <http://publichealthlawresearch.org/topic/injury-and-violence-prevention> [https://perma.cc/LG9Q-XBWL] (last visited Apr. 23, 2018).

379. The Department of Justice investigation into police and municipal court practices in Ferguson, MO, made clear that, other than encounters with police, the municipal courts provided much of the public's primary interaction with local government. Cf. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2815–16, 2834–36 (2015) (stating that the Department of Justice's investigation into the municipal courts greatly affected the public's perception of, and relationship with, the courts).

380. See *supra* Part II.

sometimes *only* the poor) interact.<sup>381</sup> Now, I'd like to suggest how that interaction may work to perpetuate inequality of opportunity. From the standpoint of the person, we may call this aspect of the theory "set-back dynamics." A set-back is something that derails continuity of purpose. It is an obstacle to moving forward along a more stable, chosen route. For example, being forced to leave your home because of non-payment or a relative's conviction for a felony is a set-back for you and every member of your household, especially children (for whom it may also mean a new school after an interruption in schooling). Most people try very hard to avoid set-backs and hope to have the resources for resiliency when they occur. However, for people with limited resources, such as the families at the heart of this analysis of complex trauma, set-backs occur with greater frequency than for more middle-class families and have more devastating effects on opportunity.<sup>382</sup> Indeed, it is these *set-back dynamics* that become sources of traumatic injury.<sup>383</sup> Therefore, I divide the following discussion of prevention strategies into two general aspects of set-back dynamics: becoming *untrapped* by set-backs or becoming *unencumbered* by them. The first set of ideas is associated with the urge to move away from destabilizing environments (i.e., migration and mobility). This is the Tieboutian decisional route<sup>384</sup> and relies on mobile choice to reduce set-backs. It sounds in both civil rights and local government law. The second, *unencumbered*, refers to the intersectionality of institutional failures discussed in Part II. The point of these prevention strategies is to use local government and civil rights concepts to change the ways local institutions compound the risk of trauma in poor children's lives.

### B. "*Untrapped*": Housing-Related Prevention Approaches

One of the earliest research findings from the Moving to Opportunity pilot project that began in 1994 was that low-income residents who moved to high-opportunity areas experienced less psychological stress, particularly for girls and women.<sup>385</sup> Unheralded at the time, this result is neither surprising nor unimportant. People flee hardship whenever they can. It is a natural human instinct to seek safe haven from tyranny, disease, war, and destitution. The

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381. See *supra* Part II.

382. Margevich, *supra* note 8, at 13.

383. *Id.*

384. See *supra* Section II.C.

385. See OFF. OF POL'Y DEV. & RES., U.S. DEP'T OF HOUSING & URBAN DEV., MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: FINAL IMPACTS EVALUATION 7, 113–16, 123–36 (2011), [https://www.huduser.gov/publications/pdf/mtofhd\\_fullreport\\_v2.pdf](https://www.huduser.gov/publications/pdf/mtofhd_fullreport_v2.pdf) [<https://perma.cc/8H8E-QRQA>].

world's refugee crisis—currently estimated at around 20 million people—reflects the growing number of intolerable conditions that people have fled in search of the opportunity for a better life.<sup>386</sup> No one told them to leave.<sup>387</sup> The ravages of civil war in Syria have produced an immigration crisis across the Middle East and Europe because people naturally refuse to stay trapped in the carnage.<sup>388</sup> The most difficult immigration issues in the United States involve economic immigrants from destitute conditions in Mexico and violence and organized crime in Central America, many of whom arrive without documentation because the risks of deportation naturally seem better than the risks they are fleeing.<sup>389</sup> Similarly, African Americans have a tradition of flight

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386. See THE U.N. REFUGEE AGENCY, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, at 2, 6, 16 (2016), <http://www.unhcr.org/576408cd7.pdf> [<https://perma.cc/GWB9-8899>]. 65.3 million people were forcibly displaced worldwide. *Id.* at 2. 21.3 million of those people were refugees. *Id.* “On average 24 people worldwide were displaced from their homes every minute . . . during 2015 . . . . This compares to 30 per minute in 2014.” *Id.* Unresolved crises and conflicts contribute to the increase in forced displacement. *Id.* at 6. The majority of refugees come from developing regions. *Id.* at 16.

387. See Christian A. Davenport et al., *Sometimes You Just Have to Leave: Domestic Threats and Forced Migration, 1964–1989*, 29 INT’L INTERACTIONS 27 (2003). Refugees “tend to flee when the integrity of their person is threatened.” *Id.* at 27. Refugees rely on information available to them, which is mainly “input from others facing similar circumstances.” *Id.* at 43. Genocide and politicide raise the level of threat “forcing many to flee.” *Id.* “The more distinct types of conflict dissidents use, the more likely are individuals within the country to perceive threats and leave, and the more likely are those outside of the country to stay away.” *Id.* THE U.N. REFUGEE AGENCY, *supra* note 386, at 24 (noting that unresolved crises and conflicts, political instability, loss of livelihood, no access to healthcare, and education contribute to the increase in forced displacement).

388. See *Syria’s Refugee Crisis in Numbers*, AMNESTY INT’L, <https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/> [<https://perma.cc/JL4S-G74W>] (last updated Dec. 20, 2016). 13.5 million people in Syria are in urgent need of humanitarian assistance. *Id.* More than 4.8 million Syrian refugees are in Turkey, Lebanon, Jordan, Iraq, and Egypt. *Id.* Between January 2016 and September 2016, Syrian refugees “made up the largest nationality of those crossing the Mediterranean to get to Europe” at 26.2%. *Id.* Germany has pledged over 43,000 places for refugees via resettlement and the remaining 27 EU countries pledged over 50,000 places. *Id.*

389. KATE BRICK ET AL., MEXICAN AND CENTRAL AMERICAN IMMIGRANTS IN THE UNITED STATES 5 (2011). The following numbers represent the number of unauthorized immigrants living in the United States: 6.7 million from Mexico; 530,000 from El Salvador; 480,000 from Guatemala; and 320,000 from Honduras. *Id.*; see also JONATHAN T. HISKEY ET AL., UNDERSTANDING THE CENTRAL AMERICAN REFUGEE CRISIS: WHY THEY ARE FLEEING AND HOW U.S. POLICIES ARE FAILING TO DETER THEM 6 (2016) (noting that crime victimization is a reason why people from Central America risk immigrating illegally to the U.S.); Mexico: *Asylum Elusive for Migrant Children*, HUM. RTS. WATCH (Mar. 31, 2016), <https://www.hrw.org/news/2016/03/31/mexico-asylum-elusive-migrant-children> [<https://perma.cc/6AJQ-A9RU>] (noting that gang violence is prevalent in Central America, often targeting children).

to “warmer suns.”<sup>390</sup> The Underground Railroad is a testament to the instinct to run from bondage in the antebellum South.<sup>391</sup> The Great Migration to northern cities, a sixty year trail of internal migration by blacks fleeing peonage, sharecropping and lynching in the South, may be the quintessential example of the flight instinct on American soil.<sup>392</sup>

Complex trauma demonstrates what happens when people cannot exercise this instinct and instead are trapped in circumstances of extreme hardship.<sup>393</sup> One of the primary means of trapping low-income families in place is economic and racial housing segregation, an enduring legacy of localism, discrimination, and market constraints on affordable housing.<sup>394</sup> Housing market conditions are beyond the scope of this Article, but localist barriers to entry and discrimination are the province of fair housing law.<sup>395</sup> Thus, the first and most urgent trauma prevention strategy compelled by the theory of structural inequality is greater open housing choice.

If people with limited means enjoyed greater housing choice they could vote with their feet—like Tiebout’s consumer-voters—to align their residential preferences with less traumatic threats to their children, like gang violence, drug dealing, and dangerous schools—chronic set-backs en route to trauma exposure.<sup>396</sup> This result seems pretty unthinkable, though it is the essence of housing equality. It is also the goal envisioned by federal fair housing law under Title VIII of the Civil Rights Act of 1968.<sup>397</sup> That Act, as I have argued elsewhere,<sup>398</sup> has two prongs—antidiscrimination and antisegregation.<sup>399</sup> The latter concerns us here, particularly the U.S. Department of Housing and Urban Development (HUD) Secretary’s duty to “affirmatively further fair housing”<sup>400</sup> (AFFH) through racially and economically balanced residential municipal planning. There are three routes through AFFH. One is by challenging the adequacy of a HUD grantee’s compliance with regulatory requirements to

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390. See ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* (2010).

391. See *id.* at 161.

392. See *id.* at 532–33.

393. See Angela Nickerson et al., *A Critical Review of Psychological Treatments of Posttraumatic Stress Disorder in Refugees*, 31 *CLINICAL PSYCHOL. REV.* 399, 400 (2011).

394. See Orfield, *Racial Integration*, *supra* note 367, at 1754–61.

395. See *generally id.*

396. See *supra* Section II.C.

397. 42 U.S.C. § 3601 (2012).

398. See *generally* Troutt, *supra* note 105.

399. *Id.* at 7.

400. 42 U.S.C. §§ 3608(d), (e)(5).

assess fair housing (the “Assessment of Fair Housing” or AFH rule).<sup>401</sup> However, this requires active enforcement by HUD, which is dependent on the politics of successive presidential administrations.<sup>402</sup> A second path is through AFFH litigation, such as the landmark *Thompson v. HUD*<sup>403</sup> and *Westchester*<sup>404</sup> cases. These are less dependent on who the HUD secretary happens to be, and several notable cases are already in the pipeline.<sup>405</sup> The third route, expansion of low-income housing vouchers, is not an AFFH remedy per se but is consistent with the theory of affirmative action on housing choice.<sup>406</sup> The voucher program at issue in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*<sup>407</sup> lies at the heart of affordable housing groups’ efforts to overcome state and local regulations that limit families’ access to areas of greater opportunity—and lower stress and trauma.<sup>408</sup> Each of these routes through AFFH illustrates how housing mobility may effectuate trauma prevention.

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401. 24 C.F.R. § 5.154 (2017).

402. It is conceivable that states could adopt within their own fair housing laws the data-intensive AFH approach to racially and economically balanced community planning, but that too is beyond the scope of this Article.

403. See 348 F. Supp. 2d 398 (D. Md. 2005).

404. See U.S. *ex rel.* Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty., N.Y., 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

405. See, e.g., Complaint at 2–3, *Chambers et al. v. City of Danville* (Nov. 24, 2010), <http://s3.documentcloud.org/documents/367883/hudcomplaint.pdf> [https://perma.cc/YJN5-ENP7] (alleging a violation of the City’s duty to affirmatively further fair housing by repeatedly certifying it had conducted an Analysis of Impediments when it had not done so and was in fact promoting policies that had the effect of discriminating and perpetuating segregation); Complaint at 2–4, *Metro. Mil. Fair Hous. Council v. Waukesha Cty, Wis.* (Mar. 15, 2011) <http://www.relmanlaw.com/docs/MMFHCWaukesha-Complaint.pdf> [https://perma.cc/FEX8-RA8Q] (alleging that Waukesha County failed to comply with its AFFH duties by allowing its constituent communities to use their land use powers to block affordable housing on racial grounds); Complaint at 2–3, *Metro. Interfaith Council on Affordable Hous., et al. v. State of Minnesota, et al.*, [https://dk-media.s3.amazonaws.com/AA/AV/micah-org/downloads/292213/Complaint\\_Final\\_Filed\\_2014\\_11\\_10.pdf](https://dk-media.s3.amazonaws.com/AA/AV/micah-org/downloads/292213/Complaint_Final_Filed_2014_11_10.pdf) [https://perma.cc/QFQ7-MUQ7] (alleging that the Minnesota Housing Finance Agency and the Metropolitan Council of the Twin Cities region caused housing segregation and unequal opportunity, thereby failing to comply with its obligation to affirmatively further fair housing, by intentionally concentrating affordable rental homes in areas of low opportunity disconnected from quality schools, dependable transportation, and living-wage jobs).

406. See *Texas Dep’t. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2513–14 (2015).

407. *Id.*

408. *Id.*; see OFF. OF POL’Y DEV. & RES., *supra* note 385, at 113–16, 123–36.

Transiency may also be a significant source of trauma in children's lives, especially through evictions. Unwanted moves are educationally disruptive.<sup>409</sup> Limiting set-back dynamics by increasing housing stability may come through state and local reform of eviction criteria in both subsidized and non-subsidized housing. In the last decade, an eviction crisis has quietly increased the stresses and dangers of transiency in tightening housing markets.<sup>410</sup> Poor families across the United States first contend with an affordability crisis—in 2015, for instance, rent consumed 70% of the monthly income for almost half the country's families with incomes below the poverty line.<sup>411</sup> According to Matthew Desmond's Milwaukee Area Renters Study, poverty is associated with higher rates of transiency due to poorer renters' greater exposure to displacement from formal and informal eviction, building condemnation, and landlord foreclosure.<sup>412</sup> Evictions are also fueled by the presence of children,<sup>413</sup>

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409. See Alexandra Beatty, STUDENT MOBILITY: EXPLORING THE IMPACTS OF FREQUENT MOVES ON ACHIEVEMENT: SUMMARY OF A WORKSHOP 9–11 (2010), <https://www.nap.edu/read/12853/chapter/3> [<https://perma.cc/E5QP-5F82>] (“The effect of mobility is consistently negative and increases with the frequency of moves, although it is smaller than the effect of other factors, such as the family's socioeconomic status or home environment.”). Chapter 2 specifically discusses Henry Reynold's research on school children in Baltimore and Chicago, as well as his meta-analysis of studies showing various negative effects on academic achievement for students. *Id.* at 9–32.

410. According to *The New York Times*, from 2010 to 2013, Maine experienced a 21 percent increase in eviction filings, Massachusetts 11 percent and Kentucky 8 percent. In the fiscal year that ended in June, New Jersey, which has some of the strongest tenant protections in the country, had one eviction filing for every six renter households. In Georgia, where court statistics do not differentiate between tenants evicted by a landlord and homeowners evicted after foreclosure, filings soared to almost 270,000 last year, a 9 percent jump since 2010. Over the same period, according to the research firm CoreLogic, the number of foreclosures dropped by half.

Shailesh Dewan, *Evictions Soar in Hot Market; Renters Suffer*, N.Y. TIMES (Aug. 28, 2014), [https://www.nytimes.com/2014/08/29/us/evictions-soar-in-hot-market-renters-suffer.html?\\_r=0](https://www.nytimes.com/2014/08/29/us/evictions-soar-in-hot-market-renters-suffer.html?_r=0) [<http://perma.cc/S6FR-U8DA>].

411. Jeff Larrimore & Jenny Schuetz, *Assessing the Severity of Rent Burden on Low-Income Families*, BOARD GOVERNORS FED. RES. SYS. (Dec. 22, 2017), <https://www.federalreserve.gov/econres/notes/feds-notes/assessing-the-severity-of-rent-burden-on-low-income-families-20171222.htm> [<https://perma.cc/LH7X-YWSV>] (“The median renter in the lowest income quintile pays 56 percent of monthly income on rent, exceeding HUD's standard for ‘severe rent burden.’”).

412. Matthew Desmond et al., *Forced Relocation and Residential Instability Among Urban Renters*, 89 SOC. SERV. REV. 227, 227–28, 237 (2015).

413. For every child, researchers found that renters' odds of being evicted increased by 2.2% annually. Matthew Desmond & Carl Gershenson, *Who Gets Evicted? Assessing Individual, Neighborhood, and Network Factors*, 62 SOC. SCI. RES. 362, 362–63 (2016).

expanding legal bases for evicting tenants,<sup>414</sup> and a lack of legal representation.<sup>415</sup> “Tenant blacklisting” by private reporting companies that record the names of tenants who have been involved in any kind of eviction proceeding—without regard to whether they were plaintiff or defendant, the outcome of the case or even amicable settlements—can severely constrict any future housing options at the tenant’s own expense and without recourse.<sup>416</sup> Some rules may rightly increase residents’ safety and owners’ expectations, but many go too far and contribute significantly to the household and neighborhood instability that is a common precondition to childhood traumatic experience.<sup>417</sup> Local efforts by town councils, housing authorities and regional planning associations to lower the frequency and impact of evictions would increase housing stability and help to prevent child trauma.<sup>418</sup>

### C. Unencumbered: Institutional Reform-Based Prevention Approaches

The theory of structural inequality suggests that institutional practices may vary dramatically between affluent and low-income places but also, in the case of institutions that primarily serve low-income populations, may operate to compound stress with encumbrances that contribute to traumatic

414. See Eviction Notice Termination Law Guide by State, LANDLORD.COM, <http://www.landlord.com/eviction-notice-termination-law-guide.htm> [https://perma.cc/5S47-53G4] (last visited Feb. 28, 2018). Landlords can evict tenants for a variety of reasons, typically nonpayment of rent, breach of lease, or damage to the unit, but also to make renovations. *Id.* Most states allow landlords to evict for nonpayment of rent in less than a week. *Id.*

415. See Paula A. Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U.L. REV. 1, 5–6 (2016) (reporting authors’ study that “of the more than forty-thousand residential eviction proceedings brought in 2014 in Essex County, only eighty asserted breach of the implied warranty of habitability as a defense” because most tenants are unrepresented by counsel). According to analysis of court records in Delaware County (PA) and Philadelphia, landlords win in housing court 92–96% of the time. Jake Blumgart, *The Housing Crisis We Don’t Talk About*, NEXT CITY (Oct. 20, 2014), <https://nextcity.org/features/view/the-opposite-of-gentrification> [https://perma.cc/HL9K-W3Y2]. In a Baltimore study, landlords won 92% of the time, despite 80% of surveyed renters living in conditions that legally justified withholding of rent. See Dan Pasciuti & Michele Cotton, *Justice Diverted: How Renters are Processed in the Baltimore City Rent Court*, PUB. JUST. CTR. (2015), [http://www.publicjustice.org/uploads/file/pdf/JUSTICE\\_DIVERTED\\_PJC\\_DEC15.pdf](http://www.publicjustice.org/uploads/file/pdf/JUSTICE_DIVERTED_PJC_DEC15.pdf) [https://perma.cc/6CKJ-F98L].

416. See Kim Barker & Jessica Silver-Greenberg, *On Tenant Blacklist, Errors and Renters with Little Recourse*, N.Y. TIMES (Aug. 16, 2016), [https://www.nytimes.com/2014/08/29/us/evictions-soar-in-hot-market-renters-suffer.html?\\_r=1](https://www.nytimes.com/2014/08/29/us/evictions-soar-in-hot-market-renters-suffer.html?_r=1) [http://perma.cc/V2TH-6AF4]; Rudy Kleysteuber, Note, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1344–49 (2007).

417. Barker & Silver-Greenberg, *supra* note 416. See generally Dewan, *supra* note 410.

418. See Dewan, *supra* note 410.

experiences.<sup>419</sup> The institutional prevention approaches discussed next follow that insight. Here I propose that states and localities undertake institutional reform from the perspective of toxic child stress and rely on common civil rights law frameworks for implementation.

Ironically, child trauma's relationship to law and public policy may be more intuitive than some other issues. People understand stress. More importantly, people understand (and try to avoid) the stress of set-backs. This understanding offers perspective on how institutional practices can unduly stress children or their parents. Interactions with child welfare bureaucracies, municipal courts, school safety personnel, and social welfare agencies often produce great stress on low-income families, much of it the unnecessary result of regulatory inconsistencies, poor management, and a disregard for unintended consequences.<sup>420</sup> If stress reduction on children were a recognized interest, many institutional reforms would readily follow. Further, if reducing stress were viewed from the perspective of spatial inequality—e.g., concentration effects, the impact of residential exclusion and isolation on children's development, community violence as a public health matter—the logic of institutional reform would be clearer. This is the basis for institutional prevention strategies that unencumber young lives by alleviating stress on their parents.

Certain common practices routinely produce or compound stressful set-backs in a dynamic many families cannot easily overcome. Whether they result from race or class bias or something else, the following reflect poorly on local governance and undermine democracy: first, the housing instability described above that results in part from changes in landlord-tenant rules;<sup>421</sup> second, as shown in Part IV, critical aspects of the child welfare system, whose vague, often inconsistent rules on neglect lead to indefinite removals into foster care, loss of parental rights and bureaucratic requirements seem to serve little point but to inconvenience and stress disproportionately black caregivers;<sup>422</sup> third, shared jurisdiction over similar problems—domestic violence and child protection, for example—can produce contradictions that force mothers to

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419. See Troutt, *supra* note 105, at 12.

420. See generally Roberts, *supra* note 331; ROBERTS, SHATTERED BONDS, *supra* note 114.

421. See *supra* Section V.B. See generally Matthew Desmond, *Forced Out: For Many Poor Americans, Eviction Never Ends*, NEW YORKER (Feb. 15, 2016), <http://www.newyorker.com/magazine/2016/02/08/forced-out> [http://perma.cc/SV85-J7P7].

422. See *supra* Section IV.D.

choose between getting help and losing custody of their children;<sup>423</sup> fourth, like the Department of Justice's investigation into municipal revenue production in Ferguson, Missouri, numerous studies have detailed wasteful, expensive and discriminatory ordinances and practices that result in debtors' prisons for low-income and working-class residents;<sup>424</sup> and fifth, harsh school discipline policies found almost exclusively in districts with high proportions of low-income students of color may impose draconian criminal punishments for disruptive behavior and contribute to a "school-to-prison pipeline."<sup>425</sup> This is a partial list of the kinds of institutional practices whose effects are rarely considered through the prism of lasting psychological trauma and chronic stress. As a result, they are a constant source of set-backs, ultimately diminishing the capacity of low-income children to participate in the burdens and benefits of citizenship.

While each of these institutions is the target of reformers, rarely is reform undertaken with the aim of preventing the proliferation of child trauma or with the broader goal of undoing structural inequality. Doing so combines three important governmental interests: good government, public health, and social inclusion. Reform may be justified on each or all of these grounds. Yet how might reform work?

Common civil rights regimes offer an incentives-based approach that encourages local creativity while requiring fealty to basic equality principles. Under Title VI of the Civil Rights Act, for example, the U.S. government conditions receipt of federal funding for a range of activities on compliance with the nation's civil rights laws.<sup>426</sup> Similarly, we have seen how grantees of Housing and Urban Development funding must demonstrate that they are

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423. See BRITTANY DIBELLA ET AL., FROM RESEARCH TO PRACTICE: AN OVERVIEW OF SYSTEMS COLLABORATION EFFORTS TO ADDRESS THE CO-OCCURRENCE OF DOMESTIC VIOLENCE AND CHILD MALTREATMENT 2 (2017).

424. See Whitney Benms & Blake Strode, *Debtors' Prison in 21st-Century America*, THE ATLANTIC (Feb. 23, 2016), <https://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/> [<https://perma.cc/P3YB-RX6V>]; Kirsten D. Levingston & Vicki Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 J. POVERTY L. & POL'Y 187, 187 (2007); U. S. DEP'T JUST., C.R. DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2, 55–56 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/F8KL-BW9Y>].

425. See Noguera, *supra* note 128, at 341–43; Wald & Losen, *supra* note 128, at 9–11 (discussing school-to-prison pipeline policies and their comparative absence in wealthier white districts).

426. 42 U.S.C. § 2000d (2012).

“affirmatively furthering fair housing” in their relevant community.<sup>427</sup> Most of the institutions implicated in childhood trauma are local—city, county, or state—so the federal linkage is lacking.<sup>428</sup> However, the same regime could be imposed legislatively at the state or locality level. Advancing the three government interests—good government, public health, and social inclusion—could be explicit statutory objectives. Legislators would have to make findings about the link between segregated, isolated environments, and the mental health and cognitive development of children who live there. For example, state departments of education or child protective services could condition program funding—or offer incentives for funds above baseline—only where local agencies demonstrate compliance with reforms that demonstrably reduce traumatic experiences for families with children and promote residential inclusion. This would entail careful scrutiny of a given program’s unintended harms to client families. Evidence-based challenges would compel rules to change. New practices might require re-training personnel. Reforms should be carefully monitored, subject to benchmarks, with exacting accountability provisions. The results of such an approach should be welcome to interests from all political persuasions, as experiments with local democracy yield to regional preferences while producing best practices.

## VI. CONCLUSION

The growing crisis in childhood psychological trauma reflects the worst aspects of entrenched structural inequality.<sup>429</sup> It reveals some of the most intense and enduring effects of a society long divided by race, class, and place.<sup>430</sup> The harms experienced by its youngest victims are expressed in all the human ways possible—emotionally, educationally, psychologically, behaviorally, physically, and epigenetically—then transmitted to distant and proximal others in a destructive spiral over lifetimes.<sup>431</sup> The costs to those trapped in traumatic environments are incalculable. The costs to a society that keeps them there are exponential. Yet the cause is structural, which exempts no one.<sup>432</sup>

I have argued that the fundamental causal nexus between early trauma and spatial inequality requires legal intervention. In making this argument, I examined psychological, public health, and education literature on childhood

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427. *Id.* § 3608. For the quoted language, see 24 C.F.R. § 5.154 (2017).

428. See Tiebout, *supra* note 117, at 418.

429. See *supra* Section II.C.

430. See *supra* Section II.A, Part V.

431. See *supra* Part III.

432. See *supra* Section V.A.

trauma. I then analyzed school-based legal interventions through innovative uses of special education laws and state-based school reforms. These show both promise and peril, because of the risk of doing too little and of pathologizing poor people of color too much. Instead, I argued that structural inequality theory compels prevention approaches. I offered a framework for two kinds—those that offer mobility out of areas where “set-back dynamics” proliferate and those that focus on reforming the very institutions that compound those dynamics. To advance state interests in good government, public health, and social inclusion, I illustrated approaches that rely mainly on local government and civil rights law paradigms. Complex childhood trauma reflects a dizzying array of issues, many of which we see in other countries crippled by war and natural disaster. Hopefully, I have offered a sturdy framework, if not fixes, from which to start.