

RACE AND THE JUVENILE JUSTICE SYSTEM

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Having worked with the Los Angeles County Public Defender's office for 40% of my life, it is difficult not to presume that even the most conservative among us recognize the disparate treatment of people of color in the criminal justice system. Some may argue an inherent deviance as opposed to systemic oppression, but the ratio of incarcerated people of color to their percentage of the population makes clear that there is a tremendous failure somewhere. Notions of the "School to Prison Pipeline" have gained validation in recent years as research confirms people of color's conduct is seen as aggressive, negative, and criminal, as early as preschool.

Children of color carry a heavier load of the system's failures. The overlapping traumas experienced due to race, poverty, lack of access to resources, mass incarceration, community violence and a host of other ills create a specific, racial trauma that is unique in its attack and largely ignored when crafting reform efforts. This paper hopes to not only walk us through the staggering statistics for involvement with the criminal justice system for children of color, but also serve as a guide to understanding the phenomenon of racial trauma, and finally, provide some insight to using the trauma as mitigation in litigating juvenile delinquency cases.

Confronting Perception

“The recognition of black childhood as a legally relevant status and a basis for access to developmental opportunities and resources is fundamental to the struggle for equitable youth justice” *Toward equal recognition, authority, and protection: legal and extra-legal advocacy for black youth in the juvenile justice system*. Studies show that law enforcement and the general public view Black children as adults as early as 13 years old. On average, society overestimates the age of Black youth by more than four and a half years. Simply put, Black children do not receive the benefit of “kids being kids,” because they are not seen as kids. (Henning, Nanini & Ward, 2018)

The impact of society’s perception starts incredibly young. When analyzing the treatment of students of color within an academic setting, a disturbing trend is clear. Schools which employ “zero tolerance” policies also criminalize minor indiscretions that should be handled in-house. Zero tolerance policies mandate disciplinary action for certain conduct and usually amp up the level of punishment with each subsequent offense. “While Black students only make up 16 % of public school enrollment, they account for 42% of all students who have been suspended multiple times.” According to ACLU *School-to-Prison Pipeline* (2018), Black students represent 31% of school related arrests. Add to the mix the presence of police officers on school grounds, and we observe drastic responses to **cognitively normal behavior**. The *New York Times* surmised that in schools where law enforcement officers are the primary enforcers of discipline, minor offenses are more likely to be categorized as criminal, to the detriment of the students (Dell’Antonia, KJ, 2015). Even when students are not immediately arrested for misbehaving, students who are suspended or expelled are 3 times more likely to have delinquency contact the following year.

Not only do educators tend to view Black children as older, but they also see them as less intelligent—often as a reflection of dialect. African American English (AAE) has long been recognized but not respected or validated. As such, learning deficits in traditional reading and language comprehension courses are seen as a deficit within the learner and not the lesson.

The linguist William Labov advanced the reigning theory. A teacher writes a word on the blackboard—something simple, like told or past—sounding out letter by letter as she does. For a speaker of Standard English, the lesson is clear: The four letters represent the four sounds that make up the word. But the rule is more complex for AAE

speakers. In the black vernacular, many consonant clusters—such as the *-ld* in *told*, and the *-st* in *past*—aren’t fully pronounced when they appear at the end of a word. A speaker of African-American English is likely to say *told* the same as *toll* (or even *toe*), and *past* the same as *pass*. The profusion of homonyms obscures the fundamental sound-to-letter principle: AAE-speaking kids are presented with an enormous number of words that are all pronounced the same yet spelled in nonsensically different ways.

Most instructors are hostile towards AAE. In California schools surveyed, Ann McCormick Piestrup noted that even when children answered questions correctly, the teachers would “pounce” on them for irrelevant differences in pronunciation or grammar. Children eventually withdrew from voluntary participation. Consequently, the students most interrupted had the lowest reading scores. As a country, we see value in speaking two languages, but not two dialects.

When the teacher views students of color as older—and subsequently more responsible for his actions, more aggressive, more violent, and less intelligent, she sees them as problems. Discipline categories such as, “willful defiance” and “disruption” become synonymous with the personalities of the problem children. Those children are then removed from the classroom for various periods of time ranging from a trip to the principal all the way to suspension and expulsion. Such discretionary impetus for causing a child to miss school allows implicit bias to run wild.

The constant push for removal of “disruptive” students is known as exclusionary discipline. The belief is that removing the bad kids will lead to a better learning environment for the good ones. However, the practice can be extremely confusing for students who do not recognize the risk of consequences to their conduct in the first place. Once again, developmentally normal behavior becomes stigmatized despite the fact that all kids are testing the boundaries of independence and identity development as part of maturation. The U.S. Department of Education Office of Civil Rights (2014) reported that starting in preschool Black males are suspended more than any other racial group.

Other predictors of discipline and subsequent contacts with law enforcement for children include poverty, community violence, victimization, incarcerated parents, homelessness, children with disabilities, and finally, trauma-exposed students. These risk factors are often highly present within the Black community. For example, childhood exposure to violence leads to an increased risk of being arrested for a violent crime. Black children are twice as likely as white

youth to be victims of child maltreatment. Yet, even when Black youth have less exposure to a risk factor—they are still punished at higher rates. Since tracking began in 1991, Black youth report lower rates of drug and alcohol related behavior. However, Black people are arrested and detained for drug violations in staggering numbers. Adolescent behavior is consistent across race and ethnicity but youth of color are prosecuted more frequently and treated more harshly (Henning, 2013). Even when a rehabilitative or therapeutic model is the expressed goal of the juvenile courts, the treatment needs of children of color are not recognized correctly and appropriate services are not provided.

Shifts in Delinquency Law

The reality is that the notion of a juvenile justice system is relatively new. *In re Gault*, the United States Supreme Court decision which recognized that children charged with delinquency have a constitutional right to counsel, was only established in 1967. At that time, juvenile delinquency courts were already disproportionately packed with poor children of color. From the beginning of juvenile courts, reformers focused their attention on “normalize[ing]” poor white, particularly European immigrant youth they believed to be neglected and delinquent, and assimilating them into the white body politic. They did not often contemplate the rehabilitation and “citizen-building” of “Negro” and other nonwhite children (Henning, Nanini & Ward, 2018) Before Black children could even begin the fight for equal resources and dispositions, they have consistently had to battle to even be seen as children. As important as the right to counsel is for juvenile delinquency advocacy, it is insufficient alone to ensure justice for Black youth.

Further, two short decades after the *Gault* decision, the United States had a collective shift in philosophy regarding children. The country declared war. “Zero tolerance” policies gained popularity at the same time as the United States declaring war on children. From the late 1980s through the 1990s fear gripped the country threatening an attack of juvenile “super predators.” Princeton political scientist, John Dilulio, described these mysterious children as subhuman, amoral, and feral. The war on children altered the way the United States treated children as young as 8-10 years old and helped to feed the beast of mass incarceration—despite the fact that data did not corroborate the notion of an increased risk of violent crimes by juveniles. Racial disparities intensified.

Every State, except Nebraska, enacted policies that made it easier to try youth as adults. Examples included lowering the age at which juveniles could be prosecuted as adults, extending the types of crimes that trigger automatic prosecution in adult court, giving prosecutors exclusive authority over which minors were tried as adults, and limiting the discretion of juvenile judges to overturn the prosecutors’ decisions. Prior to the passing of Proposition 57 in California (which takes away the ability of the prosecutor to directly file a juvenile case in adult court), 90% of all direct file cases were youth of color. Youth of color are 5 times more likely to be incarcerated

than white youth. Youth of color are 300 times more likely to be arrested for simple assault than white youth (Blades, 2018).

Juvenile arrests and filings have dramatically decreased over the last 15 years. Yet, in studying data from 2003 to 2013, youth of color still remain more likely to be detained. The difference between white and Black youth being detained increased by 15%. As of 2013, Black youth were 4 times more likely to be detained than white youth, Native Americans were 3 times more likely, and Latino youth were 61% more likely to be detained than white youth. Joshua Royner, State Advocacy Associate at The Sentencing Project. April 2016.

In 1989, Stanford v. Kentucky, rejected the argument that the 8th Amendment prohibited the death penalty for 16 and 17 year old youth who committed capital offenses. Interestingly, the court acknowledged scientific evidence regarding adolescent psychological development, but refused to protect juveniles as a class. The decision caused advocates to look to behavioral scientists to clarify how the mind of a youth functions differently than an adult. Research proved that youth are more likely to take risks, more susceptible to peer influence, and more impulsive. Regardless of intellect, youth have diminished decision making ability. Scientific advances in observing brain images provided a view into the biological foundation for the differences in behavior. Finally, seeing that adolescent brains continued to develop well into one's twenties, illustrated an ability for juveniles to change.

In 2005, Roper v. Simmons overturned the Stanford decision and abolished the death penalty for juveniles. Distinguishing juveniles from adults, the Court recognized, "immaturity, vulnerability, and a lack of true depravity." In 2010, Graham v. Florida got rid of life without the possibility of parole for juvenile on non-homicide offenses and, in 2012, the Supreme Court ruled in Miller v. Alabama, that mandating life without the possibility of parole for all capital cases failed to take the individualized inquiry approach necessary for addressing the difference between juvenile and adult minds. The Court affirmed that youth are different from adults for sentencing purposes. Finally, in 2016, Montgomery v. Louisiana interpreted Miller to mean that life without the possibility of parole was barred for all juveniles "but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."

Children have become a class separate from adults according to the courts and must be treated as such. Yet, despite the obvious shift in the Country's moral compass, prosecutors still attempt to have children tried in adult courts citing an inability to be rehabilitated. Further, they

often ignore the research showing that the age of maturity is closer to 25 than 18 in terms of adolescent brain development. As such, policy needs to shift to start treating “young adults” (18-25) in the criminal justice system more like juveniles.

The core to combatting assertions that a juvenile acted in a manner that elevates him to warranting adult punishment is to prove that the culmination of factors from the minor’s life to the facts of the alleged conduct fit squarely within the findings of juvenile behavior. Look to the minor’s history for risk factors including complex trauma. Each case is different but there is an entire body of literature which confirms that trauma affects brain development and decision making beyond even the known distinctions. For our purposes, we want to look at the significance in recognizing racial trauma as an often ignored area of mitigation for children of color.

Racial Trauma

Kenneth V. Hardy wrote the following, “All service systems for youth encounter young people of color who can be challenging to treat, reach, and teach. Our difficulty in meeting their needs is not just because of greater ‘pathology’ or ‘resistance’ as some assert. Rather, we fail to appreciate the ways in which race is entangled with their suffering.” (Hardy, 2018). Racial trauma can often carry secondary symptoms that distract from identifying it. We rarely think of racial oppression when watching a child act out or display signs of hopelessness. Youth often react emotionally to oppression without having the language to define it.

Internalized Devaluation, as the name suggests, is the feeling of worthlessness that comes from living in a country that deifies whiteness and demonizes people of color. Consistent, repeat encounters with experiences of devaluation leads to an unhealthy view of self. The remedy is a pervasive desire to earn respect and to interpret disrespect as an affront to their literal being. A symptom of the trauma is often rage. Hardy explains, “It is virtually impossible to be the depository of perpetual negative and debilitating messages and have one’s sense of self assaulted without experiencing rage... Rage builds over time as a result of cumulative suppressed emotions precipitated by voicelessness. It is distinguishable from anger, which is an emotion connected to immediate experiences.” (Hardy pg. 26).

In other words, “To be a [Person of Color] in this country and to be relatively conscious is to be in a rage almost all the time.” -James Baldwin. The concept is not new or difficult to understand for adults. What is important for our purposes here is the impact of trauma on adolescent brain development and recognizing racial trauma as valid trauma which impacts youth of color in dramatic, meaningful ways. David Troutt discusses the relationship between trauma and “spatial inequality.” Essentially, “If you live where traumatizing events are more prevalent, you are more at risk for experiencing trauma and its after effects.” (2018). African American and Latino children generally live in the most concentrated poverty (Litcher, 2018).

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 (Cohen, 2002).

Racial trauma adds the component of believing that these traumatic events are normal and deserved. The stories are shared throughout the community, throughout family, and throughout generations. There is no need to seek therapy or articulate mental health concerns for what seems like everyday happenings. When speaking on community violence, Troutt writes, “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.” Additionally, the effects of the trauma can potentially re-wire a child’s brain, “impair cognitive abilities, imperil learning and condition her body for an array of life-threatening addictions and illnesses over time.” (2018)

Most important for handling the cases of young people (juvenile delinquency and young adults in the 18-25 range), is being able to convince prosecutors and judges that racial trauma is real. It is the overlap of accepted traumatic events for sure, but it is more. The many victims that find themselves battling criminal accusations often have such similar backgrounds that those responsible for doling out “justice” become desensitized. Prosecutors tend to play the game of quantifying the incidents in the accused’s background to, without training or expertise, determine that her life “wasn’t that bad.” If the accused is Black or Brown raised in the United States, there is inherent trauma. And, to the obvious question, no. The trauma does not necessitate criminal behavior or justify it. It mitigates. It fills in a picture and offers treatment options, similar to recognizing addiction.

Where do we Go from Here?

The effects of childhood trauma persist. They are linked to mental illness and addiction in adulthood. So why has childhood trauma not been considered a public health crisis? As with other areas, the lifelong health effects of childhood trauma are more prevalent among minorities. They are more likely to participate in risky behavior, struggle financially, and have violent relationships. Criminal defense advocates are in a unique position to lead the charge in addressing trauma and its long-term effects because we receive the broken children and adults as clients. We are often the first to hear their stories in the context of trying to solve the presenting issue of the criminal charges.

At the practical level, the following are some suggestions for having racial trauma recognized, and ultimately codified, in order to assist our clients.

1. Build and nurture alliances with other advocates. We should be in constant communication through list serves and conferences to see what is working in our respective jurisdictions.
2. Testify at legislative hearings and cultivate legislative relationships. We are too often on the defense without contributing our knowledge to changing the law.
3. Participate in policy formation. See a bogus law repeatedly harming your clients, re-write it.
 1. Stop housing young people in adult jails and prisons
 2. Increase the age of juvenile jurisdiction to 18 exclusively
 3. Enact laws that recognize a youth's ability to mature and be rehabilitated by permitting individualized reassessments of youth serving long sentences in the adult system (juvenile clemency board)
4. Collect data. All of your African American clients receiving harsher offers or remaining detained longer? Be able to point out that within a certain time period, there was clear discrepancy.
5. Say yes to the press. Nothing put pressure on the system like public inquiry. Defense attorneys should be the ones creating the narrative.

With regards to suggesting appropriate, rehabilitative treatment for youth of color, take racial trauma into consideration.

1. Make sure that treating professionals have an understanding and acceptance of the premise that race is a critical organizing principle in society.
2. Take a proactive role in encouraging conversations about race in the courtroom, with the prosecutor, with your experts, and with your clients.
3. Youth should be invited to share personal stories of racial experiences. Ask your client questions such as:
 1. Can you tell me a story about the first time you realized you were being treated differently because of your race?
 2. Can you tell me a story about a time when you felt proud of your race?
4. Provide confirmation of the youth's worldview and worth.
5. Give a name to racial oppression. It is difficult to describe and overlaps with other traumas. Do not be part of the dominant view that we live in a colorblind society and your client has a chip on her shoulder or is not a positive person.
6. Increase desire for respect in healthy ways. Problematic behavior is often a counterproductive way to gain respect.
7. Assist in helping youth to re-channel the rage.

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