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## The Effects of Adverse Childhood Experiences on the Future of Our Youth

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### Cover Page Footnote

[1] Population Reference Bureau, Percent of the Population Under Age 18, <https://www.prb.org/usdata/indicator/age18/snapshot/> (last visited May 23, 2023).

# The Effects of Adverse Childhood Experiences on the Future of Our Youth

Patrick M. Cobb\*

## ABSTRACT

22.3 percent.<sup>1</sup> This is the percentage of the population of the United States under the age of 18. These three words should come to mind: growth, family, and safety. Unfortunately, just because these words come to mind, does not mean these are a reality for our youth. The Adverse Childhood Experience (ACEs) study explores our youth’s mental, emotional, and social well-being across a wide sample with some disturbing results.

As we de-code what exactly ACEs entails, we can learn to predict, diagnose, and ultimately prevent negative environments our youth are involved in. Prioritizing these prevention efforts can eventually lead to the avoidance altogether of these adverse experiences resulting in a residual rise in positive change for this 22.3 percent. This effort does not stand alone but does begin somewhere, and somewhere is you, YOU being the parents.

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<sup>1</sup> Population Reference Bureau, *Percent of the Population Under Age 18*, <https://www.prb.org/usdata/indicator/age18/snapshot/> (last visited May 23, 2023).

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### INTRODUCTION

What happens to children when they commit, or are accused of, criminal acts? Should these children be tried as adults through the process of waiver, securely detained while being classified as delinquents, or just given a slap on the wrist and forgiven? The answers to these questions are more complex than you think. When handling juveniles under the age of 18, rights that normally attach to adult individuals are not automatically given to these juveniles under 18. Due to the disability of nonage, these juveniles are seen as requiring heightened protection in the form of the state stepping in and acting under the authority of *Parens Patriae*.<sup>1</sup> Generally, when children are accused of criminal acts, the case is first addressed in a juvenile court setting, unless certain special provisions are met that allow the courts to treat juveniles as adults. Cases that usually are waived into adult court typically involve a very serious charge or a child with a significant history of criminal activity; however, as we will see there exists a grey area into which a certain number of these juveniles fall into. While exploring the nuances of our juvenile justice system, it is important to remember that everyone has a right to a future that is not dictated by their past.<sup>2</sup>

This paper will offer an interpretation of the movements across history distinguishing the traditional juvenile reforms we have witnessed from the more recent “interpretive” approach. I will explain the foundational signs of early childhood marking a critical moment in every

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<sup>1</sup> *Parens Patriae* is a doctrine which asserts a duty on the state to provide for those that cannot care for themselves. See Kimberly Thielbar, *Parental Roles in Juvenile Delinquency*, 31 CHILD. LEGAL RTS. J. 39, 39 (2011).

<sup>2</sup> Jan Jeske & Mary Louise Klas, *Adverse Childhood Experiences: Implications for Family Law Practice and the Family Court System*, 50 FAM. L.Q. 123, 123 (2016).

individual's life and then adapt adverse childhood experiences to these certain situations that can occur. First, I will delve into the psychological processes that we see are being altered by such Adverse Childhood Experiences (ACEs) and what importance they hold. Second, I will describe how these can affect a young child, even through adulthood. Finally, I will adapt these theories beginning with an introduction into the juvenile justice system and continuing with an explanation of how juveniles can be tried as adults, specifically analyzing the factors considered by decision-makers. My argument will revolve around taking ACEs into consideration to determine whether to waive a juvenile into adult court, while pushing for the implementation of policies to be at the forefront of these issues.

The relationship between the core foundational principles of early childhood development and the law reflects what we know from decades of interdisciplinary research and show that the first five years of life are so acutely important for human development.<sup>3</sup> These early years have such an enduring impact on a child's outcomes causing the state to have a distinctive interest in healthy development, but we have yet to see it reflected in the legal system. The state needs to be attentive to the needs of families throughout children's lives, but what we have seen instead is still a mass grouping of these adolescents' committing crimes. The data cannot be ignored: the staggering proof continues to reveal all the health, social, and economic risks that result from childhood trauma. These differences we see in children are present at the schoolhouse gate.<sup>4</sup> Yet, the "reality of childhood for many American children is that they are differentiated from their peers and lack developmental support."<sup>5</sup> "Once children reach school age their differences can become exacerbated, resulting in incidents of discipline, rates of suspension, exclusion, and even a funneling from school to the juvenile justice system in what we call the prison pipeline."<sup>6</sup>

Early childhood is such a critical time in development when "equality can be sustained, or inequality can take root" by stemming from these early differences.<sup>7</sup> During this developmental period, the foundation is laid, which is seen marked by rapid neurological growth that can be positively fostered through the ecology of the child.<sup>8</sup> Since

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<sup>3</sup> Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755, 759-60 (2017).

<sup>4</sup> Nancy E. Dowd & Teresa Drake, *Early Childhood Matters*, 71 FLA. L. REV. F. 1,1 (2019).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

their brains are not fully developed, young people do not think in the same way that adults do. With family being the most important indicator for potential success we can also look to functions within the community, the neighborhood, and layers of policies that can affect the developmental inputs of the child. Children's critical needs are in this developmental support that is found in "early stages of nurturing and response interactions in everyday activities and routines."<sup>9</sup> Usually, we don't know the experiences that children or even adults have gone through until it is usually too late. The commonality of these negative interactions and experiences is concerning, leading to disruption in brain development, lowering of immune systems, and other unhealthy behavior. Differences in this immediate ecology are contributions to social negative impacts that can lead to drastic changes in later years. Poverty in particular, affects nearly one in every five children according to the National Center for Childhood Poverty's recent poll showing roughly 15 million children live with families below the poverty line.<sup>10</sup> With poverty comes added stressors and the greater likelihood for these adverse experiences. Although this can lead to inequality and is certainly a major factor in a youth's development, it does not compare to the lasting effects of childhood trauma.

In addition to the impacts on a child's ecology, "some children are subject to various traumas in their early years that create additional developmental hurdles".<sup>11</sup> Children experiencing trauma in a variety of forms leads to an impact on their development drastically in the short term, and if left unaddressed can have long-term implications. "The Adverse Childhood Experiences (ACEs) framework identifies traumas that can have lifelong implications" when experienced between birth and the age of 18.<sup>12</sup> Such implications can lead to poor performance in school, less peer interaction, and eventually criminal behavior.

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<sup>9</sup> *Id.* at 2.

<sup>10</sup> According to the National Center for Children in Poverty that is putting research into action to improve lives. Specifically, their recent publication for child poverty throughout the United States estimated 15M or about 21% of all children live in families with incomes below the federal poverty threshold. See Yang Jiang et al., *Basic Facts About Low-Income Children: Children Under 18 Years*, NAT'L CTR. FOR CHILD. POVERTY (2015), <https://www.nccp.org/publication/basic-facts-about-low-income-children-children-under-18-years-2015/>.

<sup>11</sup> Dowd, *supra* note 4, at 2.

<sup>12</sup> *Id.*

## ADVERSE CHILDHOOD EXPERIENCES

Adverse Childhood Experiences are potentially traumatic events that occur in childhood (ages 0-18), that can play a crucial part in an individual's behavioral, mental, and social well-being.<sup>13</sup> Originating in San Diego in 1995, The ACE study is an ongoing collaborative research project between the Centers for Disease Control and Prevention and Kaiser Permanente.<sup>14</sup> The first study involved patients selected during a routine health screening who were then mailed ten questions relating to adverse childhood experiences. The questionnaires were titled "Family Health History and Health Appraisal" to give the participants some knowledge of what information was to be collected. The questionnaires focused on gathering information about child abuse, neglect, household challenges, and other social-behavioral factors. The questionnaires were broken up into two waves and received a generous 70 percent return, revealing frightening statistics. Experiences suggested in the questions included, but were not limited to violence, abuse, neglect, witnessing violence, or being directly or indirectly affected by suicide. Demographic information from the entire ACE study sample included 17,337 participants with a 54 percent female and 46 percent male ratio.<sup>15</sup> Race/ethnicity statistics revealed 74.8 percent Caucasian, 11.2 percent Hispanic, 7.2 percent Asian/Pacific islander, 4.5 percent black, and 2.3 percent other.<sup>16</sup> The age groups ranged from 19-60 years and over with most responses coming from the older aged groups and progressively decreasing down to age 19.<sup>17</sup> Educational demographics within the Southern California region, revealed a 39.3 percent college graduate degree or higher.<sup>18</sup>

An ACE score is found by a tally of all the yes answers to each individual question. The three main overarching categories under ACEs include abuse, neglect, and household dysfunction. Under each of these categories, a child can experience life altering situations and events that affect his or her growth and attachments both socially, economically, and physically. Of the 17,337 responses accumulated in the initial ACE initial report the prevalence of at least one of these categories can be

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<sup>13</sup> Jeske, *supra* note 2 (discussing the original study that utilized adverse childhood experiences which led to further studies to complement the initial results).

<sup>14</sup> *Id.*

<sup>15</sup> *About the CDC-Kaiser ACE Study*, CDC (April 6, 2021), <https://www.cdc.gov/violenceprevention/aces/about.html>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

found.<sup>19</sup> A striking one-third of the demographics have experienced an adverse event that could potentially have long-term side-effects. These hallmarks which are indicative of a rough childhood are fairly consistent signs for future harm as well as for risk of potential health problems. Abuse statistics revealed a positive rate of 10.6 percent for emotional abuse, 28.3 percent for physical abuse, and 20.7 percent for sexual abuse.<sup>20</sup> Household challenges showed a whopping 26.9 percent substance abuse issue, 19.4 percent mental illness, and 23.3 percent separation or divorce rates.<sup>21</sup>

Vulnerable populations are more prone to experiencing these ACEs because of the social and economic conditions in which they live, learn, work, and play. Although ACEs are common across all populations, notably, the study's participants consisted of mostly middle-class, college-educated, white individuals. By retrospectively assessing these individuals, we can prospectively prepare for the impact of an overall dysfunctional household and plan for the care of these children subjected to such abuses.<sup>22</sup>

Understanding what an ACE score is can limit the exposure to negative consequences later in life. The risks associated with an ACE score of four or more in any of the above-mentioned categories "had a four-twelfth fold health risk for alcoholism, drug abuse, depression, and suicide attempt; a two-fold increase in smoking, poor self-rated health, fifty or more sexual partners, sexually transmitted disease, and a one-fourth fold increase in physical inactivity and severe obesity."<sup>23</sup> These adverse childhood experiences are beginning to show premature mortality rates as well.<sup>24</sup>

#### A. ACEs Applied Today

A Centers for Disease Control and Prevention (CDC) initiative in Minnesota set up an ACEs study which uncovered a behavioral risk factor status that was consistent with the initial ACE study at Kaiser.<sup>25</sup> The occurrence of just one ACE score made the chances of another one

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<sup>19</sup> *Id.*

<sup>20</sup> CDC, *supra* note 15.

<sup>21</sup> *Id.*

<sup>22</sup> Huntington, *supra* note 3, at 814.

<sup>23</sup> Jeske, *supra* note 2, at 130.

<sup>24</sup> Yael Cannon & Andrew Hsi, *Disrupting the Path from Childhood Trauma to Juvenile Justice: An Upstream Health and Justice Approach*, 43 *FORDHAM URB. L.J.* 425, 434 (2016).

<sup>25</sup> The Minnesota ACEs study pulled sample data from Wave II of the original ACEs study conducted at Kaiser Permanente. See Jeske, *supra* note 2.



occurring that much more frequent.<sup>26</sup> During the Minnesota Student Survey (MSS) 84 percent of public schools agreed to participate and revealed a shocking concern. Across Minnesota, 66 percent of fifth graders and 71 percent of eighth graders participated. Of these students, 35 percent had one or more ACEs.<sup>27</sup> These numbers are profoundly concerning and raises the question of why more is not being done to aid in these children's development. Training and Trauma-Informed Policies would be the start, but where to begin?

Healthcare providers, psychologists, and child therapists can help reduce these risks by looking for the signs. Anticipating certain behavioral or social cues can be an effective way to begin intervention or possible help referral. Recommending effective victim-centered approaches and therapeutic treatments could be the life-saving devices we need for a prolonged future. "Early intervention are those developmental services, under special education law, for children with physical, mental, or social disabilities."<sup>28</sup> These services include family therapy, occupational treatment, communication, and psychological services.<sup>29</sup> By disrupting the path, adverse childhood experiences limit a child's potential and overall chance for success.

Ecological and trauma differences raise critical policy issues when dealing with children. In our juvenile justice system, the response to family needs is far less intrusive and at times subordinating than it should be. Ecological differences do not mean an unfair advantage; differences simply mean that not every child will experience the same family model, participate in a healthy school system, and ultimately follow a unique path. In turn, this affects the daily practice for family law attorneys or legal services attorneys who are representing and handling cases involving children who have experienced such hardships.

Family law attorneys should be aware of the negative effects of adverse childhood experiences. Clients who see that the attorney understands the trauma that they have experienced can lead to an open flow of communication and overall positive attorney-client relationship. This relationship can develop a higher level of trust, leading to better overall representation, which can lead to future referrals and overall success as a practicing family and children law attorney. The delicate nature of these cases arising out of violent situations supports the need for sustained organizational and grounded policymaking. Through advocating, training, and eventual implementation, we will then begin to

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<sup>26</sup> *Id.* at 130.

<sup>27</sup> *Id.* at 131.

<sup>28</sup> Cannon, *supra* note 24, at 428.

<sup>29</sup> *Id.*

see a change and the effect made for these victims, victims being what these children are.

Toxic stress stemming from ACEs does not just affect a child's mental and physical health but also their behavioral health.<sup>30</sup> Every response to trauma releases more toxic stress which is then manifested in a multitude of ways; one of which being crime.<sup>31</sup> What is interesting but less known are the effects of ACEs on "predicting internalizing (i.e., psychological) or externalizing (i.e., criminological/antisocial) outcomes."<sup>32</sup> There exists a variety of risk factors for criminological behavior. This includes deficits such as impulsivity, low empathy, weak parental supervision, and structural issues portrayed in the home or neighborhood.<sup>33</sup> Through a joint collaboration between multiple universities across the state, researchers conducted a study looking for the effects of ACEs on internalizing versus externalizing outcomes (IOs and EOs).<sup>34</sup> The study utilized regression techniques and propensity matching scores with results that indicated that the most pertinent factor for predicting externalizing problems exemplified through criminal behavior was emotional abuse.<sup>35</sup> Household incarceration, physical abuse, emotional neglect, and household violence or substance abuse also predicted EOs, while sexual abuse was the only ACE predictive of IOs. With emotional abuse consistently being the strongest predictor of externalizing behavior, it is important to utilize intervention and prevention techniques targeted at this specific factor. By establishing these correlates of delinquency, these behaviors are predictive in nature and thus preventable. Significantly reducing the potential for such behaviors, we focus on the large caseload of already delinquent juveniles we face today. ACEs do not just affect juveniles during their young adulthood, but also affect them well into their later life.

*ACEs: The Original Family Health History Questionnaire* can also be used to see the effect these adverse experiences have later in life. The National Center for Biotechnology adapted the original ten ACEs including abuse, (sexual, emotional, and physical), neglect (physical and emotional), and household challenges (mother treated violently, household mental illness, incarcerated family member, household

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<sup>30</sup> *Id.* at 440-41.

<sup>31</sup> *Id.* at 461.

<sup>32</sup> Caitlyn N. Muniz et al., *The Effects of Adverse Childhood Experiences on Internalizing Versus Externalizing Outcomes*, SAGE J. 568, 569 (Feb. 10, 2019).

<sup>33</sup> *Id.* at 572.

<sup>34</sup> *Id.* at 570.

<sup>35</sup> The study conducted by Professor Muniz at the University of Texas at El Paso used a sample of 30,909 youth who exclusively exhibited internalizing or externalizing problems. *See id.* at 581.

substance abuse, and parental separation or divorce).<sup>36</sup> These items were adapted to the Conflict Tactics Scale found in Wyatt's 1985 paper and the Childhood Trauma Questionnaire.<sup>37</sup> The study examined the relationship between ACEs and four mental health outcomes that showed a drastic and similar set of outcomes as seen previously in children. The four mental health factors utilized in the research study (Unpacking the impact of adverse childhood experiences on adult mental health) were drug use, alcohol use, depressed affect, and attempted suicide. For example, a single item on the survey assessed the experience of being spanked and prefaced the question with the statement, "sometimes parents spank their children as a form of discipline."<sup>38</sup> The answer options consisted of five available responses ranging from never being spanked to spanked weekly or more.

Data for this study was drawn from Wave II of the CDC-Kaiser study on ACEs that was collected in 1997. The sample consisted of adult members of Kaiser Permanente seeking routine health checks at an outpatient clinic. Most of the sample were Caucasian (75.2%), followed by 10.7% Hispanic, 7.6% Asian, 4.1% Black, and 2.4% other races and ethnicities.<sup>39</sup> Mirroring the original sample with the same type of data collection methods, this was deemed the most accurate way to achieve the desired results. The results indicated a general dose-response relationship between ACE score and adult mental health problems.<sup>40</sup> A single ACE score increased the odds of experiencing at least one of the four factors.<sup>41</sup>

For example, compared to individuals with no ACEs, individuals reporting 6 or more ACEs had 2.73 times increased odds of reporting depressed affect during adulthood, 24.36 times increased odds of attempting suicide, 3.73 times increased odds of reporting drug use, and 2.84 times increased odds of reporting moderate to heavy drinking after adjusting for socioeconomic factors.<sup>42</sup>

These findings suggest that expanded ACE studies have the potential to capture a breadth of diverse experiences that may impact

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<sup>36</sup> Melissa T. Merrick et al., *Unpacking the Impact of Adverse Childhood Experiences on Adult Mental Health*, NAT'L. SOC'Y FOR BIOTECH INFO. 1, 4 (Apr. 15, 2017).

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.* at 5.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.* at 7.

<sup>41</sup> Merrick et al., *supra* note 36, at 7.

<sup>42</sup> *Id.* at 7.

lifelong health and well-being not previously considered by more traditional ACE studies. The associations between each ACE and adult mental health outcome were examined in addition to the overall dose-response relationship.

Those who experienced childhood adversity may use alcohol and drugs as a coping mechanism.<sup>43</sup> Children who are exposed to such adverse experiences may resort to these methods as well, which is seen later in life with alcohol being used as an alleviator of negative moods.<sup>44</sup> Indicators such as emotional abuse and neglect in childhood can also cause significant harm to the developmental processes and have lasting impact on adult mental health. When children are subjected to such harsh environments and repeatedly humiliated, threatened, demeaned, and denied the love and affection every child deserves, the consequences can be far-reaching and extend well into adult life.<sup>45</sup> Experiencing such adverse times during such delicate years, it is no surprise that delinquency rates have been persistently increasing. As we delve into the workings of our juvenile justice system it is important to remember that everyone has the right to a future that is not dictated by their past.<sup>46</sup>

#### THE JUVENILE JUSTICE SYSTEM

A major way the juvenile justice system differs from the adult criminal justice system is the juvenile justice system's objective revolving around rehabilitation. This goal is drastically different from the five main theories of punishment usually associated with criminal law: general deterrence, specific deterrence, incapacitation, isolation, and retribution. Juvenile courts were created with the understanding that children are not mature enough to be held responsible for their actions in the same way adults should be held responsible.<sup>47</sup> It is believed that most, if not all, of these children that enter the juvenile courts can be rehabilitated in some way. However, rehabilitation was not always the idea. Three-quarters of a century ago, we saw a substantial and influential change in the way the court systems handle juveniles. Stemming from the famous trilogy of *Kent*, *Gault*, and *Winship*, we see

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 8.

<sup>46</sup> Jeske, *supra* note 2, at 123.

<sup>47</sup> Nicole Scialabba, *Should Juveniles Be Charged as Adults in the Criminal Justice System*, ABA (Oct. 3, 2016)

<https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-as-adults/>.

constructive rights were established for juveniles.<sup>48</sup> Establishing their simple due process rights was a breakthrough into how youth are treated today.

More specifically, in juvenile courts, a child accused of a crime is neither convicted nor sentenced to jail or prison, instead; he or she is considered a delinquent or “in need of supervision” which is all based upon a report by the Department of Juvenile Justice called the Detention Risk Assessment Instrument (DRAI). The DRAI includes a multitude of factors to address the youth’s situation and ultimately provides a score for that child. The scores have a range from zero to six points which allows for automatic release, seven to twelve points calls for home detention or supervised released, and thirteen or more points which require secure detention. If a juvenile is classified under a different score than recommended from the DRAI, written formal findings from the record need to be made highlighting the simple due process rights found in *Kent* which have been expanded upon as we have progressed.<sup>49</sup> These steps are also similar under the legal provisions where juveniles can be tried as adults.

The focus will not only be on how juveniles are treated overall throughout their journey into adult court, we will also review specific examples of waiver in context. A judge’s determination of whether to waive a juvenile from juvenile jurisdiction to adult court can be influenced in a multitude of ways. The factors used in today’s courts in making such a determination are still questionable and fail to consider ACEs and the tender years of these juveniles.

Waiver refers to the process by which a juvenile, over whom the juvenile court has jurisdiction, is transferred to the adult criminal court.<sup>50</sup> At this point in time, it is critical that the juvenile judge look to a set of solid factors in making his or her determination. During the waiver process, juveniles lose the *parens patriae* protection afforded to them under the juvenile system. Juveniles entering the adult criminal prosecution arena fear public hostility, fewer employment opportunities, and a negative stigma. Waiver also increases juveniles’ chance for recidivism by increasing the offender’s chances of continuing indefinitely in the criminal justice system with little choice or

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<sup>48</sup> This trilogy of case law was set forth in the 60’s where we see juveniles attaining due process rights in response to the lack of structure and oversight in the juvenile system. *See Kent v. United States*, 383 U.S. 541 (1966); *see also In re Gault*, 387 U.S. 1 (1967); and *see also In re Winship*, 397 U.S. 358 (1970).

<sup>49</sup> Theilbar, *supra* note 1.

<sup>50</sup> *See* Kristin Henning, *Juvenile Justice after Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J. L. & POL’Y 17 (2012).

opportunity otherwise. From a public perspective, it is important to consider protection from violent juveniles. Looking through a social lens, it may not seem all that disastrous waiving a juvenile into the adult realm, but what if that juvenile were already coming from a disastrous setting?

American society looks upon childhood with special consideration. Developments in child labor laws and public education are just at the forefront of a desire to protect our nation's youth. The historical justification for a separate justice system is expressed in the notion *parens patriae*. *Parens patriae* functions under the principle that political authority carries the responsibility for the protection of its citizens, i.e., juveniles. The government has this inherent power, or authority, to act as a legal protector in certain situations. With the rapid spread of a separate juvenile justice system came countless situations in which delinquent children were subjected to it. Beyond this rapid growth of the juvenile justice system was a belief that being saved from a life of crime through constant guidance and or rehabilitation, which still remains the ultimate goal at the forefront of our juvenile justice system. This appears consistent for children who have suffered from adverse childhood experiences. Despite this optimism, there were still children beyond the reach of the juvenile justice grips.

Due to the significance of the waiver hearing, the criteria to make such a decision to transfer a child is critical. "The standards by which a judge makes his or her determination are usually fixed by statute or court rule."<sup>51</sup> Florida Statute 985.556 outlines the judicial waiver process, allowing for voluntary or involuntary waiver for juveniles, and imposes harsh and restrictive guidelines that seem completely out of line with the ultimate goal of rehabilitation.<sup>52</sup> Assigning the age at fourteen for a delinquent felony conviction, leads to involuntary automatic waiver into adult court, and seems counterintuitive to juvenile court sanctions. This seems to stem from a public outcry in response to the high rate of juvenile crime over the years. Due to the disappointing juvenile justice system it is no surprise the apparent willingness to impose harsher sentences and volunteering to waive these juveniles into the adult system. Although the judge seems to make the final determination, prosecutorial discretion plays a more integral role.

Although judicial waiver is the most common method for transferring a juvenile offender into the adult criminal justice system, an alternative method exists. Legislative waiver and prosecutorial choice

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<sup>51</sup> Theilbar, *supra* note 1.

<sup>52</sup> See FLA. STAT. § 985.556 (2022).

utilize some of the same methods while achieving the same end results.<sup>53</sup> Legislative waiver is simply an automatic transfer of a juvenile into adult jurisdiction based upon the juvenile's age and the crime committed. Prosecutorial choice, on the other hand, involves discretion that largely remains "unchecked," but even the prosecutor must stay within certain specified boundaries.<sup>54</sup> While examining certain statutes it is important to check the validity of such prosecutorial discretion while employing methods by which the rights of the juvenile may be protected.

Statutes defining legislative waiver and prosecutorial discretion have been adopted as a method for dealing with repeat juvenile offenders while imposing stricter sentences on them; without effective exercise of these statutes, they can have harsh effects on first time offenders. These one-time offenders are the ones that seem to slip through the cracks, are more than likely to suffer from at least one ACE and have a greater probability of entering the prison pipeline. Upon entering any sort of detention facility, whether it be a juvenile or an adult, the juvenile will return to society with a hardened attitude, while society will take a step back from the usually humanitarian and rehabilitative attitude it has towards such juveniles.<sup>55</sup> The system has procedural safeguards in place to ensure due process rights are met, but what about substantive due process?

The judges in juvenile courts are afforded discretion to transfer any case to adult court. This process is also known as waiving the exclusive jurisdiction that is afforded juvenile courts to hear cases involving juvenile offenders. Under a waiver or transfer process, the prosecutor requests such an action and then the judge decides whether to grant the request.<sup>56</sup> Factors that usually influence a judge's decision include: the seriousness of the offense, whether there was harm to another person, the age of the juvenile, the record of criminal activity, and the juvenile's amenability to treatment.<sup>57</sup> However, where are the ACEs?

"The juvenile court was notable not for the goals it sought to accomplish or the technology it employed but for the institutional ideology upon which its authority rested."<sup>58</sup> Throughout the decades, the juvenile justice system has seen major changes in what can and cannot be done. "The juvenile court is an institutional organization whose formal

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<sup>53</sup> Wallace J. Mlyniec, *Juvenile Delinquent or Adult Convict - The Prosecutor's Choice*, 14 AM. CRIM. L. REV. 29, 33 (1976).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 37.

<sup>56</sup> *Id.* at 31.

<sup>57</sup> *Id.*

<sup>58</sup> John R. Sutton, *The Juvenile Court and Social Welfare: Dynamics of Progressive Reform*, 19 LAW & SOC'Y REV. 107, 109 (1985).

structures (or lack thereof) derives more from the” need to achieve a legitimate structure “than from the technical requirements of judging and disposing of delinquents.<sup>59</sup> We observe this by following a historical trilogy of cases, starting with *Kent* which established that juveniles deserve the same basic due process rights as adults while under the jurisdiction of juvenile court.<sup>60</sup> After *Kent*, *In re Gault* expanded and formalized these fundamental due process rights. And lastly, as seen in *Winship*, we see the standard of proof being set at “beyond a reasonable doubt.” These cases finalized the rights, proof, and burden to convict juveniles.<sup>61</sup> Making this process more uniform and structured was a step in the right direction but there exists a lot of work yet to be done.

Roughly a half century later, in another highly contested set of cases, we see yet another expansion upon the fundamental rights of juveniles as held in the trilogy of *Roper*, *Graham*, and *Miller*.<sup>62</sup> By limiting the imposition of life without parole sentences on juveniles, as seen in *Graham* and *Miller*, the court relies on the juvenile’s “lack of maturity and underdeveloped sense of responsibility” for such a ruling.<sup>63</sup> This relates back to the entire system revolving around rehabilitation as the ultimate goal. For a juvenile to otherwise be subjected to such a harsh restriction there must be an irretrievable depravity showing rehabilitation is impossible for such an offender.<sup>64</sup> The importance of these cases is that the sentence imposed must reflect the child’s background, character, and potential for change. “It is not sufficient that a sentencer simply considers the mitigating effect of youth before imposing a sentence.”<sup>65</sup> These cases, although tend to be rare, are increasing at a high rate of concern. What does this then mean for our juvenile justice system and how can we limit such abuses actively occurring moving forward?

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<sup>59</sup> *Id.*

<sup>60</sup> *Kent*, 383 U.S. at 553.

<sup>61</sup> *In re Winship*, 397 U.S. at 368.

<sup>62</sup> See *Roper v. Simmons*, 543 U.S. 551, 578 (2005); see also *Graham v. Florida*, 560 U.S. 48, 82 (2010); and see also *Miller v. Alabama*, 567 U.S. 460, 489 (2012). for a discussion of extending the rights found previously in *Kent*, *Gault*, and *In re Winship*.

<sup>63</sup> *Graham*, 543 U.S. at 68.

<sup>64</sup> Henning, *supra* note 50, at 24.

<sup>65</sup> Amy Weber et al., *Juvenile Life Without Parole: Irreparable Corruption as a Substantive Standard*, FAIR PUNISH PROJECT (2016), <https://secure.in.gov/ipdc/files/Juvenile-LWOP-motion.pdf> (In 2016, the Fair Punishment Project issued a report highlighting systematic misconduct in several prosecutor offices across the country. The study focused on more than juvenile life without parole but also the death penalty and other excessive penalties among the youth).



*A. Deterrence*

Harvard Law School's Charles Hamilton Houston Institute for Race and Justice and its Criminal Justice Institute created the Fair Punishment Project to investigate specific areas of juvenile law.<sup>66</sup> One such area that the joint initiative focused on was juvenile life without parole. The project provided concise briefs regarding important doctrinal questions that have and are currently developing in state and federal courts. The main goal of the project was to promote a proportionate, fair, and accountable justice system. Operating through the holdings found in *Miller*, *Graham*, and *Roper*, courts have concluded that *Miller* created a substantive standard that conditions life without parole on reflecting "irreparable corruption" or "permanent incorrigibility."<sup>67</sup> But how is that determined and tested for the rare juveniles for whom it is questioned against?

It is clear that the sentencer does perform some sort of forward-looking inquiry into whether a meaningful possibility exists that the juvenile will experience growth and maturity at some point in his or her life; because "before imposing life without parole, a sentencer must conclude that a particular child is the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible."<sup>68</sup> This sort of thinking and planning needs to be implemented not just in the rare or severe cases but in all cases in that which less than parole is being offered.

Juveniles as a whole tend to be more vulnerable and susceptible to external influences stemming from inside the home than to peer pressure. Vulnerability due to age inside the home can be seen in the form of prospective abuse, either sexual or physical, single parent home, or drug dependent authority figures.<sup>69</sup> Now that we can start classifying these vulnerabilities and putting a label to them, we can gain a better understanding of what is occurring. The role of ACEs is fundamental to grasp the severity of the situations these children are involved in.

Children exposed to such complex issues should have diminished culpability for their actions. The balance between children's autonomy and children's vulnerability shows a clear need for protection. Protecting our youth does not need a call for reduced autonomy for these children or more state interference, but instead a careful yet intelligent approach in handling these situations. Reformers of such policy change, following

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See generally Huntington, *supra* note 3.

late nineteenth century progressivists, further believed that youth lacked the capacity for moral and reasoned judgment and that their behavior was impulsive and caused by environmental factors beyond their control. When determining whether to waive or transfer a juvenile to adult court, it is important to take all relevant factors into consideration, especially the need for rehabilitation and the existence of any adverse childhood experiences. Abuses can stem from physical, emotional, or sexual harm, while neglect can be seen in the form of physical and emotional actions. When it comes to household dysfunction, it is important to account for divorce, substance abuse issues, violence, incarcerated relatives, or history of mental illness. Knowing just these simple yet disheartening facts can not only help one understand and communicate with children with just an ACE score of one, but it can also help plan for their future accordingly. Studies have further shown that ACEs increase both physical and mental health risks, portrayed in poor behavior.<sup>70</sup> When we dive into what the courts actually utilize when making such dramatic and life changing determination for these youths, it is important to keep in mind how closely they parallel such a convincing piece of information ACEs has become.

### *B. Prevention*

Crime prevention seems to be a second thought for most social policy makers. When trying to play catchup with the crime rates, coupled with large caseloads, struggling with overcrowded prison systems, and underfunded justice programs, it seems logical to start at the beginning. Despite the rehabilitative goal of the juvenile courts, delinquency prevention is still not a growing idea in most jurisdictions. There are many family risk factors associated with juvenile delinquency. “Family characteristics, such as low socioeconomic status, parental involvement in criminal activities, domestic violence, and child abuse and neglect.”<sup>71</sup> These factors are similar to the ACEs study developed, which showed that children exposed to abuse, neglect, or household dysfunction are not only at a greater risk of physical and mental health, but more prone to criminal activity. “Families with delinquent children often experience more emotional turmoil and conflict in the home than other families.”<sup>72</sup> This turmoil, in turn, develops into outward expressions of defiant and disrespectful conduct by the juvenile which can filter into the school system towards teachers and peers, and secrecy towards parents and

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<sup>70</sup> Jeske, *supra* note 2 at 123.

<sup>71</sup> Thielbar, *supra* note 1 at 40.

<sup>72</sup> *Id.*

adult figures.<sup>73</sup> Poor communication stems from all these events leading to a poor relationship between the child and parent, which is the root of the problem.

In addition to these negative aspects of dysfunctional households, “researchers have identified protective factors that buffer the negative effects of exposure to risk factors, stopping the development of behavioral problems.”<sup>74</sup> Researchers have found these protective factors to “include strong, supportive bonds with positive family members or other adults and having clearly stated rules and expectations for their children’s behavior.”<sup>75</sup> Adding structure such as this can bring children closer to their parents without interfering with their daily routine. Five major types of “protective factors” have been identified and categorized: “1) supportive parent-child relationships; 2) positive discipline methods; 3) monitoring and supervision; 4) advocating for children; and 5) seeking information and support.”<sup>76</sup> Juvenile courts can utilize these protective factors while simultaneously incorporating them into their rehabilitative practices. Keeping adverse childhood experiences in conjunction with the identified protective factors can help reduce the risk of childhood delinquency.

It is important to realize the protective factors cannot guard against every type of influence a child may come across. Community and environmental factors are fluid, and cannot be changed, so when juveniles are released, they are potentially returned to the same environment that prompted their arrest. Delinquent peers, gangs, and other negative influences confront these children on a day-to-day basis and can lead to a recycling effect and a prison pipeline system.<sup>77</sup> Given the major impact these factors have and the unlikely chance of eliminating them, it is important to equip these children, as well as their parents, with skills to cope. Parental involvement in delinquency cases is crucial when dealing with these types of situations.<sup>78</sup>

A family’s role not only can play a risk factor but can also be a vital component in the prevention of delinquency. The youth of Orange County, Florida, in particular, are susceptible to these unique risks. An average of 12,500 youths are estimated to have social, emotional, and behavioral health challenges with 500 youths under the age of twelve

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Thielbar, *supra* note 1, at 40.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

being referred to the Orange County Juvenile Justice Center.<sup>79</sup> Orange County has implemented Wraparound Orange to facilitate a family driven youth-guided and culturally competent system of care for the youth.<sup>80</sup> By developing and sustaining less restrictive treatment options together with an aggressive community-wide outreach and education campaign, using existing and emerging outreach methods, families are equipped with the tools necessary to combat their challenges.

Another way parents can have an impact on their children's involvement with the juvenile justice system is through direct communication with their child's attorney.<sup>81</sup> Children are afforded legal representation at every stage of the process as established in *Gault*.<sup>82</sup> "This right means that the child has the right to make key decisions regarding their representation."<sup>83</sup> Parents, on the other hand, are seen as a source of physical and moral support whereas children look to them for guidance and understanding while involved with the system.<sup>84</sup> Finding that balance of where the parent fits in regarding the child-attorney relationship can have positive or devastating impacts. Only through careful placement and willingness on the part of the child will positive interactions occur leading to ultimate rehabilitation for the juvenile delinquent.

### C. Delinquency Today

Delinquency in the United States is also seeing a drastic change in the number of female juvenile offenders. "With rates of arrests for girls in the United States fast outpacing those for boys, the past decade has seen increasing attention devoted to understanding the causes, consequences, and solutions for girls' delinquency."<sup>85</sup> Girls are now estimated at about 30 percent of the annual arrests, according to the National Child Traumatic Stress Network.<sup>86</sup> Research focusing on these

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<sup>79</sup> *Wraparound Orange*, ORANGE CNTY. GOV'T FLA., [https://www.orangecountyfl.net/Portals/0/Library/Families-Health-Social%20Svcs/docs/Logic\\_Model\\_6\\_8-11%20CERT.pdf](https://www.orangecountyfl.net/Portals/0/Library/Families-Health-Social%20Svcs/docs/Logic_Model_6_8-11%20CERT.pdf) (last visited April 6, 2023).

<sup>80</sup> *Id.*

<sup>81</sup> Thielbar, *supra* note 1, at 40.

<sup>82</sup> *In re Gault*, 387 at 1.

<sup>83</sup> Thielbar, *supra* note 1, at 40.

<sup>84</sup> *Id.*

<sup>85</sup> Patricia Kerig & Julian Ford, *Trauma Among Girls in the Juvenile Justice System*, NAT'L CHILD TRAUMATIC STRESS NETWORK JUV. JUST. CONSORT 4 (2014), [https://www.nctsn.org/sites/default/files/resources/trauma\\_among\\_girls\\_in\\_the\\_j\\_j\\_system.pdf](https://www.nctsn.org/sites/default/files/resources/trauma_among_girls_in_the_j_j_system.pdf).

<sup>86</sup> *Id.*

increases have suggested that these girls in the juvenile justice system have higher levels of exposure to trauma and victimization.<sup>87</sup> With these higher levels of exposure, girls are acting out and demonstrating higher levels of mental health problems, including PTSD, when in comparison to their male peers.<sup>88</sup> Careful analysis of the data suggests that these girls not only suffer from unequal levels of exposure to trauma which can be seen stemming from ACEs, but that changes in mandatory sentencing and law enforcement policies seem to also be playing a role.

Why are we seeing such a dramatic increase in girls' arrest rates, while boys' arrest rates for violent crimes has decreased by six percent?<sup>89</sup> What is happening actually has been coined "net-widening" or "up-criming."<sup>90</sup> By increasing penalties for low-level infractions, such as those for drug possession and domestic violence where we used to see youths being sent into diversion programs, we are now seeing them face the full-frontal force of the juvenile justice system. By implementing these minimum mandatories, strict DRAI guidelines, and increased penalties for minor infractions, we seem to be doing more harm than good. Such harm leads to higher recidivism rates, greater percentages of delinquent youth, and overall dysfunction throughout our juvenile justice system.

The state is supposed to act as a guardian when children are vulnerable and sometimes at their lowest. Reverting to the doctrine of *parens patriae*, the state has ultimate authority and control in some situations. After experiencing trauma from adverse childhood experiences, we will see a backlash and poor behavioral demonstrations, in youths, but what we do about these episodes is critical in forestalling negative future developments. For example, "[a] review of arrest reports involving 1,000 girls in California found that the majority of charges against girls for domestic assault resulted from non-serious and mutually combative situations with parents."<sup>91</sup> Simple and sometimes laughable situations such as "throwing cookies" or "wrestling a phone away from a teenage daughter" arise,<sup>92</sup> but do these situations rise to the level of needing to arrest and detain a juvenile? A mutual problem exists between parenting and troublesome youth. Generation after generation we are seeing poor parenting styles and disrespectful youth in return. This conflict in most ways is what gives rise to delinquent behavior.

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Kerig, *supra* note 85.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

Another growing concern for these female juveniles is the appearance of unequal treatment once involved with the juvenile justice system. Girls appear to receive harsher treatment from the juvenile justice system than boys. When boys and girls engage in misbehavior, girls are seen to be detained twice as much for status and technical offenses such as i.e., violating probation, and receive more severe punishments for those charges once violated.<sup>93</sup> The most common crimes girls commit can be called “survival crimes,” and include running away, shoplifting, involvement in commercial sexual exploitation.<sup>94</sup> These crimes are coined survival crimes because girls are running away from a toxic home environment with no other place to go. By escaping the vicious cycle of abuse or neglect in their home life, girls are looking for activities that wind up being delinquent acts and in turn land them a trip to the juvenile justice system. Involvement in these activities also leads to a higher rate of revictimization, which then leads to a higher rate of recidivism, particularly the exposure of these risks associated with such crimes.<sup>95</sup> Girls are experiencing a special type of double jeopardy through being driven by their experiences of victimization.

#### CONCLUSION

Through countless research studies, a recurring finding is that youth in the juvenile justice system have been exposed to significantly higher rates of traumatic events than community youth. Rates of exposure have been seen ranging from seventy to ninety-six percent. In comparison to the modern ACEs study with similar percentages, these trauma experiences are borderline mimicking the true ten ACEs study test but are just being given different titles. The National Child Traumatic Stress Network has termed the grouping of these trauma experiences “polyvictimization.”<sup>96</sup> This is just another way to conceptualize the dramatic impact such experiences can have on the youth, particularly young girls. “Dangerous and troubled families thus may place girls at particular risk for both pervasive traumatic victimization and for involvement in the juvenile justice system.”<sup>97</sup> In a nationally representative sample, the study involved over 3,000 youth which found out not only that girls are more likely than boys to be polyvictims, but that polyvictimization itself was a predictor of delinquency.<sup>98</sup> Another

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<sup>93</sup> *Id.* at 4-5.

<sup>94</sup> *Id.* at 5.

<sup>95</sup> *Id.*

<sup>96</sup> Kerig, *supra* note 85, at 6.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

study conducted, the sample consisted of 2,000 youth and showed girls being significantly over-represented amongst the polyvictims while being under-represented in the sub-group who experienced few or no trauma exposures.<sup>99</sup>

Estimates of trauma among delinquent youth have a fairly consistent evidence rate. Whether the children are assessed using the ACE's scoresheet, the NCIS chart, or the surveys conducted by the National Child Trauma Stress Network, incidents of delinquent behavior are again not the only side-effects observed. The prevalence of PTSD among justice-involved girls is prevalent. The kinds of assessments performed not only look at clinical interview vs. self-report but also full vs. partial and current vs. lifetime PTSD effects.<sup>100</sup> "Studies of community samples indicate that PTSD is 3 times more prevalent among girls than boys."<sup>101</sup> Other findings consistent with PTSD, show that girls are more likely to develop co-morbid disorders, particularly depression, and associating trauma exposure with a multitude of other negative psychological and physical outcomes.<sup>102</sup> Among these girls, we see higher rates of substance abuse, self-harm, and participation in risky sexual behaviors.<sup>103</sup> The accumulation of these longitudinal research projects on the developmental psychopathology of delinquency, indicates that the maltreatment, victimization, and the trauma that these girls are experiencing are strong predictors of justice-involvement. By turning to unhealthy strategies to deal with conflict at this point in these girls lives, it is important to understand the psychological, physical, as well as the emotional processes that are occurring.

Interviews with stakeholders in the justice system, including staff, parents, and the girls themselves, confirmed the countless hours of research and their findings.<sup>104</sup> The many negative characteristics and experiences found inside the court and detention environments lead to such re-trauma. Such experiences include overtly physically intrusive and threatening detention procedures, witnessing violence among peers, and exposure to restrictive and offensive procedures being implemented against other incorrigible youth.<sup>105</sup> Posttraumatic reactions can be triggered by such events with the complete lack of privacy or control over their bodies.<sup>106</sup> By acting against these policies, the youth find

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Kerig, *supra* note 85, at 6.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

additional sanctions being brought down upon them. Such involvement seems to have adverse rather than ameliorative effects.<sup>107</sup> The creation of a trauma-informed juvenile justice system in which the staff are trained on how to recognize and respond to triggers is an important step forward. These steps should not just be recognized as a gender exclusive problem. By implementing a variety of gender-responsive and inclusive programs, such as cultural, relational, and strength-based, such programs can yield positive results.

Recognizing the distinct pathways toward delinquency can have targeted effects, and in return, lead to the development of confidence and trust among the youth. Hinging recovery and rehabilitation upon the needs of affected youth will foster important relationships and hopefully foster the end of high recidivism rates. Collaboration is key in the search for a successful outcome. Given the importance of multiple relationships, many key actors play a part in such a process, such as family members, romantic partners, therapists, and juvenile justice professionals.<sup>108</sup> Working together for the future of our youth should be a priority. Decades of data and statistics can help guide the path to new ways and detention methods for delinquent youth if required. But why not prevent the youth from ever having to go through such an experience? Policymakers, judges, and the juvenile justice professionals should be aware of this information in making their determinations.

These research results stress the importance of examining the effects of cumulative ACE scores, individual ACE categories, and health outcomes for the youth experiencing multiple other types of traumas outside of the ACE's test. Providing a more complete picture of childhood adversity is collectively insufficient. But, by examining each child individually, a picture can be painted to pinpoint what exactly is occurring. It is imperative that practitioners and researchers alike recognize these different forms of childhood adversity and how the different forms can be so deeply intertwined. Understanding them individually and additively can influence health outcomes and lead to key risk factors as well as protective factors. "Though we know that adverse health experiences can have a deleterious health and behavioral consequences, it is important to stress that ACEs are neither deterministic nor inevitable, ACEs can be prevented."<sup>109</sup> The CDC has developed a package with the best information regarding adverse health impacts stemming from childhood trauma with a prioritization of

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<sup>107</sup> *Id.*

<sup>108</sup> Kerig, *supra* note 85, at 6.

<sup>109</sup> *Risk and Protective Factors*, CDC (2021), <https://www.cdc.gov/violenceprevention/aces/riskprotectivefactors.html>.



prevention efforts.<sup>110</sup> By developing safe and stable relationships we can foster a positive change and environment that plays a key role in preventing adverse experiences, which can eventually overcome the harmful effects of early adversity.

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<sup>110</sup> *Id.*