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# Mass Incarceration's Second Generation – The Unintended Victims of the Carceral State and Thinking About Alternatives to Punishment Through Restorative Justice

Alexandra A. Hoffman

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# Mass Incarceration’s Second Generation – The Unintended Victims of the Carceral State and Thinking About Alternatives to Punishment Through Restorative Justice

Alexandra A. Hoffman

*The evolution of the juvenile criminal court system has involved a sharp movement away from the nineteenth century “rehabilitative ideal” to today’s state of hyperincarceration and punitive policies of control. Amongst the unintended and under-recognized harms of our carceral state includes a generation of minority children growing up with imprisoned parents. This analysis spotlights the tangible effects of parental incarceration on juvenile growth and development, which creates risks for further mass incarceration. This note suggests that restorative justice may offer an alternative method of “punishment” that can work towards breaking the connection between parental incarceration and adverse life outcomes for their children. This note recognizes the successes of diverse restorative programs in various cities and imagines what the next policy transformation in the juvenile criminal justice system should look like.*

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## I. INTRODUCTION:

In August 2008, The United States Department of Justice (DOJ) released a report noting that by midyear in 2007, about 1,706,600 minor children had parents whom were currently incarcerated.<sup>1</sup> Another way, out of the 74 million children in the United States, 2.3% had a parent who was currently in either State or Federal prison—an eighty percent child increase from 1991.<sup>2</sup> Of these minors with incarcerated parents, the disparate racial impact is clear: African American children had a 6.7% chance, and Hispanic children had a 2.4% chance of having a parent incarcerated—seven and a half times and two and a half times, respectively, more likely than a Caucasian child (.9%) to have a parent incarcerated.<sup>3</sup> Furthermore, of the more than 1.7 million children with incarcerated parents, most children were pre-adolescent: 53% of state and 50% of federal inmates’ children were nine-years-old or younger; 22% of state and 16% of federal inmates’ children were four-years-old or younger.<sup>4</sup> Given the increasing number, and the young age, of children with incarcerated parents, thinking about how incarceration interplays

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<sup>1</sup> LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2010), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> (showing demographic between 1991, 1997, and mid-2007); *see also* CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS INCARCERATED PARENTS AND THEIR CHILDREN 1 (2000), <https://www.bjs.gov/content/pub/pdf/iptc.pdf> (showing demographic changes from 1997 to 1999).

<sup>2</sup> GLAZE & MARUSCHAK, *supra* note 1, at 2.

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

<sup>4</sup> *Id.* at 2, 3.

with later-life outcomes and development is critical to holistically understanding the multi-generational impact of hyperincarceration.

Studies on the effects of parental incarceration on minor children are emerging but incomplete.<sup>5</sup> While methodological designs struggle with separating preexisting disadvantages with the causal effects of parental imprisonment on children, scholars are consistently finding links between such incarceration and behavior problems, educational lagging, and later life encounters with law enforcement and the criminal justice system.<sup>6</sup> The metastasis of mass incarceration into our carceral state, labelled by Michelle Alexander as the “New Jim Crow,” is distinctively racial and singles out incapacitation as the sole purpose of punishment.<sup>7</sup> The goal of this note is not to expound upon the thoroughly-examined fallout from “law and order” and the “War on Drugs,” but instead to focus on the generation of children who have been the unintended victims of such failed initiatives and the United States’ regime of incapacitation.

The “social experiment” of hyperincarceration has failed.<sup>8</sup> And yet, the generation of children growing up with incarcerated parents is coming of age with a host of behavioral problems, gaps in education, decreased school readiness, antisocial tendencies, mental problems, trauma, and social stigmatization.<sup>9</sup> Responding to the dilemma of such an increasingly disadvantaged population as they reach the age of majority requires rethinking about how punishment comes into the lives of those whom depart from the “social contract.”<sup>10</sup> Studying this coming-of-age

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<sup>5</sup> See Holly Foster & John Hagan, *The Mass Incarceration of Parents in America: Issues of Race/Ethnicity, Collateral Damage to Children, and Prisoner Reentry*, 623 ANNALS. AM. ACAD. POL. SOC. SCI. 179 (2009); Joseph Murray & David Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME AND JUST. 133, 135 (2008) (noting the absence of studies on this topic).

<sup>6</sup> See Murray & Farrington, *supra* note 5, at 140-52.

<sup>7</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW*, 1-20 (2011); MARIE GOTTSCHALK, *CAUGHT*, 119-139 (2015) (“As Franklin Zimring notes, the era of mass incarceration that began in the 1970s is not a unitary phenomenon. It is composed of at least three distinct periods driven by different engines of growth. From the early 1970s to the mid-1980s, the main engine was a general rise in committing more marginal felons to prison, with a few discernible patterns by type of crime or type of offender. The 1985-1992 period was the heyday of the war on drugs as ‘the growth of drug commitments and drug sentences far outpaced the rate of froth of other offense commitments.’ From the early 1990s onward, longer sentences and time served for a range of offenses due to a more punitive political climate that fostered penal innovations like three-strikes and truth-in-sentencing laws propelled the prison population upward.”).

<sup>8</sup> See generally TODD CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* (2015) (discussing the various means by which punitive policies have marginalized minority communities).

<sup>9</sup> See GOTTSCHALK, *supra* note 7, at 1-7.

<sup>10</sup> JAMES W. BURFEIND & DAWN J. BARTUSCH, *JUVENILE DELINQUENCY: AN INTEGRATED APPROACH* 253 (1st ed. 2006) (The social contract is the theoretical analysis described by

generation, acknowledging how particular external factors adversely impact life outcomes, and accepting that mass imprisonment in the United States is not a viable form of punishment, emphasizes the growing importance and need for alternative modes of crime control.

Restorative justice presents an alternative to traditional forms of punishment and, while flawed and not readily institutionalized, can offer a new model for “punishment” that seeks to break the unsustainable cycle of mass incarceration. This note will begin by roughly outlining the demographics and series of issues faced by the population of minors who are coming of age in the era of incapacitation. Next, this note will briefly summarize the evolution of the juvenile criminal justice system, from the nineteenth century’s pioneering mold of rehabilitation, to where we are today with hyperincarceration. The substance of this discussion will focus on restorative programs that have been successful in the United States and highlight particular methods within these programs that seem particularly apt to service the community at large. I suggest that given the connection between parental incarceration and juvenile delinquency, restorative justice offers a viable and promising alternative to failing incapacitative methods of punishment. This note concludes with the assertion that restorative justice methods are better suited to acknowledge the structural inequality wetted to hyperincarceration and should be functionally incorporated into juvenile justice reform.

## II. THE SECOND GENERATION OF MASS INCARCERATION – THE DEVASTATING AND UNDER-RECOGNIZED EFFECTS OF PARENTAL INCARCERATION ON JUVENILES

### A. *Delinquency*

Researching the effects of parental incarceration on antisocial behavior, Joseph Murray and David Farrington utilized four distinct general population studies and found that having an incarcerated parent more than triples a child’s chances of delinquent behavior.<sup>11</sup> It is difficult to disentangle the impact of parental incarceration on rates of juvenile delinquency because of how other variables related to disadvantage likely contribute to this same problem.<sup>12</sup> While measurement is imprecise,

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Jean-Jacques Rousseau “that refers to the mutual agreement among individuals in a political community to relinquish a portion of their individual freedom and self-interest in order to promote interpersonal peace, order, and stability.”)

<sup>11</sup> Murray & Farrington, *supra* note 5, at 152 (finding a 3.4 odds ratio between parental and juvenile crime).

<sup>12</sup> *Id.* at 169-187.

research consistently shows that parental incarceration remains a “relatively strong predictor of multiple adverse outcomes from children,” which is interwoven with “traumatic separation, economic and social strain, and stigma . . . .”<sup>13</sup> In the Netherlands, research using official state data showed that children with imprisoned fathers before birth were 1.4 times more likely, and children with imprisoned fathers between the ages of zero and twelve were 1.97 times more likely, than children without imprisoned fathers to obtain a conviction.<sup>14</sup> While parental incarceration “during childhood does not alter the shape of the development of a criminal career . . . [it] does (to a small extent) alter the height of a criminal trajectory (i.e., the average number of convictions over their life course).”<sup>15</sup>

### B. *Mental Health*

Increased juvenile delinquency is not the only harm produced by parental incarceration. Children with incarcerated parents are at least twice as likely to suffer from mental health problems compared to children without incarcerated parents.<sup>16</sup> The effects of parental incarceration on children’s health can be understood through the stress process theory, which suggests that “disadvantaged social contexts differentially expose individuals to social stressors that have negative contexts for health.”<sup>17</sup> The proliferation of stress upon a child from parental incarceration—together with additional strains like “poverty, single parenting, poor job conditions, and changes such as divorce and intermittent unemployment”—can have reverberating and lasting effects on a child’s health and well-being.<sup>18</sup> Children with incarcerated parents have a 6.2%

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<sup>13</sup> *Id.* at 187; see also Jean M. Kjellstrand & J. Mark Eddy, *Parental Incarceration During Childhood, Family Context, and Youth Problem Behavior across Adolescence*, 1 J. OFFENDER REHABILITATION 18, 31 (2011) (studying youth problem behavior in children with incarcerated parents in 5th, 8th, and 10th grades; shows increase in association between parental incarceration and delinquency strengthening over time).

<sup>14</sup> Van de Rakt et al., *The Long-Term Effects of Paternal Imprisonment on Criminal Trajectories of Children*, 49 J. OF RESEARCH IN CRIME AND DELINQUENCY 81, 96-98 (2012) (This study utilized data from the Criminal Careers and Life Course Study (CCLS), a “large-scale research project . . . [that collected] court information and life course data . . . [from] 4,615 randomly selected individuals (344 women and 4,271 men) all convicted of a crime in the Netherlands in 1977.”).

<sup>15</sup> *Id.* at 100.

<sup>16</sup> *Id.* at 157 (Murray and Farrington found a 2.5 odds ratios for mental health problems. This probability is the product of 6 independent studies, which included two general population studies, two matched control studies, and two clinic-based studies).

<sup>17</sup> Kristen Turney, *Stress Proliferation across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. OF HEALTH AND SOCIAL BEHAVIOR 302, 303 (2014).

<sup>18</sup> *Id.* at 304.

chance of suffering from depression, which is significantly higher than the 1.83% chance that children without incarcerated parents will suffer from depression.<sup>19</sup> Additionally, children with incarcerated parents suffer twice higher rates of learning disabilities, anxiety, asthma, obesity, speech or language problems, rare physical health conditions, hearing problems, vision problems, and bone, joint, and muscle problems, compared to children without incarcerated parents.<sup>20</sup>

### C. *Education Delays*

In her research on child development as impacted by mass incarceration, Anna Haskins recently undertook a study using longitudinal birth-cohort data from the Fragile Families and Child Wellbeing Study (FFS) to show how paternal incarceration negatively impacts boys' education preparedness.<sup>21</sup> Education preparedness has direct effects on whether or not a child will be placed in special education.<sup>22</sup> Preparedness is measured through both non-cognitive readiness and cognitive readiness.<sup>23</sup> Non-cognitive readiness "encompasses the attention, social, and behavioral components of learning and includes a child's ability to concentrate, stay on task, cooperate, interact with peers, and exercise emotional self-regulation."<sup>24</sup> Cognitive readiness includes a "child's ability to process information, apply knowledge, and engage in reasoning and problem solving."<sup>25</sup>

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<sup>19</sup> *Id.* at 308.

<sup>20</sup> *Id.* (Children with incarcerated parents are "at least twice as likely to suffer from learning disabilities (15.29% vs. 7.41%,  $p < .001$ ), ADD/ADHD (18.01% vs. 7.09%,  $p < .001$ ), and anxiety (6.99% vs. 3.06%,  $p < .001$ ). Children with incarcerated parents also have higher rates of physical health conditions such as asthma (14.00% vs. 8.43%,  $p < .001$ ), obesity (21.15% vs. 15.21%,  $p < .001$ ), and speech or language problems (7.37% vs. 4.58%,  $p < .001$ ) as well as higher rates of relatively rare physical health conditions such as epilepsy or seizure disorders (1.30% vs. .61%,  $p < .01$ ), hearing problems (1.93% vs. 1.19%,  $p < .01$ ), vision problems (2.11% vs. 1.26%,  $p < .05$ ), and bone, joint, or muscle problems (3.10% vs. 2.16%,  $p < .05$ ). Parental incarceration is also associated with activity limitations (8.44% vs. 4.69%,  $p < .001$ ) and chronic school absence (3.96% vs. 2.60%,  $p < .01$ .").

<sup>21</sup> See Anna R. Haskins, *Unintended Consequences: Effects of Paternal Incarceration on Child School Readiness and Later Special Education Placement*, 1 SOC. SCI. 141, 142-52 (2014) (FFS is a longitudinal study that followed 4898 children and their parents from twenty large cities between 1998-2000. The FFS data "allows for the inclusion of measures that account for economic constraints, demographic and household characteristics, neighborhood context, and a number of paternal psycho-social and deviant behaviors (all measured prior to the father's incarceration) that might drive the association between paternal incarceration and child schooling outcomes.").

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 142.

<sup>25</sup> *Id.*

Both African-American boys (-.223 SD) and Caucasian boys (-.422 SD) who experienced paternal incarceration, for the first time, between ages one and five, scored significantly worse on the non-cognitive readiness scale compared to boys who never experienced a father in prison.<sup>26</sup> Meaning, African-American boys with incarcerated fathers were approximately two months behind, and Caucasian boys with incarcerated fathers were approximately four months behind children with non-incarcerated fathers.<sup>27</sup> Regardless of race, having an incarcerated father has a negative impact on a child's educational development; however, these statistics are particularly alarming given the grossly disproportionate number of African American parents who are incarcerated.<sup>28</sup> Accounting for outside variables, poor school readiness accounted for one-fifth of the effect on special education placement for children once they reached age nine.<sup>29</sup>

While the effect of paternal incarceration on *non-cognitive* school preparedness was statistically significant, the effect on cognitive school readiness was not as clear.<sup>30</sup> Although the effect of paternal incarceration on cognitive readiness was similar to the effect of non-cognitive school readiness, the estimates for cognitive school readiness were imprecise; this was due to the high standard errors that could not isolate the direct impact of paternal incarceration from other variables.<sup>31</sup> Paternal incarceration's significant effect on non-cognitive, but not cognitive, school readiness supports the theory that paternal incarceration is causally affecting children's educational development because non-cognitive school readiness tends to be "subject to localized family conditions."<sup>32</sup> In other words, cognitive abilities are "mainly correlated with race, and [are] highly sensitive to poverty, maternal education, and parental cognitive abilities," which are externalities distinct from, specifically, the adverse implication of paternal incarceration.<sup>33</sup> Paternal incarceration did not significantly affect girls' non-cognitive school readiness.<sup>35</sup>

Paternal incarceration also has larger, more sweeping effects on a child's educational outcomes. Children who experience paternal incarceration between ages one and five are about twenty percent more

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<sup>26</sup> *Id.* at 149, 150.

<sup>27</sup> Haskins, *supra* note 21, at 150.

<sup>28</sup> *Criminal Justice Fact Sheet*, NAACP (2007), <http://www.naacp.org/criminal-justice-fact-sheet/> (last visited May 9, 2017) ("African Americans are incarcerated at nearly six times the rate of whites.").

<sup>29</sup> Haskins, *supra* note 21, at 152.

<sup>30</sup> *Id.* at 150.

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

<sup>32</sup> *Id.*

<sup>33</sup> Haskins, *supra* note 21, at 150.

<sup>35</sup> *Id.* at 148, 149.



likely to be retained a year in school between kindergarten and third-grade.<sup>36</sup> More than half of the correlation between child retention and paternal incarceration is explained by teacher-reported proficiency, and not test scores or behavioral issues, which suggests that teachers stigmatize children with incarcerated parents.<sup>37</sup> Also, parental incarceration has long-lasting effects on whether a child, and whether other children in school with children with incarcerated parents, will later graduate from college.<sup>38</sup>

Maternal incarceration—which is growing at an exponential rate—also has severe repercussions on child development.<sup>39</sup> State and federal prisons in the United States held 115,000 women by midyear in 2004, where sixty-two percent of women in state prison and fifty-six percent in federal prison were mothers to minor children.<sup>40</sup> Youths between the ages of fourteen and nineteen with an incarcerated mother drop out of school at a twenty to twenty-eight percent higher rate during the period of incapacitation than children without incarcerated mothers.<sup>41</sup>

#### D. *Impact on Social Inequality*

In undertaking a rigorous examination of the effects of paternal incarceration on racial and social inequality, Sara Wakefield and Christopher Wildeman studied how paternal incarceration impacts child behavior problems, homelessness, and infant mortality.<sup>42</sup> Using data from the Project on Human Development in Chicago Neighborhoods (PHDCN)—a longitudinal study of children and their caregivers—Wakefield and Wildeman found that children with incarcerated parents “exhibited thirty percent more internalizing behavior problems (11.45 to 8.81 SD), forty-four percent more externalizing behavior problems (11.32

<sup>36</sup> Kristin Turney & Anna R. Haskins, *Falling Behind? Children’s Early Grade Retention after Paternal Incarceration*, 87 SOC. OF EDUC., 241, 253 (2014) (Table 4).

<sup>37</sup> *Id.* at 254; see also Foster & Hagan, *supra* note 5, at 182-83 (describing the “exclusionary” process).

<sup>38</sup> John Hagan & Holly Foster, *Children of the American Prison Generation: Student and School Spillover Effects of Incarcerating Mothers*, 46 LAW & SOC. R. 37, 58 (2012) (finding a fifteen percent reduction in the college graduation rates where ten percent of the students (7th to 12th grade) had a mother in prison; finding a fifty percent reduction rate in college graduation rates where twenty-five percent of the students (7th to 12th grade) had a father in prison during high school).

<sup>39</sup> See GLAZE & MARUSCHAK, *supra* note 1.

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

<sup>41</sup> Rosa M. Cho, *Understanding the Mechanism Behind Maternal Imprisonment and Adolescent School Dropout*, 60 FAM. REL. 272, 286 (2011); but see Rosa M. Cho, *The Impact of Maternal Imprisonment on Children’s Probability of Grade Retention*, 65 J. OF URBAN ECONOMICS 772, 790-91 (2009) (finding that maternal incarceration does not cause a decreased in a child’s reading and math standardized test scores).

<sup>42</sup> See SARA WAKEFIELD & CHRISTOPHER WILDEMAN, CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY (2014).

to 7.83 SD), and thirty-three more total behavior problems (29.49 to 22.23 SD) than do other children [without incarcerated parents].<sup>43</sup> Moreover, boys with incarcerated parents exhibited one-half of a standard deviation more physically aggressive behavior (.49 to -.01 SD).<sup>44</sup> Internalizing behavioral problems are psychological—like anxiety and depression—whereas externalizing behavioral problems are exhibited physically—like aggression and delinquency.<sup>45</sup> The effect of mass imprisonment on the black-white disparities in children is drastic: but for mass imprisonment, the black-white gap would be fourteen to twenty-six percent smaller in children's internalizing behavioral problems; but for mass imprisonment, the black-white gap would be twenty-four to forty-six percent smaller in externalizing behavioral problems.<sup>46</sup>

Wakefield and Wildeman measured infant mortality, as a predictor of childhood wellbeing in those who survive infancy, by utilizing data from the Pregnancy Risk Assessment Monitoring System (PRAMS), a program of the Center for Disease Control (CDC).<sup>47</sup> Accounting for a multitude of risk factors surrounding a birth, the immediate aftermath of the birth, and the health of the pregnancy, the final model found a forty-nine percent increase in the odds of infant mortality with recent paternal incarceration.<sup>48</sup> Infants with incarcerated parents are distinct from infants without incarcerated parents in other ways: “Their mothers were dramatically less likely to report having had a previous healthy birth . . . were also more likely to report smoking and the receipt of public assistance . . .” and were significantly more likely to report being physically abused by the father of the child.<sup>49</sup>

Negative externalities, in addition to parental incarceration, can also impact child homelessness. Whether the father became abusive or involved in drugs during the time when the data was collected increased the risk of child homelessness between 2.4 and 2.7 percentage points.<sup>50</sup> Maternal incarceration did not have similar outcomes on child homelessness, but this is probably because children are more likely to live with their mothers prior to incarceration, and thus, are more likely to end up in foster care before becoming homeless.<sup>51</sup> Wakefield and Wildeman suggest that the prison boom's effect on child homelessness

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<sup>43</sup> *Id.* at 76-77.

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

<sup>45</sup> *Id.* at 92.

<sup>46</sup> *Id.* at 156-57.

<sup>47</sup> *Id.* at 105.

<sup>48</sup> WAKEFIELD & WILDEMAN, *supra* note 42, at 108.

<sup>49</sup> *Id.* at 105.

<sup>50</sup> *Id.* at 128.

<sup>51</sup> *Id.* at 115-117.

was one of the reasons why the homelessness rate increased pre- and post-the Great Recession.<sup>52</sup> But for mass imprisonment, the black-white gap in child homelessness would have been approximately twenty-six to sixty-five percent less.<sup>53</sup>

One must recognize that “the children of incarcerated parents are exposed to many other disadvantages at much higher rates than other children before experiencing the incarceration of a parent.”<sup>54</sup> These disadvantages, as discussed above, accumulate and worsen over time if not addressed.<sup>55</sup> Parental incarceration cannot be accurately singled out as the sole or even primary cause of the host of difficulties faced by minority children in disadvantaged communities; however, it is “yet another problem to add to an already large pile of difficulties confronting them.”<sup>56</sup> What remains important about the detrimental effects of parental incarceration on children is the ability to put an end, or at least lessen, the policies of the carceral state that create these risks for adverse juvenile outcomes.

### III. REHABILITATION TO HYPERINCARCERATION

#### A. *Juvenile Criminal Justice*

By 1925, Progressive Era reformers succeeded in creating a juvenile justice system separate and distinct from adult court processes in every state.<sup>57</sup> Until the 1960s, the juvenile court system ran on informal procedures with the clear goal of rehabilitation.<sup>58</sup> As described by Sanford J. Fox, “the typical practice of this era was to treat poor and/or neglected children and young criminals as a homogeneous group,” whereby “[c]riminal behavior and poverty were seen as synonymous in terms of the threat they posed.”<sup>59</sup> Parents were portrayed as the primary causes of

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<sup>52</sup> *Id.* at 129.

<sup>53</sup> *Id.* at 157.

<sup>54</sup> WAKEFIELD & WILDEMAN, *supra* note 42, at 105.

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

<sup>56</sup> *Id.* at 105-06.

<sup>57</sup> ELIZABETH SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 88-90 (2008).

<sup>58</sup> *Id.* at 85-88; see also Barry Feld, *The Honest Politician's Guide to Juvenile Justice in the Twenty-First Century*, 564 ANNALS. AM. ACAD. POL. SOC. SCI., 10, 12 (1999) (“The juvenile court combined the new conception of children with new strategies of social control to produce a judicial-welfare alternative to criminal justice, to remove children from the adult process, to enforce the newer conception of children’s dependency, and to substitute the state as *parens patriae*.”).

<sup>59</sup> See Sanford J. Fox, *The Early History of the Court*, 6 THE JUVENILE COURT 1, 32 (1996).

juvenile delinquency and “deviancy.”<sup>60</sup> The Progressive Era rehabilitative model of juvenile justice failed because of 1) the inability of rehabilitation to confront an increase in violent juvenile crime, and 2) activists’ calls for procedural safeguards in line with those provided in adult processing.<sup>61</sup>

Youth advocates highlighted how minor offenders were adversely impacted by the informal nature of the juvenile criminal process, which failed to provide treatment and give offenders adequate procedural rights.<sup>62</sup> As highlighted by the United States Supreme Court in *Kent v. United States*, “[t]he child receives the worst of both worlds: he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”<sup>63</sup> *In re Gault* altered juvenile justice away from the “rehabilitative ideal” centered on “[s]pecialized judges, assisted by social service personnel, clinicians, and probation officers” who “assumed that a rational, scientific analysis of facts would reveal the proper diagnosis and prescribe the cure.”<sup>64</sup>

*In re Gault* gave juvenile offenders a right to counsel, to a notice of the charges, to confront the witnesses who were going to testify against them, and to abstain from self-incrimination.<sup>65</sup> As termed by Barry Feld, the 1960s shift from the flexible, discretionary, benevolent policies of rehabilitation came as a result of “constitutional domestication.”<sup>66</sup> *In re Gault* reformulated juvenile justice in terms of traditional adult court processes, with corollary adult punishments attached.<sup>67</sup> In short, “*In re Gault* shifted the focus of delinquency hearings from real needs to proof of legal guilt and formalized the connection between criminal conduct and coercive intervention” so that “[p]roviding a modicum of procedural justice also legitimated greater punitiveness in juvenile courts.”<sup>68</sup>

The increase in violent juvenile crime during the 1980s and 1990s as a result of the proliferation of drugs, gangs, and access to handguns, magnified calls for juvenile reform in the punitive direction.<sup>69</sup> Between

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<sup>60</sup> *Id.*

<sup>61</sup> SCOTT & STEINBERG, *supra* note 57, at 88-89; see *In re Gault*, 387 U.S. 1, 18-19 (1967).

<sup>62</sup> Barry Feld, *Criminalizing the American Juvenile Court*, 17 CRIME AND JUSTICE 197, 204-09 (1993).

<sup>63</sup> *Id.* at 198 (quoting *Kent v. United States*, 383 U.S. 541, 555 (1966)).

<sup>64</sup> *Id.* at 203-04; SCOTT & STEINBERG, *supra* note 57, at 89.

<sup>65</sup> SCOTT & STEINBERG, *supra* note 57, at 90.

<sup>66</sup> Feld, *supra* note 62, at 205.

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

<sup>68</sup> See Feld, *supra* note 58, at 14.

<sup>69</sup> Jeffrey M. Jenson & Matthew O. Howard, *Youth Crime, Public Policy, and Practice in the Juvenile Justice System: Recent Trends and Needed Reforms*, 43 SOCIAL WORK 324, 325 (1998).

1987 and 1994, juvenile violent crime increased by seventy-one percent.<sup>70</sup> In 1994, juvenile courts disposed fifty-six percent more violent cases than in 1988.<sup>71</sup> The monumental procedural shift away from the rehabilitative goals of the 1920s juvenile court system, combined with an increase in violent crimes, fear-mongering surrounding “super-predators,” and high recidivism in youth offenders, brought about the “get tough” policies of today.<sup>72</sup>

### B. *Hyperincarceration Fails to Acknowledge Structural Inequality*

Today, criminal justice policies in the United States involve a double bind of hyperincarceration and hyperghettoization that present, “a political quandary calling for an expanded analysis of the nexus of class inequality, ethnic stigma, and the state in the age of social insecurity.”<sup>73</sup> In the cogent words of Loïc Wacquant, as a consequence of “intensified policing coupled with a rising propensity to confine miscreants, American jails have become gargantuan operations processing a dozen million bodies each year nationwide, as well as huge drains on the budgets of counties and pivotal institutions in the lives of the (sub) proletariat of the big cities.”<sup>74</sup> The consequences of this “new caste system” is felt most heavily by the young.<sup>75</sup>

Our American criminal justice practice and policy of incapacitation fails to acknowledge structural inequality in the United States permeating racial inequality and civil exclusion.<sup>76</sup> Not only does the relationship between the hyperghetto and prison ingrain “the socioeconomic marginality and symbolic taint of the African America subproletariat,” it also works to associate blackness with “devious violence and dangerousness.”<sup>77</sup> Post-incarceration, minorities are vulnerable to what sociologist Michelle Phelps describes as “mass probation,” or “mass

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 326.

<sup>72</sup> SCOTT & STEINBERG, *supra* note 57, at 88-95; *see also* BARRY FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* (1999) (discussing the evolution of the juvenile court system away from child welfare goals to punitive initiatives).

<sup>73</sup> Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 *DAEDALUS* 74, 74 (2010).

<sup>74</sup> *Id.* at 75.

<sup>75</sup> ALEXANDER, *supra* note 7, at 125-26 (discussing how mass incarceration has excluded young African American men from education and job opportunities).

<sup>76</sup> Wacquant, *supra* note 73, at 80-81.

<sup>77</sup> *Id.* at 82.

supervision,” where the state’s regime of control extends post-prison through the reach of probation, fines, and stigma.<sup>78</sup>

Hyperincarceration, the hyperghetto, and mass probation, create “a novel form of citizenship in the carceral age based on the presumption that one has committed a crime.”<sup>79</sup> An individual who is, or has been, imprisoned becomes a “carceral citizen,” which is “an alternative citizenship track unique to the largely raced and gendered targets of the criminal justice system who are marked by a criminal record.”<sup>80</sup> Reuben J. Miller and Amanda Alexander discuss carceral citizenship as a “social arrangement” where certain actions (crime) are presumed from a certain class of people.<sup>81</sup> Conceptualizing the carceral citizen as the social consequence of hyperincarceration emphasizes the need for reformation in crime control: “The carceral citizen is not a second-class citizen in a traditional sense . . . [but] a citizen [that] experiences social, political, and economic life in ways that are unique to members of his or her class, and are not typically shared by even the most marginalized people . . . .”<sup>82</sup> Crime is not associated with “criminals,” but with minority, typically African American, men and communities.<sup>83</sup> What is particularly disturbing about hyperincarceration is the exclusion of persons from the social and economic fabric of civil society based on locked-in “social arrangements” of cyclical disadvantage.<sup>84</sup>

The rehabilitative model—as was adopted in the mid-1920s—and the incapacitative model—which gained momentum in the 1960s and still dominates today—are extreme responses to juvenile crime that fail to alleviate social ills or prevent future crime.<sup>85</sup> Currently, the United States’ system of punishment generates mass incarceration, which inadvertently works to further perpetuate mass incarceration due to the detrimental effects upon a child when a parent is away in prison. In light of the negative impact of parental incarceration on children—including, but not limited

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<sup>78</sup> Michelle Phelps, *Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC’Y, 53, 56-57 (discussing the “net-widening” reach of incapacitative control).

<sup>79</sup> Reuben J. Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291, 295 (2016) (emphasis omitted).

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

<sup>81</sup> *Id.* at 296.

<sup>82</sup> *Id.* at 296-97.

<sup>83</sup> *See id.* at 312; *see also* D. Marvin Jones, “He’s a Black Male . . . Something Is Wrong With Him!” *The Role of Race of the Stand Your Ground Debate*, 68 U. MIAMI L. REV. 1025, 1030 (2014) (discussing the “reasonable racist” who “denies that he is acting on emotion,” but rather “claims to know something about the black people who he targets for violence or arrest based of who they are”).

<sup>84</sup> Miller & Alexander, *supra* note 79, at 297.

<sup>85</sup> *See supra* Section III.

to, future delinquency, mental health problems, educational delays, and homelessness—it behooves the state to find alternatives to crime control that work towards breaking the cycle of multi-generational state incapacitation. As a matter of public policy, and safety, a remedy to our carceral state might be found in the diverse methods of restorative justice that are successfully being implemented around the globe and across the nation. “Restorative justice offers an alternative to the traditional vision of “punishment” currently utilized by the criminal justice system that can not only provide relief to the victim and offender, but also work towards breaking the connection between parental incarceration and juvenile offending.

#### IV. NEGOTIATING REHABILITATION AND ACCOUNTABILITY THROUGH RESTORATIVE JUSTICE

##### A. *Theoretical Underpinnings of Restorative Justice*

Unlike punitive policies, which focus on punishing the offender for the crime inflicted, restorative justice (RJ) is “based on a nonadversarial interaction between victims, offenders, and other individuals impacted by the criminal act in order to repair the damage caused by the crime and to encourage offender accountability.”<sup>86</sup> The substance of RJ is “empowerment, dialogue, negotiation and agreement.”<sup>87</sup> Professionals take a secondary role within RJ, whereby the “stakeholders”—including the victim, offender, community leaders, and “secondary victims”—decide what harm occurred and what “justice” for the offence will look like.<sup>88</sup> The goal of RJ is not to punish or rehabilitate the offender but rather to repair the harm caused.<sup>89</sup> Thus, while RJ outcomes tend to center on apologies, community work, or monetary compensation, “any outcome—including a prison sentence—can be restorative if it is an outcome agreed to and considered appropriate by the key parties.”<sup>90</sup> As elaborated on by Howard Zehr, a leader in the RJ field, the three central questions of RJ include: “1) Who has been hurt? 2) What are their needs? and 3) Whose

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<sup>86</sup> Jeff Bouffard et al., *The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders*, 1 YOUTH VIOLENCE AND JUVENILE JUST. 1, 1-2 (2016).

<sup>87</sup> Andrew Ashworth, *Responsibilities, Rights, and Restorative Justice*, 42 THE BRITISH J. OF CRIMINOLOGY 578, 578-79 (2002).

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

<sup>89</sup> Lode Walgrave, *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives*, 31 CRIME AND JUSTICE 543, 553 (2004).

<sup>90</sup> Allison Morris, *Critiquing the Critics: A Brief Response to Critics of Restorative Justice*, 42 THE BRITISH JOURNAL OF CRIMINOLOGY 596, 599 (2002).

obligation is it to meet those needs?”<sup>91</sup> These guiding questions contrast with general principles of criminal justice: “1) What laws have been broken? 2) Who did it? 3) What do they deserve?”<sup>92</sup>

Although, in its purest form, RJ is a bottom-up communitarian approach to delinquency, legal safeguards are often in place to ensure that a victim’s “dominion,” or liberty, is protected.<sup>93</sup> As Kathleen Daly posits: “Restorative justice is not a type of justice. It is a justice mechanism.”<sup>94</sup> RJ retreats from retributive policies of the criminal justice system in different degrees depending on the amenability of state and local reforms.<sup>95</sup>

Ingrained punitive state policies clash with the implicit and explicit element of voluntariness that guides RJ sessions; as such, incorporating RJ into the traditional criminal justice system is not always a fluid process.<sup>96</sup> “Constitutionally-protected procedural rights do not have a clear place within the comparatively flexible approach of RJ, in that ‘RJ’ grants ‘stakeholders’ the power of the constructive ‘rule of law.’”<sup>98</sup> The traditional crime and punishment model of justice, governed by “outsiders” to the offense—the court and judge—contrasts with the collaborative process of RJ, which requires those personally impacted by the crime to be the collective directors of civic order and responsibility.<sup>99</sup> However, as suggested by Andrew Ashworth, RJ practices call into question whether or not the “state” itself should even be responsible for ensuring social order, law-abidance, and a criminal justice system.<sup>100</sup> Thinking about maintaining an authentic and effective approach to RJ within our democratic, judicial form of government is challenging and fosters a push-and-pull between constitutional rights and less-formal procedures.

RJ methods can typically be categorized as either process or outcome-based.<sup>101</sup> Process-based RJ, articulated by Tony Marshall, is where “all parties with a stake in a particular offense come together to resolve

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<sup>91</sup> HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 20 (Updated ed. 2014).

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

<sup>93</sup> Walgrave, *supra* note 89, at 554-60.

<sup>94</sup> Kathleen Daly, *What is Restorative Justice? Fresh Answers to a Vexed Question*, 11 *VICTIMS & OFFENDERS* 9, 14 (2016).

<sup>95</sup> Walgrave, *supra* note 89, at 559-60.

<sup>96</sup> *Id.* at 560.

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

<sup>99</sup> See ZEHR, *supra* note 91, at 15-16 (discussing the important role of “stakeholders”).

<sup>100</sup> Andrew Ashworth, *Responsibilities, Rights and Restorative Justice*, 42 *THE BRITISH J. OF CRIMINOLOGY* 578, 579 (2002) (providing an overview of arguments in favor and against having the state responsible for criminal justice).

<sup>101</sup> Walgrave, *supra* note 89, at 552; see also Daly, *supra* note 94, at 10 (discussing the different types of RJ processes).



collectively how to deal with the aftermath of the offense and its implications for the future.”<sup>102</sup> Process-based RJ does *not* require that the outcome of the program be strictly restorative when all of the stakeholders cannot come together for a restorative outcome, as in the cases where the victim does not support a solely restorative result.<sup>103</sup> When implementing process-based RJ, punitive and rehabilitative techniques can be incorporated to accommodate, include, and satisfy all stakeholders.<sup>104</sup> In contrast, Lode Walgrave and Gordon Bazemore suggest implementing outcome-based RJ, which is “an option on doing justice after the occurrence of a crime which gives priority to repairing the harm that has been caused by the crime.”<sup>105</sup> During outcome-based RJ, if a voluntary restorative outcome is not obtainable, “coercive obligations in pursuit of (partial) reparation must be encompassed . . . .”<sup>106</sup>

RJ practices typically give credence to two theoretical foundations.<sup>107</sup> First, John Braithwaite’s reintegrative shaming theory suggests that punishment should target and stigmatize an offender’s wrongful act, rather than the individual offender.<sup>108</sup> In this way, the child-offender can reconnect with the community and his family in a positive manner.<sup>109</sup> By stigmatizing the act, and not the child, the punishment process does not sever the child from society or foster a negative self-image that further ostracizes the juvenile from the rest of the community.<sup>110</sup> Second, procedural justice is the theory that “if an offender experiences fairness in the handling of their case, and in the decision-making regarding the response to their criminal behavior, they are more likely to attribute legitimacy to the law and legal authorities.”<sup>111</sup> Both reintegrative shaming and procedural justice lay the theoretical foundations for restorative justice practices. Looking at how RJ has been used within communities in response to behavioral problems and delinquency can help clarify the purposes and goals behind RJ theories, outcomes, and processes.

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<sup>102</sup> Walgrave, *supra* note 89, at 552.

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

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

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

<sup>106</sup> *Id.* (according to Walgrave: “Process-based definitions confuse the means with the goal and limit the possible means to achieve (partial restoration).”).

<sup>107</sup> Bouffard et al., *supra* note 86, at 2.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

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

<sup>111</sup> *Id.*

## B. Restorative Justice Programs

### i. The Community Conferencing Center in Baltimore, Maryland –An Example of Victim-Offender Mediation

Victim-offender mediation (VOM) traditionally consists of a meeting between the victim, offender, and a neutral party.<sup>112</sup> VOM “provides interested victims of primarily property crimes and minor assaults the opportunity to meet the offender, in a safe and structured setting, with the goal of holding the offender accountable for his or her behavior while providing important assistance and compensation to the victim.”<sup>113</sup> A 2006 meta-analysis based on fifteen prior studies on the effects of VOM found that VOM programs were accountable for a thirty-four percent drop in recidivism compared to minors who did not participate in VOM.<sup>114</sup> A survey of 116 VOM programs by the University of Minnesota School of Social Work found that forty-three percent of the programs were run by community-based organizations and twenty-three percent were church-based, meaning most VOM programs are run by private non-profit organizations.<sup>115</sup>

In Baltimore, Maryland, the Community Conferencing Center (CCC), directed by Dr. Lauren Abramson, works “as court diversion for offenders, as an alternative to school suspension to heal ongoing neighborhood conflicts, and as an aid in re-entry into family and community after incarceration.”<sup>116</sup> Most juveniles diverted to the CCC are accused of second degree assault or other misdemeanors.<sup>117</sup> Cases are referred to the CCC from the Baltimore City Police, Juvenile Courts, the Maryland Department of Juvenile Services (DJS), Maryland State’s Attorney’s

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<sup>112</sup> *Id.* at 3.

<sup>113</sup> Mark S. Umbreit et al., *Impact of Restorative Justice Conferencing with Juvenile Offenders*, CENTER FOR RESTORATIVE JUSTICE & PEACEMAKING 1, 2 (2001).

<sup>114</sup> Bouffard et al., *supra* note 86, at 3; Leena Kurki, *Restorative and Community Justice*, 27 CRIME AND JUST. 235, 272 (2000) (emphasizing how little is known about actual recidivism decreases and noting that the recidivism rate for offenders who participate and for offenders who do not participate in adult RJ VOM programs is twenty to thirty percent).

<sup>115</sup> Kurki, *supra* note 114, at 269.

<sup>116</sup> Lauren Mirsky, *The Community Conferencing Center: Restorative Practices in Baltimore, Maryland*, INT’L INST. FOR RESTORATIVE PRAC. (Mar. 9, 2004), <http://www.iirp.edu/eforum-archive/4297-the-community-conferencing-center-restorative-practices-in-baltimore-maryland>.

<sup>117</sup> ALTERNATIVE DISPUTE RESOLUTION LANDSCAPE: AN OVERVIEW OF ADR IN THE MARYLAND COURT SYSTEM, ADMINISTRATIVE OFFICE OF THE COURTS 1, 29 (2014) <http://mdcourts.gov/courtoperations/pdfs/adrlandscape.pdf>.

Office, and Baltimore City School Police.<sup>118</sup> Between 2004 and 2009, of the 2,500 juveniles participating in CCC sessions, 96.8% were minorities.<sup>119</sup>

A CCC session is a voluntary proceeding, meaning both the victim and offender must agree to have the conflict handled restoratively rather than through the traditional court system.<sup>120</sup> From this understanding, the offender begins the session by admitting his wrongdoing.<sup>121</sup> Dr. Abramson describes conferencing as a three-step process: “hearing what happened, letting everybody say how they’ve been affected by the situation and then having the group come up with ways to repair the harm and prevent it from happening again.”<sup>122</sup> Conferences are typically for ninety minutes and conclude with a written agreement that documents what must be done to fix the harm caused by the wrong.<sup>123</sup> Agreement terms “can include an apology, assurances that it will not occur again, repayment of money, repair of any property damage, community service work and seeking appropriate support.”<sup>124</sup>

If the parties affected by the crime reach an agreement, then the case is closed for purposes of the state criminal justice system, but if an agreement is not reached, the case is “returned to the referral source to be processed in the usual manner.”<sup>125</sup> In 2012, the Maryland Legislature passed House Bill 543, which required “the establishment of a pretrial victim-offender mediation program by the Chief District Court.”<sup>126</sup> Per Section 11-1105 of the Bill, if the conference reaches a mediation agreement that is approved by the court, and the defendant satisfies the terms in the agreement, the state’s attorney will dismiss the charge and enter a “nolle prosequi.”<sup>127</sup> However, if the defendant fails to meet the terms of the agreement, the case shall be “returned to the docket and proceed through the criminal justice system.”<sup>128</sup> Of particular note, “[e]xcept in a proceeding concerning the meaning of a mediation

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<sup>118</sup> *Programs and Services Community Conference Center*, COMMUNITY CONFERENCING, [http://www.communityconferencing.org/index.php/programs/juvenile\\_justice/](http://www.communityconferencing.org/index.php/programs/juvenile_justice/) (last visited May 9, 2017).

<sup>119</sup> Douglas Young et al., *Disproportionate Minority Contact in the Maryland Juvenile Justice System*, INSTITUTE FOR GOVERNMENTAL SERVICE AND RESEARCH 109 (2011).

<sup>120</sup> Mirsky, *supra* note 116.

<sup>121</sup> *Program and Services Community Conference Center*, *supra* note 118.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See THE MARYLAND JUDICIARY ADMIN. OFF. OF THE COURTS: DEP’T OF FAMILY ADMIN., A REGISTRY OF JUVENILE COURT PROGRAM INITIATIVES 1, 8 (2013).

<sup>125</sup> See *Program and Services Community Conference Center*, *supra* note 118.

<sup>126</sup> H. B. 543, 2012 Gen. Assemb., Reg. Sess. (Md. 2012).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

agreement, all communications made in the program are confidential and may not be introduced into evidence.”<sup>129</sup> Statutory incorporation of victim-offender mediation programs balances the need for rehabilitation through restorative conferencing mechanisms while also holding juveniles accountable if the terms of such agreements are not met.<sup>130</sup>

A number of examples of the CCC’s impact within the community’s neighborhood and local schools are provided on their website—with names changed to preserve the minors’ identities.<sup>131</sup> In one example, two boys—Timothy, aged twelve, and Terrance, age fourteen, entered the local 7-Eleven, owned by Mr. Simon, and each stole a pack of M&Ms.<sup>132</sup> The store owner called the police and both were arrested and charged with theft.<sup>133</sup> The police referred the case to the CCC and a session was set to take place outside the 7-Eleven, in the parking lot with both boys, Mr. Simon, Timothy’s parents, Terrance’s guardian, and the social worker.<sup>134</sup> The session began with both boys explaining what happened and then Mr. Simon describing how “there had been an increase in problems with the neighborhood youth – shoplifting, vandalizing, and loitering. It damaged his business and he wanted it to stop.”<sup>135</sup>

Following the victim’s discussion about the harm imparted from the event, the juveniles’ parents shared their own concerns and disappointment with their child’s actions. The social worker then asked the boys “to imagine what would happen if shoplifting continued to be a problem: ‘Wouldn’t the store have to eventually close? Then where would people in your neighborhood go for milk, bread, eggs, and morning coffee?’”<sup>136</sup> The session ended in apologies from Terrance and Timothy, a written Community Conference agreement, and shared refreshments, which altogether worked towards improving community understanding while keeping the children out of the court system.<sup>137</sup> Personalized,

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<sup>129</sup> *Id.*

<sup>130</sup> *See id.*; but see Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 202 (2016) (raising concerns about procedural fairness and the unappreciated risks resulting from atypical—non-criminal justice—methods of handling crime, whereby a defendant’s rights, like *Miranda* warnings and traditional high standards of proof, are not required); see also Tamara Rice Lave, *Ready, Fire, Aim: How Universities are Failing the Constitution in Sexual Assault Cases* 48 ARIZ. L.J. 637 (2016).

<sup>131</sup> *Boys Steal M&Ms from the 7-Eleven and get Arrested*, COMMUNITY CONFERENCING, [http://www.communityconferencing.org/impact/resolving/boys\\_steal\\_mms\\_from\\_the\\_7-eleven\\_and\\_get\\_arrested/http://www.communityconferencing.org/index.php/impact/resolving/](http://www.communityconferencing.org/impact/resolving/boys_steal_mms_from_the_7-eleven_and_get_arrested/http://www.communityconferencing.org/index.php/impact/resolving/) (last visited May 9, 2017).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> COMMUNITY CONFERENCING CENTER, *supra* note 130.

<sup>137</sup> *Id.*

flexible, and informal conferencing helps bring members of the community together in ways that prevent future crime, respect a victim's harm, and repair the injury caused by the crime itself.<sup>138</sup>

ii. The “Indianapolis Experiment” and Child Welfare Programs in North Carolina— Examples of Family Group Conferencing

Originating in New Zealand from the Maori culture, Family Group Conferencing (FGC) is another form of RJ.<sup>139</sup> After New Zealand enacted the *Children, Young Persons and Their Families Act* in 1989, the state integrated native problem-solving practices through legislation requiring all juvenile cases be referred to “conferencing.”<sup>140</sup> A support staff member begins a conferencing session by reading the charges from the police report, and asking the minor to affirm or deny guilt—if guilt is denied, the process ends and the case is sent to court.<sup>141</sup> Unlike most United States’ FGC initiatives, in New Zealand, FGC is administered as a nation-wide response to juvenile crime by the Department of Social Welfare.<sup>142</sup>

FGC is often viewed as an expansion of VOM, and is similar to VOM in its method of providing victims an opportunity to “express the full impact of the crime upon their lives, to receive answers to any lingering questions about the incident, and to participate in holding the offender accountable for his or her actions.”<sup>143</sup> Unlike VOM however, FGC incorporates a less-structured method and uses public officials or “conference facilitators”—like law enforcement agents, probation officers, and school administrators—to lead RJ sessions instead of trained volunteers or mediators.<sup>144</sup> Also, FGC tends to recognize a greater swath of people victimized by a crime, and directly includes such secondary victims in the RJ session as a means of encouraging follow-up support for

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<sup>138</sup> See Lauren Abramson, *Better Justice in Baltimore: A Community Approach to Crime*, 2 THE SOLUTIONS JOURNAL 1, 12-15 (2011) <https://www.thesolutionsjournal.com/article/better-justice-in-baltimore-a-community-approach-to-crime/> (for more stories on CCC’s impact).

<sup>139</sup> Bouffard et al., *supra* note 86, at 4.

<sup>140</sup> Umbreit, *supra* note 113, at 4.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (Conference support staff are employees of the Children and Young Person Service, which governs child protection and youth justice.)

<sup>143</sup> U.S. DEP’T OF JUST., OFFICE OF JUSTICE PROGRAMS SIMILARITIES AND DIFFERENCES BETWEEN FAMILY GROUP CONFERENCING AND VICTIM-OFFENDER MEDIATION (2000), [https://www.ncjrs.gov/ovc\\_archives/reports/family\\_group/family6.html](https://www.ncjrs.gov/ovc_archives/reports/family_group/family6.html) [hereinafter SIMILARITIES AND DIFFERENCES].

<sup>144</sup> *Id.*; Heather Strang et al., *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*, THE CAMPBELL COLLABORATION 1, 12 (2013).

the victim and offender after the session is over.<sup>145</sup> VOM focuses on primary stakeholders: the victim and offender.<sup>146</sup>

FGC advocates suggest that this particular form of RJ, which includes a “face-to-face conference with the victim, supporters of the victim, and the offender’s own supporters,” imparts “a greater sense of the harm caused to others than does the more depersonalized actions of a court.”<sup>148</sup> FGC is able to build a “community of care” for the primary stakeholders in the offense.<sup>149</sup> Previous studies suggest that FGC is particularly apt to satisfy the theoretical foundations of RJ through reintegrative shaming and procedural justice based on findings of high victim participation and satisfaction.<sup>150</sup> Generally, victims perceive apologies as “extremely important” in repairing the harm they have experienced from the crime.<sup>151</sup> In studies involving juvenile and adult offenders for violent and non-violent crimes, victims were more likely to receive apologies that they perceived as sincere through FGC than through conventional justice (CJ) systems.<sup>152</sup> Additionally, findings suggest that victims of robbery and burglary are forty-nine percent less likely to suffer from post-traumatic stress symptoms (PTSS) if they partake in restorative justice conferencing (RJC) combined with criminal justice processes compared to victims that solely partake in CJ.<sup>153</sup>

The Indianapolis Experiment was a project initiated by the Hudson Institution, a public policy research organization, testing the success rate of FGC on first-time juvenile offenders.<sup>154</sup> The juvenile offenders in the study were at least fourteen-years-old, were never previously criminally charged, admitted to committing the offense, and committed a certain type of crime: “criminal mischief, disorderly conduct, theft (including D felony theft), conversion (shoplifting), or battery.”<sup>155</sup> The experiment randomly

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<sup>145</sup> SIMILARITIES AND DIFFERENCES, *supra* note 143.

<sup>146</sup> *Id.*

<sup>148</sup> Edmund F. McGarrell & Natalie K. Hipple, *Family Group Conferencing and Re-Offending among First-Time Juvenile Offenders: The Indianapolis Experiment*, 24 JUST. Q. 221, 223 (2007).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 224-5.

<sup>151</sup> Lawrence W. Sherman et al., *Effects of face-to-face restorative justice on victims of crime in four randomized, controlled trials*, J. OF EXPERIMENTAL CRIMINOLOGY 367, 388 (2005).

<sup>152</sup> *Id.* (Figure 2).

<sup>153</sup> Caroline M. Angel et al., *Short-Term Effects of Restorative Justice Conferences on Post-Traumatic Stress Symptoms Among Robbery and Burglary Victims: A Randomized Controlled Trial*, 10 J. OF EXPERIMENTAL CRIMINOLOGY 291, 292 (2014) (Here, RJC consisted of a meeting led by police officers, specially-trained facilitators, victims, offenders and their friends and family).

<sup>154</sup> McGarrell & Hipple, *supra* note 148, at 229.

<sup>155</sup> *Id.*

placed youths in either the FGC program or in one of four other diversion programs: teen court, a shoplifting program, community service, or VOM.<sup>156</sup> The study, which tracked rates of re-offending over a two-year period with thirteen-week intervals, found that reoffending remained the same between the control and FGC group until the second interval approached, during weeks thirteen through twenty-six.<sup>157</sup> In this second interval, fifteen percent of the control group were arrested, but only eight percent of the FGC treatment group were arrested.<sup>158</sup> By the end of the twenty-sixth week, 27.5% of the control group and 18.5% of the FGC group were re-arrested.<sup>159</sup> The final results of the study found that juveniles in the control group were twenty-three percent more likely to be rearrested than juveniles in the FGC group.<sup>160</sup>

Notably, recidivism rates applying restorative justice conferencing (RJC) are lower for violent crimes than for non-violent, property crimes.<sup>161</sup> In one youth violence experiment, offenders committed thirty-eight fewer offenses per year, per one hundred offenders, than those assigned to CJ programs.<sup>162</sup> After evaluating ten different experiments comparing RJC treatment to CJ, Lawrence Sherman and Heather Strang found, with a ninety-five percent confidence interval, that “across 1879 offenders in all 10 eligible experiments, the average effect size is .155 standard deviations less repeat offending among the offenders in cases randomly assigned to RJC than among the offenders in cases assigned not to have an RJC.”<sup>163</sup> Although calculating a concrete amount of crimes prevented by RJC is

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 236-37.

<sup>158</sup> *Id.* at 236.

<sup>159</sup> *Id.* at 236-37.

<sup>160</sup> McGarrell & Hipple, *supra* note 148, at 238.

<sup>161</sup> Lawrence W. Sherman et al., *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review*, 31 J. OF QUANTITATIVE CRIMINOLOGY 1, 12 (2015) (Here, RJC consisted of a 60 to 180-minute meeting involving “1. Facilitators conduct a pre-conference screening discussion one-on-one with offenders and victims . . . ;2) Scheduling of a conference at the victims’ convenience; 3) Seating all participants in a circle in a private space with a closed door . . . ;4) Introducing all participants . . . ;5) Opening the discussion by asking offenders to describe the crime they committed; 6) Inviting victims and all participants to describe the harm the crime has caused and to whom;7) . . . inviting all participants, including the offender, to suggest how the harm might be repaired . . . ;8) Filing the agreement with a court . . .”).

<sup>162</sup> Lawrence W. Sherman et al., *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)*, CTR. FOR RESTORATIVE JUST. RESEARCH SCH. OF SOCIAL SCI. AUSTRALIAN NAT’L U., at 12 (2000).

<sup>163</sup> Sherman et al., *supra* note 161, at 12 (Figure 1).

difficult, applying RJC approximately decreased repeat convictions or arrests by seven to forty-five percent.<sup>164</sup>

The cost effectiveness of applying RJC over CJ is even more startling: applying RJC to London robbery and burglary cases cost £598,848, while the government costs of the robbery and burglary crimes prevented by RJC are £2,214,811; applying RJC to Northumbria Juvenile, Adult Violence and Adult Property crime cost £275,411, while the government costs of such crimes prevented by RJC are £1,414,593; applying RJC to Thames Valley Prison and Probation for Violence cost £222,463, while the government costs of such crimes prevented by RJC are £1,808,952.<sup>165</sup> Not only does conferencing offer a more rehabilitate model to punishment that can ensure public safety—even for the most violent crimes—conferencing also offers a more cost-effective mechanism for managing punishment.<sup>166</sup>

In an aim to recognize “culturally competent programs,” FGC models have also taken root in state child welfare services.<sup>167</sup> Considering the positive impact of FGC in child welfare programs is important in the context of parental imprisonment because incarcerating mothers significantly increases the chances that the mother’s child will be placed into foster care.<sup>168</sup> The United States Children’s Bureau conducted reviews of Child and Family Services in thirty-two states between 2001 and 2002, and found after examining 1584 child welfare files that services failed at “developing case plans jointly with parents.”<sup>169</sup> A lack of family involvement in state child welfare planning is problematic given that such involvement is critical to ensuring both the stability of a child’s living placement and well-being.<sup>170</sup> FGC offers a community-based, integrative approach to child welfare, which acts as “a participatory process in which the affected individuals and their informal social support network can

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (Table 2).

<sup>166</sup> *See id.*

<sup>167</sup> Cheryl Waites et al., *Increasing the Cultural Responsiveness of Family Group Conferencing*, 49 *SOCIAL WORK* 291, 292 (2004) (“In a multicultural society best practice is moving beyond self-awareness and cultural sensitivity to a point where attention to cultural knowledge is mainstreamed and service delivery systems and treatment models are adapted to fit diverse client communities.”).

<sup>168</sup> Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1272, 1284-85 (2004); *see generally* DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (discussing the disproportionate representation of black children in the child welfare system).

<sup>169</sup> Joan Pennell, *Restorative Practices and Child Welfare: Toward an Inclusive Civil Society*, 62 *J. OF SOCIAL ISSUES* 259, 257-77 (2006).

<sup>170</sup> *Id.* at 274 (citing U.S GOV’T ACCOUNTING OFFICE, GAO-03-357, *HHS COULD PLAY A GREATER ROLE IN HELPING CHILD WELFARE AGENCIES RECRUIT AND RETAIN STAFF* (2003)).



make decisions to resolve issues in their lives and still retain the safeguards of the law to uphold human rights.”<sup>171</sup>

In North Carolina, the Department of Social Services (DSS) enacted the North Carolina Family Group Conferencing (NC-FGC) project, which focuses on formulating practices that best respond to culturally diverse and underrepresented communities.<sup>172</sup> NC-FGC trained child service providers and assessed how thirteen North Carolinian counties implemented FGC models in child welfare cases.<sup>173</sup> The NC-FGC project increased the amount of family members involved: of 336 total participants, 221 were family group members, and 115 were service providers.<sup>174</sup> Additionally, NC-FGC evaluated group satisfaction with FGC methods and reported that 53.9% of family members “strongly agree[d]” and 41.8% members “agree[d]” that they were “satisfied with the way that the conference was run.” Even more, 47.5% “agree[d]” and 36.7% “strongly agree[d]” that “they had a lot of influence on the group.”<sup>175</sup> Not only were FGC processes positively received, but the final outcome reached by the group also reflected a collective achievement: 59.4% “strongly agree[d]” and 32.6% “agree[d]” that they “support the final decision”; 54.6% “strongly agree[d]” and 34.0% “agree[d]” that “the group reached the right decision.”<sup>176</sup>

The Family-Centered Practice Project (NCDSS) succeeded NC-FGC, and continues to integrate FGC in DSS by “providing training technical assistance, and evaluation on family-centered approaches.”<sup>177</sup> NCDSS developed the Strengthening Families Protective Factors Framework, which “starts from the premise that families have the willingness and capacity to support care for their members but may require an infusion of informational, emotional and economic resources.”<sup>178</sup> Similar to

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<sup>171</sup> *Id.* at 260 (“FGC participation refers to the decision-making process at the conference. It is examined in terms of (1) who took part in the conference, where and for how long, (2) how satisfied family group members were with the conference process and its decision, and (3) how family group members thought the decisions were reached.”).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 266.

<sup>174</sup> *Id.* at 269.

<sup>175</sup> Pennell, *supra* note 169, at 270 (Table 1).

<sup>176</sup> *Id.*

<sup>177</sup> Joan Pennell et al., *Family-Centered Practice Project: Annual Report to the North Carolina Division of Social Services*, Raleigh, N.C. ST. U. CTR. FOR FAM. AND COMMUNITY ENGAGEMENT 1, 1 (2014) (“Family-centered practice means that workers engage families in making and carrying out plans that build on and enhance their strengths. The aim is to increase the capacity of families and their communities to promote optimal child and youth development, prevent child abuse and neglect, and support safe and healthy family relationships. Family is broadly defined to encompass the immediate family, relatives, and other close supports.”).

<sup>178</sup> *Id.* at 4.

traditional FGC models, NCDSS adopts child and family team (CFT) meetings, which act as “decision-making forums [that] strengthen families by welcoming their insights about what works for them and supporting their leadership in carrying out action steps.” Similar to the “community of care” language incorporated by FGC, NCDSS refers to its services as a “system of care” which creates unified plans by combining community and public agency involvement at the family level with CFTs at the system level.<sup>179</sup> FGC in state child welfare programs offers a poignant example of how RJ systems can incorporate formal and informal processes, inclusive of all “key players,” in a manner receptive to both accountability and rehabilitation.

### iii. Breaking the Pipeline in Oakland, California – An Example of Circle Practice

The school-to-prison pipeline is the phenomenon whereby black and brown children are disproportionately expelled or suspended from school compared to white students.<sup>180</sup> Black students are disproportionately affected by zero-tolerance school policies: between 2009 and 2010, forty-six percent of black students were suspended at least twice or more times compared to only twenty-nine percent of white students.<sup>181</sup> Rather than confronting the root of student misconduct, many schools respond to defiance by removing the child from the institution, which exacerbates the problem by putting the child further behind in school, disrupting the educational environment, lowering the child’s self-image, and limiting the child’s ability to excel.<sup>182</sup> In addition to expulsion and suspension, special police task forces arrest minors in school, pushing juveniles into the criminal justice system early on, which markedly increases the child’s probability for later-life delinquency.<sup>183</sup> In an effort to replace zero-

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<sup>179</sup> *Id.* at 7.

<sup>180</sup> Russell J. Skiba et al., *Race is not neutral: A national investigation of African American and Latino disproportionality in school discipline*. *School Psychology Review*, 40 SCHOOL PSYCHOLOGY REVIEW 85, 87-91 (2011).

<sup>181</sup> SONIA JAIN ET AL., U.S. DEP’T OF EDUCATION, RESTORATIVE JUSTICE IN OAKLAND SCHOOLS IMPLEMENTATION AND IMPACTS 1, 1 (2014), <http://www.ousd.org/cms/lib07/CA01001176/Centricity/Domain/134/OUUSD-RJ%20Report%20revised%20Final.pdf> (citations omitted).

<sup>182</sup> *Id.*; see also Susan Dominus, *An Effective but Exhausting Alternative to High-School Suspensions*, N.Y. TIMES MAGAZINE (Sept. 7, 2016), <https://www.nytimes.com/2016/09/11/magazine/an-effective-ut-exhausting-alternative-to-high-school-suspensions.html>.

<sup>183</sup> See Clyde Haberman, *The Unintended Consequences of Taking a Hard Line on School Discipline*, N.Y. TIMES (Oct. 2, 2016), <https://www.nytimes.com/2016/10/03/us/the-unintended-consequences-of-taking-a-hard-line-on-school-discipline.html>; The Editorial Board, *The School-to-Prison Pipeline*, N.Y. TIMES (May 29, 2013),

tolerance policies with less disruptive and harmful “punishment,” RJ can be implemented “as a community building approach that addresses root causes of student disruptive/conflict behavior through listening, accountability, and healing.”<sup>184</sup>

In Oakland, California, private and state-sponsored alternatives to zero-tolerance programs in school are gaining traction and success. The Oakland Unified School District (OUSD) implemented Whole School Restorative Justice (WSRJ), which provides “school-wide, group, and individual-level interventions,” in addition to a Peer Restorative Justice (Peer RJ) program.<sup>185</sup> Using various RJ techniques, OUSD engages in mediation, circles, restorative conversations, and family group and community conferences.<sup>186</sup>

Restorative Justice for Oakland Youth (RJOY), a private non-profit organization run by Fania Davis, had startling success at decreasing school suspensions and violence in Oakland schools.<sup>187</sup> West Cole Middle School (Cole) incorporated RJOY practices with immediate effects: suspensions went down by eighty-seven percent and expulsions went down to zero.<sup>188</sup> Restorative circles were used at Cole to bolster a value-based approach to RJ.<sup>189</sup> Circles at the school could include students, teachers, parents, and other support members who would all sit in a circle with a “circle keeper” to guide the talk.<sup>190</sup> The circle keeper does “. . . not act as a judge in the proceedings; instead, the circle keeper ensures that everyone has an opportunity to speak, that the process is respected, and that everyone abides by the agreed-upon values.”<sup>191</sup>

For example, one circle session at Cole was interrupted by the circle keeper when participants began speaking over one another.<sup>192</sup> The keeper asked those involved in the circle session to draw up a list of values to guide the session, which would provide instructions for how and when participants could speak.<sup>193</sup> The two students and their guardians created a

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<http://www.nytimes.com/2013/05/30/opinion/new-york-citys-school-to-prison-pipeline.html?mtrref=undefined&assetType=opinion>.

<sup>184</sup> JAIN ET AL., *supra* note 181, at 3.

<sup>185</sup> *Id.* at 6.

<sup>186</sup> *Id.* at 8.

<sup>187</sup> *About Us*, RESTORATIVE JUSTICE FOR OAKLAND YOUTH, <http://rjoyoakland.org/about/>.

<sup>188</sup> Michael D. Summer et al., *School-Based Restorative Justice as An Alternative to Zero-Tolerance Policies: Lessons from West Oakland*, THELTON E. HENDERSON CTR. FOR SOCIAL JUST. 1, 31 (2010).

<sup>189</sup> *Id.* at 11.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Summer et al., *supra* note 188, at 11.

list which included four values: “listen to one another, respect one another, don’t talk while others are talking, talk and contribute to the conversation.”<sup>194</sup> Participants in the circle can be held accountable for the values they designed both in and outside of the circle.<sup>195</sup> An example of a circle that took place after a teacher perceived that a student was taking too long to follow directions in class is described below:

“Circle Keeper: ‘We have two feelings out here. [Teacher], you said you were disrespected by [student’s] actions, and [student], you were disrespected by the lack of action and [teacher] not taking the time to explain things. But I’m not hearing you two acknowledge each other’s feelings. So this is more about moving towards showing accountability.’

Student: ‘I apologize if you felt disrespected for not (she stumbled to find the right words), but yeah, that’s it.’  
Teacher: ‘I will take the time to come individually to you. The way you looked at me . . . if coming face-to-face with you will help, then that’s what I’ll do.’

Circle keeper: ‘Maybe we can make some agreements, and formalize them for the future?’

Teacher: ‘Going directly to you and talking face-to-face.’

Student: ‘Trying to do things faster.’<sup>196</sup>

The circle described above shows how teachers and students can help better understand one another and work towards an agreement striving for less conflict in the future. When agreements are not followed, additional circles can occur to address why the terms were broken or traditional-school disciplinary remedies might be applied.<sup>197</sup> Circles were used at Cole not only to handle academic discipline, but also to help students confront their relationships and friendships with other students at the school.<sup>198</sup>

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 12.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 14.

## V. CONCLUSION

Incarcerating individuals for crime at the rate the United States currently maintains has not enhanced public safety, but rather, has further entrenched racial inequality.<sup>199</sup> The hyperincarceration of minorities, whom are often parents, has a plethora of unintended, deflected, and under-recognized costs: children growing up without their fathers or mothers for varying periods of time. As these children grow up—at risk of delinquency, lower education, and mental health problems—restorative justice offers an alternative form of “punishment” that supports children outside the shadow of their parents’ incarceration and cycle of disadvantage. VOM, FGC, and circle practices in schools show positive and beneficial ways of addressing antisocial behavior in juveniles, which work to decrease behavioral outbreaks and address harm to victims. Breaking the state indoctrinated regime of hyperincarceration, and dispelling the creation of the “carceral citizen,” requires meeting and respecting the concerns of all stakeholders involved in a crime while also working to decrease the rate of criminal activity in offenders. Restorative justice, while still developing, is showing promising results and should be the successor to our incapacitation regime.

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<sup>199</sup> See generally IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY (Othello Harris & R. Robin Miller eds., 2003); see GOTTSCHALK, *supra* note 7, at 98-116.