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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 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. By recognizing the successes of diverse restorative justice programs in various cities, this note 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’s parents were incarcerated.¹ Another way, out of the seventy-four million children in the United States, 2.3% had a parent who was either in State or Federal prison by mid-2007—an 80% child increase from 1991.² 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.³ Notably, of the more than 1.7 million children with incarcerated parents, most were pre-adolescent: 53% of state and 50% of federal inmates’ children were

¹ 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).

² GLAZE & MARUSCHAK, *supra* note 1, at 2.

³ *Id.*

nine-years-old or younger; 22% of state and 16% of federal inmates' children were four-years-old or younger.⁴ Given the increasing number, and the young age, of children with incarcerated parents, thinking about how incarceration interplays with later-life outcomes and development is critical to holistically understanding the multi-generational impact of hyperincarceration.

Studies on the consequences of parental incarceration on minor children are emerging but incomplete.⁵ While methodological designs struggle with separating preexisting disadvantage 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.⁶ 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.⁷ 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.⁸ 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 health problems, trauma,

⁴ *Id.* at 2, 3.

⁵ 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 Justice 133, 135 (2008) (noting the absence of studies on this topic).

⁶ See Murray & Farrington, *supra* note 5, at 140-52.

⁷ 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 way 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.").

⁸ 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).

and social stigmatization.⁹ 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 who depart from the “social contract.”¹⁰ Studying this coming-of-age 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 justice 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 reforms.

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

⁹ See GOTTSCHALK, *supra* note 7, at 1-7.

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

more than triples a child's chances of delinquent behavior.¹¹ 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.¹² While measurement is imprecise, 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 . . ."¹³ 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.¹⁴ 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)."¹⁵

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.¹⁶ 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

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

¹² *Id.* at 169-187.

¹³ *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).

¹⁴ 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.").

¹⁵ *Id.* at 100.

¹⁶ *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).

individuals to social stressors that have negative contexts for health.”¹⁷ 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 consequences on a child’s health and well-being.¹⁸ Children with incarcerated parents have a 6.2% chance of suffering from depression, which is significantly higher than the 1.83% chance that children without incarcerated parents will suffer from depression.¹⁹ 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.²⁰

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.²¹ Education preparedness has direct effects on whether or not a child will be placed in special

¹⁷ 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).

¹⁸ *Id.* at 304.

¹⁹ *Id.* at 308.

²⁰ *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%, $p < .01$.”).

²¹ 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 4,898 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.”).

education.²² Preparedness is measured through both non-cognitive readiness and cognitive readiness.²³ 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.”²⁴ Cognitive readiness includes a “child’s ability to process information, apply knowledge, and engage in reasoning and problem solving.”²⁵

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.²⁶ 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.²⁷ 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 incarcerated African American parents compared to Caucasian parents.²⁸ 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.²⁹

While the impact of paternal incarceration on *non-cognitive* school preparedness was statistically significant, the repercussions on cognitive school readiness was not as clear.³⁰ Paternal incarceration’s effect on cognitive readiness was similar to that of non-cognitive school readiness; however, the estimates for cognitive school readiness were imprecise due to high standard errors that could not isolate the direct impact of paternal incarceration from other variables.³¹ 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

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 142.

²⁵ *Id.*

²⁶ *Id.* at 149, 150.

²⁷ Haskins, *supra* note 21, at 150.

²⁸ *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.”).

²⁹ Haskins, *supra* note 21, at 152.

³⁰ *Id.* at 150.

³¹ *Id.*

be “subject to localized family conditions.”³² 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 implications of paternal incarceration.³³ Paternal incarceration did not significantly affect girls’ non-cognitive school readiness.³⁵

Paternal incarceration also has larger, more sweeping influences on a child’s educational outcomes. Children who experience paternal incarceration between ages one and five are about 20% more likely to be retained a year in school between kindergarten and third-grade.³⁶ 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.³⁷ Additionally, parental incarceration has long-lasting effects on whether a child will later graduate from college.³⁸

Maternal incarceration—which is growing at an exponential rate—also takes a negative toll on child development.³⁹ State and federal prisons in the United States held 115,000 women by mid-2004, where 62% of women in state prison, and 56% in federal prison, were mothers to minor children.⁴⁰ Youths between the ages of fourteen and nineteen with an incarcerated mother dropped out of school at a 20% to 28% higher rate during the period of incapacitation than children without incarcerated mothers.⁴¹

³² *Id.*

³³ Haskins, *supra* note 21, at 150.

³⁵ *Id.* at 148, 149.

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

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

³⁸ 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 15% reduction in the college graduation rates where 10% of the students (7th to 12th grade) had a mother in prison; finding a 50% reduction rate in college graduation rates where 25% of the students (7th to 12th grade) had a father in prison during high school).

³⁹ *See* GLAZE & MARUSCHAK, *supra* note 1.

⁴⁰ *Id.*

⁴¹ 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).

D. *Impact on Social Inequality*

Sara Wakefield and Christopher Wildeman studied the significance of paternal incarceration on racial and social inequality by examining how paternal incarceration impacts child behavior problems, homelessness, and infant mortality.⁴² 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 to 7.83 SD), and thirty-three more total behavior problems (29.49 to 22.23 SD) than do other children [without incarcerated parents].”⁴³ Moreover, boys with incarcerated parents exhibited one-half of a standard deviation more physically aggressive behavior (.49 to -.01 SD).⁴⁴ Internalizing behavioral problems are psychological—like anxiety and depression—whereas externalizing behavioral problems are exhibited physically—like aggression and delinquency.⁴⁵ The weight of mass imprisonment on black-white disparities amongst children is drastic: but for mass imprisonment, the black-white gap would be fourteen to 26% smaller in children’s internalizing behavioral problems; but for mass imprisonment, the black-white gap would be 24% to 46% smaller in externalizing behavioral problems.⁴⁶

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).⁴⁷ Accounting for the multitude of risk factors encompassed in the birth of a child, like the immediate aftermath of the birth, and the health of the pregnancy, the final results showed a 49% increase in the odds of infant mortality with recent paternal incarceration.⁴⁸ 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

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

⁴³ *Id.* at 76-77.

⁴⁴ *Id.*

⁴⁵ *Id.* at 92.

⁴⁶ *Id.* at 156-57.

⁴⁷ *Id.* at 105.

⁴⁸ WAKEFIELD & WILDEMAN, *supra* note 42, at 108.

assistance,” and were significantly more likely to report being physically abused by the father of the child.⁴⁹

Negative externalities, in addition to parental incarceration, can also impact child homelessness. Whether the father became abusive or involved in drugs during the study increased the risk of child homelessness between 2.4 and 2.7 percentage points.⁵⁰ 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.⁵¹ Wakefield and Wildeman suggest that the prison boom’s effect on child homelessness was one of the reasons why the homelessness rate increased pre- and post- the Great Recession.⁵² But for mass imprisonment, the black-white gap in child homelessness would be approximately 26% to 65% less.⁵³

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.”⁵⁴ These disadvantages, as discussed above, accumulate and worsen over time if not addressed.⁵⁵ 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.”⁵⁶ What remains important about the detrimental effects of parental incarceration on children is the ability to eliminate, 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

⁴⁹ *Id.* at 105.

⁵⁰ *Id.* at 128.

⁵¹ *Id.* at 115-117.

⁵² *Id.* at 129.

⁵³ *Id.* at 157.

⁵⁴ WAKEFIELD & WILDEMAN, *supra* note 42, at 105.

⁵⁵ *Id.*

⁵⁶ *Id.* at 105-06.

state.⁵⁷ Until the 1960s, the juvenile court system ran on informal procedures with the clear goal of rehabilitation.⁵⁸ 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.”⁵⁹ Parents were portrayed as the primary causes of juvenile delinquency and “deviancy.”⁶⁰ The Progressive Era rehabilitative model of juvenile justice failed for a host of reasons, the leading of which was 1) the inadequacy of rehabilitation’s response to an increase in violent juvenile crime, and 2) activists’ calls for procedural safeguards in line with those provided in adult processing.⁶¹

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.⁶² 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.”⁶³ *In re Gault* altered juvenile justice away from the “rehabilitative ideal” centered on “[s]pecialized judges, assisted by social service personnel, clinicians, and probations officers” who “assumed that a rational, scientific analysis of facts would reveal the proper diagnosis and prescribe the cure.”⁶⁴

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.⁶⁵ As termed by Barry Feld, the 1960s shift from the flexible, discretionary, benevolent policies of

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

⁵⁸ *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*.”).

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

⁶⁰ *Id.*

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

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

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

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

⁶⁵ SCOTT & STEINBERG, *supra* note 57, at 90.

rehabilitation came as a result of “constitutional domestication.”⁶⁶ *In re Gault* reformulated juvenile justice in terms of traditional adult court processes, with corollary adult punishments attached.⁶⁷ 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.”⁶⁸

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.⁶⁹ Between 1987 and 1994, juvenile violent crime increased by 71%.⁷⁰ In 1994, juvenile courts disposed 56% more violent cases than in 1988.⁷¹ 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.⁷²

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.”⁷³ 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

⁶⁶ Feld, *supra* note 62, at 205.

⁶⁷ *Id.*

⁶⁸ See Feld, *supra* note 58, at 14.

⁶⁹ 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).

⁷⁰ *Id.*

⁷¹ *Id.* at 326.

⁷² 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).

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

cities.”⁷⁴ The consequences of this “new caste system” is felt most heavily by the young.⁷⁵

Our American criminal justice practice and policy of incapacitation fails to acknowledge structural inequality in the United States, which permeates institutions that reinforce racial segregation and civil exclusion.⁷⁶ 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.”⁷⁷ Post-incarceration, minorities are vulnerable to what sociologist Michelle Phelps describes as “mass probation,” or “mass supervision,” where the state’s regime of control extends post-prison through the reach of probation, fines, and stigma.⁷⁸

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.”⁷⁹ 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.”⁸⁰ 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.⁸¹ 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”⁸² Crime is not associated with “criminals,” but with minority, typically African American, men and communities.⁸³ What is particularly

⁷⁴ *Id.* at 75.

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

⁷⁶ *See* Wacquant, *supra* note 73, at 80-81.

⁷⁷ *Id.* at 82.

⁷⁸ 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).

⁷⁹ 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).

⁸⁰ *Id.*

⁸¹ *Id.* at 296.

⁸² *Id.* at 296-97.

⁸³ *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,”

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.⁸⁴

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.⁸⁵ 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 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 can 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.”⁸⁶ The substance of RJ is “empowerment, dialogue, negotiation and agreement.”⁸⁷ Professionals

but rather “claims to know something about the black people who he targets for violence or arrest based of who they are”).

⁸⁴ See Miller & Alexander, *supra* note 79, at 297.

⁸⁵ See *supra* Section III.

⁸⁶ 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).

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

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 offense will look like.⁸⁸ The goal of RJ is not to punish or rehabilitate the offender, but rather, to repair the harm caused.⁸⁹ 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.”⁹⁰ 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 obligation is it to meet those needs?”⁹¹ 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?”⁹²

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.⁹³ As Kathleen Daly posits: “Restorative justice is not a type of justice. It is a justice mechanism.”⁹⁴ RJ retreats from retributive policies of the criminal justice system in different degrees depending on the amenability of state and local reforms.⁹⁵

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.⁹⁶ 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.”⁹⁸ 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.⁹⁹

⁸⁸ *Id.*

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

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

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

⁹² *Id.*

⁹³ Walgrave, *supra* note 89, at 554-60.

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

⁹⁵ Walgrave, *supra* note 89, at 559-60.

⁹⁶ *Id.* at 560.

⁹⁸ *Id.*

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

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.¹⁰⁰ 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.¹⁰¹ Process-based RJ, articulated by Tony Marshall, is where “all parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.”¹⁰² Process-based RJ does *not* require that the outcome of a session be strictly restorative when all of the stakeholders of the crime cannot come together for a restorative outcome; as in the case where the victim does not support a solely restorative result.¹⁰³ When implementing process-based RJ, punitive and rehabilitative techniques can be incorporated to accommodate, include, and satisfy all stakeholders.¹⁰⁴ 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.”¹⁰⁵ During outcome-based RJ, if a voluntary restorative outcome is not obtainable, “coercive obligations in pursuit of (partial) reparation must be encompassed”¹⁰⁶

RJ practices typically give credence to two theoretical foundations.¹⁰⁷ First, John Braithwaite’s reintegrative shaming theory suggests that punishment should target and stigmatize an offender’s wrongful act, rather than the individual offender.¹⁰⁸ In this way, the child-offender can reconnect with the community and his family in a positive manner.¹⁰⁹ 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

¹⁰⁰ 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).

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

¹⁰² Walgrave, *supra* note 89, at 552.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

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

¹⁰⁷ Bouffard et al., *supra* note 86, at 2.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

ostracizes the juvenile from the rest of the community.¹¹⁰ Second, procedural justice proposes 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.”¹¹¹ 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.

B. Restorative Justice Programs

1. 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.¹¹² 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.”¹¹³ A 2006 meta-analysis based on fifteen prior studies on the effects of VOM found that VOM programs were accountable for a 34% drop in recidivism compared to minors who did not participate in VOM.¹¹⁴ A survey of 116 VOM programs by the University of Minnesota School of Social Work found that VOM programs are predominately led by private non-profit organizations: 43% of the programs were community-based organizations and 23% were church-based.¹¹⁵

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

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 3.

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

¹¹⁴ 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 20% to 30%).

¹¹⁵ Kurki, *supra* note 114, at 269.

incarceration.”¹¹⁶ Most juveniles diverted to the CCC are accused of second-degree assault or other misdemeanors.¹¹⁷ 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 Office, and Baltimore City School Police.¹¹⁸ Between 2004 and 2009, of the 2,500 juveniles participating in CCC sessions, 96.8% were minorities.¹¹⁹

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.¹²⁰ From this understanding, the offender begins the session by admitting his wrongdoing.¹²¹ 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.”¹²² 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.¹²³ 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.”¹²⁴

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.”¹²⁵ In 2012, the Maryland Legislature passed House Bill 543, which required “the establishment of a pretrial

¹¹⁶ 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>.

¹¹⁷ 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>.

¹¹⁸ *Programs and Services Community Conference Center*, COMMUNITY CONFERENCING, http://www.communityconferencing.org/index.php/programs/juvenile_justice/ (last visited May 9, 2017).

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

¹²⁰ Mirsky, *supra* note 116.

¹²¹ *Program and Services Community Conference Center*, *supra* note 118.

¹²² *Id.*

¹²³ *Id.*

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

¹²⁵ See *Program and Services Community Conference Center*, *supra* note 118.

victim-offender mediation program by the Chief District Court.”¹²⁶ 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.”¹²⁷ 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.”¹²⁸ Of particular note, “[e]xcept in a proceeding concerning the meaning of a mediation agreement, all communications made in the program are confidential and may not be introduced into evidence.”¹²⁹ 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.¹³⁰

A number of examples of the CCC’s impact within the Baltimore community are provided on their website, with names changed to preserve the minors’ identities.¹³¹ In one example, two boys—Timothy, age twelve, and Terrance, age fourteen—entered the local 7-Eleven, owned by Mr. Simon, and each stole a pack of M&Ms.¹³² The store owner called the police and both were arrested and charged with theft.¹³³ The police referred the case to the CCC and a restorative session took place outside the 7-Eleven, in the parking lot with both boys, Mr. Simon, Timothy’s parents, Terrance’s guardian, and the social worker.¹³⁴ The session began with both boys explaining what happened and 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.”¹³⁵

¹²⁶ H. B. 543, 2012 Gen. Assemb., Reg. Sess. (Md. 2012).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *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).

¹³¹ *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/ (last visited May 9, 2017) [hereinafter Community Conference Session].

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

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.¹³⁶ 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?'"¹³⁷ 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.¹³⁸ Personalized, 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.¹³⁹

2. 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.¹⁴⁰ 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."¹⁴¹ 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.¹⁴² Unlike most United States' FGC initiatives, in New Zealand, FGC is administered as a nation-wide response to juvenile crime by the the Department of Social Welfare.¹⁴³

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

¹³⁶ *Id.*

¹³⁷ Community Conference Session, *supra* note 131.

¹³⁸ *Id.*

¹³⁹ 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-communitys-approach-to-crime/> (for more stories on CCC's impact).

¹⁴⁰ Bouffard et al., *supra* note 86, at 4.

¹⁴¹ Umbreit, *supra* note 113, at 4.

¹⁴² *Id.*

¹⁴³ *Id.* (Conference support staff are employees of the Children and Young Person Service, which governs child protection and youth justice.).

accountable for his or her actions.”¹⁴⁴ 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.¹⁴⁵ 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 the victim and offender after a session is over.¹⁴⁶ In contrast, VOM focuses on primary stakeholders: the victim and offender.¹⁴⁷

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.”¹⁴⁹ FGC is able to build a “community of care” for the primary stakeholders in the offense.¹⁵⁰ 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.¹⁵¹ Generally, victims perceive apologies as “extremely important” in repairing the harm they have experienced from the crime.¹⁵² 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.¹⁵³ Additionally, findings suggest that victims of robbery and burglary are 49% less likely to suffer from post-traumatic stress symptoms (PTSS) if they partake in restorative justice conferencing (RJC) combined

¹⁴⁴ 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 [hereinafter SIMILARITIES AND DIFFERENCES].

¹⁴⁵ *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).

¹⁴⁶ SIMILARITIES AND DIFFERENCES, *supra* note 143.

¹⁴⁷ *Id.*

¹⁴⁹ 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).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 224-5.

¹⁵² 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).

¹⁵³ *Id.* (Figure 2).

with criminal justice processes compared to victims that solely partake in CJ.¹⁵⁴

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.¹⁵⁵ 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.”¹⁵⁶ The experiment randomly placed youths in either the FGC program or in one of four other diversion programs: teen court, a shoplifting program, community service, or VOM.¹⁵⁷ 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.¹⁵⁸ In this second interval, 15% of the control group were rearrested, but only 8% of the FGC treatment group were rearrested.¹⁵⁹ By the end of the twenty-sixth week, 27.5% of the control group and 18.5% of the FGC group were rearrested.¹⁶⁰ The final results of the study found that juveniles in the control group were 23% more likely to be rearrested than juveniles in the FGC group.¹⁶¹

Notably, recidivism rates applying restorative justice conferencing (RJC) are lower for violent crimes than for non-violent, property crimes.¹⁶²

¹⁵⁴ 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).

¹⁵⁵ McGarrell & Hipple, *supra* note 149, at 229.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 236-37.

¹⁵⁹ *Id.* at 236.

¹⁶⁰ *Id.* at 236-37.

¹⁶¹ McGarrell & Hipple, *supra* note 149, at 238.

¹⁶² 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 . . .”).

In one youth violence experiment, offenders committed thirty-eight fewer offenses per year, per one hundred offenders, than those assigned to CJ programs.¹⁶³ After evaluating ten different experiments comparing RJC treatment to CJ, Lawrence Sherman and Heather Strang found, with a 95% confidence interval, that “across 1,879 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.”¹⁶⁴ Although calculating a concrete amount of crimes prevented by RJC is difficult, applying RJC decreased repeat convictions or arrests by approximately 7% to 45%.¹⁶⁵

The cost effectiveness of applying RJC over CJ is arguably 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 £1,808,952.¹⁶⁶ 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.¹⁶⁷

In an aim to recognize “culturally competent programs,” FGC models have also taken root in state child welfare services.¹⁶⁸ 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.¹⁶⁹ The United States Children’s Bureau conducted

¹⁶³ 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).

¹⁶⁴ Sherman et al., *supra* note 162, at 12 (Figure 1).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (Table 2).

¹⁶⁷ *See id.*

¹⁶⁸ 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.”).

¹⁶⁹ 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).

reviews of Child and Family Services in thirty-two states between 2001 and 2002, and found, after examining 1,584 child welfare files, that services failed at “developing case plans jointly with parents.”¹⁷⁰ 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.¹⁷¹ 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 make decisions to resolve issues in their lives and still retain the safeguards of the law to uphold human rights.”¹⁷²

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.¹⁷³ NC-FGC trained child service providers and assessed how thirteen North Carolinian counties implemented FGC models in child welfare cases.¹⁷⁴ 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.¹⁷⁵ Additionally, NC-FGC evaluated group satisfaction with FGC methods and reported that 53.9% of family members “strongly agree[d]” and 41.8% of family 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.”¹⁷⁶ 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% “agree[d]” that “the group reached the right decision.”¹⁷⁷

The Family-Centered Practice Project (NCDSS) succeeded NC-FGC, and continues to integrate FGC in DSS by “providing training technical

¹⁷⁰ Joan Pennell, *Restorative Practices and Child Welfare: Toward an Inclusive Civil Society*, 62 J. OF SOCIAL ISSUES 259, 257-77 (2006).

¹⁷¹ *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)).

¹⁷² *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.”).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 266.

¹⁷⁵ *Id.* at 269.

¹⁷⁶ Pennell, *supra* note 170, at 270 (Table 1).

¹⁷⁷ *Id.*

assistance, and evaluation on family-centered approaches.”¹⁷⁸ 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.”¹⁷⁹ Similar to 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.”¹⁸⁰ 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.¹⁸¹ 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.¹⁸²

3. 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.¹⁸³ Black students are disproportionately affected by zero-tolerance school policies: between 2009 and 2010, 46% of black students were suspended at least twice or more times compared to only 29% of white students.¹⁸⁴ Rather than confronting the root of student misconduct, many schools respond to defiance by removing the

¹⁷⁸ 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.”).

¹⁷⁹ *Id.* at 4.

¹⁸⁰ *Id.* at 5.

¹⁸¹ *See id.* at 7.

¹⁸² *See id.* at 11.

¹⁸³ 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).

¹⁸⁴ 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/OUSD-RJ%20Report%20revised%20Final.pdf> (citations omitted).

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.¹⁸⁵ 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 of later-life delinquency.¹⁸⁶ In an effort to replace zero-tolerance polices 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."¹⁸⁷

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.¹⁸⁸ Using various RJ techniques, OUSD engages in mediation, circles, restorative conversations, and family group and community conferences.¹⁸⁹

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.¹⁹⁰ West Cole Middle School (Cole) incorporated RJOY practices with immediate effects: suspensions went down by 87% and expulsions went down to zero.¹⁹¹ Restorative circles were used at Cole to bolster a value-based approach to RJ.¹⁹² Circles at the school could include students, teachers, parents, and other

¹⁸⁵ *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>.

¹⁸⁶ 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), <http://www.nytimes.com/2013/05/30/opinion/new-york-citys-school-to-prison-pipeline.html?mtrref=undefined&assetType=opinion>.

¹⁸⁷ JAIN ET AL., *supra* note 184, at 3.

¹⁸⁸ *Id.* at 6.

¹⁸⁹ *Id.* at 8.

¹⁹⁰ *About Us*, RESTORATIVE JUSTICE FOR OAKLAND YOUTH, <http://rjoyoakland.org/about/> (last visited May 9, 2017).

¹⁹¹ 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).

¹⁹² *Id.* at 11.

support members who would all sit in a circle with a “circle keeper” to guide the talk.¹⁹³ The circle keeper is not a judge, but instead, “ensures that everyone has an opportunity to speak, that the process is respected, and that everyone abides by the agreed-upon values.”¹⁹⁴

For example, one circle session at Cole was interrupted by the circle keeper when participants began speaking over one another.¹⁹⁵ 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.¹⁹⁶ The two students and their guardians created a 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.”¹⁹⁷ Participants in the circle can be held accountable for the values they designed both in and outside of the circle.¹⁹⁸ 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.’”¹⁹⁹

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Summer et al., *supra* note 191, at 11.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 12.

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.²⁰⁰ 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.²⁰¹

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.²⁰² The hyperincarceration of minorities, who 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 works to decrease behavioral outbreaks and address the harm done 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.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 14.

²⁰² *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.