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A TIME FOR HEALING: NEW JERSEY AS A MODEL FOR YOUTH JUSTICE REFORM

Janisha Romero-Rodriguez *

Introduction

BANG! White noise rings in the ears of Cedric's classmates after the loaded gun he brought to school accidentally fires. Cedric, a 16-year-old Black teenager, spends the next 10 months in a juvenile justice camp.¹ Once he is released, he is required to participate in a restorative justice circle as a condition of his acceptance to his next school.² He found himself surrounded by a circle of supporters consisting of his family members, teachers, psychologists, and mentors.³ At first, the idea of sitting with this group to discuss his actions made him uncomfortable.⁴ However, after several exchanges between Cedric and his family members, the circle revealed that Cedric's misbehavior was motivated by his desire to protect and provide for his mother.⁵ "I probably wouldn't be into this if she wasn't struggling," Cedric said, "I just did it because my family needed it."⁶ After the shedding of many tears and the opportunity for participants to express their love and support for Cedric, the group worked together to map out a life plan for his future success.⁷ Four years later, Cedric earned his high school diploma and successfully found employment in the construction industry.⁸

With the guidance of restorative justice practices like the circle conference described above, Cedric was able to change the trajectory of his life at an early age. The wake of the COVID-

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¹ Lara Bazelon, *Oakland Demonstrates Right Way to Use Restorative Justice With Teens*, Youth Today (Jan 3, 2019), <https://youthtoday.org/2019/01/oakland-demonstrates-right-way-to-use-restorative-justice-with-teens/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

19 pandemic presents the prime opportunity for crucial youth justice reform and community empowerment through the implementation of restorative justice programs and practices.⁹ While the purpose of the current youth justice system intends to balance the best interest of the child with public safety,¹⁰ in practice the system too often pits the interests of the state, parents, and the child against one another.¹¹ Moreover, the adjudication and incarceration of children does not accomplish rehabilitative goals, increases recidivism, and ultimately can contribute to a disruption of the child's future. Since children of color and youths from low-income families are disproportionately represented in the juvenile justice system, these negative impacts affect these groups of children as well as their communities. Restorative justice approaches present a course of action that realigns interests by placing the decision-making authority back into the hands of affected communities. In an era where formerly detained and incarcerated children have been released back into the care of their communities due to pandemic response efforts,¹² now is the time for a top-down reimagination of youth justice by refocusing solutions that center around restoration and prevention through community empowerment and long-term positive outcomes for children.

Part I of this paper discusses the history of juvenile justice in America and the changing philosophies throughout time regarding how the state should respond to childhood delinquency and youth incarceration. Within the context of this analysis, I discuss how courts appropriated the common law doctrine of *parens patriae* to establish the legal justification for the state's authority

⁹ While there are a multitude of issues and concerns regarding the waiver of children into adult court as well as the sentencing of juveniles in adult court, this essay focuses solely on the juvenile justice scheme as applied to children adjudicated as minors in family court.

¹⁰ *Kent v. United States*, 383 U.S. 541, 556-557 (1966).

¹¹ See *Parham v. J.R.*, 442 U.S. 584, 604-605 (1979) (note that this case involves the commitment of children to mental health institutions, not necessarily detention facilities).

¹² Erica L. Green, *Virus-Driven Push to Release Juvenile Detainees Leaves Black Youth Behind*, N.Y. Times (June 30, 2020), <https://www.nytimes.com/2020/07/30/us/politics/juvenile-detainees-coronavirus.html>.

to intervene *in loco parentis* for children who the state determined posed a threat to themselves and public welfare, in general.¹³ I also outline the establishment of the juvenile court system and subsequent constitutional challenges it has faced. Finally, I explore New Jersey's actions as a model for youth justice reform while also exposing persisting gaps and inequalities.

Part II explains how restorative justice can fill the gaps left by the current youth justice system. This section explores the philosophy and practice of restorative and transformative justice and its potential beneficial outcomes in the juvenile justice context. Further, this section explores the proposed New Jersey bill entitled the "Restorative and Transformative Justice for Youths and Communities Pilot Program" and how this legislation should be used as a model for other states seeking to sanction restorative justice programs.¹⁴

Finally, Part III addresses constitutional and cultural concerns that should be carefully considered as this emerging approach to juvenile justice gains momentum, and why the post-COVID-19 climate provides the prime opportunity to beget a renewed long-term approach to youth justice.

I. The Evolution of the Juvenile Justice System in the United States

The state's authority to intervene in matters regarding juvenile justice, punishment, and misbehavior has deep roots in American history. This doctrine is known as *parens patriae*. Originating from English chancery law, the state's *parens patriae* function originally referred to the power and discretion of the Crown Sovereign to take on a paternalistic role over matters that

¹³ Monrad G. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 167 S. Ct. Rev. 173 (1966).

¹⁴ N S. B. 2924, 2020 Leg., Reg. Sess. (N.J. 2020), <https://legiscan.com/NJ/text/S2924/2020> (Introduced Version 09-17-2020).

concerned the wellbeing and good fortune of the nation and its subjects.¹⁵ The doctrine has been used to justify the state's intervention in matters of child rearing in the name of public interest and safety when parents are deemed unable or unwilling to properly do so.¹⁶ Although this legal terminology would not make an appearance in American jurisprudence until the 19th century,¹⁷ the belief that the state possessed an inherent authority to intervene in private family matters to protect the wellbeing of both the child and public welfare has been acknowledged since colonial times.¹⁸

a. Early Responses to Childhood Misbehavior

Before the 19th century, the responsibility of punishing and correcting misbehaving children fell solely into the hands of the child's natural parents or guardians.¹⁹ Protestant beliefs maintained that it was the duty of the heads of households to discipline mischievous and deviant children who are predisposed by nature to evildoing.²⁰ The actions of a misbehaving child were attributed to parental inadequacy in childrearing and inability to set a good example.²¹ American common law at this stage deemed children under the age of seven incapable of forming the *mens rea* to be held criminally responsible for a felony.²² A child aged seven and above, on the other hand, was presumed criminally incapable but was still allowed to be tried and sentenced in a criminal courtroom.²³ There was no presumption of innocence for children accused of misconduct,

¹⁵ Robert M. Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 *Crime & Delinquency* 68, 69 (1972), <https://journals.sagepub.com/doi/10.1177/001112877201800111>.

¹⁶ See *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

¹⁷ See *Ex Parte Crouse*, 4 Whart. 9 (Pa. 1839); Mennel, *supra* note 15 at 72; Alexander W. Pisciotta, *Saving the Children: The Promise and Practice of Parens Patriae*, 28 *Crime & Delinquency* 410 (1982), <https://journals.sagepub.com/doi/10.1177/001112878202800303?icid=int.sj-abstract.similar-articles.1>.

¹⁸ Dale Dannefer and Joseph DeJames, N.J. Dep't of Human Servs., *Juvenile Justice in New Jersey: An Assessment of the New Juvenile Code* 5 (Dec. 1979), <https://www.ojp.gov/pdffiles1/Digitization/67200NCJRS.pdf>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Mennel, *supra* note 15 at 70.

²³ *Id.*; *In re Gault*, 387 U.S. 1, 16 (1967).

leaving the determination of whether they could understand the difference between good and evil to the trier of fact.²⁴ The role of the juries in these cases was to determine the child's capacity to appreciate the circumstances of their case.²⁵ Eventually, this approach to juvenile delinquency proved to be both under performing and overly harmful to the children who it handled. For children who were acquitted, this was the end of the line, there was neither any repercussions for any bad behavior, nor follow up services to address underlying issues that might lead to further misbehavior.²⁶ On the other hand, those who were convicted were sentenced to serve time in notoriously decrepit and brutal prisons where they shared their confined living quarters with adult offenders, further traumatizing and misdirecting these children.²⁷

Eventually, social attitudes around youth delinquency response shifted, and a call emerged for differential treatment for offending children. Citizens in the New England area sought solutions that centered around a rehabilitative, rather than punitive, response that took place in more appropriate facilities – separate from the hardened adult criminals.²⁸ The early 19th century thus saw the genesis of children's institutions and reformatories – originally referred to as “Houses of Refuge” or “reformatories” across the country.²⁹ The first of these specialized institutions for delinquent and destitute children was the New York House of Refuge established in 1824.³⁰ New York was closely followed by reformatories opening in Boston and Philadelphia in 1826 and 1828, respectively.³¹

²⁴ Mennel, *supra* note 22.

²⁵ *Id.*

²⁶ *Id.* at 71.

²⁷ Dannefer and DeJames, *supra* note 18 at 6.

²⁸ Pisciotta, *supra* note 17 at 411.

²⁹ Dannefer and DeJames, *supra* note 27.

³⁰ *Id.*

³¹ *Id.*

The goal of reformatories was to convert its young residents into responsible, well-behaved, and upright citizens in a controlled environment, away from the negative influence of “incapable” parents and adult criminals.³² The regimen for children residing in these institutions consisted of religious schooling, technical training, and physical and mental discipline aimed at achieving obedience and submission to teachings.³³ The founders of early reformatories staunchly believed that the institution fostered an environment that promoted the child’s wellbeing and offered an opportunity for self-improvement.³⁴

However, studies and reports conducted from this era about reformatories reveal that this presumption was far from accurate. First, the institutions housed both delinquent (formally convicted of felonies) and non-delinquent (orphans or destitute) children alike.³⁵ This intermingling of children with diverse needs starkly contradicted the institutions’ representations, claiming that their residents were shielded from unnecessary and undue influences while in their care. Further, the crimes charged against children in these times were as minor as “stubbornness, vagrancy, and idleness” and eventually, due to the establishment of compulsory education, truancy.³⁶ These behaviors that made children statutorily eligible for institutionalization were criticized for their vagueness and disproportionality considering the severe intrusion that state-mandated institutionalization imposed on both the child’s personal liberty and parental rights to the custody. Finally, studies have reported that behind the locked doors of these reformatories,

³² Pisciotta, *supra* note 28.

³³ Mennel, *supra* note 15 at 71.

³⁴ Pisciotta, *supra* note 17 at 410.

³⁵ Dannefer and DeJames, *supra* note 27.

³⁶ *Id.*

children were subject to cruel and severe corporal punishment such as floggings, beatings, ice baths, and confined isolation.³⁷

Nonetheless, Courts insisted on invoking the state's *parens patriae* authority to justify the institutionalization of children in these reformatories, despite the lack of regard for the children's constitutional due process rights. In other words, these early institutions were the means through which the state intervened *in loco parentis* to rear delinquent children through religious education, manual labor, and firm discipline in a strict, yet corrective, environment.³⁸ These courts based their reasoning on the flawed assumption that the goals of these reformatories aligned with the best interest of the child because they performed more like "schools" that taught skills and socially acceptable behavior for adulthood.³⁹ Courts found no constitutional issue with the confinement of children in reformatories and instead reasoned that the *parens patriae* authority eliminated any necessity for due process or procedural considerations.⁴⁰

This rationalization and invocation of the *parens patriae* authority as it pertains to juvenile institutionalization was first solidified in *Ex parte Crouse*.⁴¹ In *Crouse*, a *per curiam* Pennsylvania decision held that the institutions offered a unique opportunity for education and development in an environment separate from the undue influence of society's evils.⁴² The Court declared that the state through its *parens patriae* power effectively saves the child from going down a path of lawlessness and depravity, and even went so far as to say that "not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it."⁴³ State courts and

³⁷ Pisciotta, *supra* note 17 at 414.

³⁸ Mennell, *supra* note 33.

³⁹ Pisciotta, *supra* note 17 at 411.

⁴⁰ *In re Gault*, 387 U.S. 1, 17 (1967).

⁴¹ *Ex Parte Crouse*, 4 Whart. 9 (Pa. 1839).

⁴² *Id.* at 11.

⁴³ *Id.* at 12.

reformatories across the country swiftly followed suit after *Crouse* and employed its reasoning to continuously strike down *habeus corpus* petitions and justify the state's *parens patriae* power to institutionalize children with little to no constitutional protection.⁴⁴

b. Establishment of the Juvenile Court System

By the turn of the 20th Century, an increased demand for specialized alternatives and approaches to the institutionalization and treatment of delinquent children ultimately led to the establishment of the specialized juvenile court system.⁴⁵ The first codification of the juvenile court was the Illinois Juvenile Courts Act of 1899, which was greatly informed by “The Juvenile Justice Philosophy.”⁴⁶ The essence of this philosophy was to create a separate specialized court system that would focus on the rehabilitation, rather than punishment, of at-risk children through an informal and non-adversarial proceeding informed by social and behavioral science approaches.⁴⁷ A main goal of the philosophy was to protect children from the stigma of a criminal proceedings and shield them from adult offenders who may cause them additional harm.⁴⁸ States across the country followed suit and established juvenile justice courts along the same philosophy.⁴⁹

The progress toward a specialized and informal approach to children in court, however, turned out to be a double-edged sword. The removal of children from the adult criminal system into a “non-adversarial” and “informal” setting opened the door to a murky realm of constitutional purgatory for children where “the rules of criminal procedure were therefore altogether inapplicable.”⁵⁰ The *parens patriae* justification to decriminalize juvenile courts resulted in

⁴⁴ Pisciotta, *supra* note 17 at 411-412.

⁴⁵ Dannefer and DeJames, *supra* note 18 at 7.

⁴⁶ Samuel M. Davis et al., Children in The Legal System 913 (Robert C. Clark et al. eds., 5th ed. 2014).

⁴⁷ *Id.* at 914.

⁴⁸ *Id.*

⁴⁹ Dannefer and DeJames, *supra* note 18 at 8.

⁵⁰ *In re Gault*, 387 U.S. 1, 15 (1967).

children getting “the worst of both worlds.”⁵¹ Instead, the treatment of juveniles in these specialized courts was modeled under a civil non-adversarial structure, justifying the state’s use of its *parens patriae* power to circumvent the constitutional safeguards of criminal court to determine the best interested of the child.⁵² Courts reasoned that the state, as *parens patriae*, did not infringe upon children’s constitutional interests because they did not have liberty rights equal to those of adults, rather they merely possessed a right to their custody.⁵³ This individualized, de-criminalized approach resulted in further denial of due process for juveniles.⁵⁴ Thus, for the first half of the 20th century these specialized courts existed as “a peculiar system for juveniles, unknown to our law in any comparable context.”⁵⁵

c. Constitutional Challenges to the Juvenile Court System

Between the years of 1966-1970 a series of landmark Supreme Court cases challenged the lack of procedural oversight of the juvenile court system and established the constitutional floor for the rights of children subject to adjudication in these courts. The first challenge came in 1966, when the Supreme Court answered the question of which constitutional protections extended to juveniles who were faced with a waiver order that transferred them to criminal court to be tried as adults.⁵⁶ In *Kent v. United States*, the first U.S. Supreme Court decision to decide on matters of the juvenile court, the Court declared that the power of the state as *parens patriae* was not unlimited.⁵⁷

⁵¹ *Kent v. United States*, 383 U.S. 541, 556 (1966) (“There is evidence . . . that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”).

⁵² *Gault* at 16.

⁵³ *Gault* at 17 (“The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right ‘not to liberty but to custody.’”).

⁵⁴ James E. Duffy, Jr., Note, *In re Gault and the Privilege Against Self-Incrimination in Juvenile Court*, 51 Marq. L. Rev. 68, 72 (1967).

⁵⁵ *Gault* at 19.

⁵⁶ See *Kent v. United States*, 383 U.S. 541 (1966).

⁵⁷ *Id.* at 555.

The Court established that these waiver orders violated due process and fair treatment because they denied the child an opportunity for a hearing and effective assistance of counsel.⁵⁸ Further, the Court in *Kent* warned against “procedural arbitrariness” in juvenile court matters.⁵⁹

At the heels of *Kent* came a second groundbreaking constitutional challenge to the juvenile court system. The Court in *Gault* held that children are persons protected by the Fourteenth Amendment.⁶⁰ Thus, in all proceedings where the liberty of the child is in jeopardy, the juvenile courts shall ensure that the child is afforded the following constitutional protections: (1) the right to counsel;⁶¹ (2) the privilege against self-incrimination;⁶² (3) confrontation clause rights;⁶³ (4) the right to adequate notice of the charges.⁶⁴ Although the *Gault* Court upheld the legal doctrine of *parens patriae* by affirming the state’s power to act in the best interest of the child in this specialized civil setting, it denied that granting constitutional protections for children would strip away the state’s function of acting *in loco parentis* via the juvenile courts.⁶⁵ The Court warned that combining *parens patriae* informality with heavy handed punishment may have adverse effects on the child and may even lead to a resistance of rehabilitative efforts.⁶⁶ The Court further called into question whether or not the distinguishing term of “delinquent” actually served in lessening the stigma imposed on children, citing the fact that many jurisdictions have moved onto alternate ways to refer to children adjudicated in juvenile court.⁶⁷

⁵⁸ *Id.* at 554.

⁵⁹ *Id.*

⁶⁰ Donald E. McInnis et al., *The Evolution of Juvenile Justice from the Book of Leviticus to Parens Patriae: The Next Step After In re Gault*, 53 no.3 Loyola of Los Angeles L. Rev. 553, 567 (2020).

⁶¹ *In re Gault*, 387 U.S. 1, 41-42 (1967).

⁶² *Id.* at 55.

⁶³ *Id.* at 56.

⁶⁴ *Id.* at 33.

⁶⁵ McInnis, *supra* note 60.

⁶⁶ *Gault* at 26.

⁶⁷ *Id.* at 24.

Finally, the Court in *Winship* established “beyond a reasonable doubt” as the evidentiary standard for juvenile adjudications of delinquent offenders.⁶⁸ The Court rejected the argument that juvenile delinquency adjudications were not criminal in nature and thus did not affect the youth’s rights or privileges to require a heightened standard.⁶⁹ Instead, the court held that the same considerations that play a part in criminal proceedings exist in delinquency proceedings, particularly when the child faced potential incarceration.⁷⁰ However, since this case focused on delinquency adjudication, this constitutional protection of a heightened evidentiary standard did not extend to the adjudication of status offenders.

This line of cases poked holes in the fabric of the juvenile court system, particularly in the validity and extent of the state’s *parens patriae* justification as applied to delinquent children. The Court in *Gault* described this doctrine as “murky” and having “dubious relevance” historically.⁷¹ These challenges marked the beginning of an era that limited the reach of the state’s *parens patriae* power, particularly when used as a justification to circumvent the constitutional rights and protections of children facing punishment in juvenile courts.

Since the Kent-Gault-Winship line of cases, the rights of children still remained in this murky area, particularly in the realm of *Miranda* rights and interrogations.⁷² Although rapid development in the fields of neuroscience and psychology uncovered the vast neurological and developmental differences between adults and adolescents, the law did not catch up.⁷³ Law

⁶⁸ *In re Winship*, 397 U.S. 358, 368 (1970).

⁶⁹ *Id.* at 365.

⁷⁰ *Id.* at 366.

⁷¹ *Gault* at 16.

⁷² See generally McInnis, *supra* note 60.

⁷³ See e.g., McInnis, *supra* note 60; Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 28 no.3 *Issues In Science And Technology* 67 (2014), <https://web.b.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=3&sid=27585e79-4c30-44eb-b5d6-dc636a97c389%40pdv-v-sessmgr01>.

enforcement thus functioned on a false assumption that youths facing interrogation understood their *Miranda* rights enough to either waive or invoke them.⁷⁴ Due to children's diminished capacity to withstand the pressures and coercions of police interrogation methods used on adults, children are over represented in false confession rates.⁷⁵

Despite these disparities in the area of juvenile interrogation, the Supreme Court has not delineated further guidance beyond the holding in *J.D.B. v. North Carolina*.⁷⁶ In *J.D.B.*, a thirteen year old student was pulled from class and interrogated by a police officer in a closed room without having received his *Miranda* rights, leading to a confession.⁷⁷ The state courts held that the child was not in custody and denied the consideration of age within the *Miranda* custody analysis.⁷⁸ The Supreme Court disagreed, holding that a child's age, either known or objectively apparent to the interrogating officer, should be considered for this custody analysis.⁷⁹ The Court highlighted the sensitivities of children to be more likely to submit to the authority of police presence and not feel "free to go" in the same way a reasonable adult would.⁸⁰

d. New Jersey as a Model for Youth Justice Reform Today

New Jersey is considered a model for youth justice reform. First, the state has extended constitutional protections and remedies to juveniles that exceed those granted by federal courts.

⁷⁴ Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 Iss.6 Behav. Sci. & L. 757, 773-74 (2007) (study suggesting that in interrogation settings, police perceived adolescents like adults), <https://web.b.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=3&sid=ed31a804-e115-4248-a1ee-194fd2cca07f%40sessionmgr103>.

⁷⁵ Tamar Birckhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 Washington & Lee L. Rev. 385, 414 (2008), <https://law2.wlu.edu/deptimages/Law%20Review/65-2Birckhead.pdf>; Steven A. Drizin et al., *The Problem of False Confessions in the Post-DNA World*, 82 no.3 North Carolina L. Rev. 891, 944 (2004), <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4085&context=nclr>.

⁷⁶ *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

⁷⁷ *Id.* at 265-266.

⁷⁸ *Id.* at 277.

⁷⁹ *Id.*

⁸⁰ *Id.* at 272.

The New Jersey Supreme Court has recognized that unique concerns and heightened care are involved when involving children with the powers of law enforcement and courts.⁸¹ The state's case law consistently reinforces the belief that special considerations and additional safeguards should be afforded to juveniles when interrogated in order to protect and uphold their constitutional rights.⁸² Further, New Jersey has implemented statutory provisions that further the protections granted in *Gault*. In New Jersey, a juvenile has a right to counsel at every critical stage and the child and their family shall be advised of the right to retain counsel or be appointed counsel.⁸³ Juveniles also maintain this right at initial detention hearings and pre-adjudicatory detention review hearings.⁸⁴

The most recent turn of the new millennium has seen a number of significant improvements in the juvenile justice system in the United States. A significant amount of the progress made in this century is due to the Juvenile Detention Alternatives Initiative (JDAI) launched in 1992 by the Anne E. Casey Foundation.⁸⁵ The goal of this systems-change initiative is to reduce the number of youths who are detained in facilities awaiting court hearings and improve the conditions within these facilities.⁸⁶ During the 1990s, national juvenile detention rates were at an all-time high despite the drop in delinquency and arrests during this decade.⁸⁷ In New Jersey between 1993-

⁸¹ *State in Interest of A.A.*, 240 N.J. 341, 345 (N.J. 2020).

⁸² *Id.* at 354 (holding that police must Mirandize children in the presence at the outset of a custody interrogation before allowing the parent to speak privately to the child in order to afford them “a meaningful opportunity to help juveniles understand their rights and decide whether to waive them.”); *See also State v. Presha*, 163 N.J. 304, 308 (holding that police officers make best efforts to locate a minors parent or legal guardian before commencing custodial interrogation).

⁸³ N.J. Stat. Ann. § 2A:4A-39 (2020); N.J. R. Ch. Div. Fam. Pt. R. 5:3-4(a); N.J. R. Ch. Div. Fam. Pt. R.5:21-3(c).

⁸⁴ N.J. Stat. Ann. § 2A:4A-38(h) (2020); N.J. R. Ch. Div. Fam. Pt. R.5:21-3(a).

⁸⁵ *Juvenile Detention Alternatives Initiative (JDAI)*, Annie E. Casey Foundation (last visited May 19, 2021), <https://www.aecf.org/work/juvenile-justice/jdai/>; <https://www.nj.gov/oag/jjc/pdf/JDAI-2019-Report-Annual.pdf> [PAGE i].

⁸⁶ *Id.*

⁸⁷ N.J. Off. of the Att’y Gen., *Juvenile Detention Alternatives Initiative Ann. Rep.*, at i (2019), <https://www.nj.gov/oag/jjc/pdf/JDAI-2019-Report-Annual.pdf>.

2002, juvenile arrests for the most serious offenses was cut nearly in half,⁸⁸ and yet the average daily detention rate increased by almost 40%. This led to an expensive “detention building-boom” in the state that failed to address issues of overcrowding.⁸⁹ The JDAI achieves its goals by implementing its core strategies, including, but not limited to, reassessing detention admissions policies and practices, enhancing alternatives to detention, reducing delays in processing that result in extended lengths of stay, and enhancing confinement conditions.⁹⁰ Specifically, enhancing the availability of detention alternatives involves identifying short-term placement opportunities for children to reduce their chances of reoffending by offering minimally restrictive supervision and support as they await disposition or other court hearings.

As one of the first targeted states to receive funding from the Foundation to implement the JDAI strategies, New Jersey has since made significant practice and policy changes to its juvenile justice framework on a statewide and municipal level.⁹¹ Between the years of 2003-2008, New Jersey’s detained and committed youth population dropped 80% and 85%, respectively.⁹² New Jersey has expanded its JDAI pilot program into all 21 counties as is recognized by the Foundation as a “State Model Site” for other states seeking to replicate its outcomes.⁹³

Further, the JDAI has resulted in improved facility conditions and significant cost-reduction resulting from the closure of several detention facilities as well as the overall reduction of commitment rates.⁹⁴ In January of 2018, New Jersey Governor Chris Christie ordered the

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at ii.

⁹¹ N.J. Office of the Att. Gen., *Juvenile Justice*, (last visited May 19, 2021), <https://www.njoag.gov/programs/juvenile-justice-reform/>; <https://www.nj.gov/oag/jjc/pdf/JDAI-2019-Report-Annual.pdf>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ N.J. Off. of the Att’y Gen., *Juvenile Detention Alternatives Initiative Ann. Rep.*, at iii (2019), <https://www.nj.gov/oag/jjc/pdf/JDAI-2019-Report-Annual.pdf>.

closing of two of the three youth prisons in the state and announced his plans to build two youth rehabilitation centers in line with national best practice guidelines.⁹⁵ Later that year, Governor Phil Murphy signed an executive order establishing the Task Force for the Continued Transformation of Youth Justice.⁹⁶ This task force relies on the experience of stakeholders in private and public sectors who evaluate the state's policies and practices around the juvenile justice system in order to improve outcomes for New Jersey's children.⁹⁷ Most recently, Attorney General Gurbir Grewal has jump started a number of initiatives within the Juvenile Justice Commission.⁹⁸ One of the Commission's current goals is to close the last remaining youth prison known as "Jamesburg" in order to establish and fund smaller, regional facilities.⁹⁹ On December 3, 2020, Attorney General Grewal issued an extensive policy directive which requires police departments in the state to expand and track the use of warnings and other alternatives to arrests of minors.¹⁰⁰ This directive also encourages prosecutors to limit formal court proceedings only to minors charged with the most serious offenses, and to handle all other cases outside of formal court proceedings.¹⁰¹

New Jersey has been a national pioneer in replicating the local Juvenile Detention Alternatives Initiative statewide. The state has seen significant declines in detention populations, and many detention centers have closed or been consolidated.¹⁰² In 2015, New Jersey Senate Bill

⁹⁵ Elizabeth Weill-Greenberg, *Institute Statement on Governor Christie's Plan to Close Two New Jersey Youth Prisons*, New Jersey Institute for Social Justice (January 8, 2018), https://www.njisj.org/institute_statement_on_governor_christie_s_plan_to_close_two_new_jersey_youth_prisons#:~:text=Today%2C%20January%20%2C%202018%2C.and%20to%20build%20two%20youth.~:text=Today%2C%20January%20%2C%202018%2C.and%20to%20build%20two%20youth.

⁹⁶ Exec. Order No. 42 (January 24, 2019), <https://nj.gov/infobank/eo/056murphy/pdf/EO-42.pdf>.

⁹⁷ *Id.*

⁹⁸ N.J. Off. of the Att'y Gen., *AG Grewal Announces New "Community-Based Services Consortium" to Provide Prosocial Programs to Confined Youth*, (last visited May 19, 2021) <https://www.njoag.gov/ag-grewal-announces-new-community-based-services-consortium-to-provide-prosocial-programs-to-confined-youth/>.

⁹⁹ N.J. Off. of the Att'y Gen., *Juvenile Justice* (last visited May 19, 2021), <https://www.njoag.gov/programs/juvenile-justice-reform/>.

¹⁰⁰ Dep't of L. and Pub. Safety, N.J. Off. of the Att'y Gen., *Prevention and Early Intervention*, (last visited May 19, 2021), https://www.nj.gov/oag/jjc/localized_programs_jdai.html.

¹⁰¹ *Id.*

¹⁰² Dep't of L. and Pub. Safety, N.J. Off. of the Att'y Gen., *Prevention and Early Intervention*, (last visited May 19, 2021), https://www.nj.gov/oag/jjc/localized_programs_jdai.html.

2003 further reformed certain aspects of the state’s juvenile justice system, limiting waiver to adult court to those ages 15 and older and restricting the use of solitary confinement for incarcerated youth.¹⁰³

The current juvenile justice framework in New Jersey provides some opportunities for children to be diverted out of the court process before a disposition in family court.¹⁰⁴ First, when an allegation of delinquency is made, the child can be referred to a Juvenile/Family Crisis Intervention Unit (JFCIU).¹⁰⁵ These units are tasked with diverting matters away from the courtroom that involve family related problems such as truancy, runaways, or other serious familial conflicts.¹⁰⁶ The goal is to provide services for children and their families in order to stabilize the environment that may have contributed to the misbehavior while shielding the child from contacts with the court system.¹⁰⁷

Another potential stage for diversion is what is known as “Stationhouse Adjustments.” This type of intervention occurs after a law enforcement officer has probable cause to believe that the child is delinquent and subsequently takes him into custody.¹⁰⁸ At this stage, the officer can choose to divert the child through other means instead of signing a delinquency complaint.¹⁰⁹ According to the New Jersey Attorney General’s office, “the intent of the stationhouse adjustment program is to provide for immediate consequences, such as community service or restitution and a prompt and convenient resolution for the victim, while at the same time benefitting the juvenile by

¹⁰³ S.B. 2003, 2015 Leg., Reg. Sess. (N.J. 2015), § (1)(c)(1).

¹⁰⁴ Dep’t of L. and Pub. Safety, N.J. Off. of the Att’y Gen., *Moving Through the JJC System*, (last visited May 19, 2021), https://www.nj.gov/oag/jjc/thru_system.htm.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Peter C. Harvey, Dep’t of L. and Pub. Safety, N.J. Off. of the Att’y Gen., Attorney General Guidelines for Stationhouse Adjustments of Juvenile Delinquency Offenses 3 (February 2005), https://www.nj.gov/lps/dcj/agguide/directives/directives_2005/dir-2005-4-station-guide.pdf.

¹⁰⁹ *Id.*

avoiding the stigma of a formal juvenile delinquency record.”¹¹⁰ Attorney General Grewal described the rehabilitative effects of diversion away from the juvenile justice system and stated “If we can turn a youth away from the juvenile justice system, we know they stand a much better chance of turning their life toward success in the long run.”¹¹¹ Stationhouse Adjustment programs are a mandatory feature of all patrolling law enforcement agencies in New Jersey municipalities and are made available to eligible children, most preferably by a designated juvenile officer specifically qualified to handle matters involving youth offenders.¹¹² A child is eligible to be considered for this diversionary program if the alleged offence committed was an ordinance violation, petty disorderly persons offense, or a disorderly persons offense.¹¹³ If the child has no known prior record with law enforcement, fourth degree offenses may also qualify the child for consideration.¹¹⁴ The alleged commission of certain offenses render a child ineligible for stationhouse adjustments, i.e., serious assault, sexual offenses, drug possession, bias-motivated offenses, among other considerations.¹¹⁵ Other factors that are considered are the age of the child, any prior record he may have, and the attitudes of all parties involved (including the child, their family, and the victim).¹¹⁶

¹¹⁰ *Id.*

¹¹¹ Jake Girard, *Attorney General Grewal Issues Directive to Further Transform State’s Juvenile Justice System*, New Jersey Institute for Social Justice (December 3, 2020), <https://www.njisj.org/attorney-general-grewal-issues-directive-to-further-transform-state-s-juvenile-justice-system>.

¹¹² Harvey, *supra* note 108.

¹¹³ *Id.* at 4.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Dep’t of L. and Pub. Safety, N.J. Off. of the Att’y Gen., Attorney General Law Enforcement Directive No. 2020-12 6, (2020), <https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2020-12-Juvenile-Justice-Reform.pdf>

e. Persisting Gaps and Inequities in the Juvenile Justice System

While much has been accomplished in the past three decades to improve the juvenile justice system, many harms and disparities persist. Today, youth detention facilities are used for two main purposes: as a housing facility for the committed and, more frequently, to hold the accused in order to maintain the safety of the child and the public, as well as ensure their attendance at pretrial hearings. In fact, juvenile pre-detention accounts for 75% of all admissions into juvenile detention facilities.¹¹⁷ In 2018, around 750,000 young people interacted with the juvenile court system for delinquent offenses¹¹⁸ and 97,800 more were referred for status offenses.¹¹⁹ About a third (33%) of the delinquency cases that were formally processed in juvenile court led to an adjudication of delinquency or waiver to adult criminal court.¹²⁰ Among these youth, most were placed on some form of probation which, if violated, can lead to further consequences including incarceration.¹²¹ The remaining fourth of the young people adjudicated delinquent were removed from their communities and placed in institutions or residential facilities.¹²²

Data on recidivism also serve to expose the harms inflicted by the existing youth incarceration and detention system on children and their communities. Studies show that youth incarceration and pretrial detention are closely associated with increased recidivism rates, even for children with no prior contacts with the youth justice system.¹²³ A child who is made to endure

¹¹⁷ Sarah Cusworth Walker, *The Impact of Pretrial Juvenile Detention on 12-Month Recidivism: A Matched Comparison Study*, 66(13-14) *Crime & Delinquency* 1865, 1866 (2020), <https://journals.sagepub.com/doi/pdf/10.1177/0011128720926115>.

¹¹⁸ Hockenberry, Sarah, and Puzanchera, Charles. *Juvenile Court Statistics 2018*, National Center for Juvenile Justice 1, 6 (2020), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/juvenile-court-statistics-2018.pdf>.

¹¹⁹ *Id.* at 64.

¹²⁰ *Id.* at 42.

¹²¹ *Id.* at 50.

¹²² *Id.* at 47.

¹²³ Walker, *supra* note 117 at 1882.

pretrial juvenile detention for any length of time is 33% more likely to recidivate within a year on a felony level, and 11% on a misdemeanor level.¹²⁴ Moreover, each day spent in pretrial detention increases their chances of recidivism by 1%.¹²⁵ This finding shows that any degree of exposure to incarceration has significant correlations to traumatic experiences, disruptions, further deviant behavior, and overall harmful outcomes for children. These data show that the youth incarceration and detention system is contrary to public safety. Retha Onitiri, the Campaign Manager of the 150 Years Is Enough, describes this system as “a revolving door of recidivism.”¹²⁶

While the population of children committed to secured facilities in New Jersey has dropped significantly within the last decade, the racial disparities amongst committed youth have not.¹²⁷ Black and Brown children are disproportionately impacted by the youth justice system. In 2017, New Jersey ranked the third highest in Black/White youth incarceration disparity in the country.¹²⁸ A Black child in New Jersey is more likely to be detained, committed, and incarcerated than a White child¹²⁹, even though Black and White children commit most offenses at similar rates.¹³⁰

In recent years, there has been an increasing social call for criminal and youth justice reform. While factions of our nation may be deeply divided about the specific causes underlying crime and justice, a change from the status quo is long overdue. In New Jersey, residents believe in the importance of giving children opportunities for self-improvement, and thus highly favor

¹²⁴ *Id.* at 1876.

¹²⁵ *Id.* at 1878.

¹²⁶ Dino Flammia, *New Jersey's Juvenile Prisons Have Failed, and 2 Should Close, Group Says*, New Jersey 101.5 (June 20, 2017), <https://nj1015.com/new-jerseys-juvenile-prisons-have-failed-and-2-should-close-group-says/>.

¹²⁷ Elizabeth Pelletier and Samantha Harvell, *Data Snapshot of Youth Incarceration in New Jersey*, Urban Institute 1, 3 (June 2017), https://www.urban.org/sites/default/files/publication/91561/data_snapshot_of_youth_incarceration_in_new_jersey_0.pdf.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Joshua Rovner, *Policy Brief: Racial Disparities in Youth Commitments and Arrests*, The Sentencing Project 6 (April 2016), <https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/>.

youth justice programs that prioritize rehabilitation and prevention over programs that seek to punish and commit.¹³¹ Residents across party lines support policies that are aimed at increased funding for mental health services and social workers, addressing racial disparities, and community-based service delivery that incorporates the family.¹³² Further, New Jerseyans increasingly support Congressional incentivization for states to close and repurpose youth incarceration facilities and reallocate these dollars toward funding community-based rehabilitation programs.¹³³

II. Restorative and Transformative Justice: A Re-Imagined Approach

Throughout the evolution of the juvenile justice system, from *parens patrie* to quasi-criminal courts and constitutional challenges, there exist many gaps in how this scheme adequately addresses the needs of children and their communities. The traditional system does not serve the needs of American youths, and even has disparate impacts on children of color and their communities. Despite New Jersey's large strides in youth justice reform, persisting racial disparities and socioeconomic inequities expose how the state cannot stop now in seeking out better solutions for its children. New Jersey can begin to address these gaps by reimagining its youth justice system through the lens of Restorative and Transformative Justice. Restorative and Transformative Justice. The circumstances are ripe for a reimagining of the way we conceptualize how we achieve the goals of juvenile justice.

¹³¹ *Youth First Initiative New Jersey Statewide Survey*, GBAO (March 2021), https://d3n8a8pro7vhm.cloudfront.net/njsj/pages/691/attachments/original/1617193279/Youth_First_New_Jersey_Presentation_2021_Final_%281%29.pdf?1617193279.

¹³² *Id.*

¹³³ *Id.*

a. What Is Restorative/Transformative Justice

Restorative Justice is an approach and general framework that seeks to address the gaps and harms left by the traditional justice process by challenging our conceptualization of addressing crime.¹³⁴ Unlike the traditional punitive responses to criminal behavior, essential elements of restorative justice include shifting the focus from away from punishment and instead toward accountability, recognizing and addressing the needs of the victims, and repairing the relationships harmed within the community.¹³⁵ Criminologist Howard Zehr published *Changing Lenses*, the first work to address restorative justice as a legitimate legal framework in the criminal justice process.¹³⁶ Zehr describes restorative justice as a reimagined lens to view criminal justice, one that views crime as a conflict between individuals rather than as citizens against the state.¹³⁷

In the criminal justice context, restorative justice is focused on having the offender take responsibility for the harms caused by their actions through community-based, victim-focused, and trauma informed intervention that involves all stakeholders in coming to a solution to mend the harms.¹³⁸ Most importantly, restorative justice reallocates the decision-making powers of public safety from the courts, prosecutors, and police and back into the hands of the affected community. This community-oriented approach allows all affected parties to be directly involved

¹³⁴ Michael Wenzel et al., *Retributive and Restorative Justice*, 32 Law and Hum. Behav., 375, 376 (2008).

¹³⁵ *Id.* at 378.

¹³⁶ See generally Howard Zehr, *Changing Lenses: A New Focus For Crime and Justice* (1990).

¹³⁷ *Id.* at 186.

¹³⁸ Carrie Menkel-Meadow, *Restorative Justice: What Is It And Does It Work?*, 3 Ann. Rev. L. & Soc. Sci., 10.1, 10.3 (2007),

<https://poseidon01.ssm.com/delivery.php?ID=520006116096072013070099102079123005120037062046029025071065112071069113074069088005018107016026040058048089066092103106105114040072009047028103106127092124031036028079017127099124116115002093125091109101022108010109002015088064110120122127029074&EXT=pdf&INDEX=TRUE>

in a deliberative harm-mending process¹³⁹ that can humanize¹⁴⁰ the response to criminal activity and may even transform the offender's attitudes about their behavior, particularly for juveniles.¹⁴¹

There are many different programs and approaches to restorative justice. Two traditional restorative justice approaches include: victim-offender mediation¹⁴² and family/community conferencing.¹⁴³ Unlike an adversarial court proceeding that would strictly involve the state and the defendant, restorative mediation meetings allow for all affected parties to engage with each other in order to achieve comprehensive healing and accountability.

Victim-offender mediation provides a space where the victim can voluntarily come in contact with their offender with the help of a mediator.¹⁴⁴ These mediations may also be attended by family members or other community members affected by the wrongdoing.¹⁴⁵ At these mediations, both parties are able to relay their stories, experiences, and most importantly, their emotions.¹⁴⁶ A weighty importance is placed on the offender's efforts to reconcile with the person or people they have harmed. The goal is for both parties to feel heard and for the victim to feel in control and recompensed in the way that best begins a healing process for both the victim and the offender.¹⁴⁷ Finally, the parties come to a negotiated agreement about what is to happen next.¹⁴⁸ This considers the offender's interests as well as what the victim needs to feel that their harms

¹³⁹ Wenzel, *supra* note 134.

¹⁴⁰ *Id.* at 378.

¹⁴¹ David B. Wilson, et al., U.S. Dep't of Justice, Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis 36 (2017), <https://www.ojp.gov/pdffiles1/ojjdp/grants/250872.pdf>.

¹⁴² Mark S. Umbreit & Jean Greenwood, U.S. Dep't of Justice, NCJ 176346, Guidelines for Victim-Sensitive Victim-Offender Mediation: Restorative Justice through Dialogue 1(2000).

¹⁴³ Mark S. Umbreit, U.S. Dep't of Justice, NCJ 176347, Family Group Conferencing: Implications for Crime Victims 1 (2000), https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176347.pdf.

¹⁴⁴ Umbreit, *supra* note 142.

¹⁴⁵ *Id.* at 44.

¹⁴⁶ *Id.* at 7.

¹⁴⁷ *Id.* at 9.

¹⁴⁸ *Id.* 11.

have been adequately recompensed. The important element is that the affected parties are in control of the next steps, rather than being subject to the whims of a removed, objective, and procedural system.

Secondly, group conferencing methods also brings together affected parties on either side of the conflict in a secure space, allowing for an involved deliberative process for healing and accountability.¹⁴⁹ A unique facet of this method is that it invites additional community connections and supports for the parties involved which can include police officers, probation officers, and school officials who can provide further structure to the process.¹⁵⁰ Since more parties are involved in family group conferencing, it further bolsters community empowerment and healing.¹⁵¹

Jessica Laus, a Detroit native writing for nj.com, shared her successful experience with restorative justice opportunities made available to her throughout her upbringing.¹⁵² Laus writes “if it weren’t for restorative justice, I could have easily become just another statistic.”¹⁵³ She shares how restorative justice approaches in school “created a safe environment where each student was allowed space to learn and grow and develop a shared sense of belonging and understanding – and potentially become less likely to commit harmful acts in the future.”¹⁵⁴ In fact, these positive experiences motivate Laus to urge the New Jersey Legislature to pass the “Restorative and Transformative Justice for Youths and Communities Pilot Program” bill.¹⁵⁵

¹⁴⁹ Umbreit, *supra* note 143 at 2-3.

¹⁵⁰ *Id.* at 5.

¹⁵¹ *Id.*

¹⁵² Jessica Laus, *New Jersey is Mishandling How it Deals with Troubled Youth*, NJ.com (Feb. 3, 2021), <https://www.nj.com/opinion/2021/02/new-jersey-is-mishandling-how-it-deals-with-troubled-youth-opinion.html>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

Another example is the Safe Streets Initiative implemented in Milwaukee, Wisconsin, which employs restorative justice talking circles for different healing groups such as aggrieved citizens, public officials, victims, and first-time offenders as alternatives to prosecution or incarceration.¹⁵⁶ These talking circles, led by the Marquette University Law School's Restorative Justice Initiative, aid in levelling the playing field for participants and fostering community in neighborhoods where there exists a "long negative history between the police and communities of color."¹⁵⁷ In a time when citizens are deeply divided over police, restorative justice circle like the one employed in Milwaukee may potentially serve as an early step toward healing.

Regardless of the approach, all methods of restorative justice are centered around the goals of offender accountability and victim/community empowerment. By utilizing these methods of restorative justice, the state can empower victims and their families to have a say in the way justice is served upon them, while also ensuring that the children are not subjected to cruel and harsh treatments synonymous with the traditional juvenile justice process.

Transformative Justice Transformative Justice, like Restorative Justice, does not have one clear definition. However, in the juvenile justice context, it seeks to address the underlying socio-political and economic inequities that are closely tied to outcomes of delinquency, conflicts, and harms for children and their affected communities.¹⁵⁸ Lauren J. Silver, a researcher who studies outcomes of transformative justice for children in Camden, New Jersey, explains that transformative justice focuses on the "conditions that make harm possible" in a manner that

¹⁵⁶ Janine P. Geske and India McCanse, *Neighborhoods Healed Through Restorative Justice*, Marquette Law Scholarly Commons 15, 16 (2008), https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1518&context=facpub&_ga=2.138750131.1208398499.1621648303-1902925113.1621648303.

¹⁵⁷ *Id.* at 17

¹⁵⁸ Anthony J. Nocella II, *An Overview of the History and Theory of Transformative Justice*, 6 Iss.1 Peace and Conflict 1, 4 (2011), <http://www.review.upeace.org/pdf.cfm?articulo=124&ejemplar=23>.

“moves beyond individually based reconciliation” toward “changing environments, policies, and cultural logistics” that allow for harm to be caused and experienced.¹⁵⁹

b. Outcomes of Restorative Justice

Restorative Justice interventions lead to concrete outcomes of success. When these programs are politically and fiscally supported, they can lead to a reduction in government expenditures and crime rates.¹⁶⁰ On an individual and communal level, restorative justice in the juvenile context can decrease recidivism rates,¹⁶¹ increase victim participation and satisfaction,¹⁶² and promote rehabilitation for juveniles.¹⁶³ Meta-analyses indicate that restorative justice methods can decrease recidivism rates. A 2017 study on the effectiveness of restorative justice in the context of juvenile cases reported that such programs and practices overall showed a moderate reduction in future delinquent behavior compared to the traditional juvenile court processing.¹⁶⁴ However, because restorative justice is an emerging and evolving process and such programs can take many forms, research is still ongoing to assess how effectively these practices can address concerns of recidivism. Some scholarly critics argue that these data may be a result of self-selection biases.¹⁶⁵ These scholars raise that the lower recidivism might be a function of the responsible party’s willingness to participate in a reformation process, and not because the programs alone result in lowered recidivism.¹⁶⁶ In fact, as mentioned above, the process necessitates the responsible party’s

¹⁵⁹ Lauren J. Silver, Transformative Childhood Studies – a Remix in Inquiry, Justice, and Love, 18 Iss.2 Children’s Geographies 1, 4 (2019), <https://www.tandfonline.com/doi/pdf/10.1080/14733285.2019.1610155>.

¹⁶⁰ Wilson, *supra* note 141 at 15.

¹⁶¹ Jeff Bouffard et al., *The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes among Juvenile Offenders*, 15 iss.4 Youth Violence and Juvenile Justice 465, 477 (2017), <http://yvj.sagepub.com/content/early/2016/05/03/1541204016647428.full.pdf+html>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Wilson, *supra* note 141.

¹⁶⁵ Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 no.2 The Prison Journal, 127, 138 (2005).

¹⁶⁶ *Id.*

acceptance and acknowledgement of their role in causing harm. However, some programs that do not rely on volunteered participants have returned results of decreased recidivism post-incarceration.¹⁶⁷ While there remains a need for further investigation, empirical evidence suggests that restorative justice can have an effect on reducing recidivism rates¹⁶⁸ and may even aid the re-entry of formerly incarcerated individual back into their communities.¹⁶⁹

Restorative Justice also aids youth reformation, as it can potentially offer a means to bypass the court system entirely.¹⁷⁰ This allows the lives of child to remain intact, preventing the disruptions caused by the traditional means. For example, the Restorative Community Conferencing Program of Community Works West in Oakland, California receives "the case before the prosecutor files charges, and youth who comply with their plan completely bypass the justice system, leaving no record of system involvement."¹⁷¹ Executive Director Fania Davis reports that this program successfully "diverts about one hundred youths per year from incarceration."¹⁷²

Finally, restorative justice can empower victims in ways that the traditional court processes often do not. Victims often do not get a say in a criminal proceeding once it is taken into the hands

¹⁶⁷ Lawrence W. Sherman, et al., *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review*, 31 *Journal of Quantitative Criminology* 1, 3 (2015); See generally Bandy Lee and James Gilligan, *The Resolve to Stop the Violence Project: Transforming an In-House Culture of Violence Through a Jail-Based Programme*, 27 *Journal of Public Health* 149 (2005).

¹⁶⁸ William Bradshaw and David Roseborough, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, 69 no.2 *Federal Probation* 15, 19 (2005), https://www.uscourts.gov/sites/default/files/69_2_4_0.pdf#:~:text=Restorative%20justice%20dialogue%20programs%2C%20VOM,studied%20with%20negative%20effect%20sizes.

¹⁶⁹ Gordon Bazemore and Shadd Maruna, *Restorative Justice in the Reentry Context: Building New Theory and Expanding the Evidence Base*, 4 *Victims & Offenders* 375, 379 (2009), https://www.researchgate.net/publication/232979835_Restorative_Justice_in_the_Reentry_Context_Building_New_Theory_and_Expanding_the_Evidence_Base.

¹⁷⁰ Fania E. Davis, *The Little Book of Race and Restorative Justice: Black Lives, Healing, and US Social Transformation* 71 (2019).

¹⁷¹ *Id.*

¹⁷² *Id.*

of the courts, and their capacity to speak their truth is limited to a sentencing impact statement.¹⁷³ Restorative justice methods allow victims to guide the process and outcome of the conflict. Not only can this result in lesser sanctions upon the responsible party, but it can lead to greater outcomes of healing.¹⁷⁴ For example, a study that focused on post-traumatic stress symptoms in robbery and burglary survivors noted that police-led conferencing programs reduced the traumatic effects of the crime, indicating a 49% reduction in the number of victims reporting clinical post-traumatic stress symptoms.¹⁷⁵

These types of diversion tactics are critical for interrupting the juvenile justice process and preventing lasting harm inflicted on the children involved. When a child comes in contact with the juvenile justice system through an interaction with a police officer that leads to an arrest, their odds for subsequent involvement with the justice system increase significantly.¹⁷⁶ These interactions substantially harm young people's subsequent outcomes in education and employment well into adulthood, especially for children who commit less serious offenses and do not have extensive history with the justice system.¹⁷⁷ By focusing efforts of rehabilitating children into diversionary or restorative programs, such as those described, the state will reap the benefits of positive outcomes for children and their communities, while simultaneously achieving the goals of *parens patriae*.

¹⁷³ Christine M. Englebrecht, *The Struggle For "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System*, 36 *iss.2* 129, 130 (2011).

¹⁷⁴ See 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 *Journal of Experimental Criminology*, 291 (2014), <https://restorativejustice.org.uk/sites/default/files/resources/files/Short-term%20effects%20of%20restorative%20justice%20conferences%20on%20post-traumatic%20stress%20symptoms.pdf>.

¹⁷⁵ *Id.* at 301-302.

¹⁷⁶ *Expand the Use of Diversion from the Juvenile Justice System*, Annie E. Casey Foundation 3 (2020), <https://www.aecf.org/resources/expand-the-use-of-diversion-from-the-juvenile-justice-system/>.

¹⁷⁷ Eric Hyla, *The Long-Term Economic Impact of Juvenile Criminal Activity*, 24 *iss.1* *The Park Place Economist* 72, 78 (2016), <https://digitalcommons.iwu.edu/cgi/viewcontent.cgi?article=1449&context=parkplace>.

c. New Jersey's Next Step Toward Restorative and Transformative Justice

Through the research and grass-roots advocacy of organizations like the New Jersey Institute for Social Justice (NJISJ) and the New Jersey Restorative Justice Network, the New Jersey legislature is currently reviewing the “Restorative and Transformative Justice for Youths and Communities Pilot Program.”¹⁷⁸

The N.J. Senate Bill 2924 proposes the creation of the “Restorative and Transformative Justice for Youths and Communities Pilot Program” – a two-year commitment in the Juvenile Justice Commission aimed at reducing contact between children and the youth justice system.¹⁷⁹ The bill appropriates \$8.4 million in the fiscal years 2021 and 2021.¹⁸⁰ The program is to be established in the cities of Paterson, Newark, Trenton, and Camden – urban communities that are most impacted by the disparities of the youth justice system.¹⁸¹ The overarching goals of the program include providing education, vocational programming, and employment counseling; increasing access to mental health and well-being resources; decrease unlawful behavior and improve socioemotional and behavioral responses through restorative non-punitive interventions; and increasing the rate in which children participate in these programs within their community.¹⁸²

The structure of the pilot program features two components: community-based enhanced reentry wraparound services and restorative justice hubs.¹⁸³ Community-based enhanced reentry wraparound services consist of a network of collaborating and holistic services designed to support children released from youth prisons due to the COVID-19 pandemic. The bill proposes that this

¹⁷⁸ S. B. 2924, 2020 Leg., Reg. Sess. (N.J. 2020) § (2).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at § (4).

¹⁸¹ *Id.* at § (2).

¹⁸² *Id.* at § (2)(c)(1)-(5).

¹⁸³ *Id.* at § (2)(a)-(b).

structure continue in the long-term to service all children facing reentry post-incarceration.¹⁸⁴ Wraparound services, when designed to assess and address the individual needs of the child, can reduce the likelihood that they will engage in at-risk or delinquent behavior.¹⁸⁵ The bill enumerates, but does not limit, the following services and supports to be included in the wraparound structure: mental health services; substance use disorders treatment and recovery; education support; employment services; housing support; financial literacy and debt support; life skills; and social support services.¹⁸⁶

The second branch of the pilot program involves establishing restorative justice hubs within these communities. Restorative justice hubs are physical spaces where children, their families, and other community members can gather to address local conflicts through community-led dialogue and supports.¹⁸⁷ The restorative justice hub would thus function as a community headquarters for adequate, equitable, and effective service delivery for children and their families. The bill emphasizes that an equitable relationship between the Juvenile Justice Commission, county youth services commissions, courts, state and municipal public defenders, prosecutors, and law enforcement are vital to the success of the restorative justice hubs and continued collaboration on public safety initiatives.¹⁸⁸

The pilot program proposed by Senate Bill 2924 serves as the first critical steps toward a system centered around restorative and transformative solutions of New Jersey's children. The

¹⁸⁴ *Id.* at § (2)(a).

¹⁸⁵ Michelle M Carney and Frederick Buttell, *Reducing Juvenile Recidivism: Evaluating the Wraparound Services Model*, 13 no.15 Research on Social Work Practice 551, 564 (2003), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.916.7660&rep=rep1&type=pdf>.

¹⁸⁶ S. B. 2924, 2020 Leg., Reg. Sess. (N.J. 2020) § (2)(a).

¹⁸⁷ *Id.* at § (2)(b).

¹⁸⁸ *Id.*

legislature should pass this bill and effectuate this needed response to the persisting gaps and inequalities in the state's youth justice system.

III. Constitutional and Cultural Considerations for the Path Ahead

While the past two and a half decades have seen national revolutionary changes in juvenile justice, much work is still left to be done. The state must fulfill its *parens patriae* goals by addressing the needs of children in a way that causes the least harm and enhances their chances for subsequent success, not just for the children, but for their communities. New Jersey is currently in a critical position to introduce top-down systemic changes to juvenile justice that can achieve these goals, starting with the proposed Restorative and Transformative Justice Bill.

Among the multitudes of domestic crises that accompanied the initial peak of the COVID-19 global pandemic was issue of the health and wellbeing of incarcerated people, including children.¹⁸⁹ The nature of confined and congregate living in residential treatment and detention centers was a dangerous environment for the Coronavirus disease to cultivate and spread rapidly within facilities that housed this vulnerable population.¹⁹⁰ Of the children residing in New Jersey Juvenile Justice Commission custody, 28 out of a total of 247 had tested positive for the virus.¹⁹¹ The transparency by publicly and privately-run facilities regarding their internal COVID-19 response initiatives was uneven and often unforthcoming across jurisdictions due to either inadequate testing or inadequate reporting.¹⁹² Jurisdictions varied in their responses to the rapidly

¹⁸⁹ *Matter of Request to Modify Prison Sentences*, 242 N.J. 357, 366-367 (N.J. 2020).

¹⁹⁰ Josh Ravnor, *COVID-19 in Juvenile Facilities*, The Sentencing Project 5 (February 22, 2021), <https://www.sentencingproject.org/publications/covid-19-in-juvenile-facilities/#:~:text=COVID%2D19%20has%20infected%20thousands,staff%20working%20in%20juvenile%20facilities.&text=As%20of%20January%2C%20five%20staff.%2C%20Guam%2C%20and%20Puerto%20Rico.>

¹⁹¹ *Matter of Request to Modify Prison Sentences*, 242 N.J. 357, 366 (N.J. 2020).

¹⁹² *Most States Fail to Track Critical COVID-19 Data for Prisons, Jails, and Juvenile Facilities*, UTNews (March 29, 2021), <https://news.utexas.edu/2021/03/29/most-states-fail-to-track-covid-19-data-for-prisons-jails-and-juvenile-facilities/>.

spreading virus. Some measures enacted by states were to limit or entirely restrict visitation privileges and recreational/vocational programming.¹⁹³ However, these systemic responses negatively impacted the quality of life for incarcerated youths, and sometimes resulted in more severe and dehumanizing treatment.¹⁹⁴ In some facilities, for example, children who tested positive for the virus were quarantined in circumstances that ultimately amounted to solitary confinement, a punitive practice that has been most contemporaneously denounced as inhumane and morally depraved even when used in adult prisons.¹⁹⁵ Given the racial disparities in the criminal and youth justice system, Black and Brown children housed in residential facilities were disproportionately affected by the COVID-19 virus and the institutional changes enacted in response.¹⁹⁶

A silver lining in the pandemic response within youth detention facilities is that, across the country, there was a rapid decrease in the incarcerated youth population. In efforts to control the spread of the virus and reduce the number of children living in a confined and congregate space, treatment and detention facilities both reduced rates of admissions and increased rates of release for youths, allowing them to be placed back into the care of their communities.¹⁹⁷ In New Jersey, Governor Phil Murphy signed an executive order that created a mechanism for identifying and releasing incarcerated juveniles housed in JJC Institutions, although advocates for these children contended that this response process was slow-moving.¹⁹⁸ Moreover, an active national monthly

¹⁹³ Josh Rovner, *Youth Justice Under the Coronavirus: Linking Public Health Protections with the Movement for Youth Decarceration*, The Sentencing Project (September 30, 2020), <https://www.sentencingproject.org/publications/youth-justice-under-the-coronavirus-linking-public-health-protections-with-the-movement-for-youth-decarceration/>.

¹⁹⁴ Erica L. Green, 'Pacing and Praying' Jail Youth's Seek Release as Virus Spreads, N.Y. Times (April 14, 2020), <https://www.nytimes.com/2020/04/14/us/politics/coronavirus-juvenile-detention.html?action=click&module=RelatedLinks&pgtype=Article>.

¹⁹⁵ Erica L. Green, *Virus-Driven Push to Release Juvenile Detainees Leaves Black Youth Behind*, N.Y. Times (July 30, 2020), <https://www.nytimes.com/2020/07/30/us/politics/juvenile-detainees-coronavirus.html?searchResultPosition=5>.

¹⁹⁶ Rovner, *supra* note 164.

¹⁹⁷ *Matter of Request to Modify Prison Sentences*, 242 N.J. 357, 372 (N.J. 2020).

¹⁹⁸ *Id.* at 395.

survey conducted throughout the course of the COVID-19 pandemic revealed that Black and Latino children were not released from detention at the same pace as white children, leading to an even greater racial disparity within youth prisons compared to before the pandemic.¹⁹⁹ By the start of 2021, the overrepresentation of children of color in youth detention was worse than in 2020.²⁰⁰ Thus, despite the massive decrease of the incarcerated youth population due to health concerns, the racial and ethnic disparities remained untouched, if not intensified. Now, as the effects of the pandemic begin to flatten, the population of detained youths are beginning to slowly rise again.²⁰¹

While restorative and transformative justice initiatives propose innovative solutions that address the gaps of the current youth justice framework, certain considerations remain left to be explored about this emergent conceptualization of justice. One concern is that as restorative responses become more informal when transitioned into primarily community-based interventions, the hard-earned constitutional due process protections for children may risk being discarded.²⁰² In pilot restorative justice programs in New Zealand, a country which affords similar protections to the accused as the U.S. Constitution, restorative programs co-exist with due process rights. For example, the participation of the accused in these programs are contingent upon their voluntary consent, thus preserving the right to trial and the accompanying constitutional protections afforded in the courtroom.²⁰³ Special care must be afforded to ensure that as interventions move away from

¹⁹⁹ *Survey: A Pandemic High for the Number of Black Youth in Juvenile Detention*, Annie E. Casey Foundation: Blog (March 26, 2021), <https://www.aecf.org/blog/survey-a-pandemic-high-for-the-number-of-black-youth-in-juvenile-detention/>.

²⁰⁰ *Id.*

²⁰¹ *As Pandemic Eases, Youth Detention Population Creeps Up*, Annie E. Casey Foundation: Blog (May 10, 2021), <https://www.aecf.org/blog/as-pandemic-eases-youth-detention-population-creeps-up/>.

²⁰² Tina S. Ipka, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 Washington University Journal of Law and Policy 301, 321-322 (2007), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1220&context=law_journal_law_policy.

²⁰³ *Id.*

the formalities of the courtroom, the rights of children do not fall by the wayside akin to the youth justice structure pre-*Gault*.

In addition, it is important to take note of issues involving confidentiality and self-incrimination protections for children. For example, safeguards should be put in place to ensure that any statements a child makes in an informal community-based intervention are shielded from self-incrimination or double jeopardy risks.²⁰⁴ Not only would these safeguards protect children's constitutional rights, but they may also encourage more enthusiastic participation by establishing a legal safe space.²⁰⁵

Finally, as these alternative responses serve as potential tools in correcting the persisting racial disparities of youth justice, steps should be taken to ensure that these practices are effective and do not replicate systemic biases that negatively impact children and communities of color. For example, certain differences among and within cultures that are not preemptively addressed may lead to miscommunication and further conflict.²⁰⁶ Additionally, it is imperative for mediators to confront and internalize the implications that racism can have on interpersonal conflicts.²⁰⁷

New Jersey has come a long way in reforming youth justice, but much work is left to be done to address the state's systemic inequities that lead to disproportionate effects on children. This is particularly so for children of color and their communities that lie at the intersection of income, housing, and educational inequality. The post-COVID world is ripe with opportunity to enact systemic and fundamental changes within the existing criminal and youth justice scheme.

²⁰⁴ *Id.* at 324.

²⁰⁵ *Id.*

²⁰⁶ Mark S. Umbreit and Robert B. Coates, U.S. Dep't of Justice, NCJ 176348, Multicultural Implications of Restorative Justice: Potentials, Pitfalls, and Dangers 1, 7-9 (2000), https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176348.pdf.

²⁰⁷ *Id.* at 11.

New Jersey should take these imperative first steps and continue to be a model for youth justice reform by passing Senate Bill 2924. The fiscal savings gained from this transition should follow these children into their communities where they can receive rehabilitative care that promotes positive outcomes for their future. However, it is equally important to ensure that the constitutional rights of children continue to be protected regardless of the availability of more informal approaches. While children are in the care of their communities due to the pandemic, this is the prime opportunity to re-envision the way we take care of them. Now is the time to take steps toward making community-based restorative and transformative programs the status quo in youth justice. Like Cedric, children deserve the opportunity to self-improve and be understood so that they may learn from their mistakes in a safe, non-punitive environment that not only protects but promotes their future wellbeing.