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When the Cure Makes You Ill: Seven Core Principles to Change the Course of Youth Justice

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SEVEN CORE PRINCIPLES TO CHANGE THE COURSE OF YOUTH JUSTICE

I. INTRODUCTION

Our nation's current youth justice¹ system is iatrogenic,² a term that refers to a cure that worsens the very thing it is trying to fix.³ The system's operation often results in increased violence and recidivism, the very same outcomes it allegedly intends to remedy. Many Americans, regardless of their political affiliation, would agree that children who commit harmful acts should be held accountable in proportion to the act committed and provided with meaningful help and opportunity to change, and that the operation of the youth justice system should not result in increased violence and criminality.⁴ Yet our current youth justice system routinely

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1. Some of the literature referenced in this article uses the term "juvenile justice." This term is synonymous with "youth justice." The author prefers the term "youth justice," given the negative connotations of the word "juvenile," which is generally used when discussing "juvenile delinquents" but not, for example, when asking a friend how her or his child is doing.
 2. The origins of the word iatrogenic are in the medical arena. The word has gained usage in the youth justice field to describe how youth justice interventions can exacerbate harms. It should be noted that my use of this term in no way is intended to connote or imply that young people are themselves the "harm" or social ill. The author uses the term to call attention to the ways in which current system interventions can worsen youth and community outcomes. *See, e.g.,* Uberto Gatti et al., *Iatrogenic Effect of Juvenile Justice*, 50 J. CHILD PSYCHOL. & PSYCHIATRY 991, 991–98 (2009) (finding that youth who are "poor, impulsive, poorly supervised by their parents, and exposed to deviant friends are more likely, for the same degree of antisocial behavior, to undergo intervention by the Juvenile Court, and that this intervention greatly increases the likelihood of involvement with the penal system in adulthood"). Gatti's research also found that juvenile court interventions involving placement had the most negative impact. *Id.* at 991. Although the research sample used in this analysis was from Canada, much of the reasoning applies to the United States. Similar outcomes have been found in other jurisdictions both inside and outside of the United States. *See, e.g.,* DAVID HUIZINGA ET AL., THE EFFECT OF JUVENILE JUSTICE SYSTEM PROCESSING ON SUBSEQUENT DELINQUENT AND CRIMINAL BEHAVIOR: A CROSS-NATIONAL STUDY 126 (2003) (a 2003 study tracking youth in Denver and in Bremen, Germany and finding that "those arrested and sanctioned display higher frequencies of involvement in crime at later stages in their life than do their delinquent age mates who were not so sanctioned"); Lesley McAra & Susan McVie, *Youth Justice?: The Impact of System Contact on Patterns of Desistance From Offending*, 4 EUR. J. CRIMINOLOGY 315, 325 (2007) (finding that those who faced a juvenile hearing were nearly twice as likely to admit engaging in serious offenses (forty-eight percent versus twenty-eight percent) in the following year as youth with identical backgrounds and prior self-reported offending behavior who did not face court hearings).
 3. "The best word to describe America's addiction to training schools is 'iatrogenic'—a cure that makes problems worse," says Paul DeMuro, who served as commissioner of the Pennsylvania juvenile corrections system in the late 1970s and has since served as an expert witness in numerous legal cases concerning conditions of confinement in juvenile facilities. "The model has been around for 150 years, and has proven a failure by any measure."
RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 1, 4 (2011), http://www.aecf.org/~media/Pubs/Topics/JuvenileJustice/DetentionReform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf. As this article will address, the harms caused by the current system are not limited to the "training school" model (a term often used to refer to large congregate care facilities).
 4. A 2011 poll of Americans' views on youth justice found, for example, that
By a margin of 78–15 percent, the public overwhelming [sic] wants the focus of the juvenile justice system to be on prevention and rehabilitation, rather than incarceration and punishment. Americans believe that prevention and rehabilitation will prevent

fails to meet these goals and instead systematically fails young people,⁵ their families, crime victims, and public safety, often at exorbitant taxpayer cost. Additionally, there are often vast disconnects between the severity of the acts for which children are in court and the system's responses. Children are frequently, particularly children of color and those with social service needs, harshly punished and isolated for low-level and non-violent offenses.

Decades of research demonstrates that children who have committed a crime or delinquency⁶ and then interact with the system—particularly those who are detained or incarcerated—commit *more* future acts of crime and violence as compared to children who commit similar crimes or delinquencies and never become system involved or those who are not detained or incarcerated and instead receive community-based supervision, treatment, and services.⁷

This article highlights seven core principles of youth justice reform. Grounding reform efforts in these seven principles will increase the likelihood of their success and sustainability. The article proceeds in seven sections, each corresponding to one principle. Each section introduces a principle, describes how the status quo's failure to adopt that principle is causing harm, and briefly articulates policy solutions grounded in the relevant principle.⁸ These principles are general in their nature and designed to be applicable across jurisdictions, despite the logistical and sometimes legal differences that exist in different states and localities.⁹

youth recidivism, and that young people who have committed crimes are able to change and the system should give them the opportunity to do so.

CAMPAIGN FOR YOUTH JUSTICE, YOUTH JUSTICE SYSTEM SURVEY, *administered and reported by* GBA STRATEGIES 1 (2011) (emphasis omitted), http://www.gbastrategies.com/public_files/cfyj101111m1.pdf.

5. The terms “youth,” “young people,” “children,” and “kids” are used interchangeably in this article and in much youth justice literature. All refer to people under the age of eighteen.
6. An act of delinquency is generally defined as an act that would be considered a criminal act but for the age of the person committing the act. In other words, a twelve-year-old who is found by law to have committed the act of robbery may be said to have committed an act of “delinquency” or of “juvenile delinquency,” whereas a twenty-five-year-old who is found by law to have committed the act of robbery is said to have committed a crime. States differ in terms of the youngest and oldest ages at which children can be prosecuted for acts of juvenile delinquency. Some states, such as New York, prosecute children as young as seven for acts of juvenile delinquency. *See* N.Y. FAM. CT. ACT § 301.2 (McKinney 2011).
7. This term is used to refer to forms of supervision (such as probation), treatment (such as mental health and substance abuse treatment), and services (such as vocational training and educational services) that can be provided in community settings for children who are youth-justice involved. These kinds of programs and services are also sometimes referred to as alternatives-to-detention and alternatives-to-incarceration. The author uses the term community-based supervision, treatment, and services because the author believes it is more descriptive and does not inherently posit this approach as an alternative.
8. These policy solutions are meant to be representative and are not exhaustive in scope. There are certainly other policy solutions to which application of these principles would and should lead.
9. The development of these principles is based on the author's experiences as an attorney for children and as an advocate for systemic youth justice reform. It is also based on the wisdom of the many young people with whom the author has worked. This work also draws heavily on the research, experiences, and insights of the many individuals and organizations working on youth justice reform across the nation. A number of the examples in this piece are from New York because the author's work has been largely

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A. The Current Youth Justice Landscape

Involvement in the youth justice system has been shown to increase future rates of both childhood delinquency and adult penal system involvement.¹⁰ This negative impact increases as the type of intervention used becomes more restrictive, isolating, and punitive in nature.¹¹ An ever-increasing body of evidence demonstrates that incarcerating children leads to increased violence, recidivism, and poor life outcomes for youth (even when controlling for the severity of offense).¹² For youth with mental health concerns, detention (pretrial) and incarceration (posttrial) have been shown to exacerbate mental health symptoms and increase the likelihood that youth will engage in self-harm and commit suicide.¹³ Youth who have experienced secure

concentrated on youth justice there. The principles were developed, however, to be applicable to reform efforts nationwide. It should be noted that reform efforts aimed at identifying, analyzing, and reforming the “front door” of the system (who enters the system and how), including policing patterns and practices, are desperately needed. A comprehensive examination of this issue is beyond the scope of this article. Similarly, an exploration of the many systems that can either contribute to or help prevent youth involvement in the justice system, such as education, mental health, substance abuse, and early childhood education, is also crucial and beyond the scope of this article.

10. See ANTHONY PETROSINO ET AL., THE CAMPBELL COLLABORATION, FORMAL SYSTEM PROCESSING OF JUVENILES: EFFECTS ON DELINQUENCY 6, 36–37 (2010) (discussing a 2010 report on twenty-nine experiments involving 7304 youth over a thirty-five-year period which determined that involvement in the juvenile justice system actually increases delinquency).
11. A Canadian study by Uberto Gatti, Richard E. Tremblay, and Frank Vitaro, which followed over 1000 boys from youth to adulthood, illustrated that involvement in the justice system has iatrogenic effects on youth. Gatti et al., *supra* note 2, at 991–92. The strongest predictor was placement in an institution, illustrating that the more restrictive the punishment the more damaging the long-term effects. *Id.* at 995. Their research was consistent with previous theories on the concept and effects of labeling: that being labeled as “delinquent” has the effect of altering one’s self perceptions, reducing social opportunities, and, in turn, becoming more susceptible to the influence of deviant groups and behaviors. *Id.* at 991–92. The authors also note that those subjects who were poor, deprived, and members of minority groups, and therefore already at an increased level of vulnerability, were more likely to be arrested in the first place and subsequently labeled as deviants. As a result, they were more likely to become more deeply involved in the justice system in the long run. *Id.* at 996.
12. See NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 1 (2007), http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf; AMANDA PETTERUTI ET AL., JUST. POL’Y INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 1, app. A, at 16–19 (2009), http://www.justicepolicy.org/images/upload/09_05_REP_CostsOfConfinement_JJ_PS.pdf; see also BARRY HOLMAN & JASON ZIEDENBERG, JUST. POL’Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 1, 4–5 (2006), http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf; *The Consequences Aren’t Minor: The Impact of Trying Youth as Adults and Strategies for Reform*, CAMPAIGN FOR YOUTH JUST. 1 (Liz Ryan & Jason Ziedenberg eds., 2007), http://www.campaignforyouthjustice.org/documents/CFYJNR_ConsequencesMinor.pdf; Task Force on Community Preventive Services, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, 32 AM. J. PREV. MED. S7 (2007), <http://www.thecommunityguide.org/violence/mcgowanarticle4.pdf>.
13. HOLMAN & ZIEDENBERG, *supra* note 12, at 2; see PETTERUTI ET AL., *supra* note 12, at 18. Additionally, youth who have been detained or incarcerated also have a significantly higher mortality rate than the general population, including homicide-related deaths; this increase in mortality rate disproportionately

detention or incarceration are also less likely to return to school.¹⁴ Economists have shown that incarcerating youth decreases their future earning potential and the chance that they will remain in the labor market.¹⁵

The popular belief that most children in the system, particularly those who are detained or incarcerated, have committed serious, violent offenses is wrong.¹⁶ Seventy percent of youth in pretrial detention are held for nonviolent charges.¹⁷ Some children alleged to have committed low-level and nonviolent offenses enter locked pretrial detention because a judge determines that their primary caretaker is not a stable or safe caretaker.¹⁸ Nationwide, only twenty-four percent of incarcerated children have been convicted of violent felonies; forty-five percent are guilty only of probation violations, misdemeanors, or “low-level charges unrelated to violence, weapons, or drug trafficking.”¹⁹

impacts youth of color and female youth, with the highest mortality rate found among African American male youth. See Linda A. Teplin, et al., *Early Violent Death Among Delinquent Youth: A Prospective Longitudinal Study*, 115 PEDIATRICS 1586, 1586 (2005).

14. HOLMAN & ZIEDENBERG, *supra* note 12, at 9.

15. *Id.* at 2.

16. Media representations of youth crime in the last twenty years led many people to believe it was on the rise when it was actually steadily decreasing (a trend that continues to this day). This belief was partially produced by the media’s perpetuation of the image of “superpredators,” characterized as “ultra-violent morally vacuous young people,” and their perceived prevalence in American cities. Kenneth A. Dodge, *Framing Public Policy and Prevention of Chronic Violence in American Youths*, 63 AM. PSYCHOLOGIST 573, 576–7 (2008). Additionally, youth of color are routinely overrepresented as perpetrators rather than victims of crime in the media. These false stereotypes permeate the minds of the public and policymakers in a dangerous and detrimental way and may be partially responsible for punitive based approaches to youth justice despite the failures of these approaches to reduce crime. For example, the superpredator image and mythology of the late 1980s and 1990s may have served to reify the profound racial and ethnic disproportionalities in the youth justice system at that time. See Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849 (2010).

17. More than two-thirds of these children are charged with property offenses, public order offenses, technical probation violations, or status offenses (crimes that wouldn’t be crimes if they were adults, like running away or breaking curfew). *National Statistics*, CAMPAIGN FOR YOUTH JUSTICE, <http://www.campaignforyouthjustice.org/national-statistics.html> (last visited Mar. 5, 2012). Only five percent of youth are arrested for crimes of homicide, rape, robbery, or aggravated assault. *Youth Arrests 2009*, CAMPAIGN FOR YOUTH JUSTICE, http://www.campaignforyouthjustice.org/documents/Chart_of_Youth_Arrests.pdf (last visited Mar. 5, 2012). The detention or incarceration rates for low-level offenses is often most significant for children of color and lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ) youth, issues that will be addressed in more detail later in this article. See *infra* Parts IV, V.

18. For example, until a recent small pilot program opened in New York City offering respite short-term foster care to some children in this situation, the city had no alternative programs to address this problem. The program, Ready Respite, is funded through a state grant and operated jointly by two not-for-profit agencies. See Nancy L. Fishman, *Reducing Juvenile Detention: Notes From an Experiment on Staten Island*, 56 N.Y.L. SCH. L. REV. 1475, 1478 (2011–12). However, many jurisdictions have no respite beds at all.

19. Douglas W. Nelson, *2008 Kids Count Essay: A Road Map to Juvenile Justice Reform* (summary), THE ANNIE E. CASEY FOUND. 1, 2 (2008), <http://www.aecf.org/~media/PublicationFiles/2008EssaySummaryCharts.pdf> (citing Melissa Sickmund, *Census of Juveniles in Residential Placement Databook*, FACT SHEET (U.S. Dep’t of Justice Office of Juvenile Justice & Delinquency Prevention), June 2000, <https://www.ncjrs.gov/pdffiles1/ojjdp/fs200008.pdf>).

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The reality is that many young people in the youth justice system simply should not be system-involved at all. Many of these young people have engaged only in the kinds of normative adolescent behaviors that in some communities—namely, predominantly white middle and upper class communities—are seen by schools, police, and other stakeholders as “teens being teens” and dealt with in private, nongovernmental ways.²⁰ There are also children who have engaged in more serious behaviors, including acts of violence, and they too are being failed by the system in ways that hurt both them and our long-term collective safety.²¹

II. PRINCIPLE ONE: TREAT CHILDREN AS CHILDREN²²

A. *The Problems of the Status Quo*

A robust body of developmental research has shown that the brains of children, even in late adolescence, are not fully formed. Children lack the critical decisionmaking and risk assessment capabilities of adults while simultaneously being

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20. The author once asked audience members at a youth justice event to raise their hand if, while teenagers, they had ever smoked marijuana, shoplifted from a store, went on the roof of a building without permission, or failed to pay a transit fare. Not surprisingly, many people, including the author, raised their hand. For many children, most of whom are poor children of color, these types of adolescent behaviors can result in youth justice system involvement. Similarly, Tamara Steckler, the head of New York State’s Legal Aid Society’s Juvenile Rights Practice, put it this way: “When people ask me, ‘What does a working youth justice system look like?’ I say, ‘We know what it looks like; we have a working youth justice system already. It is the one we use for white middle and upper class kids like the kids in my suburban New Jersey neighborhood.’” The task before us is ensuring that *all* children have access to a justice system that works.
 21. According to a 2009 report by the Federal Bureau of Investigation, only five percent of youth arrests are for violent crimes. NEELUM ARYA, CAMPAIGN FOR YOUTH JUST., STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 1, 12 (2011), http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf. Twenty-five percent of total juvenile placements were for violent crimes (which include criminal homicide, violent sexual assault, robbery, and aggravated assault) in 2007. *Detailed Offense Profile by Placement Status for United States for 2010*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Offense_Adj.asp (last visited Mar. 5, 2012). It is also important to note that even those young people accused or convicted of a violent crime may not themselves have engaged in violence. For example, a young person who was convicted of being a lookout for a robbery may have been unaware that violence would be used during the course of the robbery. These scenarios are common among youth, who are particularly susceptible to peer pressure and often act in groups.
 22. This principle draws on testimony the author delivered to the New York City Council on raising the age of criminal responsibility in New York State. *Supporting New York State Chief Judge Jonathan Lipman’s Call on the New York State Legislature to Pass and the Governor to Sign Legislation Raising the Age of Criminal Responsibility: Resolution 1067-2011*, N.Y.C. Council Hearing, *Resolution 1067-2011 supporting New York State Chief Judge Jonathan Lippman’s call on the New York State Legislature to pass and the Governor to sign legislation raising the age of criminal responsibility: Hearing Before the Comm. on Juvenile Justice*, N.Y.C. Council 2010–2013 Sess. (Nov. 1, 2011) (testimony of Gabrielle Prisco, Director of Juvenile Justice Project). The term “treat children as children” draws on the term “judging children as children,” used by Judge Michael Corriero, Executive Director of the New York Center for Juvenile Justice and a former member of the Board of Directors of the Correctional Association.

more susceptible to peer pressure.²³ Furthermore, children have not yet developed the ability to understand consequences and are less in control of impulses and aggression.²⁴ As Dr. Ruben C. Gur, neuropsychologist and Director of the Brain Behavior Laboratory at the University of Pennsylvania, states:

The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable. . . . Indeed, age 21 or 22 would be closer to the 'biological' age of maturity.²⁵

"The region of the brain that is the last to develop is the one that controls many of the abilities that govern goal-oriented, 'rational' decision-making, such as long-term planning, impulse control, insight, and judgment."²⁶ In addition, during adolescence, the brain is undergoing profound changes that impact the ways in which adolescents process and react to information.²⁷ The Supreme Court recognized the growing science of adolescent psychosocial and brain development in both *Roper v. Simmons*,²⁸ outlawing the death penalty for crimes committed by persons under eighteen, and *Graham v. Florida*, holding that children cannot be sentenced to life without parole in non-homicide cases.²⁹

We as a society recognize this type of categorical and bright line distinction between children and adults in a myriad of legal and social situations. For example, we do not allow any child under the age of eighteen to vote, serve in the military, or get married without parental permission, nor do we allow them to drop out of school or, in most situations, consent to medical care. As a society, we also categorically state that all children under the age of eighteen lack the sufficient maturity to make any legal contract including a cell phone contract, or view certain "adult" content. Our society even believes that eighteen-, nineteen-, and twenty-year-olds lack the sufficient emotional and cognitive development to legally drink alcohol or gamble. We as a society do not draw behaviorally based distinctions in any of these myriad situations. We do not, for example, say that some children have demonstrated through their actions, an adult-like tendency, and so should be able to serve in the military, vote, or enter into a contract with AT&T.

23. Brief for Am. Psychological Ass'n & Missouri Psychological Ass'n as Amici Curiae Supporting Respondent at 2, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

24. *Id.* at 2; Adam Ortiz, *Cruel and Unusual Punishment: The Juvenile Death Penalty: Adolescence, Brain Development and Legal Culpability*, A.B.A. JUV. JUST. CTB. 1, 2 (2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf.

25. Ortiz, *supra* note 24, at 2 (quoting Petition for Writ of Certiorari, *Patterson v. Texas*, 541 U.S. 1038 (No. 03-10348) (Declaration of Ruben C. Gur)).

26. ARYA, *supra* note 21, at 9.

27. *Id.*

28. 543 U.S. 551 (2005).

29. 130 S. Ct. 2011, 2026 (2010).

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Despite what we know both scientifically and anecdotally about the brains and developmental needs of children, the United States has a strong practice of prosecuting children as adults. In New York and North Carolina, all sixteen- and seventeen-year-olds are automatically and without exception tried as adults.³⁰ A number of other states automatically prosecute all seventeen-year-olds as adults.³¹ In almost every state, youths who are thirteen or fourteen years of age (or younger) can be tried and punished as adults for a wide range of offenses, including nonviolent offenses.³²

A study compared the recidivism rates of adolescents charged with felony offenses in New York (where sixteen- and seventeen-year-olds are prosecuted as adults) and New Jersey (where sixteen- and seventeen-year-olds are adjudicated in juvenile court). To control for the desired variable—the treatment of adolescents in either the juvenile system or the adult criminal court system—the crimes and demographics of the participants were kept equable. New York teens prosecuted as adults were eighty-five percent more likely to be re-arrested for violent crimes and forty-four percent more likely to be re-arrested for felony property crimes than teens prosecuted as juveniles in New Jersey.³³

Nationwide, youth who are transferred, or “waived,” into the adult system are thirty-four percent more likely to be arrested in the future for violent or other crimes than youth prosecuted in juvenile courts,³⁴ thereby reversing the intended deterrent effect of the laws that allow children to be prosecuted as adults.³⁵

Research also demonstrates that youth housed in adult facilities face great physical and mental danger. Children in adult facilities are fifty percent more likely to face an armed attack from a fellow prisoner and twice as likely to face physical

30. ARYA, *supra* note 21, at 1–2.

31. *Id.* at 6 n.i (“Less than ten states continue to treat seventeen-year-olds as adults.”).

32. ALEX PIQUERO & LAURENCE STEINBERG, MODELS FOR CHANGE & MACARTHUR FOUND., REHABILITATION VERSUS INCARCERATION OF JUVENILE OFFENDERS: PUBLIC PREFERENCES IN FOUR MODELS FOR CHANGE STATES 1 (2007), http://act4jj.org/media/factsheets/factsheet_55.pdf.

33. *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Adult Criminal Court*, MACARTHUR FOUND. RES. NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE 1 (last visited Mar. 6, 2012), http://www.adjj.org/downloads/3582issue_brief_5.pdf; see also Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL’Y J. 77, 92–97 (1996).

34. Task Force on Community Preventive Services, *supra* note 12, at 8; see generally Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUSTICE BULLETIN (U.S. DEP’T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION), at 1, June 2010, <https://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

35. According to the U.S. Department of Justice, the practice of transferring juveniles to adult criminal court has “produced the unintended effect of increasing recidivism, particularly in violent offenders, and thereby of promoting life-course criminality.” Redding, *supra* note 34, at 8. Michael Tonry explains that the levels of negative effects on youth who are in the adult system include “stigmatization, increased self-identification as deviant, socialization into deviant values from exposure to other offenders, and disruption of normal features of prosocial development trajectories (such as work and family relationships).” *Treating Juveniles as Adult Criminals: An Latrogenic Violence Prevention Strategy if Ever There Was One*, 32 AM. J. OF PREVENTATIVE MED. 3, 4 (2007).

assault by prison staff than are incarcerated adults.³⁶ Youth housed in adult prisons are five times more likely to be sexually abused or raped than their counterparts in youth centers.³⁷ Children are also thirty-six times more likely to commit suicide when incarcerated in an adult jail than if they are in a youth facility.³⁸ Not only are children suffering the impacts of these traumas, repeated exposure to violence and abuse can lead children to themselves commit future acts of violence.³⁹

Unlike most children prosecuted as children, children prosecuted and convicted as adults are subject to permanent criminal records.⁴⁰ Adult criminal convictions often lead to long-term collateral consequences related to housing, employment, public benefits, education, voting, and health care.⁴¹ In addition, many of these youth will leave prison without having received adequate education or other services.⁴²

Additionally, thirty-nine states and the federal government presently allow juveniles tried in adult court to be sentenced to juvenile life in prison without the chance of parole (JLWOP).⁴³ The United States stands virtually alone in employing JLWOP.⁴⁴ Although courts have restricted this measure to homicide convictions,⁴⁵

36. MICHELE DEITCH ET AL., UNIV. OF TEX. AT AUSTIN, LBJ SCH. OF PUB. AFFAIRS, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 55 (2009), <http://www.utexas.edu/lbj/archive/news/images/file/FromTimeOuttoHardTime-revisedfinal.pdf>.

37. Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 (2006).

38. ARYA, *supra* note 12, at 4.

39. *Id.* at 7–8.

40. *Id.* at 16; *see also* Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, THE CHAMPION, Aug. 2011, at 22 (“The laws governing whether a juvenile record is sealed (not accessible by the general public) or expunged vary from state to state. All states except Rhode Island allow for records expungement under certain criteria.”).

41. *See* Michael A. Corriero, *Judging Children as Children: Reclaiming New York’s Progressive Tradition*, 56 N.Y.L. Sch. L. Rev. 1413, 1419 (2011–12).

42. *Id.* at 1420. *See generally* Patricia Allard & Malcolm Young, *Prosecuting Juveniles in Adult Court: Perspectives for Policymakers and Practitioners*, 65 J. OF FORENSIC PSYCHOL. PRAC. 65 (2002).

43. NAT’L CONF. OF ST. LEGISLATURES, JUVENILE LIFE WITHOUT PAROLE (JLWOP) (2010) [hereinafter JUVENILE LIFE WITHOUT PAROLE], <http://www.ncsl.org/documents/cj/jlwopchart.pdf>.

44. AMNESTY INT’L HUM. RTS. WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 5 (2005), <http://www.amnestyusa.org/sites/default/files/pdfs/therestoftheirlives.pdf>.

45. *See* *Graham v. Florida*, 130 S. Ct. 2011 (2010). In his majority opinion, Justice Kennedy explained a categorical rule barring JLWOP sentences for youth convicted of nonhomicide offenses gives these youth “a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.” *Id.* at 2032. Discussing *Graham’s* case, the majority wrote, “The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.” *Id.* at 2033. At the time of publication, the Supreme Court is considering two cases, *Miller v. Alabama*, 63 So. 3d 676 (Ala. Crim. App. 2010), *cert. granted*, 80 U.S.L.W. 3275 (U.S. Nov. 7, 2011) (No. 10–9646), and *Jackson v. Norris*, 2011 Ark. 49 (2011), *cert. granted sub nom.* *Jackson v. Hobbs*, 80 U.S.L.W. 3275 (U.S. Nov. 7, 2011) (No. 10–9647). In both cases, a child was convicted of homicide for an act committed at the age of fourteen and sentenced to life in prison without the possibility of parole.

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there remain over 2000 youth currently in prison on JWLOP sentences.⁴⁶ The courts have acknowledged that youth are neurologically different from adults and are more likely to “age out” of criminal behavior or benefit from rehabilitation.⁴⁷ By determining, at the time of initial sentencing, that a child should never be eligible for parole, JLWOP sentencing fundamentally contradicts these principles. While the U.S. Supreme Court has deemed it unconstitutional for children to be sentenced to death,⁴⁸ under JLWOP laws, many youth have been convicted and sentenced to die in prison with very little scrutiny.⁴⁹

B. Principle-Based Policy Solutions

The youth justice system should operate as a child-serving system. The philosophical, operational, and programmatic orientation of the youth justice system should reflect the distinct social, emotional, and developmental needs of children. All jurisdictions should create and fund a robust continuum of preventive, supervision, and treatment services developed specifically for children. Police precincts, courts, youth justice agencies, and other stakeholders should be given the training, tools, and resources necessary to effectively assess and serve youth in ways that promote their development and, when necessary, rehabilitation.

Raise the age of criminal responsibility to, at a minimum, eighteen years of age for all youth, regardless of the offense. Processing and treating children as children results in better outcomes for youth and community safety. By contrast, research demonstrates that prosecuting children as adults, even for serious offenses, increases recidivism.⁵⁰ As discussed above, prosecuting children as adults has also been demonstrated to

46. JUVENILE LIFE WITHOUT PAROLE, *supra* note 43, at 16.

47. *See Graham*, 130 S. Ct. at 2030–32.

48. *Roper v. Simmons*, 543 U.S. 551, 575 (2005). On March 1, 2005, the U.S. Supreme Court held that the Eighth and Fourteenth Amendments prohibit the execution of individuals who were under the age of eighteen when they committed their crimes. *Id.* In doing so, the Court recognized that significant differences in brain development exist between adolescents and adults and that these differences diminish the level of culpability of juveniles, a position advocated by the *amici* groups. *Id.* at 571. The Court also highlighted the importance of international law, noting that the “determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” *Id.* at 575.

49. *Death in Prison Sentences for 13- and 14-Year-Olds*, EQUAL JUSTICE INITIATIVE, <http://www.eji.org/eji/childrenprison/deathinprison> (last visited Mar. 20, 2012) (“EJI has documented 73 cases where children 14 years of age or younger have been condemned to death in prison. Almost all of these kids currently lack legal representation and in most of these cases the propriety and constitutionality of their extreme sentences has never been reviewed.”). According to one report, “[t]here are more than 2,500 juvenile offenders in prison in the United States serving life without parole sentences for crimes they committed under the age of eighteen, and none in the rest of the world.” *The Issue*, THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, <http://www.endjlop.org/the-issue/> (last visited Mar. 20, 2012).

50. *See Fagan*, *supra* note 33, at 92–7; *see also* Task Force on Community Preventive Services, *supra* note 12, at 13–15.

harm children's mental health, educational and employment opportunities, and positive life outcomes.

Stop housing children in adult jails and prisons. Given the shockingly high rates of assault, armed attacks, sexual abuse, rape, and suicide that plague children in adult jails and prisons, all applicable laws should be reformed to ensure that no child under the age of eighteen can be held in an adult jail or prison, regardless of the severity of the act of delinquency or crime that child may have committed.

Waiver reform. Even in those jurisdictions where the age of criminal responsibility is seventeen or eighteen, significant numbers of even younger children can nevertheless be prosecuted as adults under the state's waiver laws. Most states either require that courts waive youth suspected of certain crimes into the adult system or afford prosecutors discretion to directly file charges against the youth in criminal court.⁵¹ Many states do not allow judges to "reverse waive" these decisions (i.e., send a child's case back to the youth justice system).⁵² The use of "once an adult always an adult" policies in thirty-three states increases the chances that children will be jailed or incarcerated in adult facilities following a waiver.⁵³ To ensure that children and communities are protected, states should remove any laws that require a youth to be automatically processed in criminal court. At a bare minimum, judges should be afforded discretion to determine that a child's case should be heard in juvenile court. Given the documented racial disparities in the use of discretionary waivers,⁵⁴ jurisdictions that have waiver provisions should engage in rigorous and on-going data analysis broken down by race, ethnicity, geography, sex, offense, and, when appropriate, sexual orientation and gender identity⁵⁵ and should design interventions to respond to any racial or ethnic disparities.

Eliminate the sentence of juvenile life without parole. The sentence of JLWOP should be abolished because of the extreme harm it inflicts on youth, the lack of any possibility of rehabilitation once the sentence is imposed, and the lack of a deterrent effect on serious youth crime.

51. JUVENILE LIFE WITHOUT PAROLE, *supra* note 43, at 17.

52. *Id.*

53. *Id.* The constitutionality of mandatory laws is beyond the scope of this article; however, whether prosecutorial discretion and mandatory waivers afford children due process has been called into question. Jennifer Park, *Balancing Rehabilitation and Punishment: A Legislative Solution for Unconstitutional Waiver Policies*, 76 GEO. WASH. L. REV. 786, 788 (2008).

54. CHARLES PUZZANCHERA & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2005 at 21 (2008).

55. *See infra* Part IV.

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III. PRINCIPLE TWO: FUND AND USE ONLY WHAT WORKS⁵⁶

A. *The Problems of the Status Quo*

Although youth who are detained or incarcerated are more likely to reoffend than those who are referred to community-based supervision, treatment, and services,⁵⁷ many jurisdictions still lack an adequate continuum of community-based options.⁵⁸ Additionally, in many states, state governments fund residential placement for youth and counties pay for alternatives to confinement, thereby creating a financial incentive for confinement and failing to incentivize investments in alternative programming.⁵⁹

Our nation's over-reliance on punitive approaches, including detention and incarceration, come at great fiscal as well as human cost. The average cost nationwide of incarcerating a youth for a stay of nine months in a youth facility is approximately \$60,000 per year.⁶⁰ In New York State, it currently costs approximately \$266,000 per year to incarcerate a child in a facility operated by the New York State Office of Children and Family Services (OCFS), the state agency that operates the state's youth justice system, including its residential facilities.⁶¹ The annualized cost to detain one young person in a New York City operated, pretrial detention facility is \$237,615.⁶² By comparison, community-based non-residential programs, are substantially cheaper (ranging for example from \$603 to \$9,902 in 2000 dollars) and save money down the road (ranging, for example, from \$5,679 to \$131,918 in 2000 dollars for combined future criminal justice cost savings and crime victim benefits).⁶³

56. The term "fund what works" is used by New York State's Deputy Secretary of Public Safety Elizabeth Glazer.

57. See HOLMAN & ZIEDENBERG, *supra* note 12, at 2–3.

58. See MENDEL, *supra* note 3, at 14.

59. PETTERUTI ET AL., *supra* note 12, at 7.

60. Additionally, studies show that formerly incarcerated youth are consistently rearrested, reconvicted, and returned to custody, leading to even higher long-term costs. MENDEL, *supra* note 3, at 17.

61. N.Y. STATE JUVENILE JUSTICE ADVISORY GROUP, TOUGH ON CRIME PROMOTING PUBLIC SAFETY BY DOING WHAT WORKS: A REPORT TO THE GOVERNOR AND LEGISLATURE 9 (2010), <http://criminaljustice.state.ny.us/pio/annualreport/2010-juvenile-justice-annual-report.pdf>.

62. See CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT FISCAL: 2010 at 38 (2010), http://www.nyc.gov/html/ops/downloads/pdf/mmr/0910_mmr.pdf. The annual cost of detention is based on a per diem cost of \$651. *Id.*

63. NAT'L JUVENILE JUSTICE NETWORK, THE REAL COSTS AND BENEFITS OF CHANGE: FINDING OPPORTUNITIES FOR REFORM DURING DIFFICULT FISCAL TIMES 7 (2010) [hereinafter THE REAL COSTS AND BENEFITS OF CHANGE], http://www.njjn.org/uploads/digital_library/resource_1613.pdf; see also STEVE AOS, ET AL., WASH. STATE INST. FOR PUBLIC POLICY, THE COMPARATIVE COSTS AND BENEFITS OF PROGRAMS TO REDUCE CRIME, VERSION 4.0 at 16–23 (2001) (stating, in 2000 dollars, the following costs and future taxpayer and crime victim benefits per participant: Multi-Systemic Therapy (MST) costs \$4,743 and accrues \$131,918 in benefits; Functional Family Therapy (FFT) costs \$2,161 and accrues \$59,067 in benefits; Aggression Replacement Training (ART) costs \$738 and accrues \$33,143 in benefits; Multidimensional Treatment Foster Care (MTFC) costs \$2,052 and accrues \$87,622 in benefits; Adolescent Diversion Project (ADP) costs \$1,138 and accrues \$27,212; Diversion with Services saves \$127 in initial costs (program itself is cheaper than juvenile court processing) and

The problem is not that we are spending a lot of money on children in the youth justice system, it is that we are investing tremendous resources in detaining and incarcerating children, despite extensive evidence that this approach results in poor outcomes for young people, communities, and the public.⁶⁴

B. Principle-Based Policy Solutions

*Fund community-based continuums of supervision, programs, and services.*⁶⁵ Each jurisdiction should provide a continuum of high quality, evidence-informed, and rehabilitative options for the supervision, treatment, and, in very limited cases, confinement of youth.⁶⁶ In addition, clear standards for quality and safety in both community-based and residential settings (for both governmental and privately operated facilities) must be developed and followed. Law enforcement, probation officers, prosecutors, judges, and defense counsel should be aware of the full continuum of services and decisionmakers should be legally required to make use of

accrues \$5,679 in benefits; Intensive probation (vs. regular probation) programs cost \$2,234 and accrue \$6,812 in benefits; Intensive probation (as an alternative to incarceration) saves \$18,478 from the cost of incarceration and accrues \$18,854 in benefits; Intensive Parole Supervision (vs. regular parole caseloads) costs \$2,635 and accrues \$6,128 in benefits; Coordinated Services cost \$603 and accrues \$14,831 in benefits; other family-based therapy approaches cost \$1,537 and accrues \$30,936 in benefits; Juvenile Sex Offender Treatment costs \$9,920 and accrues \$23,602 in benefits. By contrast, “Scared Straight” type programs cost \$51, but ultimately cost \$24,531 and Juvenile Boot Camps save \$15,424 in up-front costs, but cost an additional \$3,587 down the road.

64. Should the types of reforms outlined in this article result in cost savings to jurisdictions, those savings should be reinvested in the communities most impacted by the youth justice system. In particular, cost savings should be reinvested in those programs and services shown to prevent or reduce justice involvement including home visitation, education, mental health, substance abuse, and vocational programming. There is a particular need for vocational training and job placement for adolescents.
65. Although a detailed explanation of how this continuum could be developed in various jurisdictions is beyond the scope of this article, it should be noted that smaller jurisdictions in a particular region could form a regional grouping, combining resources, and developing shared programs and services. Such regional groupings could be useful in jurisdictions with relatively small numbers of system involved youth or with a limited social service or community-based programming infrastructure.
66. For the purposes of this article, “evidence-informed” is defined as a methodology by which the outcomes of a particular program or intervention are clearly measured and are used to inform subsequent changes to that program or intervention. Evidence-informed is not limited to only “evidence-based practices” (those practices that have undergone clinical trials). Although measuring performance and outcomes are important, it is crucial to note that funding only “evidence-based practices” may lead to the elimination of many community-based programs and other small programs that may not be able to afford the intensive scientific study necessary to be labeled “evidence-based.” There are, however, evidence-informed interventions that can be implemented by local organizations. See, e.g., *Building Community Capacity for Juvenile Justice Reform: A Community-Centered Approach to Bringing New York City’s Children Close to Home*, COMMUNITY CONNECTIONS FOR YOUTH [hereinafter *Building Community Capacity*] (Feb. 13, 2012, 11:53 AM), cc-fy.blogspot.com/2012/02/building-community-capacity-for.html (discussing the loss to communities in New York State as a result of current youth justice practices). Community Connections for Youth is a Bronx, New York-based organization “whose mission is to mobilize indigenous faith and neighborhood organizations to develop effective community-based alternative-to-incarceration programs for youth.” *History and Mission*, COMMUNITY CONNECTIONS FOR YOUTH, <http://cc-fy.org/articles.php?id=3> (last visited Mar. 6, 2012).

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the least restrictive option possible. The continuum of programs and services should be developed and funded such that children are provided access to timely, culturally competent, age-specific, and developmentally appropriate services. The continuum should integrate family and community as key partners to the greatest extent possible.⁶⁷ Positive youth development⁶⁸ and strength-based approaches should be integrated into service provision. Further, each jurisdiction should recognize that clear and well-developed mechanisms for system exit (i.e., diversion from court, adjustment, and dismissal) are fundamental parts of the system. These mechanisms should be routinely evaluated to ensure that any disparities in opportunities for system exit are eliminated.

Handle social service needs outside of the justice system. In far too many cases, the youth justice system has become a stand-in for services that children and their families should be receiving in other systems⁶⁹ or because schools and other institutions quickly turn to the police to handle discipline issues.⁷⁰ When determining the legal remedy to an act of juvenile delinquency or crime, jurisdictions should differentiate between a youth's social service needs, family needs, and the underlying delinquent or criminal act. Often in the course of a youth justice case, social service needs of a child and/or their family may be identified. There is a very real danger that these needs will be used as a proxy for public safety risk and/or as a reason to justify detention or incarceration. Specific needs (e.g., mental health, substance abuse, child welfare, education needs) identified during the

67. While engaging a young person's support system can be a key part of service provision, including the provision of re-entry services, decisionmakers must be careful not to set up a program or system in a way that punishes or harms those young people who lack such a support system. For example, family engagement should not be a requirement for a child's release from a detention center or prison. *See infra* Part VI, for a more detailed discussion of family and community engagement.

68. An increasing number of practitioners and advocates in the juvenile justice field are adopting a positive youth development (PYD) perspective and other strengths-based strategies that focus on youths' assets rather than their weaknesses or problems. PYD can be described as a youth's development of a sense of competency, usefulness, belonging, and influence.

NAT'L JUVENILE JUSTICE NETWORK, POLICY PLATFORM: APPROACHING JUVENILE JUSTICE WITH A FOCUS ON POSITIVE YOUTH DEVELOPMENT 1 (2010) [hereinafter APPROACHING JUVENILE JUSTICE] (citations omitted) (internal quotation marks omitted), http://www.njjn.org/uploads/digital_library/resource_1427.pdf.

69. *See, e.g.*, GOVERNOR DAVID PATERSON'S TASK FORCE ON TRANSFORMING JUVENILE JUSTICE, CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE 14 (2009) [hereinafter TASK FORCE] (discussing how youth justice systems nationwide "serve as caretaker-of-last-resort for youth with serious mental health problems"); *see also* HOLMAN & ZIEDENBERG, *supra* note 12, at 8 (discussing how detention can serve as a "dumping ground" for kids with mental health issues); Thomas Grisso, *Adolescent Offenders with Mental Disorders*, 18 FUTURE CHILD 143, 146-47, 155-59 (2008), http://futureofchildren.org/futureofchildren/publications/docs/18_02_07.pdf. *See generally* U.S. Gov't Accountability Office, GAO-03-397, CHILD WELFARE AND JUVENILE JUSTICE: FEDERAL AGENCIES COULD PLAY A STRONGER ROLE IN HELPING STATES REDUCE THE NUMBER OF CHILDREN PLACED SOLELY TO OBTAIN MENTAL HEALTH SERVICES 1 (2003).

70. NAT'L JUVENILE JUSTICE NETWORK, POLICY PLATFORM: SAFE AND EFFECTIVE SCHOOL DISCIPLINARY POLICIES AND PRACTICES 1 (2011), http://www.njjn.org/uploads/digital_library/STPP%20Policy%20Platform,%20FINAL,%208.1.11.pdf.

course of a delinquency or criminal case should be referred and handled outside of the formal justice system unless there is an extremely concrete nexus between the delinquent or criminal act and the social service need.⁷¹ For example, if a child is found guilty of drug possession and has a documented substance abuse problem, referral to substance abuse treatment might be an appropriate part of his or her youth justice case. If, however, a child is arrested for not paying a transit fare and, during the course of the case, the court learns that the child has a substance abuse problem, was sent to a drug treatment program by their parent, and is failing to attend that program, the legal outcome of that child's transit fare case should not be dependent upon their compliance with substance abuse treatment. Although it may be appropriate and useful for that child to be referred to substance abuse treatment, such referrals should generally be voluntary.

Clear and effective methods for diverting children away from the youth justice system and toward other services or programs should be in place. For instance, in Clayton County, Georgia, a diverse stakeholder working group generated a "cooperative agreement" ensuring that:

'misdemeanor delinquent acts' [in schools] . . . do not result in the filing of a [legal] complaint unless the student commits a third or subsequent similar offense during the school year, and the principal conducts a review of the student's behavior plan. Thus youth receive warnings after a first act and referral to mediation or school conflict training programs after a second act.⁷²

Public transparency of performance-based data and system contracts. Jurisdictions should ensure that the system and its component agencies, courts, and other organizations set and achieve ambitious, performance-based goals and that their work is grounded in best practices and informed by community input.⁷³ Jurisdictions should also use data to analyze and improve the performance of its youth justice system overall and of its constituent individual agencies, courts, and other organizations. This data should specifically inform policy and funding decisions.⁷⁴ In addition, community members, including system-involved children and families, have a right to know what programs, facilities, and interventions they are publicly financing and how those programs, facilities, and interventions are performing. The government should be transparent about both the contracts it makes with service providers and the ways in which those contracts are initially evaluated and

71. MENDEL, *supra* note 3, at 29.

72. LOUISIANA MODELS FOR CHANGE, LOUISIANA FINS COMMISSION, STUDY AREA 4: THE IMPLEMENTATION OF DUE DILIGENCE REQUIREMENTS 1, 2 (2011), http://www.gov.state.la.us/assets/Due_Diligence_Summary.pdf.

73. This sub-point heavily draws on the State Strategic Plan issued by the New York State Strategic Plan Steering Committee. The author of this article was a Steering Committee member and now serves on the statewide implementation team charged with helping implement the State Strategic Plan. See N.Y. STATE JUVENILE JUSTICE STEERING COMMITTEE, SAFE COMMUNITIES SUCCESSFUL YOUTH: A SHARED VISION FOR THE NEW YORK STATE JUVENILE JUSTICE SYSTEM 9 (2011), http://www.nysjjag.org/documents/safe_communities_successful_youth_full_version.pdf.

74. *Id.* at 5-7.

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subsequently monitored. An informed and knowledgeable public can help ensure that youth justice funding follows positive outcomes.⁷⁵

Incentivize community-based alternatives to detention and incarceration. Perverse fiscal incentives to detain and incarcerate children result from policies or laws by which counties are reimbursed by states for residential placements but not for alternative community-based non-residential treatment and services.⁷⁶ All jurisdictions should ensure that their youth justice funding streams incentivize alternatives to detention and incarceration and other services and programs that have demonstrable positive outcomes.⁷⁷ As recent examples demonstrate, this can be done a number of ways:

To eliminate or reduce the financial incentive of sending youth to state-funded secure care, several states have altered the fiscal architecture of the juvenile justice system. Some states provide financial reimbursement for costs incurred by counties to manage youth locally, while requiring the county to pay part of the cost of confining a child in a state institution. Other states have simply increased the costs for counties to send youth to state institutions, and programs have grown naturally in localities where there had previously been no incentive to develop them before.⁷⁸

Facilities and programs that hurt children should be shut down. States and localities should have rigorous licensure requirements and should monitor compliance with those requirements. Programs and in particular residential facilities that do not meet these requirements should lose their licenses.

IV. PRINCIPLE THREE: END RACIAL AND ETHNIC INEQUALITY

A. *The Problems of the Status Quo*

The youth justice system, like the adult criminal justice system, is characterized by deep and longstanding racial and ethnic inequities. The term “disproportionate minority contact” (DMC) is often used to describe this situation. Children of color are not, however, merely disproportionately represented, instead they almost exclusively populate the youth justice system.⁷⁹

75. As discussed later, data can be aggregated so that individual identifying information is removed. In addition, decision makers should ensure youth, families, and communities have a voice in assessing and improving the system. See *infra* Part VII.

76. PETTERUTI ET AL., *supra* note 12, at 5–6.

77. THE REAL COSTS AND BENEFITS OF CHANGE, *supra* note 63, at 2–3 (outlining successful fiscal realignment models used in several states to provide local jurisdictions with financial incentives to keep youth out of state facilities and noting that each model cited has “helped the state save money, spend its resources more wisely, and treat youth more humanely and effectively”).

78. PETTERUTI ET AL., *supra* note 12, at 5.

79. Although an exploration of the adult criminal justice system is beyond the scope of this article, it is important to note that similar extreme and persistent disparities exist in the adult system and that these disparities are intertwined in multiple ways. Among these intersections, detailed earlier, youth justice involvement increases the likelihood of adult criminal justice involvement (even when controlling for behavior). In addition, the communities in which youth of color are disproportionately policed and sanctioned tend to be the same communities where adults of color are disproportionately policed and sanctioned.

A central part of understanding DMC and coming up with effective policy solutions is acknowledging that we as a society did not just happen upon racial and ethnic disproportionality. The current trend is not an accident nor is it new; racial inequalities have characterized this country's penal system for children since its earliest days.⁸⁰ Although racial inequalities existed long before the 1940s, during that time, Mary Huff Diggs completed the first formal research articulation on this topic, reviewing fifty-three courts across the country, and reporting:

It is found that Negro children are represented in a much larger proportion of the delinquency cases than they are in the general population . . . An appreciably larger percent of the Negro children came in contact with the courts at an earlier age than was true with the white children . . . Cases of Negro boys were less frequently dismissed than were white boys. Besides, they were committed to an institution or referred to an agency or individual much more frequently than were white boys.⁸¹

Her observations are eerily similar to those about our modern-day system. In current times, children of color remain over-represented and continue to receive unequal justice; white children who are system-involved generally receive better outcomes or a reduced likelihood of detention or incarceration, even when arrested and prosecuted for the same category of offense.⁸² Youth of color are discriminatorily treated at all points of the system. Youth of color have a higher case rate, are more frequently detained, are more likely to have their case petitioned in court, and are consistently waived into the adult system at higher rates than white youth.⁸³ African American youth represent only seventeen percent of the overall youth population, yet they make up thirty percent of those arrested and sixty-two percent of those prosecuted in the adult criminal system. They are also nine times more likely than white youth to receive an adult prison sentence.⁸⁴ The disadvantages that attach to

U.S. Bureau of Justice Statistics estimated that as of 2008, there were more than 846,000 black men in prison, making up 40.2 percent of all inmates in the system. . . . “More African American men are in prison or jail, on probation or parole than were enslaved in 1850, before the Civil War began,” Alexander, an Ohio State law professor, recently told listeners at the Pasadena Branch of the American Civil Liberties Union.

Thoai Lu, *Michelle Alexander: More Black Men in Prison Than Were Enslaved in 1850*, COLOR LINES (Mar. 30, 2011, 10:00 AM), http://colorlines.com/archives/2011/03/prison_system_holds_more_black_men_than_slavery_did.html.

80. JAMES BELL & LAURA JOHN RIDOLFI, THE W. HAYWOOD BURNS INST., *ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM* 8 (Shadi Rahimi ed., 2008), http://sccounty01.co.santa-cruz.ca.us/prb/jdai/bi_dmc.pdf.
81. *Id.* at 8 (citing Mary Huff Diggs, *The Problems and Needs of Negro Youth as Revealed by Delinquency and Crime Statistics*, 9 J. NEGRO EDUC. 311, 313, 316 (1940)).
82. PUZZANCHERA & SICKMUND, *supra* note 54, at 64–65.
83. *Id.* at 21–27.
84. *Youth of Color Are Disproportionately Impacted by These Policies*, THE CAMPAIGN FOR YOUTH JUSTICE, <http://www.campaignforyouthjustice.org/documents/Disproportionate-Impact-on-Youth-of-Color.pdf> (last visited Mar. 6, 2012).

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children in the system simply because they are African American or Latino increase the deeper into the system they move.⁸⁵

This unequal racial breakdown of arrest, detention, and incarceration rates does not reflect the racial breakdown of crime rates. A research study completed by the U.S. Department of Justice (DOJ), Office of Justice Programs found that in two-thirds of state and local juvenile justice systems there was a “race effect.”⁸⁶ For example, white youth report using drugs at a higher rate than African American youth, and are approximately thirty percent more likely to report selling drugs than African American youth.⁸⁷ Nonetheless, African American youth are both arrested and detained for drug offenses at double the rate of white children.⁸⁸ African American youth are also much more likely to be prosecuted in adult court for drug offenses.⁸⁹ In a study of forty jurisdictions, “drug cases in adult court were filed against African-American youth at nearly 5 times the rate of white youth.”⁹⁰ In addition, African American youth are more likely to be processed, detained, and waived into criminal court and sentenced to out-of-home placement for drug offenses than white youth.⁹¹ Research indicates that these inequities are cumulative and worsen the deeper a child moves into the system.⁹² The DOJ first acknowledged the problem of racial and ethnic disparities on a national level in 1988, amending the federal Juvenile Justice and Delinquency Prevention Act (JJDPA) to mandate states to address such disparities.⁹³ Although twenty-three years have passed since the passage of this legislation, profound racial and ethnic inequities persist.

Strong racial and ethnic disparities also characterize police arrest practices and patterns. For example, according to the New York City Police Department’s own statistics, the Department made approximately two and a half million stops between

85. See THE NAT’L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 4 (2007), http://www.nccdcrc.org/nccd/pubs/2007jan_justice_for_some.pdf.

86. Carl E. Pope & William Feyerherm, *Minorities and the Juvenile Justice System: Research Summary*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE 1, 2 (1995), <https://www.ncjrs.gov/pdffiles/minor.pdf>.

While the research literature is far from conclusive with regard to the effect that race or ethnicity may play in influencing the differences in the handling of minority youth within the juvenile justice system, it does suggest that racial or ethnic status may be a factor that influences decisions in certain jurisdictions, at particular decision points, during certain time periods, and in response to specific behaviors.

Id. at iii.

87. CAMPAIGN FOR YOUTH JUSTICE, CRITICAL CONDITION: AFRICAN-AMERICAN YOUTH IN THE JUSTICE SYSTEM 1, 1 http://www.campaignforyouthjustice.org/documents/impact_on_african-american_youth.pdf.

88. *Id.*

89. *Id.*

90. *Id.*

91. PUZZANCHERA & SICKMUND, *supra* note 54, at 17–27.

92. Pope & Feyerherm, *supra* note 86, at 10.

93. BELL & RIDOLFI, *supra* note 80, at 8.

2005 and 2010 (including youth and adults); ninety percent of those stops were of people of color.⁹⁴ Despite the frequency of stops, ninety percent of those stopped were released without having any legal action taken against them.⁹⁵ The vast discrepancy between the number of people stopped and the number of consequent legal actions suggests that a significant portion of these stops may be driven by something other than reasonable suspicion⁹⁶ that a crime had been committed. Secret recordings made by one New York City Police Department officer demonstrate that stop and frisk and arrest quotas were used in a precinct with a high number of people of color.⁹⁷ This systematic practice of stop and frisk is only increasing; in 2011, the New York City Police Department made 685,724 stops, an almost fourteen percent increase from 2010.⁹⁸ Eighty-seven percent of the people stopped in 2011 were black or Latino.⁹⁹

Youth and adults of color are also disproportionately impacted by the use of police force in stops. For example, in 2009, the New York City Police Department “used force in 19 percent of the stops involving whites but in 27 percent of stops against Latinos and in 25 percent of those involving blacks” (these stops involved both youth and adults).¹⁰⁰

B. Principle-Based Policy Solutions

As James Bell, the Executive Director of the Haywood Burns Institute, writes in the opening to *Adoration of the Question*, it is not enough to simply keep “adoring the question” of why such racial and ethnic inequalities exist and persist. “Beginning today, we must stop lingering on the question, ‘What should we do about disparities?’ and instead identify the best practices that are proven to actively combat the issue—

94. Barry Kamins, *New Criminal Justice Legislation*, 82 N.Y. St. B.A. J. 30, 30 (2010) (Judge Kamins is Administrative Judge for Criminal Matters for the 2nd Judicial District); see also *Stop-and-Frisk Campaign: About the Issue*, NYCLU [hereinafter *Stop-and-Frisk Campaign*], www.nyclu.org/issues/racial-justice/stop-and-frisk-practices (last visited Mar. 21, 2012).

95. Kamins, *supra* note 94, at 30.

96. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (articulating the constitutional standard for a reasonable search under the Fourth Amendment).

97. *The NYPD Tapes*, a multi-part series documenting secret recordings made by a member of the New York City Police Department, included recordings related to stop and frisk quotas in a precinct in Bedford-Stuyvesant, Brooklyn, a multiracial precinct where many residents are people of color. See Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy's 81st Precinct*, THE VILLAGE VOICE (May 4, 2010), <http://www.villagevoice.com/2010-05-04/news/the-nypd-tapes-inside-bed-stuy-s-81st-precinct/>; Graham Rayman, *The NYPD Tapes, Part 2*, THE VILLAGE VOICE (May 11, 2010), <http://www.villagevoice.com/2010-05-11/news/nypd-tapes-part-2-bed-stuy/>.

98. *Stop-and-Frisk Campaign*, *supra* note 94.

99. *Id.*

100. Al Baker, *City Minorities More Likely to be Frisked*, N.Y. TIMES, May 13, 2010, at A1. For a detailed analysis of the frequency of youth contact with the New York City Police Department and the impact of its stop and frisk policies, using NYPD and independently collected data, see Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. Sch. L. Rev. 1331 (2011–12). For a first person account of the impact of stop and frisk policies in New York City, see Nicholas K. Peart, *Why is the N.Y.P.D. After Me?*, N.Y. TIMES, Dec. 18, 2011, at SR6.

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effectively reducing racial and ethnic disparities state by state, jurisdiction by jurisdiction.”¹⁰¹ Issues of race and ethnicity undergird and pervade every aspect of the youth justice system; every single youth justice reform effort must be conscious of and responsive to the realities of racial and ethnic discrimination and disparities. Specific policy suggestions include:

Research racial disparities and take action on the results. Although research alone is not enough, it can help determine the degree to which racial and ethnic disparities exist in a particular jurisdiction.¹⁰² Differences may exist both between jurisdictions and at different stages of the criminal justice system.¹⁰³

The following framework outlines a means by which local jurisdictions can begin a five-step process to address this issue. These five steps are:

- (1) Determine whether the rate of minorities involved at any stage of the criminal justice system is disproportionate;
- (2) Assess the decision points where racial and ethnic disparities occur;
- (3) Identify plausible reasons for any disparity identified and the extent to which it is related to legitimate public safety objectives;
- (4) Design and implement strategies to reduce disparities; and
- (5) Monitor the effectiveness of strategies to reduce disparities.¹⁰⁴

Legally mandate the collection and public release of relevant data. This data should include comprehensive race-related data, including arrest data broken down by race, ethnicity, sex, geography, offense,¹⁰⁵ and, when available, LGBTQ status.¹⁰⁶ This

101. BELL & RIDOLFI, *supra* note 80, at 1. Identifying a “class of decision-makers who could have a significant impact on racial and ethnic disparities, but are unmotivated to do so” and who “[i]nstead . . . make-up a multi-million dollar cottage industry whose primary activity is to restate the problem of disparities, in essence, endlessly adoring the question of what to do about DMC, but never reaching an answer.” *Id.* at 15.

102. THE SENTENCING PROJECT, *REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* 21 (2d ed. 2008) [hereinafter *REDUCING RACIAL DISPARITY*], http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf (although this publication primarily focuses on the adult criminal justice system, it is relevant to the youth justice system and some specific youth justice information and examples are given).

103. *Id.*

104. *Id.*

105. Advocacy for the “REGGO” data collection technique whereby data is collected by “Race, Ethnicity, Gender, Geography, and Offense” originates with the Haywood Burns Institute, a national leader in reducing racial and ethnic disparities for youth in the justice system. The organization the author works for, the Correctional Association of New York, has worked with the New York State Task Force on Racial Disparities, part of the Community Justice Network for Youth, a program of the Burns Institute. It should be noted that gender within the REGGO framework generally represents a child’s assigned birth sex and not gender identity. The author recommends that, when possible, data regarding a child’s gender identity be collected along with data regarding a child’s assigned birth sex. *See* discussion *infra* Part V.

106. The disproportionate involvement of LGBTQ youth in the youth justice system will be addressed in the following section. Many LGBTQ children in the system are also children of color and are impacted by

data must be tracked at every decision point from policing to aftercare to recidivism. Data must be collected, analyzed, and publicly released about points at which youth can be diverted from the system (for example, the points at which a probation officer, prosecutor, or judge can choose to divert a child from court involvement to an alternative resolution, such as mediation or restitution).

Furthermore, this data should be collected in the youth justice system as well as in the child welfare, education, healthcare, and other social service systems. For instance, schools with large populations of mostly youth of color could benefit from an evaluation of “zero tolerance” policies that speed the flow of youth of color through the school-to-prison pipeline.¹⁰⁷ This data also must be clearly recorded and shared with all relevant decisionmakers and stakeholders, including policymakers, members of the judiciary, prosecutors and defense counsel, elected officials, and the public. In addition, given the reluctance and failure of jurisdictions to comprehensively collect and analyze racial and ethnic-related data, there must be consequences for those agencies, systems, or jurisdictions that fail to comply.

Acknowledge the cumulative and systemic nature of racial disparities. “The problem of racial disparity is one which builds at each stage of the criminal justice continuum . . . rather than the result of the actions at any single stage.”¹⁰⁸ Strategies to reduce disparities must account for and be responsive to the interlocking and cumulative impacts of such disparities. Effective strategies also engage systemic solutions.¹⁰⁹

Work across decision points. Players should be encouraged and incentivized to communicate across all system decision points of the system.¹¹⁰ In order to effectively reduce disparities, strategies are required to address the problem at each stage of the criminal justice system, in a coordinated cross-system way.¹¹¹ “Without a systemic approach to the problem, gains in one area may be offset by reversals in another.”¹¹² Players should also keep in mind that what works at one decision point may not work at other points. “Each decision point and component of the system requires unique strategies depending on the degree of disparity and the specific populations affected

the intersections of these identities and related social biases. *See infra* Part V.

107. For example:

In Peoria County, Illinois, the BI [the Burns Institute] developed a pilot restorative justice project to address ‘zero tolerance’ policies in schools that reduced African American youth admissions to detention for aggravated battery (school fights) by 43 percent. This resulted in better life outcomes for youth of color while also upholding public security and school safety.

What is DMC, THE W. HAYWARD BURNS INST., <http://www.burnsinstitute.org/article.php?id=59> (last visited Mar. 21, 2012).

108. REDUCING RACIAL DISPARITY, *supra* note 102, at 2.

109. *See id.*

110. *See id.*

111. *See id.*

112. *Id.*

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by the actions of that component.”¹¹³ The Sentencing Project has, for example, compiled detailed suggested strategies for various system players including law enforcement, prosecutors, defense attorneys, the judiciary, prisons, and probation.¹¹⁴ These kinds of practice-specific strategies should be employed.

Congress should reauthorize the Juvenile Justice and Delinquency Prevention Act (JJDP A). The JJDP A expired in 2007 and most of its provisions have remained unauthorized since that time.¹¹⁵ A reauthorized JJDP A would provide jurisdictions with better and more detailed guidance on reducing disparities. The reauthorization bill would address some of the JJDP A’s shortcomings and provides clear guidance to states and localities by requiring that they: “1) Plan and implement data-driven approaches to ensure fairness; 2) Set measurable objectives for racial and ethnic disparities reduction; and 3) Publicly report their progress in reducing disparities.”¹¹⁶ Congress should reauthorize the JJDP A and should ensure that this reauthorization includes sufficient system resources for reducing racial disparities.

V. PRINCIPLE FOUR: EQUAL JUSTICE AND CULTURALLY COMPETENT SERVICES FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER/QUESTIONING YOUTH¹¹⁷

A. *The Problems of the Status Quo*

LGBTQ youth are disproportionately represented in the youth justice system; face stiffer sanctions than their heterosexual peers; and suffer routine and systemic mistreatment in detention and placement as a result of their perceived or actual sexual orientation, gender expression, or gender identity. A 2010 national study of youth in detention facilities found that approximately fifteen percent of the youth (eleven percent of boys and twenty-seven percent of girls surveyed) identified as gay, bisexual, or gender non-conforming.¹¹⁸ Furthermore, a 2011 national longitudinal study found that non-heterosexual youth are more likely to be stopped by the police, expelled from school, arrested, convicted as juveniles, and convicted as adults.¹¹⁹ These disparities were not explained by greater engagement in illegal or transgressive behaviors.¹²⁰

113. *Id.*

114. *See id.* at 25–61.

115. BELL & RIDOLFI, *supra* note 80, at 16.

116. *Id.*

117. Judy Yu, Associate Director of LGBTQ Youth Issues for the Correctional Association of New York, authored Principle Four.

118. Angela Irvine, “*We’ve Had Three of Them*”: *Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675–76, 687 (2010).

119. Kathryn E. W. Himmelstein & Hannah Bruckner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49, 51 (2011).

120. *Id.* at 54.

Once LGBTQ youth are funneled into the youth prison system, they face dangerous conditions.¹²¹ A survey on conditions for LGBTQ youth incarcerated in youth justice facilities across the country found that approximately eighty percent of respondents felt that “lack of safety in detention was a serious problem.”¹²² Statistics reveal that LGBTQ youth are particularly vulnerable to sexual abuse inside youth justice facilities. A federal report on sexual victimization inside youth facilities found “[y]outh with a sexual orientation other than heterosexual reported significantly higher rates of sexual victimization by another youth (12.5%) compared to heterosexual youth (1.3%).”¹²³ LGBTQ youth in Louisiana reported that both youth and staff perpetrated sexual and other forms of violence against them.¹²⁴

Youth justice facilities have frequently responded to these issues of safety by placing LGBTQ youth in segregation or isolation; many youth experience this as a deeply traumatic form of punishment.¹²⁵ Numerous studies have shown that such isolation is deeply damaging and can result in “lasting psychiatric symptoms.”¹²⁶ Facilities that have made the decision to isolate an LGBTQ youth have sometimes done so due to the erroneous stereotype that LGBTQ youth are more likely to sexually assault other youth.¹²⁷

121. A lawsuit filed in 2005 in federal district court in Hawaii addressed the failure of the Hawaii Youth Correctional Facility staff to protect a seventeen-year-old transgender girl, an eighteen-year-old lesbian, and an eighteen-year-old boy perceived to be gay from continuous physical, emotional, and sexual abuse by other youth. *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006). The court ultimately found that the facility’s failure to protect the youth violated due process. *See id.* at 1154–55. A 2001 study of incarcerated LGBT youth in New York found that LGBT youth suffer pervasive verbal harassment in facilities, and that physical harassment is also an issue. *See RANDI FEINSTEIN, ET AL., LESBIAN & GAY YOUTH PROJECT OF THE URBAN JUSTICE CTR., JUSTICE FOR ALL: A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM 32–34 (2001)*, <http://www.equityproject.org/pdfs/justiceforallreport.pdf>. The Juvenile Justice Project of Louisiana issued a report that found that “LGBT[Q] youth in prison face[d] increased physical, sexual, and psychological abuse and harassment, increased isolation, [and] violations of their right to confidentiality.” WESLEY WARE, JUVENILE JUSTICE PROJECT OF LOUISIANA, *LOCKED UP AND OUT: LESBIAN, GAY, BISEXUAL, & TRANSGENDER YOUTH IN LOUISIANA’S JUVENILE JUSTICE SYSTEM 18–27 (2010)*, <http://www.equityproject.org/pdfs/Locked-Up-Out.pdf>.

122. KATAYOON MAJD ET AL., *THE EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 102 (2009)*, http://www.equityproject.org/pdfs/hidden_injustice.pdf. Facility staff failed to intervene and also sometimes encouraged physical and sexual violence toward LGBTQ youth. *Id.*

123. ALLEN BECK ET AL., U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATS., *SPECIAL REPORT: SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008–09* at 11 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf>.

124. WARE, *supra* note 121, at 11.

125. *See MAJD ET AL., supra* note 122, at 107.

126. News Release No. 09-12, Am. Psychiatric Ass’n, *Incarcerated Juveniles Belong in Juvenile Justice Facilities* (Feb. 27, 2009), <http://www.psych.org/MainMenu/Newsroom/NewsReleases/2009NewsReleases/IncarceratedJuveniles.aspx>.

127. *See MAJD ET AL., supra* note 122, at 107.

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Transgender youth are at risk of sexual abuse and other forms of harassment and violence, particularly because they are commonly incarcerated in facilities by their assigned birth sex, not their gender identity.¹²⁸ Placing transgender youth in facilities according to their assigned birth sex results in significant psychological stress to such youth who are forced to conform to gender roles that do not align with their core gender identity. Moreover, transgender youth commonly require medical care related to a diagnosis of gender identity disorder, such as the continuation of hormone treatment.¹²⁹ Staff at youth justice facilities frequently lack an understanding of the importance of providing transgender-specific medical care and as a result, transgender youth encounter significant barriers to necessary treatments.¹³⁰ The denial of such care, which may include hormone treatment as well as surgeries to change a person's body to match his or her core gender identification, can result in serious mental health distress, including increased risk of suicide.¹³¹

Poor outcomes and recidivism may manifest for LGBTQ youth in particular ways. LGBTQ youth frequently cycle between homelessness, youth justice, and child welfare systems due to a complex constellation of factors, including familial rejection, abuse due to their sexual orientation, gender expression, or gender identity, and a lack of LGBTQ-competent and affirming social services.¹³² Between twenty and forty percent of homeless youth are LGBTQ.¹³³ LGBTQ youth are also disproportionately represented among youth in out-of-home foster care, where they commonly encounter inadequate services, discrimination, and mistreatment by both staff foster parents and other youth due to their sexual orientation, gender expression, or gender identity.¹³⁴ These multiple and intersecting system failures increase the likelihood of recidivism for court-involved LGBTQ youth.¹³⁵

LGBTQ youth may be released from youth justice facilities with no stable housing and no meaningful support from their family, community, or social service

128. Sarah Mountz, *Revolving Doors: LGBTQ Youth at the Interface of the Child Welfare and Juvenile Justice Systems*, 1 LGBTQ POL'Y J. HARV. KENNEDY SCH. 29, 38 (2011).

129. See MAJD ET AL., *supra* note 122, at 109, 112.

130. See *id.* Transgender-specific care is recognized as a medical necessity in public statements by the American Medical Association and the American Psychological Association. See *Resolution 122: Removing Financial Barriers to Care for Transgender Patients*, AM. MED. ASS'N HOUSE OF DELEGATES (2009), http://www.tgender.net/taw/ama_resolutions.pdf; Barry S. Anton, *Policy Statement: Transgender, Gender Identity & Gender Expression Non-Discrimination*, AM. PSYCHOL. ASS'N, <http://www.apa.org/about/governance/council/policy/transgender.aspx> (last visited Mar. 13, 2012).

131. *ACS' LGBTQ Policies: Oversight Hearing Before the J. Comm. on Civil Rights, General Welfare and Juvenile Justice*, N.Y.C. Council 2010–2013 Sess. (Feb. 10, 2011) (testimony of Jody Marksamer, Nat'l Ctr. for Lesbian Rights).

132. Mountz, *supra* note 128, at 29–38.

133. NICHOLAS RAY, NAT'L GAY & LESBIAN TASK FORCE POL'Y INST. & NAT'L COAL. FOR THE HOMELESS, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 1 (2006), <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>.

134. SHANNAN WILBER ET AL., CHILD WELFARE LEAGUE OF AM., CWLA BEST PRACTICE GUIDELINES 1 (Julie Gwin ed., 2006).

135. See Mountz, *supra* note 128, at 29–30.

systems. In turn, they may be forced to commit “survival crimes” such as sex work or shoplifting and end up back in the youth justice system. A recent report on the prison system found recidivism for transgender and gender non-conforming people was frequently due to systemic barriers to successful re-entry, including a lack of culturally competent re-entry services.¹³⁶

The disproportionate detention and incarceration of LGBTQ children in the youth justice system and the routine mistreatment of LGBTQ youth in prison has a devastating impact on the health of a stigmatized population already at higher risk for suicide, substance abuse, and harassment.¹³⁷

B. Principle-Based Policy Solutions

The following policy solutions would help ensure that LGBTQ youth are not disproportionately targeted for detention and placement due to their sexual orientation, gender expression, or gender identity; and that LGBTQ youth are safe and treated with respect, equity, and dignity in all parts of the youth justice system.¹³⁸

Develop and implement non-discrimination policies that protect gender identity and sexual orientation. All residential facilities housing youth should establish and disseminate comprehensive policies and guidelines on effective practices for LGBTQ youth.¹³⁹ These policies and guidelines should cover both actual and perceived LGBTQ status and should be distributed to all youth and staff in writing as well as posted in the facility. The guidelines should include clear protocols for responding to

136. PASCAL EMMER ET AL., HEARTS ON A WIRE COLLECTIVE, THIS IS A PRISON, GLITTER IS NOT ALLOWED: EXPERIENCES OF TRANS AND GENDER VARIANT PEOPLE IN PENNSYLVANIA'S PRISON SYSTEMS 43 (2011), <http://www.tipphilly.org/thisisaprisson.pdf>.

137. MASSACHUSETTS DEP'T OF EDUC., MASSACHUSETTS HIGH SCHOOL STUDENTS AND SEXUAL ORIENTATION RESULTS OF THE 2009 YOUTH RISK BEHAVIOR SURVEY (2009), <http://www.mass.gov/cgly/YRBS09Factsheet.pdf>.

138. A study found that LGBTQ youth possess tremendous resiliency in the face of these dire circumstances and that effective care and support are critical to bolstering their innate strengths. RAY, *supra* note 133, at 79–80.

139. National examples exist and can provide starting points for jurisdictions and individual facilities looking to create these kinds of policies. As a result of *R.G. v. Koller*, the Hawaii Youth Correctional Facility was mandated to create and implement policies to protect LGBTQ youth and prohibit discrimination of LGBTQ youth in custody. 415 F. Supp. 2d 1129, 1135 (D. Haw. 2006). In 2008, New York's OCFS, under the leadership of Commissioner Gladys Carrión, released a landmark LGBTQ anti-discrimination policy and guidelines. N.Y. STATE OFFICE OF CHILD. & FAM. SERVS., POLICY & PROCEDURES MANUAL: LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING YOUTH (2008), http://srp.org/files/LGBTQ_Youth_Policy_PPM_3442_00.pdf. In July of 2011, New York City's Administration for Children's Services (ACS) (the agency that operates the city's child welfare system) and the Division of Youth and Family Justice (DYFJ) (the division within that agency which operates the city's youth detention centers) released an LGBTQ anti-discrimination policy and guidelines. N.Y.C. ADMIN. FOR CHILD. SERVS., GUIDELINES FOR PROMOTING A SAFE AND RESPECTABLE ENVIRONMENT FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING (LGBTQ) YOUTH AND THEIR FAMILIES INVOLVED IN THE CHILD WELFARE SYSTEM (2011), http://www.njjn.org/uploads/digital_library/NYC-ACSLGBTQPolicies,7.27.11.pdf. A group of LGBTQ advocates, including the Correctional Association of New York, worked closely with OCFS, ACS, and DYFJ on the development of each of these guidelines and policies. *See id.*

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verbal, physical, and sexual abuse of LGBTQ youth by staff and other youth. They should also include clear grievance procedures with mandated timelines for response to ensure that youth have an effective mechanism to report incidents of abuse and harassment and receive timely decisions. Protocols should ensure that gender non-conforming and transgender youth are treated appropriately, including the use of preferred name and pronoun, the right to be placed in a safe facility, the right to present and dress in accordance to their core gender identity, and access to transgender-competent medical care and treatment. In addition to residential facility guidelines, judicial nondiscrimination policies are needed.

Mandatory and regular training of those having direct contact with LGBTQ youth. All professionals (including police officers, school safety agents, attorneys, judges, probation officers, caseworkers, and transportation staff) having direct contact with LGBTQ youth must be adequately trained on LGBTQ cultural competency. Even if a facility or agency has a non-discrimination policy, staff training can help ensure that the policy is meaningfully implemented. Mental health and medical staff should receive specialized LGBTQ competency training focused on delivering health services with cultural competence. LGBTQ cultural competency training should be integrated into the orientation for all new employees and be required on an ongoing basis to ensure staff possess up-to-date information. Trainings should include evaluation components to help ensure that they are achieving their desired goals. In addition, demonstration of a basic comfort with working with diverse populations, including LGBTQ youth, should be included in criteria for hiring new staff.

Increase funding for LGBTQ competent community-based programs and services. LGBTQ youth, like all youth, will benefit from a shift away from detention and incarceration toward community-based treatment, programs, and services. The limited number of prevention and alternative programs that do exist are often not LGBTQ-competent.¹⁴⁰ The lack of a culturally competent continuum of services for LGBTQ youth make it more likely that LGBTQ youth will be incarcerated and struggle with re-entry upon release, making them vulnerable to recidivism.

Eliminate zero tolerance and punitive policies in favor of positive interventions. Legislation should be passed that gives schools the incentives and resources to engage in positive interventions focused on principles of positive youth development.¹⁴¹ Positive interventions are generally informed by and based on principles of adolescent development, engage the voices and strengths of youth in disciplinary procedures, and include conflict resolution as a primary mechanism for addressing behavior and discipline issues.¹⁴² Where necessary and appropriate, schools should make referrals to community-based LGBTQ-competent programs for students and their families.

140. MAJD ET AL., *supra* note 122, at 84–85.

141. See APPROACHING JUVENILE JUSTICE, *supra* note 68, at 1.

142. For further examination of alternative models of school discipline, see UDI OFER ET AL., NYCLU, ET AL., SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS 22–40 (Jennifer Carnig et al. eds., 2009), http://www.nyclu.org/files/Safety_with_Dignity.pdf.

Referral to the justice system should be the last resort and only permitted for the most serious offenses.¹⁴³

VI. PRINCIPLE FIVE: SHARE POWER AND RESOURCES WITH FAMILIES AND COMMUNITIES

A. *The Problems of the Status Quo*

Families and communities have traditionally been excluded and even blamed in the youth justice system.¹⁴⁴ Parents of system-involved youth report feeling demonized and treated as “the criminals who raised a new generation of criminals.”¹⁴⁵ Mass incarceration practices have not only failed to help children, they have made communities, particularly low-income communities of color, worse off.¹⁴⁶ Communities have suffered as a result of their children being incarcerated, often at great distances from home, as well as from the loss of dollars that are tied up in maintaining institutions.¹⁴⁷ Communities have similarly often been excluded from the youth justice system.¹⁴⁸

When we exclude the voices and experiences of families and communities from reform efforts, we exclude a rich source of data. Families and communities in the youth justice system often have powerful insight into what happened to get a child off-track, what they need to change, and the ways in which the system could change to better serve all children.

Engaging families in youth justice services and systems can lessen some of these harms. It also can lead to better outcomes; family engagement¹⁴⁹ is increasingly being recognized as critical to positive youth justice outcomes. New research on evidence-based practices has illustrated that families must be viewed as partners and

143. This recommendation can also be found in the report *Hidden Injustice*. MAJD ET AL., *supra* note 122, at 143.

144. See JOAN PENNELL ET AL., CTR. FOR JUVENILE JUSTICE REFORM AT GEORGETOWN, SAFETY, FAIRNESS, STABILITY: REPOSITIONING JUVENILE JUSTICE AND CHILD WELFARE TO ENGAGE FAMILIES AND COMMUNITIES 6 (2011), <http://cjjr.georgetown.edu/pdfs/famengagement/FamilyEngagementPaper.pdf> (“Current responses to maltreated and delinquent children and youth are built upon a historical foundation that viewed parents as absent, inconsequential, and/or detrimental to the well-being of their children.”).

145. Grace Bauer, Co-Director of Justice for Families, Presentation to Associate Marine Institute Kids (Nov. 3, 2011) (on file with author).

146. See Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 97–104 (Michael Tonry ed., 2008).

147. See *Building Community Capacity*, *supra* note 66.

148. Gordon Bazemore & Susan E. Day, *Restoring the Balance: Juvenile and Community Justice*, III JUV. JUST. 3, 3 (1996), <https://www.ncjrs.gov/pdffiles/jjld96.pdf>.

149. Family engagement may be defined as “any role or activity that enables families to have direct and meaningful input into and influence on systems, policies, programs, or practices affecting services for children and families.” PENNELL ET AL., *supra* note 144, at 1. It is crucial to note that “family” can and should be defined broadly and in no way limited to a child’s biological family. Instead, the term family should be “broadly defined to encompass those whom youths see as their family group, whether based on biological, social, foster, or adoptive ties.” *Id.*

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collaborators in order to ensure the best outcomes for court-involved youth.¹⁵⁰ Research shows that young people who have been incarcerated are more likely to maintain their post-release goals (established with facility staff when designing their release plan) and successfully handle the inevitable challenges of re-entry if they maintained positive relationships with their loved ones while incarcerated.¹⁵¹

As attention grows around the issue of family involvement in the youth justice system, advocacy groups, including family-led organizations, are working to empower and educate families to allow them to maneuver the difficult and often exclusionary system to better support their loved ones.¹⁵² Many jurisdictions, however, still lack organized support systems for families. In addition, research on family and community engagement, including data on best practices, is far less comprehensive and accessible than for other aspects of youth justice reform.

A different model is possible. Community engagement includes sharing information about what is happening in the youth justice system with community members and local leaders.¹⁵³ “Real system-community partnerships are those in which system stakeholders and community members share information and evaluate and analyze data together for the purpose of identifying the best way to solve problems.”¹⁵⁴ In system-community partnerships, both qualitative and quantitative data about system operations and outcomes should be valued.¹⁵⁵ Actual system-community partnerships also rely on shared decisionmaking power, whereby both communities and institutional stakeholders should have “shared authority to define what strategies and responses are chosen as interventions.”¹⁵⁶ Successful community engagement also relies on the sharing of resources, there must be a financial investment in the ideas and strategies generated by system-community information sharing and joint decisionmaking.¹⁵⁷

150. MENTAL HEALTH ASS'N & PENNSYLVANIA COUNCIL OF CHIEF JUVENILE PROBATION OFFICERS, MODELS FOR CHANGE-PENNSYLVANIA, FAMILY INVOLVEMENT IN PENNSYLVANIA'S JUVENILE JUSTICE SYSTEM 15 (2009), http://www.njjn.org/uploads/digital_library/resource_1419.pdf (Functional Family Therapy (FFT) and Multisystemic Therapy (MST) are on the list of nationally published evidence-based practice models).

151. *See Family Youth Initiative (FYI): Developing National Standards in Juvenile Justice for Engaging Families*, VERA INST. OF JUSTICE, <http://www.vera.org/project/families-youth-initiative> (last visited Mar. 21, 2012).

152. *See* NAT'L JUVENILE JUSTICE NETWORK, AN ADVOCATE'S GUIDE TO MEANINGFUL FAMILY PARTNERSHIPS: TIPS FROM THE FIELD 1 (2009), http://njjn.org/uploads/digital_library/resource_1665.pdf; *see also About Us: Mission and Vision*, FAMILIES AND FRIENDS OF LOUISIANA'S INCARCERATED YOUTH, <http://www.ffflic.org/home> (last visited Mar. 7, 2012) (information on a strong example of a family-based advocacy organization); *Close California's Youth Prisons, Books Not Bars*, ELLA BAKER CTR. FOR HUMAN RIGHTS, <http://www.ellabakercenter.org/our-work/books-not-bars> (last visited Mar. 7, 2012) (information about another strong example of a family-based advocacy organization).

153. *See Building Community Capacity*, *supra* note 66.

154. *Id.*

155. *See id.* (discussing how traditional system stakeholders may have access to more quantitative data while community members may have more access to qualitative data accumulated from living and working in neighborhoods where children in the system come from).

156. *Id.*

157. *Id.*

B. Principle-Based Policy Solutions

Invest in local knowledge and programs with strong family and community engagement components. Jurisdictions should invest in evidence-informed interventions as well as local wisdom.¹⁵⁸ Community-based programs “that are strong in social capital and effective in connecting relationally with young people, have a wisdom and a knowledge of the local context that cannot be ignored.”¹⁵⁹ The movement toward evidence-informed interventions is not mutually exclusive with community-based programming and system stakeholders should look for ways the two intersect.¹⁶⁰ Additionally, some states are beginning to invest in more family-focused interventions. For example, the “Missouri Model,” which is structured around small, therapeutic, and treatment oriented programs close to home, involves a variety of community and family-oriented practices that have become a model for best practices in other states.¹⁶¹

Outreach and listen to families and communities. Community and family members must have meaningful and substantial input in the design, implementation, and evaluation of services for youth.¹⁶² Policymakers must genuinely collaborate with family and community members to ensure that their perspectives and insights are recognized. Youth justice agencies can, for example, hold listening sessions where families can present research findings and draw on their own experiences when articulating concerns and offering ideas for system improvement.¹⁶³ Learning communities should be created that bridge “the gap between the performance-based, numbers-driven approach increasingly adopted by system stakeholders, and the ‘in the trenches’ [community] knowledge of what is happening with youth at the street level.”¹⁶⁴

*Orient families to the system and provide peer support.*¹⁶⁵ As part of a national research project, Justice for Families conducted research with families in New York. A “consistent concern raised by families in New York was the lack of clear communication and information about what families can expect during the court process.”¹⁶⁶ Based on this research, Justice for Families suggests that families in New York would benefit from the provision of clear information about the court process and from peer-to-peer supports (where families learn from other families who are in or have been similarly

158. *Id.*

159. *Id.*

160. *See generally id.*

161. *See* RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS 2–3 (2010), <http://www.aecf.org/upload/publicationfiles/MOFullreportwebfinal.pdf>.

162. PENNELL ET AL., *supra* note 144, at 17.

163. *See Toward a Family Centered Justice System*, Justice for Families (forthcoming) (on file with author).

164. *Building Community Capacity*, *supra* note 66.

165. *See id.*

166. *Toward a Family Centered Justice System*, *supra* note 163 at 1.

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involved in the system),¹⁶⁷ a suggestion applicable to families nationwide. Sustaining family engagement is equally important to having established it in the first place.¹⁶⁸

*Give families and communities access to the levers of change.*¹⁶⁹ Sharing the “levers of institutional change” with families is a critical component of actual family engagement.¹⁷⁰ Power should also be shared with local leaders who have the ability to both mobilize community members and manage effective local programs.¹⁷¹ Families and communities should be actively recruited and involved in the design of programs, services, and any facilities within a jurisdiction. For example, Calcasieu Parish’s Children and Youth Planning Board (the Planning Board) in Calcasieu, Louisiana is comprised of children, two parents of children who are in the justice system, professional advocates, members of faith-based communities, and lay citizens along with prosecutors, defense attorneys, judges, law enforcement, and other more traditionally empowered stakeholders.¹⁷² The Planning Board assists in the “assessment, alignment, coordination, prioritization, and measurement of all available services and programs that address the needs of children and youth.”¹⁷³ The Planning Board participates in conditions of confinement inspections.¹⁷⁴ It has also partnered with community-based groups to advocate for legislation aimed at improving detention conditions.¹⁷⁵

Family access to detained and incarcerated youth. Frequent and consistent opportunities for detained and incarcerated youth to engage with their families and other support should be created. These opportunities can include “increased telephone contact, use of video conference technology, and more frequent family visits.”¹⁷⁶ Withholding family visits is not an appropriate behavior modification technique for children; all children, regardless of their behavior should have a right to see their family.

Opening facilities up to family and community inspection. Youth justice facilities should also be open to routine public inspection by family and community members along with other outside monitors.¹⁷⁷ One example is the monitoring being done by

167. *Id.* at 1–2 (discussing examples of peer-to-peer supports including a county-supported family partner program in King County, Seattle and the Child Welfare Organizing Project in New York City).

168. SARAH BREYER, THE NATIONAL JUVENILE JUSTICE NETWORK, AN ADVOCATES GUIDE TO MEANINGFUL FAMILY PARTNERSHIPS: TIPS FROM THE FIELD 1, 2 (2010).

169. This suggestion draws heavily on the work and suggestions of Justice for Families. See *Toward a Family Centered Justice System*, *supra* note 163.

170. *Id.* at 2.

171. *Building Community Capacity*, *supra* note 66.

172. *Board Membership*, CALCACIEU PARISH: CHILD. & YOUTH PLANNING BD., <http://www.calcypb.org/faqmembership.php> (last visited Mar. 7, 2012).

173. *Id.*

174. *Toward a Family Centered Justice System*, *supra* note 163, at 2.

175. *Id.*

176. PENNELL ET AL., *supra* note 144, at 11.

177. *Toward a Family Centered Justice System*, *supra* note 163, at 2 (discussing how any facilities in New York City should be open to regular public inspection that includes family members). See also *infra* Part VIII, for a more in-depth discussion of system monitoring.

Families and Friends of Louisiana's Incarcerated Children (FFLIC) in collaboration with local and state youth justice authorities.¹⁷⁸ FFLIC participated in the monitoring of a local detention center and is now also participating in monitoring of the state's residential facilities.¹⁷⁹

Link community-based support systems to the youth justice system. Programs designed to assist incarcerated, formerly incarcerated, and youth in alternative programs ought to be substantively connected to already existing resources within communities.¹⁸⁰ Building and sustaining connections between youth justice programs and already existing community resources will ensure that when any particular youth does encounter the justice system, a community support system is identified and positioned to assist. For example, if a young person becomes youth justice involved and expresses an interest in photography, his or her caseworker should be able to easily refer him or her to a community-based photography program. Residential facilities should also develop community connections such that local programs regularly come into facilities, bringing programming and services with them. Continuing the example, if this child were incarcerated, he or she might receive photography instruction while incarcerated. National best practices for engaging communities by building on existing community networks exist and should be used as starting points.¹⁸¹

Engage young people in identifying the people and programs that support them. Service providers in both community-based programs and detention and incarceration facilities should actively work with young people to identify their networks of support, remembering that it may take some work to identify and locate such resources and that even the most seemingly disconnected young people may have some organic networks of support (e.g., a trusted extended family member, a church they once attended, or a community center with a staff person they like). For example,

178. *Toward a Family Centered Justice System*, *supra* note 163, at 2.

179. *Id.*

180. These resources can include but are not limited to schools, community centers, places of worship and communities of faith, libraries, cultural institutions, art programs, mentoring programs, local businesses, parks, sports programs, and vocational programs.

181. For example, the Juvenile Detention Alternatives Initiative (JDAI), a project of the Annie E. Casey Foundation, focuses on reducing the secure confinement of youth. *About the Juvenile Detention Alternatives Initiative*, THE ANNIE E. CASEY FOUND., <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/AboutJDAI.aspx> (last visited Mar. 21, 2012). The program began in 1992 and has been frequently replicated such that there are now approximately 100 JDAI sites in thirty states and the District of Columbia. *Sites & Contacts, Juvenile Detention Alternatives Initiative*, THE ANNIE E. CASEY FOUND., <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/SitesAndContacts.aspx> (last visited Mar. 7, 2012). Santa Cruz, California's JDAI site:

developed meaningful partnerships with community based organizations to provide culturally responsive alternatives to detention, as well as programming from diversion to family preservation. The reduction of racial/ethnic disparities and disproportionate minority confinement has been an integral component of their detention reform work. As a result, Santa Cruz has significantly narrowed the gap between Latino youth representation in the general population and the detention population.

Id.

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one former child protective client of mine repeatedly told me that his support was “Lisa,” who lived “upstairs in his building,” although, as I remember it, he did not know her last name, phone number, apartment number, or much about her. I shared this information with the local service agency and, somewhat sheepishly because of the information’s paucity, asked the agency to speak to “Lisa.” The agency’s attorney said they would try, although she, like me, expressed skepticism. The agency was able to locate Lisa, who, it turned out, had often provided my client shelter and food when his home was unstable. Lisa ultimately became my client’s foster mother.

Engaging children’s networks of support includes ensuring that, consistent with any applicable federal and state laws and with the permission of the young person, these supportive individuals are apprised of the young person’s case developments and invited to actively participate in case planning meetings and conferences, and that their voices and experiences are heard in the process.

Invest resources in families and communities. Much has been said in recent times about the concept of ‘justice reinvestment’ but the actual practice of such reinvestment has been limited.¹⁸² Justice for Families, a national network of local organizations working to empower families as leaders of the youth justice movement, offers the following conceptual distinction between *intra-institutional reinvestment* and *inter-institutional reinvestment*:

Intra-institutional reinvestment consists of changes that can be made *within* systems [*institutions*] to move justice practice away from an overreliance on incarceration, toward the use of more effective and often less costly alternatives. . . . These efforts are admirable, but still more could be done to keep youth out of residential placements. By investing in community and family-centered safety solutions [*inter-institutional reinvestment*], justice systems can reduce their footprint and increase the informal community controls that make the safest communities safe. For example, transferring specified probation department duties to paid community and family partners through the use of peer support programs can help create a more collaborative-minded department and strengthen disadvantaged communities.¹⁸³

Such inter-institutional reinvestments in communities are an important part of true system transformation.

VII. PRINCIPLE SIX: JUSTICE IS NOT FOR SALE

A. *The Problems of the Status Quo*

For-profit corporations are increasingly operating youth justice facilities.¹⁸⁴ According to the Justice Policy Institute, privately owned corporations operate more

182. *Toward a Family Centered Justice System*, *supra* note 163, at 3.

183. *Id.*

184. At this point, the body of research on prison privatization is relatively new and much of the research is focused on both youth and adult facilities (often with both discussed in the same report or analysis). The research and analysis in this section is tailored, when possible, to the youth justice system. A significant amount of the research currently available does not substantially distinguish between youth and adult

than fifty percent of youth correctional facilities in the United States.¹⁸⁵ There are five key and interrelated problems with for-profit prisons. First, for-profit corporations are driven by a profit motive, which can directly trade-off with the level and quality of programs and services provided to youth and with successful youth outcomes. Second, the profit motive driving private prisons creates financial incentives to incarcerate more people and for longer periods of time.¹⁸⁶ There is direct evidence of clear economic relationships between major prison corporations and influential political organizations,¹⁸⁷ and private prison companies have successfully promoted “policies that lead to higher rates of incarceration and thus greater profit margins for their company.”¹⁸⁸ Third, for-profit youth facilities have been characterized by abusive conditions. Fourth, despite prison industry claims to the contrary, for-profit prisons have not consistently been shown to reduce taxpayer or municipality costs.¹⁸⁹ Fifth, for-profit prisons are largely closed off from oversight and public evaluation.

First, the profit motives of for-profit prison companies can directly trade-off with the provision of rehabilitative and other programming.¹⁹⁰ According to the Justice Policy Institute:

Private prisons have an incentive to minimize costs by cutting services and treatment. Whether a private prison provides rehabilitative services (such as job training or drug treatment) is dependent upon the private prison company’s contract, which is drafted by legislators and susceptible to political influence by private prison companies. Although most private prisons offer similar programming as state-run facilities as stipulated in their contracts, they are often not of the same caliber as those offered within public institutions.¹⁹¹

facilities. The nation’s two largest private prison providers, Corrections Corporation of America and Geo Group, Inc., operate both youth and adult facilities. *See* CODY MASON, *THE SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 2* (2012), http://sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf. Also, as discussed *supra* Part I, large numbers of children are currently confined in adult facilities.

185. PAUL ASHTON & AMANDA PETTERUTI, JUSTICE POLICY INST., *GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES* 18 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf (stating that private facilities amount to fifty-six percent of all entire correctional institutions for persons under the age of twenty).

186. For example, many private prison companies operate on a per diem basis, whereby their profit grows in direct relation to the number of people they have in custody and the number of days those people are in custody. Therefore, a financial incentive exists to detain more inmates and for a longer period of time. *See, e.g.*, AMY CHEUNG, *THE SENTENCING PROJECT, PRISON PRIVATIZATION AND THE USE OF INCARCERATION* 1 http://www.sentencingproject.org/doc/publications/inc_prisonprivatization.pdf (last updated Sept. 2004); Eyal Press & Jennifer Washburn, *The At-Risk-Youth Industry*, *THE ATLANTIC*, Dec. 2002, at 38, <http://www.theatlantic.com/magazine/archive/2002/12/the-at-risk-youth-industry/2645/>.

187. *See* CHEUNG, *supra* note 186, at 5.

188. ASHTON & PETTERUTI, *supra* note 185, at 3.

189. *See* MASON, *supra* note 184, at 11–12.

190. *See* ASHTON & PETTERUTI, *supra* note 185, at 35.

191. *Id.* (footnotes omitted).

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Additionally, because the market place for prisons—unlike other industries—is created by the government for the government (and only the government has the power to incarcerate), there is no such thing as a natural market for these services.¹⁹² Essentially, the result of this limited and government orchestrated marketplace is an oligopoly, dominated by of only a few major companies and therefore “inherently less competitive and innovative.”¹⁹³

Second, because many private prisons operate on a per diem (daily) rate for each bed filled, a financial incentive exists for more people to be detained or incarcerated and for confinements to last longer periods of time. This financial incentive is even larger in the youth justice industry than it is in the adult criminal justice industry because per diem rates for children are higher than those for adults due to children’s eligibility for more education and mental health related services. This played a particular influence in the 1980’s when corporations like Wackenhut (now GEO group) and Correctional Corporation of America (CCA) entered the private prison market.¹⁹⁴

“The profit motive of private prison companies inherently creates a problematic entanglement between interest in profit and public policy.”¹⁹⁵ “[P]rivate prison companies have had either influence over or helped to draft model legislation . . . which have driven up incarceration rates and ultimately created more opportunities for private prison companies to bid on contracts to increase revenues.”¹⁹⁶ For example:

CCA and Wackenhut are major contributors to the American Legislative Exchange Council (ALEC), a Washington, D.C. based public policy organization that supports conservative legislators. ALEC’s members include over 40% of all state legislators—representing a serious force in state politics. One of ALEC’s primary functions is the development of model legislation that advances conservative principles, such as privatization. Under their Criminal Justice Task Force, ALEC has developed and helped to successfully implement in many states “tough on crime” initiatives including “Truth in Sentencing” and “Three Strikes” laws.¹⁹⁷

Third, abusive treatment of youth has systemically occurred in jurisdictions that have allowed for for-profit private youth justice facilities. For example, the Southern Poverty Law Center, the American Civil Liberties Union (ACLU), and a civil rights attorney recently filed a federal lawsuit on behalf of children residing in Mississippi’s

192. Richard Culp, *The Failed Promise of Prison Privatization*, 22 PRISON LEGAL NEWS 1, 1 (2011), [https://www.prisonlegalnews.org/\(S\(mdpqbamhayatulniqnfx1qb4\)\)/includes/_public/_issues/pln_2011/10pln11.pdf](https://www.prisonlegalnews.org/(S(mdpqbamhayatulniqnfx1qb4))/includes/_public/_issues/pln_2011/10pln11.pdf). In fact, by the end of 2011 there only remained seven companies in the industry, with the top four maintaining an overwhelming monopoly over the market. *See id.* at 4.

193. *Id.* at 3.

194. CHEUNG, *supra* note 186, at 1. *See generally* Press & Washburn, *supra* note 186.

195. CHEUNG, *supra* note 186, at 4.

196. ASHTON & PETTERUTI, *supra* note 185, at 3.

197. CHEUNG, *supra* note 186, at 4–5; *see also* MASON, *supra* note 184, at 12–16 (detailing the inter-relationship between the private prison industry and ALEC and other methods used by the private prison industry to promote policies that prioritize profits over rehabilitation and treatment outcomes).

Walnut Grove Youth Correctional Facility (WGYCF).¹⁹⁸ A private company, Geo Group, Inc., the nation's second largest private prison company, operates WGYCF.¹⁹⁹

The plaintiff's allegations describe children imprisoned in "barbaric, unconstitutional conditions" and a for-profit management culture that perpetuates violence and corruption.²⁰⁰ According to the complaint,

[s]ome prison staff exploit youth by selling drugs inside the facility. Other staff members abuse their power by engaging in sexual relationships with the youth in their care. Many youth have suffered physical injuries, some serious and some permanent, as a result of dangerously deficient security policies and prison staff who physically abuse the young men housed in WGYCF. Youth who are handcuffed and defenseless have been kicked, punched, and beaten all over their bodies. For the sole purpose of inflicting excruciating pain, some WCYCF staff have sprayed dangerous chemical restraints on young men who are secure in their cells. Some youth are stripped naked and held in isolation for weeks at a time.²⁰¹

Fourth, a common argument in support of private prisons is that they are cheaper than government facilities. "However, hidden costs related to the actual operation [of the facilities], lawsuits, and instances in which private prison companies don't fill their facilities end up costing communities more than anticipated."²⁰² In fact, research conducted by the Department of Corrections in Arizona found that the state had not saved any money by contracting out minimum security beds to a private company. The research additionally found that more money is actually spent on private medium security beds than would be if the institution were publicly operated.²⁰³ In addition, there are often tremendous nonmonetary costs to taxpayers for private prisons, although these costs can be difficult and even impossible to capture.²⁰⁴

198. See Complaint, *C.B. v. Walnut Grove Correctional Authority*, No. 3:10cv663 (S.D. Miss. filed Nov. 16, 2010). As of the time of publication, the judge in the case is considering a settlement agreement that would move youth from the privately-run Walnut Grove facility, and would ban the use of solitary confinement for youth. See Jerry Mitchell, *Consent Decree Would Ban Isolation, Private Jails for Youths*, CLARION LEDGER, Feb. 27, 2012, <http://www.clarionledger.com/article/20120228/NEWS/202280325/Consent-decree-would-ban-isolation-private-jails-youths>.

199. Complaint, *supra* note 198, at 2. Geo Group is one of two companies that own and/or operate the majority of for-profit prisons; the other is the Corrections Corporation of America (CCA). See ASHTON & PETTERUTI, *supra* note 185, at 2.

200. Complaint, *supra* note 198, at 2.

201. *Id.* at 2–3. According to the Complaint, WGYCF was "[c]onstructed with over \$41 million in taxpayer-funded subsidies, the facility has generated approximately \$100 million for the various for-profit entities that have operated the prison since it opened its doors in 2001." *Id.* at 2.

202. ASHTON & PETTERUTI, *supra* note 185, at 32; see also MASON, *supra* note 184, at 7–10 (reviewing multiple studies related to the costs of private prisons and concluding that cost-savings are largely illusory).

203. MASON, *supra* note 184, at 9.

204. ASHTON & PETTERUTI, *supra* note 185, at 31–33. "This lack of services not only causes harm to the people in prison, but it also affects the community when people are eventually released without proper treatment or skills to effectively re-enter the community." *Id.* at 36.

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Finally, there is a limited amount of independent and public oversight in private facilities. Performance measures in contracts for private prisons are often vague and even when failures in performance are identified, private corporations are often not sanctioned or fined.²⁰⁵ In fact, through various lobbying and other political activities, corporations have been able to eliminate many bills that would have subjected them to more oversight.²⁰⁶ Further, there is limited public transparency when it comes to contracting and performance. Private prisons are able to finance construction through private revenue and therefore get around the need for public approval.²⁰⁷

*B. Principle-Based Policy Solutions*²⁰⁸

The solutions to the problem of abuses within private prison systems are intertwined with solutions to other issues discussed in this article.²⁰⁹ Additionally:

All residential facilities for children should be operated by governmental or not-for-profit entities. “The available evidence does not point to any substantial benefits to privatizing prisons. Although there are instances where private prisons result in small savings, the structure and demands of for-profit prisons appear to produce a negative overall impact on services.”²¹⁰ Given the aforementioned risks and harms of private prisons, the operation of residential facilities for children should be legally limited to governmental or not-for-profit entities. These risks include the trade-off between profit and the level and quality of programs and services, the financial incentives of private prison companies to incarcerate more people and for longer periods of time, the history of private prison companies promoting policies that lead to higher rates of incarceration and consequently greater profit margins, and the abusive conditions that have characterized private youth prisons.

*Independent researchers should evaluate the cost and recidivism claims of the private prison industry.*²¹¹ Additional research into the industry’s claims regarding the cost efficiencies and reduced recidivism rates of private prisons is needed. These researchers should be independent and without any financial or other ties to the private prison industry. Currently, there are conflicting claims about these two

205. Craig Malisow, *Prison Pays; Despite a History of Abuse and Bad Conditions, Private Prison Corporation GEO Keeps Getting Contracts from the State*, HOUS. PRESS, Dec. 29, 2010, available at <http://www.houstonpress.com/2010-12-30/news/prison-pays/>.

206. *Id.*

207. CHEUNG, *supra* note 186, at 5. “Taxpayers are denied the opportunity to approve or disapprove the building of new facilities while remaining liable for the expenses incurred by the government through their contract with private prison companies.” *Id.*

208. One of the solutions (research on the claims of the private prison industry is needed) presented as part of this principle heavily draws on the policy recommendations presented in the report by Ashton and Petteruti. See ASHTON & PETTERUTI, *supra* note 185, at 37.

209. See *supra* Part III and *infra* Part VIII for additional discussion and policy solutions.

210. MASON, *supra* note 184, at 17.

211. See ASHTON & PETTERUTI, *supra* note 185, at 37.

subjects and additional independent research could assist stakeholders, including the public and legislators, in considering the issue of prison privatization.

VIII. PRINCIPLE SEVEN: ALWAYS HAVE STRONG OUTSIDE EYES

A. *The Problems of the Status Quo*

Children who are institutionally confined are particularly vulnerable to neglect and abuse, a problem that is not confined to a particular system or jurisdiction, nor attributable merely to a few “bad apples” among a particular facility’s workforce.

Since 1970, systemic violence, abuse, and/or excessive use of isolation or restraints have been documented in the juvenile corrections facilities of 39 states (plus the District of Columbia and Puerto Rico). In 32 of those states (plus Washington, DC, and Puerto Rico), the abusive conditions have been documented since 1990, and in 22 states (plus Washington, DC), the maltreatment has been documented since 2000.²¹²

The DOJ has documented constitutional violations of the rights of children, including the excessive use of force against children, in multiple jurisdictions and in facilities operated by both counties and states.²¹³ Despite this pattern of systemic and pervasive abuses, “correctional oversight by an independent entity whose findings are disseminated to the public is a relative rarity in the United States, although some such monitoring does occur in this country, such as that conducted at the federal

212. MENDEL, *supra* note 3, at 5.

213. In August 2009, the DOJ concluded a two-year investigation of four New York State-operated juvenile prisons, finding routine incidents of physical abuse and excessive use of force, a complete lack of staff accountability, and woefully inadequate mental health services. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE LANSING RESIDENTIAL CENTER, LOUIS GOSSET, JR. RESIDENTIAL CENTER, TRYON RESIDENTIAL CENTER, AND TRYON GIRLS CENTER, (2009), http://www.justice.gov/crt/about/spl/documents/NY_juvenile_facilities_findlet_08-14-2009.pdf. The DOJ found that, “[s]taff at the facilities routinely used uncontrolled, unsafe applications of force . . . [a]nything from sneaking an extra cookie to initiating a fistfight may result in a full prone restraint with handcuffs.” *Id.* at 5. Injuries to children included concussions and spiral fractures. *Id.* DOJ investigations have been conducted and findings made against many other jurisdictions across the nation. See MENDEL, *supra* note 3, at 5; CIV. RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION REPORT OF ARTHUR G. DOZIER SCHOOL FOR BOYS AND THE JACKSON JUVENILE OFFENDER CENTER, MARIANNA, FLORIDA (2011), http://www.justice.gov/crt/about/spl/documents/dozier_findltr_12-1-11.pdf; Press Release, U.S. Dep’t of Justice, Department of Justice Releases Investigative Findings on the Walnut Grove Youth Correctional Facility in Mississippi (Mar. 21, 2012), *available at* <http://www.justice.gov/opa/pr/2012/March/12-crt-352.html>; Letter from Grace Chung Becker, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, to Yvonne B. Burke, Los Angeles County Board of Supervisors (Oct. 31, 2008), http://www.justice.gov/crt/about/spl/documents/lacamps_findings_10-31-08.pdf; Letter from Wan J. Kim, Assistant Attorney Gen., U.S. Dep’t of Justice, to the Executive Committee of the Marion County Superior Court (Aug. 6, 2007), http://www.justice.gov/crt/about/spl/documents/marion_juve_ind_findlet_8-6-07.pdf; Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, to Michel Claudet, President, Terrebonne Parish (Jan. 18, 2011), http://www.justice.gov/crt/about/spl/documents/TerrebonneJDC_findlet_01-18-11.pdf.

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level by the Inspector General of the United States Department of Justice.”²¹⁴ In contrast, prisons in all of the European Union countries are subject to independent monitoring by the European Committee for the Prevention of Torture.²¹⁵

Oversight of the youth justice system is not in and of itself a goal.²¹⁶ “Rather, oversight is a means of achieving the twin objectives of transparency of public institutions and accountability for the operation of safe and humane prisons and jails.”²¹⁷ National expert Michele Deitch frames the concept of prison oversight as an umbrella term that refers to at least seven distinct functions, which may be carried out by separate agencies or bodies: regulation; audit; accreditation; investigation; legal; reporting; and inspection and monitoring.²¹⁸ A meaningful oversight process can highlight the good work that is being done in institutions and help ensure its sustainability. Oversight also offers opportunities for proactively responding to problems as they arise. As the American Bar Association states:

[T]he public identification of significant problems . . . can and should lead to the rectification of those problems, resulting in . . . facilities that are safer, operated in conformance with the Constitution, other laws, and best correctional practices, and equipped to better prepare inmates for a successful reentry into society. Second . . . potential problems that have been overlooked at the facility can be detected, preventing them from becoming major problems for correctional officials. Third, external oversight of correctional operations and the problem solving that it catalyzes can be a cost-effective and proactive means to potentially avert lawsuits . . . Fourth, the factual findings of the monitoring entity can substantiate the need for funds requested by correctional administrators. And finally, the revelation by a monitoring entity of what is and is not happening behind prison walls can lead to better-informed decisions about a jurisdiction’s sentencing and correctional policies.²¹⁹

B. Principle-Based Policy Solutions

Robust oversight and independent monitoring. Robust oversight includes but is not limited to independent monitoring of all residential facilities and clear mechanisms for public transparency. This kind of oversight can both facilitate systemic change and improve conditions of confinement. Robust oversight includes a range of

214. STEPHEN J. SALTZBURG, A.B.A. CRIM. JUSTICE, REPORT TO THE HOUSE OF DELEGATES 2–3 (2008), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104b.authcheckdam.pdf.

215. *Id.* at 3 (citing Michele Deitch, *Why You Should Love Watchdogs: The Case for Effective Prison Oversight and the British Experience*, in THE STATE OF CORRECTIONS: PROCEEDINGS AM. CORRECTIONAL ASS’N ANNUAL CONFERENCES 141, 147–48 (2006)).

216. See Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438, 1438–39 (2010) (discussing how prison oversight is not in and of itself a goal).

217. *Id.*

218. *Id.* at 1439.

219. SALTZBURG, *supra* note 214, at 2.

functions from licensing and accreditation to legal protections for those in custody. All jurisdictions operating a youth justice system should have one or more well-defined and well-resourced oversight bodies.

The American Bar Association (ABA) outlined twenty standards for effective youth and adult prison oversight, including the following essential points. The overseeing entity must be: 1) independent, specifically meaning that it must not be located within the agency it oversees and it must operate from a separate budget; 2) statutorily guaranteed the right to conduct unannounced and unfettered visits including the ability to have confidential conversations with youth in the facilities and programs; 3) granted the power to subpoena witnesses and documents and have the power to file suit against the agency operating a facility(ies); 4) assigned the power and duty to report its findings to the executive, legislative, and judicial branches, and also to the public; and 5) allocated adequate funding and appropriate staffing levels necessary for effectiveness. Additionally, facility administrators must be required to respond publicly to monitoring reports. The ABA standards should be adopted by all jurisdictions operating or licensing the operation of a custodial facility, any relevant oversight mechanisms should be measured against them, and any deficiencies remedied.²²⁰

System transparency. System transparency is crucial to the success of efforts to reduce minority and ethnic disproportionalities, and is also critical to ensuring that legislators, policymakers, and the public are aware of what is happening to its children so that they can effectively and appropriately respond when children are being harmed.²²¹ Additionally, the transparency of data, including fiscal data, reduces the likelihood of corruption and ethical scandals. Finally, the more educated policymakers and citizens are, the more likely it will be that youth justice policy will be made on facts and not on biases, stereotypes, or myths.

The public should have easy access to aggregated (de-identified) data about all aspects of the system from policing to aftercare, including timely system performance data about how the youth justice system is operating (for example, which programs are available to which youth, recidivism rates broken down by multiple variables including dispositional outcomes and service provision, and inspection records from visits to all facilities by the relevant oversight body).²²²

220. *See id.* at 4–8 (discussing the twenty standards for effective youth and adult prison oversight).

221. The ABA also has made specific recommendations relating to transparency. *See id.* at 3. The author wishes to thank Avery Irons of the Children's Defense Fund of NY, Kyung Ji Rhee of the Institute for Juvenile Justice Reform and Alternatives, a project of the Center for NuLeadership, Alexandra Cox, and Ruben Austria of Community Connections for Youth for their assistance developing the ideas contained within this principle.

222. Concerns about the confidentiality of records may be raised when the public dissemination of data is discussed. This proposal is specifically limited to aggregate data where the names and identifying information of young people, complaining witnesses, and others are removed.

SEVEN CORE PRINCIPLES TO CHANGE THE COURSE OF YOUTH JUSTICE

IX. CONCLUSION

The reality of the current youth justice system is grim. The young people most harmed by the system are almost exclusively children of color from poor families. An extensive and credible body of research documents the ways in which punitive approaches, including an overreliance on detention and incarceration, lead to worse outcomes, such as increased recidivism. Despite these facts, jurisdictions across the country are heavily invested in perpetuating a failed system.

There is, however, a countervailing force in the form of advocates, researchers, service providers, system-involved and formerly system-involved children and families, philanthropists, community members, and government officials, calling for change. New and surprising alliances that transcend traditional political lines are being formed.²²³ There is a strong and growing body of research demonstrating that rigorous and effective forms of community-based interventions and supervisions exist and can result in positive outcomes for both young people and the public, including reductions in recidivism.²²⁴

In addition, there are local and national models and best practices that offer guidance as to how we might as a nation improve our youth justice system. Drawing upon this research and models for best practices, the principles identified in this article lay out a roadmap for effective and sustainable youth justice reform. Principle one, *Treat Children as Children*, is a core bedrock principle that can be applied to very specific laws, policies, and practices including but not limited to setting the age of criminal responsibility at eighteen and ensuring that children in confinement are not housed with adults. Principle two, *Fund and Use Only What Works*, encourages rational and performance-based policy-making and funding allocations. Principle three, *End Racial and Ethnic Inequality*, looks to specifically address the persistent racial and ethnic inequalities that have been part of the youth justice system since its

223. For example, the national organization, Right on Crime makes “the conservative case for reform” and stresses the need for effective community-based alternatives to incarceration as a way to cut costs and ensure public safety. *The Criminal Justice Challenge*, RIGHT ON CRIME: THE CONSERVATIVE CASE FOR REFORM, <http://www.rightoncrime.com/the-criminal-justice-challenge/> (last visited Mar. 8, 2012).

224. “A number of youth violence intervention and prevention programs have demonstrated that they are effective; assertions that ‘nothing works’ are false.” *Executive Summary, Youth Violence: A Report of the Surgeon General*, DEP’T OF HEALTH & HUMAN SERVS. (2001), <http://www.surgeongeneral.gov/library/youthviolence/>. “The most effective strategy for treating and rehabilitating juvenile offenders and preventing recidivism is a comprehensive, community-based model that integrates prevention programming; a continuum of pretrial and sentencing placement options, services, and sanctions; and aftercare programs.” Shelley Zavlek, *Planning Community-Based Facilities for Violent Juvenile Offenders as Part of a System of Graduated Sanctions*, JUVENILE JUSTICE BULLETIN (U.S. DEP’T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION), at 5, Aug. 2000, <https://www.ncjrs.gov/pdffiles1/ojjdp/209326.pdf>. The State of Missouri’s system of juvenile justice focuses on providing youth with services in small home-like settings in the community, and has maintained a very low recidivism rate (less than nine percent) since implementation. MO. DEP’T OF SOC. SERVS., DIVISION OF YOUTH SERVICES, ANNUAL REPORT: FISCAL YEAR 2007 at 18 (2007), <http://www.dss.mo.gov/re/pdf/dys/dysfy07.pdf>. “Rather than providing a public safety benefit, processing a juvenile through the system appears to have a negative or backfire effect. This was especially true in those studies that compared system processing with a diversion program or services.” PETROSINO ET AL., *supra* note 10, at 38.

founding. Principle four, *Equal Justice and Culturally Competent Services for Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning Youth*, guides our eyes to LGBTQ children who are often overlooked, stigmatized, and disproportionately harmed by the youth justice system. Principle five, *Share Power and Resources with Families, and Communities*, reminds us that involving children, families, and communities in key youth justice decisions at both the individual and system levels results in better outcomes for youth. Principle six, *Justice is Not for Sale*, outlines some of the harms that result when for-profit corporations administer justice. Principle seven, *Always Have Strong Outside Eyes*, makes clear that no jurisdiction, regardless of the good intentions of its leaders and agencies, should monitor its own system, particularly its residential facilities, and that a robust oversight system including independent monitoring and clear mechanisms for public transparency is essential to protecting children.

Above all else, however, what is needed is a commitment by the public and policymakers to speak out on behalf of and devote resources to those children who generally have no political capital and whose bodies and voices are silenced in courtrooms, jails, and prisons across our nation, to their and our collective detriment.