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INVESTIGATING THE ROLE OF RACE AND CULTURE IN THE U.S. JUVENILE JUSTICE SYSTEM

By Brenda McKinney*

I. INTRODUCTION

Emotional. Disturbing. Uplifting. These words have been used to describe recent events that have, along with titles like Michelle Alexander’s *New Jim Crow*¹, reopened a broad discussion about issues at the intersection of race relations, culture and youth who offend in the United States. More specifically, a series of unfortunate and high profile deaths—such as Mike Brown in Ferguson, Walter Scott in North Carolina and Trayvon Martin in Florida²—have highlighted the need for discourse on how to appropriately support historically marginalized groups.³ Even U.S. Supreme Court Justice Ruth Bader Ginsburg has stated that, America has a “real racial problem.”⁴ Her colleague, Justice Sonya Sotomayor, echoed this sentiment while speaking to law students in September 2014, stating that “we all aspire to a color-blind society [...] But the reality is that as much as we wish it away, it makes a difference in society. Society is affected by it at every level.”⁵

Accordingly, the purpose of this Article is to contribute to conversations through the development of ideas that offer a better system—one that offers equal and fair treatment to all youth regardless of their color, culture or ethnicity by providing a cursory review of the current

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²MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (discussing issues surrounding race and incarceration in the United States, with particular focus on African American males from a legal viewpoint, and arguing the need for a new social movement that will change the culture around mass incarceration).


landscape. Furthermore, while the United States has a rich and diverse society, we experience overwhelmingly disproportionate numbers of minority youth in the justice system. This negatively affects not only the youth who offend and those individuals touched by crime, but also the youths’ communities. While this Article does address whether minority youth have different experiences of the juvenile justice system and the factors that might cause disparate impact or bias, the aim is to review the issue, not propose a one-size-fits-all solution.

A. A Snapshot: Disproportionality Statistics

In the United States, research indicates that extreme racial and ethnic disparities continue to exist across the various state-level juvenile justice systems and that African American males are especially overrepresented in these systems. While African American youth represent seventeen percent of the American youth population, they make up forty-six percent of juvenile arrests, thirty percent of referrals to juvenile court, and forty-one percent of waivers to adult court. African American males are also six times more likely to be incarcerated than white males and 2.5 times more likely than Hispanic males. Additionally, African American and Hispanic males make up nearly two-thirds of the young prison population, with non-Hispanic black males making up the largest single demographic.

Furthermore, it is estimated that one in three (thirty-three percent) of African American males will serve time in prison at some point in his life—compared to a seventeen percent chance

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6Howard Snyder, OJJDP Bulletin: Juvenile Arrests 2004, U.S. DEP’T OF JUST. 9 (Dec. 2006), https://www.ncjrs.gov/pdffiles1/ojjdp/214563.pdf (providing data on juvenile arrests and racial disproportionality in the juvenile justice system). See, e.g., Alexander supra note 1, at 3 (discussing the current climate of incarceration and crime as one that “plagues” African American communities, not only the individuals affected); Michael J. Bamshad and Steve E. Olson, Does Race Exist?, SCL AM. N 78, 83 (2003), http://www.brandeis.edu/provost/diversity/Events/diversitypdfs/Does_Race_Exist.pdf (defining race as a categorization of humans into populations based on genetic or heritable traits such as skin color, hair texture, and facial features); Anthony D. Smith, The Ethnic Origins of Nations 7 (1987) (explaining that “ethnicity” refers to a group of people that share a commonality based on heritage that is real or assumed).

7What is the JJDPA?, ACT 4 JUV. JUST. (Apr. 15, 2015), http://www.act4jj.org/what-jjdpa (providing an overview of the JJDPA and four core requirements / protections); Christopher Hartney and Linh Vuong, Created Equal, Race and Ethnic Disparities in the US Criminal Justice System, NAT’L COUNCIL ON CRIME AND DELIQ. 1, 5 (March 2009) http://www.nccglobal.org/sites/default/files/publication_pdf/created-equal.pdf (explaining that differential representation of racial and ethnic groups exists at every level of the juvenile justice system and that there is a growing concern about this issue).


10E. Ann Carson, Bulletin: Prisoners in 2013, U.S. DEP’T OF JUST. (Sept. 2014), http://www.bjs.gov/content/pub/ascii/p13.txt (explaining also that in 2013, almost three percent of black males were imprisoned compared to 0.5 percent of white males); Marc Mauer & Ryan S. King, Uneven Justice: State Rates of Incarceration By Race and Ethnicity, THE SENTENCING PROJECT 1-3 (2007).

for Hispanic males and a six percent chance for Caucasian males. In 2011, the victimization rate for non-Hispanic, black youth was more than twice the rate for non-Hispanic white youth.

Additionally, statistics show that the issues surrounding minority youth seem to be worsening in the face of improved policies for youth. While a recent decline in crime has resulted in a decline in arrest rates, Figure 1 displays that the proportions of minority youth (red line) in the American justice system compared to their non-minority peers (blue line) have not decreased. Minority youth remain significantly overrepresented.

**Figure 1 Juvenile Arrest Rates for All Crimes by Race (US), 1980-2009**

*Source: OJJDP Statistical Briefing Book. (Note: Rates are arrests of persons ages 10-17 per 100,000 persons ages 10-17 in the resident population).*

Furthermore, this seems to be a growing trend. Between 1980 and 2009, the total juvenile arrest rate decreased thirty-eight percent for Asians, twenty-nine percent for Indigenous youth (“American Indians”), and twenty-four percent for white youth, but *increased* by seven percent for African American (“black”) youth. Thus, despite efforts and declining crime rates, there is

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15See Tavis Smiley, *Fact Sheet: Outcomes for Young Black Men*, PBS, http://www.pbs.org/wnet/tavissmiley/tst/too-important-to-fail/fact-sheet-outcomes-for-young-black-men/ (last visited Apr. 23, 2015) (offering statistics and context to illustrate “the impact that structural inequality has had on Black men and boys in America” and indicating that these youths’ futures “will be lost if something is not done”); *Race, Ethnicity & Health Care Fact Sheet: Young African American Men in the United States*, THE HENRY J. KAISER FAMILY FOUNDATION (2006), https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7541.pdf (offering statistics on young African American men to highlight concerns and illustrate that racial disparity exists).


17Note that the term “minority” is used here, but refers generally to African Americans. One of the weaknesses with the American system is that Native American and also Hispanic youth are sometimes categorized as “white” or “black,” making it difficult to decipher reliable data about these populations. Thus, the “black” category seen in Figure 1 might, and likely does, include a small proportion of Hispanic youth.

18Every two years, the Census of Juveniles in Residential Placement (CJRP) gathers detailed information on youth residing in detention, correctional, and other shelter facilities. This Section draws on data from CJRP and its
clearly more that we as a society can do to address these issues and ensure that all youth receive fair treatment, especially where the racial disparity for certain groups of marginalized youth in the justice system seems to be worsening, tempering the positive effects of the drop in crime.

II. IDENTIFYING RACE

A. Defining Terms: What is Meant by the Term “Race”?

Race relates to physical characteristics and groups of people who share similar and distinct physical traits. Comparatively, culture relates to the identities that we form based on where and how we are raised, “that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.” Some scholars question whether “race” even exists, while others point to rudimentary differences between race and culture to underscore the difference between the two, including: 1) that a person can potentially change or affect her culture, but cannot decide the race into which she is born; 2) that culture is related to behavior and environment and can be—but is not always tied to—race; and 3) that race usually refers to one’s looks, such as the color of his or her skin, whereas culture extends to behavior, dress and actions, often influenced by one’s environment.

B. Does Indigeneity Differ from “Race”?

Just as race and culture differ, there is also a distinction between race and indigeneity, which might be overlooked in the American context. While the concepts of race (and ethnicity)


Edward Burnett Tylor, Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art, and Custom I (1871). See also Culture, CAMBRIDGE DICTIONARY (defining “culture” as “the way of life, especially the general customs and beliefs of a particular group of people at a particular time.”), http://dictionary.cambridge.org/us/dictionary/english/culture (last visited Mar. 31, 2015).

See generally Jeffrey C. Long & Rick A. Kittles, Human Genetic Diversity and the Nonexistence of Biological Races, 75 HUM. BIOLOGY, 449-57 (2003) (explaining that genetic variations include more frequently within socially constructed racial groups than among multiple different racial groups); Audrey Smedley & Brian Smedley, Race as Biology Is Fiction, Racism as a Social Problem Is Real, 60 AM. PSYCHOL. 16-26 (2005) (demonstrating that while there are negligible biological differences between racial groups, the scientific classification of people into racial groups has social and political consequences); Hua Tang, et al, Genetic Structure, Self-Identified Race/Ethnicity, and Confounding in Case-Control Association Studies, 76 AM. J. HUM. GENET. 268-275 (2005), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1196372/ (evaluating self-identified race/ethnicity corresponding highly to genetic cluster categories, showing correlations among genetic variation and race vary widely).


are more focused on physical traits, indigeneity is a more complex concept that considers legacy, heritage and even language.24 The concepts are similar in that both Indigenous communities and racial groups can be minority groups within a country.25 Indigeneity, however, refers to the natural rights that come with being part of the First Nation people.26

Several significant treaties have offered potential definitions of indigeneity, including: the International Labor Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples (1989), that of the World Bank (1991), and the United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly (2007).27 The concept can be hard to define and “something of a mouthful” to explain.28 Further, common working definitions of Indigeneity, in contrast to race, combine “subaltern status and first occupancy” as common elements.29 Among these, the “Cobo definition” is generally regarded to be the most widely accepted definition of Indigeneity.30 It states:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant


25By definition, these groups can be ethnic minorities where they are not the majority culture; although this is relative to each country, its cultural context and the populations of different ethnic and racial groups within that country. *See Ethnic Minority*, THE FREE DICTIONARY, http://www.thefreedictionary.com/ethnic+minority (last visited Oct. 5, 2015) (defining an ethnic minority as, “an ethnic group that is not the dominant one in a particular society”).

26See, e.g., *Politics of Indigeneity in the South Pacific: Recent Problems of Identity in Oceania* (Erich Kolig and Hermann Muckler eds., 2002).


sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. This historical continuity may consist of the continuation, for an extended period reaching into the present of one of or more of the following factors:

(a) Occupation of ancestral lands, or at least part of them;
(b) Common ancestry with the original occupants of these lands;
(c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an Indigenous community, dress, means of livelihood, lifestyle, etc.);
(d) Language (whether used as the only language, as the mother tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
(e) Residence in certain parts of the country, or in certain regions of the world; and
(f) Other relevant factors.\textsuperscript{31}

While the United States has existing Indigenous cultures, Native Americans only make up two percent of the U.S. population. Some scholars suggest they might be seen as a less important minority group and might not be considered “at the table” in discussions about race relations.\textsuperscript{32} Thus, discussions about minorities currently appear to focus primarily on African American and Hispanic youth.\textsuperscript{33} This is likely due to population variances in the United States, and the fact that indigenous populations are relatively small, while Hispanics and African Americans are the two biggest minority groups in the United States.\textsuperscript{34} Yet race, culture, and Indigeneity are relevant to all youth justice considerations where racial disparities are viewed as a defining characteristic of the American youth justice system.\textsuperscript{35}

\textsuperscript{31}Martinez-Cobo \textit{supra} note 23, at Add.1-4.


\textsuperscript{33}See, e.g., \textit{The Personal News Cycle: A Focus on African American and Hispanic News Consumers}, AM. PRESS INST. (Sept., 2014), http://www.americanpressinstitute.org/publications/reports/survey-research/african-american-hispanic-news-consumers/ (describing the prevalence of these ethnic groups in the United States, and describing them as America’s largest ethnic groups).

\textsuperscript{34}Karen R. Humes et al., \textit{Overview of Race and Hispanic Origin: 2010} (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (providing data on racial and ethnic groups in the United States and showing that the indigenous populations are much smaller than African American or Hispanic Populations).

\textsuperscript{35}See e.g., Van Jones, \textit{ARE Blacks A Criminal Race? Surprising Statistics}, HUFFINGTON POST, http://www.huffingtonpost.com/van-jones/are-blacks-a-criminal-rac_b_8398.html (last updated May 25, 2011) (addressing “the false debate” about a criminal race and the deeper issue of whether or not African Americans contribute disproportionately to the crime rate, highlighting “media coverage, conviction rates . . . [that] suggest that Blacks commit crimes at a rate disproportionate to our numbers in society”; also explaining a conservative approach and call for “tougher laws” based on the data); The Sentencing Project, \textit{Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers}, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2008), http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf (discussing racial disparity and explaining that it exists “when the proportion of a racial or ethnic group within the control of the system is greater than the proportion of such groups in the general population”); Elizabeth Bartholet, \textit{The Racial
C. What Causes Racial Disparities?

The United States has struggled with these issues since its inception and so a full discussion of the influence of race and culture on the justice system—including the factors that led to current societal divides and the history of racial inequality—is too complex and multifaceted for one article. Additionally, changes to the criminal justice system alone will not rectify the conflict. Yet the aim of this Article is to contribute to the conversation by exploring the terminology and significance of the issue within the realm of the justice system as it pertains to youth. As a result, various causes might include legislative policies, decision-making by criminal justice practitioners who exercise broad discretion in the justice process at one or more stages in the system, or law enforcement emphasis on particular communities.

It is indisputable that race, culture and Indigeneity broadly affect one’s experience in society. Within the realm of the justice system, examples of explanations include the early life environmental theory, which highlights the correlation between youth who experience the child welfare system and the justice system. Under this theory, many professionals believe that the

Racial disparities in imprisonment in the United States, for example, were much smaller at the beginning of the twentieth century, closer to 2 to 1, compared to more than 6 to 1 today. Pamela Oliver, Racial Disparities in Imprisonment, DEP’T OF SOC., UNIV. OF WIS. MADISON, http://www.ssc.wisc.edu/~oliver/RACIAL/Reports/neparticledraft3.htm. (Dec. 25, 2004). See also, Margaret Simms, et al., racial and ethnic disparities among low-income families, THE URBAN INSTITUTE (Aug. 2009), http://www.urban.org/uploadedpdf/411936_racialandethnic.pdf (explaining that low-income status varies significantly by race and ethnicity); The Persistence of Racial and Ethnic Profiling in the United States: A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination, AM. CIVIL LIBERTIES UNION AND THE RIGHTS WORKING GRP. (2009) (analyzing the prevalence of racial profiling on the federal, state, and local levels); Elizabeth N. Jones, Disproportionate Representation of Minority Youth in the Juvenile Justice System: A Lack of Clarity and Too Much Disparity among States “Addressing” the Issue, 16 UC DAVIS J. JUV. L. & POL’Y 155, 157 (2012)(stating “The overrepresentation of youth of color in the juvenile justice system reveals a dissonance between our country’s treasured philosophy of judicial equality for all and the cold reality of racial disproportionality.”).


Caitlin E. Burns, Examining Juvenile Delinquency Contributors through Life-Course and Strain Theory, EAST TENNESSEE STATE UNIVERSITY 2, 1, 15 (2013), http://dce.etsu.edu/cgi/viewcontent.cgi?article=3655&context=etd.

poorer the child, the more at-risk that child is for abuse, neglect and for graduating into the youth justice system. Dr. Randall Kennedy notes that “given the history of race and racism [in the United States] [and] given the deplorable conditions suffered disproportionately by black families—conditions that produce high rates of substance abuse and other self-destructive behavior—it would be surprising if black children did not have higher rates of contact with the child welfare system [and justice system] than white children.” Because racism is an issue of power and occurs when prejudice, privilege and power intersect, these theories stress not only the correlation but also emphasize that history and context play a significant role in discussions. Similarly, institutionalized or structural racism also stems from longstanding differential treatment.

To offer another example, there are also those that argue that disparity evinces bias, either explicit (intentional / known) or implicit (not plainly expressed or clear), and that this is the root of racial disparity. Implicit bias has an especially astonishing effect on a range of human interactions and has “significant implications for participants in the criminal justice system.” The danger lies in the fact that this bias is both implicit and pervasive, and so even those with the best of intentions might not be aware of how personal bias can affect not only individual actions, but also the experience of those in the system. With regard to youth in the justice system, implicit

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43Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (arguing that “Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role” and that as a result “unconscious racism” is embedded within our civic institutions).


bias could take the form of an unconscious association between youth who wear certain styles and brands of clothing and "bad," or, alternatively, an association between youth from certain neighborhoods and a stereotypical trait such as "troublesome." 47

Additionally, bias and especially implicit bias can be a greater risk in situations in which there is a high level of discretion and major consequences to decisions, which recent research indicates is the case with court cases and especially with youth court. 48 Even well intentioned judges who diligently follow the letter of the law are influenced by factors such as locality and therefore might be influenced by local perspectives surrounding factors like race. 49 A recent study indicates that the judges "[are] not saying: 'I'm going to form my own sentencing rules.' Rather, they are left in a vacuum [in the communities within which they serve] and they have no choice but to form their own rules. There's too great a vacuum, . . . ." 50 This demonstrates implicit bias in the justice system even where rules are followed, and underscores the importance of these factors within the context of the research question and racial, Indigenous, or cultural disparities with youth. Thus, while racialization 51 and racism 52 can lead to the preference and privilege of certain groups over others, disparity can result from unguarded, individual, or institution level decisions that are race-based -intentionally or unintentionally. 53

episode of the popular American radio program, This American Life, that bias applies directly to policy interactions with youth, and arguing that matters where police serve as a "gateway" into the school-to-prison pipeline): This American Life, Cops See It Differently: Part Two, National Public Radio (Feb. 13, 2015), www.capradio.org/news/this-american-life/2015/02/13/cops-see-it-differently-part-two/ (providing examples through the personal stories of police officers and others).

47Nan S. Park, Pathways and Predictors of Antisocial Behaviors in African American Adolescents from Poor Neighborhoods, 32 CHILD YOUTH SERV. REV. 409-15 (2010), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2796796/ (identifying antisocial behavior in a sample of poor, inner-city African American youth, and referring to it as "troublesome or dangerous behavior").

48See, e.g., Brandon K. Crase, When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion, 20 GEORGETOWN J. L. ETHICS 475 (2007), (providing evidence for and discussion about discretion within the judge system).

49See Wayne Goodall, Sentencing Consistency in the District Courts (2014), http://researcharchive.vuw.ac.nz/bitstream/handle/10063/3375/thesis.pdf?sequence=2 (unpublished Ph.D. thesis)(showing data that suggests, for example, that District Court judges from urban areas that are assigned to the bench in a rural location become comparatively more punitive in their decisions, while rural judges assigned to more urban areas appear to make less punitive decisions than they otherwise would).


51Racialization is "the overvaluing of particular bodily characteristics or differences that are imbued with a lasting significance [and which] are produced and reproduced through the support of particular constructions of difference," V.R. Dominguez, A Taste for 'The Other,' 35(4) CURRENT ANTHROPOLOGY 333, 334 (1994).

52In contrast to racialization, racism relates to suppressing or oppressing a group based on similar traits. As Professor Audrey Smedley, via Encyclopedia Britannica, defines it, racism is "any action, practice, or belief that reflects the racial worldview—the ideology that humans are divided into separate and exclusive biological entities called races, and that there is a causal link between inherited physical traits and traits of personality, intellect, morality, and other cultural behavioral features, and that some races are innately superior to others." Audrey Smedley, Racism, ENCYCLOPEDIA BRITANNICA.

53Note that evolving research shows that there is no correlation between rising crime rates, imprisonment and race and that gang involvement, for example, is not always synonymous with criminal behavior. See, e.g., Bronwyn Naylor, The Evidence is In: You Can’t Link Imprisonment with Crime Rates, THE CONVERSATION (Apr. 23, 2015), http://theconversation.com/the-evidence-is-in-you-cant-link-imprisonment-to-crime-rates-40074(looking at global crime and imprisonment rates to argue that the extent of a country’s use of imprisonment is matter of policy choice rather than a response to crime, and that increased crime is not driving prison trends as many governments claim);
III. PRACTICAL APPLICATION

A. I See This Issue on the News,

But Don’t Our Laws Already Address These Factors?

It is true that Disparate Race Impact (DRI), the theory that any act that disproportionately harms minorities to be discriminatory, regardless of intent has been widely recognized by both case law and legislation in the United States.\(^{54}\) Additionally, the idea of equality is hardly a new

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Ben Birchall, Bad Boys, 9 SMITH J. 86, 86 (2014) (explaining that “gangs didn’t start with the Crips and Bloods. Some stretch back thousands of years, each with their own style [and] customs”); BARBARA NEWMAN AND PHILLIP NEWMAN, DEVELOPMENT THROUGH LIFE: A PSYCHOLOGICAL APPROACH (2011) (describing a young man joining a gang because he was “looking for love”); CAROLYN M. DRIVER, "ABANDONED CHILDREN" RESCUED, ORPHANED, RESTORED, AND REFINED: TURN YOUR PAIN INTO PURPOSE! TURN YOUR PURPOSE INTO PRAISE! (2012) (explaining through experience that “hard core gang members [are] only looking for love and attention in the wrong places”). See also, Abraham Maslow, A Theory of Human Motivation, 50 PSYCH. REV. 370-96 (1943) (introducing a spectrum of need through ordering the human needs of food, sleep, safety, love and purpose into a hierarchy; showing that everyone seeks a sense of love or belonging as a fundamental trait of being human); Christopher Mathias, Baltimore Gang Members Say They Never Formed Trace to Hurt Cops, HUFFINGTON POST (Apr. 28, 2015), http://www.huffingtonpost.com/2015/04/28/baltimore-gangs-cops-freddie-gray_n_7162350.html?ir=Crime&ncid=fcbklhsymph0000021 (describing gang members upset about their image in the media: “It makes us look real bad, and it’s backing up what they are saying about us,’ the Blood member said of the violence Monday. ‘They are saying we are animals, and we acting like savages out here. But I also don’t agree with what’s going on, but I understand what’s going on. I understand why people are mad, but we have to handle things another way”).

\(^{54}\) Race and the Supreme Court: Disparate Dilemma, THE ECONOMIST (Jan. 24, 2015), http://www.economist.com/news/united-states/21640354-court-mulls-controversial-theory-about-how-prove-disparitoodiscrimination-disparate-dilemma (providing an example from U.S. Supreme Court case of Inclusive Communities Project (ICP) v. Texas Department of Housing, also explaining that disparate impact is much easier to prove than deliberate discrimination which is why it is more commonly used to address racial justice issues). See Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs, 747 F.3d 275, 276–77 (5th Cir. 2014)(addressing the question of whether the Fair Housing Act includes a right of action for disparate-impact claims); Lawrence Rosenthal, Saving Disparate Impact, 34 CARDOZO L. REV. 2157-8 (2013), http://cardozolawreview.com/content/34-6/ROSENTHAL.34.6.pdf (arguing that a 1964 case opened the door for four decades of cases explicating the disparate-impact theory of liability; illustrating that a discussion of race and disparate impact is decades long). See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e (West 2015); Voting Rights Act of 1965, 52 U.S.C. § 10101 (West 2015)(providing example of a history of legislation that aimed to overcome legal barriers preventing African Americans from voting, and addressing disparate impact within voter rights); Brown v. Board of Education 347 U.S. 483 (1954)(providing example of a court addressing the harmful effect of previous case law in deciding that the “separate but equal” doctrine had no place in the field of education); Arlington Heights v. Metro Housing Dev. Corp., 429 U.S. 252 (1977)(addressing the question of whether a city’s denial of a zoning request, necessary for the creation of low-and moderate-income housing, was racially discriminatory in violation of the Fourteenth Amendment’s Equal Protection Clause); Grutter v. Bollinger, 539 U.S. 306 (2003)(addressing the question of whether the University of Michigan Law School’s use of racial preferences in student admissions violates the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964); Office of Juvenile Justice and Delinquency Prevention, Disproportionate Minority Contact, DEP’T OF JUST., www.ojjdp.gov/mpg/litreviews/Disproportionate_Minority_Contact.pdf (last visited Apr. 15, 2015)(explaining terminology, the history of DRI and that “racial and ethnic disparities in the juvenile justice system are not new”); Tanya Asim Cooper, Racial Bias in American Foster Care: The National Debate, 97 MARQUETTE L. REV. 243 (2013) (explaining that “Congress has responded to trends in foster care data by enacting laws to remedy historical discrimination in foster care while at the same time protecting children truly at risk.”).
Equality under the law is enshrined in the U.S. Declaration of Independence, the U.S. Constitution, decades of case law, and numerous treaties, including the United Nations Universal Declaration of Human Rights. Under this theory, everyone—including youth—must be treated equally under the law regardless of their race, gender, ethnicity, religion, disability, or other characteristics, without privilege, discrimination, or bias. The U.S. Fair Sentencing Act (FSA), which was passed by Congress in 2010, reduced the sentencing disparity between punishment for certain drug-related offenses that have traditionally had a disproportionate effect on minority groups, explicitly for that reason. Additionally, the 1974 federal Juvenile Justice and Delinquency Prevention Act (OJJDP), most recently re-authorized in 2002, applies to all states and "creates a federal-state partnership for the administration of juvenile justice and delinquency prevention in the United States, and also recognizes this issue. Through this legislation, the government—through the Office of Juvenile Justice and Delinquency Prevention (OJJDP)—provides funding to states that follow a series of federal protections, known as the "core protections," on the care and treatment of youth in the justice system. One of these "core requirements" is a focus on Disparate Minority Contact. As a leading youth organization describes,

Under the DMC requirement, states must assess and address the disproportionate contact of youth of color at key decision points in the juvenile justice system. In the last

In 443 BC, the Athenian leader Pericles famously stated, "if we look to the laws, they afford equal justice to all in their private differences; if no social standing, advancement in public life falls to reputation for capacity, class considerations not being allowed to interfere with merit; nor again does poverty bar the way." Thucydides, The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War (Robert B. Strassler and Richard Crawley, eds., 1998).

While the word "equality" does not appear anywhere in the Constitution, the 14th Amendment guarantees "equal protection of the laws." U.S. Const. amend. XIV, § 1.

Article 7 states, "all are equal before the law and are entitled without any discrimination to equal protection of the law." G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

Courts have established that youth are categorically different from adults, but this concept applies to everyone. Human rights are youth rights. See, e.g., Roper v. Simmons, 543 U.S. 551, 1, 14-21 (2005) (providing an example of how youth are different and that this difference should be taken into account, via providing three general differences between juveniles under eighteen and adults that demonstrate why juvenile offenders cannot with reliability be classified among the worst offenders under Eighth Amendment analysis. In this case, the Court set forth a categorical rule that imposing the death penalty on a juvenile violates the Eighth Amendment, reasoning that juveniles are less culpable than adults, more susceptible to peer pressure and negative influences than adults, and have not fully developed their character yet); Graham v. Florida, 560 U.S. 48 (2010) (addressing whether the Eighth Amendment ban on cruel and unusual punishment prohibits sentencing a juvenile convicted of a non-homicide offense to life imprisonment without the possibility of parole).

Universal Declaration of Human Rights supra note 56, at Art. 2; Within Our Reach: Gender, Racial and Ethnic Equality in the Courts, The Administrative Office of the Trial Court and the Supreme Judicial Court of Massachusetts 1 (Feb. 4, 2004), http://www.mass.gov/courts/court-info/sjc/about/court-mgt-admin/withinourreach.pdf (defining equality as treating others with respect, regardless of specific traits). But see Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537-96 (1982) (arguing that equality is an empty notion because it is derived from external criteria and once labeled as furthering equality, whether or not it deserves that pinnacle, it cannot be opposed; opposing it would be opposing equality itself).


JJDPA, supra note 8.

Id.
reauthorization, the DMC requirement was broadened from disproportionate incarceration (confinement) of minority youth to disproportionate contact, i.e., disproportionate representation throughout the juvenile justice system.64

Because the JJDPA is tied to the only sources for funding for state-level juvenile justice systems, however, it is influential, and formal recognition of the issue creates a springboard for both improvement and action.65 While the DMC seeks to address these issues as well, there is still much work to be done for its effective successful implementation. Some advancements are evidenced, however, by the field of scholars, practitioners, and advocates who work to serve as change agents in order to address race- and Indigeneity-based differences within youth justice systems, and use the theories of DMI and DMC to expose issues and seek racial justice.66

VI. CONCLUSION: WHY DOES THIS MATTER, AND WHERE DO WE GO NEXT?

As is illustrated in the statistics stated at the beginning of this Article, the impact of disparities and potential racism and bias is a complex but serious dilemma67 and one that cannot be solved by one approach alone.68 It is imperative to address racial disparities in the juvenile

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65The JJDPA contains four “core protections.” JJDPA supra note 8. States must follow these as a condition of receiving federal juvenile justice funding. Id. The four requirements are Deinstitutionalization of Status Offenders (DSO), Jail Removal, Sight and Sound Separation and Disproportionate Minority Contact (DMC). Id. See Gary Gately, Senate Judiciary Hearing to Focus on Whistleblower Claims, OJJDP Grants, JUV. JUST. INFO. EXCHANGE (Apr. 16, 2015), http://jije.org/senate-judiciary-hearing-to-focus-on-whistleblower-claims-ojjdp-grants/10858/ (discussing how OJJDP grants grant states funding). But see JJDPA Reauthorization supra note 64 (explaining that while JJDPA requires states to “address” DMC, the reality is that many states “have done little to address the issue” due to the fact that the requirement is too vague).
67This question is often covered under the umbrella theory of “critical race theory.” It is likely that no one solution might resolve the issues at hand; however, that is why it is important to explore potential models and paradigms. REILAND RABAKA, AFRICANA CRITICAL THEORY: RECONSTRUCTING THE AFRICAN AMERICAN RADICAL TRADITION, FROM W.E.B. DU BOIS AND C.L.R. JAMES TO FRANZ FANON AND AMILCAR CABRAL, 15 (2009). See, e.g., Racism, NAT'L ASS’N OF SOCIAL WORKERS, www.naswdc.org/pressroom/events/911/racism.asp (last visited Mar. 31, 2015) (explaining that changes in laws and public policy can go but so far in ending racism).
68See, e.g., Cecelia M. Klingele et al., Reimagining Criminal Justice, WIS. L. REV. 953, 1 (2010) (arguing that the criminal justice system needs more than just reform or one response).
justice system because these disparities "undermine faith among all races and ethnic groups in the fairness and efficacy of the [system]"\textsuperscript{69}

There is a benefit to everyone when we support a culturally appropriate system. Within youth justice, disparities are particularly intolerable because incarceration has such grave implications for offenders' own lives, and those of their families and communities.\textsuperscript{70} Those children who commit crimes hold the potential to grow into responsible, productive citizens. In the words of Dr. Martin Luther King, Jr., "[i]njustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."\textsuperscript{71} Thus, the next step is to continue to learn, discuss, and advocate. It is important to move towards a culturally appropriate system\textsuperscript{72} that meets the needs of all members of society and is respectful of differences.\textsuperscript{73}

Finally, many opportunities exist to advance both these issues and the discussions surrounding them. Several examples at the state and national levels highlight potential progress that may signal a shift in attitudes.\textsuperscript{74} Law schools such as New York University School of Law and the University of Washington School of Law now offer racial justice focused legal clinics to train senior law students on providing quality representation in this area,\textsuperscript{75} while localized initiatives and reforms—such as New York City Mayor Bill de Blasio's New York Police Department reforms\textsuperscript{76} and


\textsuperscript{70}Id.


\textsuperscript{72}A culturally appropriate youth justice system, model, process, practice or treatment is defined here as that which is respectful of and not negatively influenced by the individual circumstances of the young person, including his or her race, culture, Indigenous status, gender or appearance. This also extends to the young person's family, as disparate treatment towards a youth's wider group invariably affects the youth's experience. In other words, a culturally appropriate model is colorblind—it does not treat individuals differently on the basis of their skin—but takes into account and accommodates for differences based on culture, origin and background.

\textsuperscript{73}Potential for Change: Public Attitudes and Policy Preferences for Juvenile Justice System Reforms, MACARTHUR FOUNDATION 9, https://www.macfound.org/media/article_pdfs/CCLPPOLLINGFINAL.PDF (last visited Aug. 15, 2015) (introducing data showing that the public believes some youth receive worse treatment than the other in the juvenile justice system, and that the public opinion is shifting to support change); Todd Belcore, The New Jim Crow: Honoring the Civil Rights of Those Who Have Paid Their Debt to Society, THE SHRIVER BRIEF (Jul. 2, 2014), http://www.theshriverbrief.org/2014/07/articles/economic-security-and-opportun/racial-justice/the-new-jim-crow-honoring-the-civil-rights-of-those-who-have-paid-their-debt-to-society/ (introducing a history of discrimination and highlighting that people “of all ages and backgrounds risked everything to eradicate those immoral laws and practices so that liberty and justice could truly be available to all,” before providing examples of improvement).

\textsuperscript{74}Potential for Change supra note 73, at 3,11(explaining poll data showing a shift in attitudes, and that the public is now more optimistic and potentially ready to support juvenile justice reform).


\textsuperscript{76}Marc Santoro, Mayor de Blasio Announces Re-training of New York Police, NEW YORK TIMES (Dec. 4, 2014), http://www.nytimes.com/2014/12/05/nyregion/mayor-bill-de-blasio-retraining-new-york-police-dept-eric-garner.html\_r=0.
localized initiatives in Seattle\textsuperscript{77}—have brought attention to the issue and begun to pave the road for development on a larger scale.