

1 ADORATION OF THE QUESTION

*Reflections on the Failure to
Reduce Racial & Ethnic Disparities
in the Juvenile Justice System*

DECEMBER 2008



W. Haywood Burns Institute

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*Reflections on the Failure
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1

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PREFACE

Our institute is named for the late W. Haywood Burns, who was a beacon of light for all who believe the battle for human rights and justice can be won through activism, humility and dedication.



W. Haywood Burns

W. Haywood Burns served as general counsel to Martin Luther King's Poor People's Campaign in 1968 and was a founder of the National Conference of Black Lawyers. He helped defend the Attica Rebellion prisoners and others struggling for self-determination. He served as dean of the City University of New York (CUNY) School of Law. He died in a car accident while attending the International Association of Democratic Lawyers conference in Cape Town, South Africa.

There is no more fitting a person in whose memory the Burns Institute works. It is through the example of W. Haywood Burns that we continue to advocate for orphans of opportunity — youth of color who make up almost 70 percent of this nation's incarcerated youth.

To date, the Burns Institute has worked in more than 30 jurisdictions and achieved significant results in reducing disparities. Through our programs, services and national network, Community Justice Network for Youth (CJNY), we provide support to organizations that offer alternatives to incarceration for youth of color, and arm jurisdictions with the statistics, methods and staff training to engage in policy work and strengthen disparities reduction efforts.

Over the past five years, we have become intrigued by the difficulty and intractability associated with disparities reduction in the juvenile justice system. We have watched in disbelief as the national numbers of youth of color confined skyrocket. Moreover, through our work, we have found that measurable results require a thorough examination of race, ethnicity, public safety and confinement. We are proud to release our first report, which offers reflections on the historical legacy and current issues involved with working to reduce disparities.

This publication is the first in a series to be released in 2009 that will endeavor to comprehensively address all aspects of reducing disparities in the juvenile justice system. The release of this first report comes on the 20th anniversary of a Congressional mandate that directed States to address the overrepresentation of youth of color in juvenile justice systems. It also coincides with the historic election of the 44th United States President, Barack Obama.

In the air lingers a spirit of hope, possibility and a change. Also, as expected, sweeping statements are being made that hint to the idea of a "post-racial" America. But advocates are reminding the public that, in the words of Colin Powell, "There are still a lot of black kids who don't see that dream there for them." For youth of color coming in contact with the justice system, nothing will change unless we continue to advocate for equity.

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 — effectively reducing racial and ethnic disparities state by state, jurisdiction by jurisdiction.

We should settle for nothing less.

-James Bell
Executive Director
W. Haywood Burns Institute

INTRODUCTION

Tonight, more than 90,000 youth in this nation will sleep somewhere other than their homes, in the custody of the juvenile justice system.¹ For Latino youth, the chance of this occurring is more than double that of White youth. For Black youth, the chance is more than five times that of White youth. United States Department of Justice data reveals such glaring disproportionality is reflected in nearly every state. Disturbingly, these inequities extend far beyond higher rates of confinement for youth of color.

Youth of color are also arrested, charged and incarcerated more than White youth for similar conduct, and are disproportionately represented at every decision-making point in the juvenile justice system. Studies show this disadvantage increases as they move deeper through the system.² Moreover, and perhaps most importantly, youth of color are incarcerated at rates that cannot be explained by crime alone.

But little substantive action has been taken to transform this nationwide crisis of Disproportionate Minority Confinement (DMC) in the two decades since the United States Congress first mandated that States “address” the overrepresentation of youth of color in juvenile justice systems. We at the W. Haywood Burns Institute (BI) believe this 20th anniversary of the mandate is an opportune time to reflect on the legacy of racial and ethnic disparities in the juvenile justice system, and to analyze the barriers that continue to obstruct the reduction of disparities.

In 2009, we will publish reports that explore in depth the tools, technologies, insights and strategies that the BI has utilized to help local jurisdictions reduce disparities in their juvenile justice systems. In this first publication of our series, we examine the antecedents that continue to influence the juvenile justice system. We begin by outlining early juvenile justice systems and their approach toward youth of color, and then examine DMC and its perceived causes. We next analyze the federal mandates that have largely failed to reduce entrenched racial and ethnic disparities in the modern juvenile justice system.

We must push for transformation. Without a sense of urgency we are doomed to be forever trapped in a cyclical debate about how to address DMC.

We conclude this report by suggesting that the action Congress has called for since 1988 has yielded few tangible results. We argue that the pervasive problem of racial and ethnic disparities throughout the nation’s juvenile justice systems could be effectively confronted with strengthened federal legislation to provide the structure, direction and resources necessary to support jurisdictions that demonstrate political will and a strategic approach.

We must push for transformation. Without a sense of urgency we are doomed to be forever trapped in a cyclical debate about how to address DMC, thus fulfilling Friedrich Hegel’s maxim that unendingly adoring the question overwhelms the search for answers.

Now is the time for long-awaited and measurable change.

¹ Sickmund, M., Sladky, T.J., & Kang, W. (2005). *Census of Juveniles in Residential Placement (CJRP) Databook*. Pittsburgh, PA: National Center for Juvenile Justice. Retrieved from <http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/>.

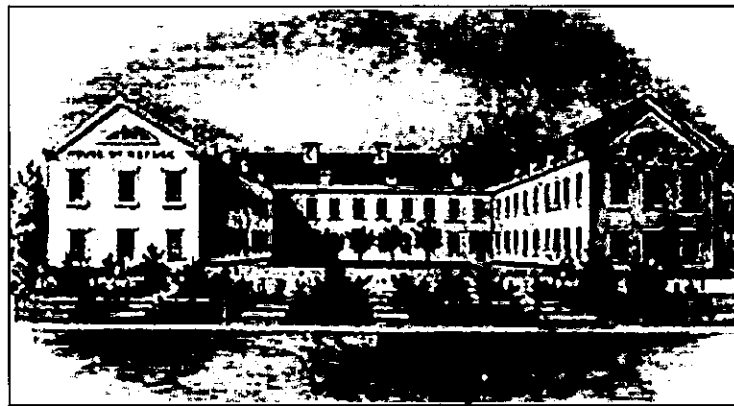
² The National Council on Crime and Delinquency. (2007). *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*. Retrieved from http://www.nccdcrc.org/nccd/pubs/2007jan_justice_for_some.pdf.

A LEGACY OF DISPARITIES

Racial and ethnic inequity is one of the most intransigent problems found today within juvenile justice systems. But its persistence is no accident. The problem existed long before the U.S. Department of Justice first acknowledged it on a national scale in 1988 with an amendment to the Juvenile Justice and Delinquency Prevention Act (JJDPA). It was institutionalized within the earliest penal system so profoundly that it continues to influence which youth are valued and which are neglected. We believe those who seek to advance disparities reduction work today should first understand its underlying antecedents and the power they wield.

Disparate Treatment in Detention

From the earliest days of our nation, segregationist policies dictated that the detention of youth of color would be different than that of White youth coming into contact with the penal system for the same categories of offense. When the nation's first youth detention facility, the New York House of Refuge, established a "colored" section in 1834,³ the exclusion of Black children from rehabilitation services was rationalized as a waste of resources and a debasement of Whites.



New York House of Refuge circa 1825⁴

The superintendent of the Philadelphia House of Refuge during this early period explained the exclusion of Black children from rehabilitation services on the basis that "it would be degrading to the [W]hite children to associate with beings given up to public scorn."⁵ In Mississippi, when a legislator proposed opening a reform school for Black children, the bill was defeated on the grounds that "it was no use trying to reform a Negro."⁶ The prevailing sentiment was that "[W]hite taxpayers refused to 'waste' money on the needs of 'incorrigible' young [B]lacks."⁷

Such notions, though far less blatant today, still have currency in the policies and practices that directly impact the prevalence of disparities in juvenile justice systems. It is still common for

3 Span, C.M. (2002). Educational and Social Reforms for African American Juvenile Delinquents in 19th Century New York City and Philadelphia. *The Journal of Negro Education*. 71(3) 110.

4 Lithograph, New York Historical Society, negative 20820. Online at <http://www.nyc.gov/html/djj/html/1800.html>.

5 Mennel, R.M. (1973) *Thorns and Thistles: Juvenile Delinquents in the United States, 1825-1940*. Hanover, New Hampshire: University Press of New England. 17. As cited by Ward, G. K. (2001). Color lines of Social Control: Juvenile Justice Administration in a Racialized Social System, 1825-2000. *Dissertation Abstracts International*. 62(10). 47.

6 Oshinsky, D.M. (1996). *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice*. New York, New York: Free Press. As cited by Ward, G. K. 47.

7 Ibid.

White youth to be systematically offered diversion and probation while youth of color are sent to confinement and other out-of-home placements for similar conduct.⁸

Differential detention and resources are just the beginning of a legacy that includes disparate treatment, a lack of legal recourse and disproportionate rates of confinement. Throughout the 1800's, the exclusion of Black youth from White juvenile facilities often resulted in their placement in adult prisons. In 1850, approximately 50 percent of youth under 16 in the Providence, RI, jail were Black, 60 percent of the youth at the Maryland penitentiary in Baltimore were Black, and all youth in the Washington D.C. penitentiary were Black – despite the regions' largely White populations.⁹ Black children were also incarcerated younger than White children, had fewer opportunities for advancement upon discharge, and suffered a disproportionately higher death rate.¹⁰

The overrepresentation of youth of color in the early penal system served as a convenient solution for labor needs in the post-Civil War South. A significant reason for opening the Baltimore House of Reformation for Black Children in Maryland was “the need for agricultural labor through [the] state, as well as the great want of competent house servants.”¹¹ The demand for cheap labor after the Civil War was quickly satisfied through widespread arrests of Blacks for minor violations under Jim Crow laws to fuel “convict leasing,” which is described by Pulitzer Prize-winning historian David Oshinsky as “worse than slavery.” This practice would continue through the 20th century.



Boys and men in cell, Birmingham, AL¹²



Punishment in a forced labor camp, Georgia circa 1930¹³

The judicial system was “retooled to provide cheap forced labor to mines, farms, timber camps, turpentine makers, railroad builders and entrepreneurs. Tens of thousands of men, the vast majority of them [B]lack, found themselves pulled back into slavery.”¹⁴ In a common arrangement,

8 The National Council on Crime and Delinquency. (2007). *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*. Retrieved from http://www.nccdcrc.org/nccd/pubs/2007jan_justice_for_some.pdf.

9 Curry, L.P. (1981). *The Free Black in Urban America, 1800-1850: The Shadow of The Dream*. Chicago, Illinois: University of Chicago Press. 115-116.

10 Frey, C.P. (1981). The House of Refuge for Colored Children. *The Journal of Negro History*. 66(1). 17.

11 Frey, C.P. 15.

12 Blackmon, D.A. (2008) *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*. Doubleday. Online at <http://www.slaverybyanothername.com>. Archived at the Birmingham Public Library and Archives.

13 Blackmon, D.A. Owned by the Harry Ransom Humanities Research Center at the University of Texas at Austin.

14 Blackmon, D.A. (2008) *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*. Doubleday. Online at <http://www.slaverybyanothername.com>.

a local sheriff and a turpentine operator in desperate need of men “made up a list of some eight Negroes known to both as good husky fellows, capable of a fair days’ work. The sheriff was promised five dollars plus expenses for each Negro he ‘landed.’”¹⁵ This practice did not spare young children; on the contrary, their vulnerability made them a target. An 1890 census analysis by scholar and author W.E.B. Du Bois found that more than 18 percent of all Black prisoners were juveniles.¹⁶ Prison was a horrific place for children to be confined. A report by journalist Ida B. Wells on the convict leasing system found starvation, disease, rape and whippings were part of the daily experience.¹⁷

As Black youth were experiencing disparate treatment within the burgeoning penal system, Native tribes not yet displaced by federal policies were attempting to maintain such restorative justice practices as family meetings and talking circles as discipline. But in 1885 Congress passed the Major Crimes Act, essentially obliterating centuries-old restorative justice approaches to dispute resolution and replacing them with a punitive model that persists today on and around Indian reservations. Lengthy labor and confinement in prison became punishment for Native youth.¹⁸



Lakota boys before boarding school



The same Lakota boys afterward¹⁹

The federal government established Indian boarding schools across the country and handed their operation over to missionaries who carried out the prevailing mantra, “Kill the Indian, Save the Man,” at harsh work-camp institutions meant to “civilize” the students.²⁰ Assimilation to Euro-centric social mores was enforced and the practice of cultural traditions and beliefs were punished harshly.²¹ Widespread cases of sexual, physical and mental abuse at the schools have been well documented, but never officially addressed by the U.S. government. Their impact reverberates to this day as new generations of Native youth are attempting to relearn languages and tradition circumvented by the forced isolation and assimilation of their grandparents or parents.

15 Oshinsky, D.M. (1996). *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice*. New York, New York: Free Press. As cited by Ward, G. K. (2001) Color lines of Social control: Juvenile justice administration in a racialized social system, 1825-2000. *Dissertation Abstracts International*. 62(10). 3582-A.

16 Du Bois, W.E.B. (1904). *Efforts for Social Betterment among Negro Americans: A Social Study Made By Atlanta University, Under the Patronage of the Trustees of the John F. Slater Fund*. Atlanta, Georgia: Atlanta University Press. Cited in Perry, T.E., & Davis, Maye, D. (2007). Bein’ Womanish: Womanist Efforts in Child Saving During the Progressive Era: The Founding of Mt. Meigs Reformatory. *Journal of Women and Social Work*. 22(2). 213.

17 Wells, I.B. (1893). *The Convict Lease System*. The Reason Why the Colored American is not in the World’s Columbian Exposition. 5. Retrieved from <http://digital.library.upenn.edu/women/wells/exposition/exposition.html>.

18 Poupart, J., et.al. (2005). *Searching For Justice: American Indian Perspectives on Disparities in Minnesota Criminal Justice System*. University of Minnesota Duluth. American Indian Policy Center.

19 Online at <http://socrates.bmcc.cuny.edu/bfriedheim/shapewest.htm>.

20 Churchill, W. (2004) *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools*. City Lights Publishers.

21 Sharpes, D.K. (1979). Federal Education for the American Indian. *The Journal of American Indian Education*. 19(1). Retrieved from <http://jaie.asu.edu/v19/V19S1fed.html>.

Ironically, as many juvenile justice professionals are now pushing for a return to restorative justice practices based on traditional tribal models, Native youth continue to suffer the fallout of centuries-long genocide and occupation. They still have less access to services and are granted disproportionately harsher sanctions including secure confinement and transfers to the adult criminal system, and receive little or no court intervention.²²

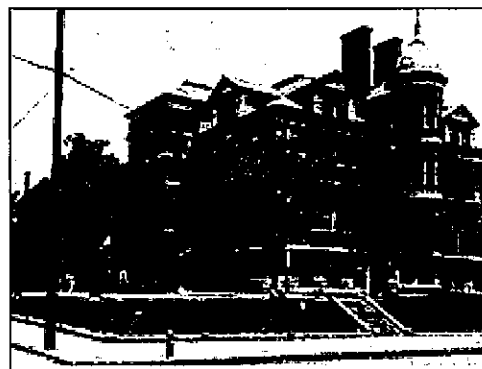
Inequity in Juvenile Courts

The problems that many juvenile advocates confront today were present even in the earliest days of the juvenile court. Just before the turn of the century, Jane Addams and other child advocates of the Hull House established the first juvenile court, in Chicago, IL. From its inception, Black children represented a greater percentage of the court case load than their overall population and were substantially underrepresented in the agencies and services contracted to assist them.²³

According to the account of a local chief probation officer during this early period, "[T]he difficulty of providing adequate care for the dependent and neglected colored children constitutes one of the greatest problems with which the court has to deal. The situation is complicated by a lack of resources in the community comparable with those available for white children in the same circumstances. Practically no institutions are to be found in the community to which this group of children may be admitted."²⁴



Black juvenile court; Memphis, TN²⁵



White juvenile court; Memphis, TN²⁶

In addition to receiving unequal treatment in the fledgling court system, Black children were also left unprotected from the retributive mob justice and lynchings frequented upon the Black population.²⁷ The brutal murder of 17-year-old Jesse Washington in Waco, TX, is among the more shocking accounts. In 1916, within minutes of receiving a sentence of death by hanging, dozens of spectators seized and attacked Jesse with clubs, shovels and bricks. He was stripped and dragged to the lawn in front of City Hall, where a crowd of thousands prepared a bonfire beneath a tree. He was immersed in oil, raised onto the tree and lowered into the fire. Spectators cut off fingers and

22 Arya, N. & Rolnick, A.C. *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State and Tribal Justice Systems*. Race and Ethnicity Series, Volume 1. Washington, DC: Campaign for Youth Justice.

23 Ward, G. K. (2001) Color lines of Social control: Juvenile justice administration in a racialized social system, 1825-2000. *Dis-sertation Abstracts International*. 62(10). 3582-A.82-83.

24 Ibid.

25 Kelley, Florence. (1914) "A Burglar Four Years Old in the Memphis Juvenile Court. *The Survey*. 32(12). 318-19. Available for download online from <http://books.google.com/books>.

26 Ibid.

27 Gabbidon, S.L. & Greene, H.T. (2005). *Race and Crime*. Thousand Oaks, California: Sage Publications. 14.

toes from the corpse as souvenirs.²⁸



The murder of Jesse Washington in Waco, TX²⁹

The World-War II Era

In the decades that followed, the nation emerged as an industrial power and cities were overcome with the social problems of rapid urban growth. Police forces increased in size and influence in order to maintain the ideals of civil society. Police were given wide discretion regarding referrals to juvenile justice systems, shifting their role from community protection to crime suppression.³⁰ Factors such as offense, attitude and cooperativeness began to influence arrest decisions.³¹

Historian David B. Wolcott found that in 1940, the Los Angeles Police Department was arresting a disproportionate proportion of youth of color. "Latinos constituted 32 percent of all boys arrested by the LAPD, as opposed to an estimated 8 percent of the city's population," Wolcott reported. "Blacks similarly were 12 percent of boys arrested, in comparison to 4 percent of the population. In short, by 1940, law enforcement used arrests predominately as a mechanism to regulate boys who were darker skinned and — allegedly — more often criminal."³²

Nearly seven decades later, disproportionality at the point of arrest remains significant in Los Angeles County, and in many other jurisdictions across the nation.

Nearly seven decades later, disproportionality at the point of arrest remains significant in Los Angeles County, and in many other jurisdictions across the nation. In 2007, Black youth in Los Angeles County were arrested 3.5 times more often than White youth, and Latino youth were arrested 1.4 times as often as White youth, according to data collected by the California Department of Justice. In the 1940's, as still seen today, increasing arrests of youth of color led to an overrepresentation of Latinos in Los Angeles detention facilities. Then, mono-lingual youth serving time at the California State Reform School in Whittier were given a battery of tests in English. Based on the results, school officials labeled more than 60 percent of Latino youth as "feeble-minded" or "unable to develop beyond

28 Bernstein, P. (2006). *The First Waco Horror: The Lynching of Jesse Washington and the Rise of the NAACP*. College Station, Texas: Texas A&M University Press.

29 Online at <http://www.executedtoday.com/2008/05/15/1916-jesse-washington-lynched-after-conviction/>.

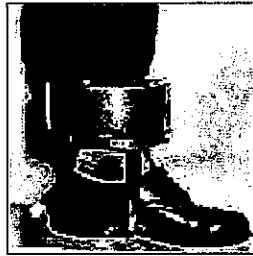
30 Wolcott, D. (2001). "The Cop Will Get You": The Police and Discretionary Juvenile Justice, 1890-1940. *Journal of Social History*. 35(2). Pittsburgh, Pennsylvania: Carnegie Mellon University. 356-357.

31 Ibid.

32 Ibid.

the intellectual level of an average 12-year old.” Not surprisingly, Latino wards were responsible for the greatest percentage of escapes from the institution. Those caught fleeing were subjected to harsh penalties by school officials.³³

Sometimes, boys in solitary confinement were even forced to wear a device called the “Oregon Boot,” also referred to as the “Gardner Shackle” after its inventor, Oregon State Penitentiary Warden J.C. Gardner. Wearing the five to 28 pound shackles “for extended periods of time caused extreme physical damage. Inmates would be bedridden for weeks at a time in extreme pain. The Gardner Shackle became known as a man-killer to the prisoners who wore them.”³⁴



Oregon Boot³⁵

Disproportionality Then and Now

During the 1940's, researcher Mary Huff Diggs surveyed juvenile courts across the country and articulated for the first time what is now widely known as “disproportionality.”

In her review of 53 courts across the country, Diggs reported, “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 [W]hite children.” Diggs continued, “Cases of Negro boys were less frequently dismissed than were [W]hite boys. Besides, they were committed to an institution or referred to an agency or individual much more frequently than were [W]hite boys.”³⁶

It is important to recount this history to fully understand the entrenchment of racial and ethnic disparities in today's juvenile justice system. In its early history, the inequitable treatment of youth of color in the juvenile justice system was the result of intentional and blatant race-based policies. Today, our policies are race-neutral, but remain covertly steeped in the same legacy of structural racism. Two-thirds of all youth in public detention facilities today are youth of color — though they represent only 39 percent of the overall youth population — who are still treated more harshly even when charged with the same offense as White youth.

We next examine the perceptions that fuel a culture of complacency, creating philosophical and structural obstacles to disparities reduction.

33 Chavez-Garcia, M. (2006). Youth, Evidence, and Agency: Mexican and Mexican American Youth at the Whittier State School, 1890-1920. *Aztlan: A Journal of Chicano Studies*. 31(2). University of California Regents. 55-83.

34 Oregon Department of Corrections. http://www.oregon.gov/DOC/OPS/PRISON/osp_history3.shtml.

35 Permission from Oregon Department of Corrections. http://www.oregon.gov/DOC/OPS/PRISON/osp_history3.shtml.

36 Diggs, M.H. (1940). The Problems and Needs of Negro Youth as Revealed by Delinquency and Crime Statistics. *The Journal of Negro Education*. The Negro Adolescent and His Education. 9(3). 313-316.

MYTHS, FALSEHOODS AND CONJECTURE

Over the past 20 years, juvenile justice professionals, academics and policy makers have proffered several theories to explain the unconscionably high levels of disproportionality in juvenile justice systems across the country. Many have asserted that DMC is inevitable because youth of color commit more crimes. Others have suggested that poverty, poor family situations or a lack of educational opportunities lead to DMC. All such theories have a common thread – that disproportionality is caused by the youth, their families or society at large and is not within the control of the juvenile justice system or its related partners.

Much of the literature about the causes of racial and ethnic disparities in the juvenile justice system is focused primarily on whether the differential system-processing of youth of color, differential levels of offending in communities of color, or a combination of the two, contribute most to disproportionality. But such debate does little to move the field toward successful interventions.³⁷ In local jurisdictions, stakeholders are often paralyzed by the breadth and complexity of these proposed theories. Consequently, stakeholder groups tasked with reducing racial and ethnic disparities often accept the notion that the problem is too great to impact. Many concede that addressing DMC requires the seemingly impossible task of solving the macro-level social issues that have negatively impacted poor communities and communities of color for centuries.

It is well accepted that poverty and related issues outside the control of juvenile justice decision-makers can contribute to delinquent behavior and youth involvement in the justice system.³⁸ However, the examination cannot end there. Too often, juvenile justice stakeholders focus on the extrajudicial factors of DMC instead of using data to critically investigate whether internal juvenile justice policies and practices are contributing to disproportionality.

In our 2009 publications, the BI will detail the interventions that have achieved measurable results in reducing racial and ethnic disparities, including the use of data and a focus on juvenile justice decision-making and policy mandates that disparately affect youth of color in the system. For now, we will discuss the myth that disproportionality can be explained by higher levels of criminality. Namely, some analysts believe disproportionality is the

Too often, juvenile justice stakeholders focus on the extrajudicial factors of DMC instead of using data to critically investigate whether internal juvenile justice policies and practices are contributing to disproportionality.

consequence of youth of color committing more crime; that the overrepresentation is an appropriate system response to offending youth because, as widely believed, “If you do the crime, you do the time.”

However, research indicates this is not always true, and that one factor correlated with this differential system response is the youth’s race or ethnicity. Youth of color receive more severe sanctions than White youth even when charged with the same category of offense. The most consistent example of this can be found in drug charges. Self-reports of drug use indicate that White youth and youth of color use drugs at the same rate.³⁹ Yet, youth of color come into contact with the justice system more often and with more severe consequences for drug offenses than White youth.

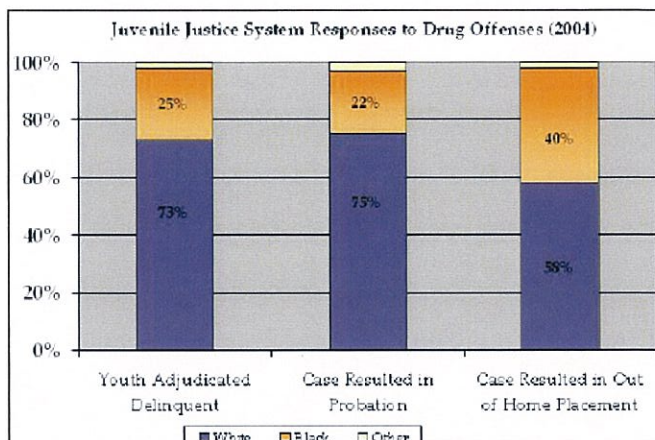
³⁷ Piquero, A.R. (2008). Disproportionate Minority Contact. *The Future of Children*. 18(2). 59-79.

³⁸ Johnson, O. (2007) Disparity Rules. *107 Columbia Law Review*.

³⁹ Sickmund, M., Sladky, T.J., & Kang, W. (2005). *Census of Juveniles in Residential Placement (CJRP) Databook*. Pittsburgh, PA: National Center for Juvenile Justice. Retrieved from <http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/>.

In 2003, for example, Black youth represented only 25 percent of the total youth nationwide adjudicated delinquent for drug offenses. But they represented a much larger margin of the youth sent away from their families into residential placement, 40 percent.⁴⁰

In 2004, White youth represented 73 percent of total youth adjudicated delinquent for drug offenses. But they were provided far more opportunities for rehabilitation than Black youth. White youth represented 58 percent of youth sent to out-of-home placement and 75 percent of youth who received probation. In contrast, Black youth represented only 25 percent of total youth adjudicated delinquent for drug offenses. But they represented 40 percent of those sent to out-of-home placement, and a slim 22 percent whose case resulted in probation.⁴¹



When reviewing States' assessments of the current status of DMC, a survey showed that 32 of 44 states found evidence of ethnic or racial differences in juvenile justice system decision-making that was unaccounted for by differential criminal activity.⁴² Moreover, a recent review of studies on disproportionality found that the effects of race and ethnicity on juvenile justice decision-making do not reflect overt bias, but rather a subtle indirect impact. The review found that while the effects may not be as influential as legal factors, "[T]he cumulative effect across decision-making stages work to the disadvantage of minority youth."⁴³

Forward movement is obstructed by the constant and misdirected citation of extrajudicial factors as the only causes contributing to disparities. Worse yet, such as excuse leads to the reduction of disparities being viewed as an intractable problem.

Today, youth of color comprise 35 percent of the total U.S. youth population, yet make up 65 percent of all youth who are securely detained pre-adjudication.⁴⁴ Overrepresentation such as this is rampant in all levels of juvenile justice systems across the country. But forward movement in the field is obstructed by the constant and misdirected citation of extrajudicial factors as the only causes contributing to disparities.

Worse yet, such an excuse leads to the reduction of racial and ethnic disparities being viewed as an intractable problem, resulting in confusion about solutions and paralysis around the issue of disparities reduction found in many jurisdictions today.

⁴⁰ National Council on Crime and Delinquency. (2007). *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*. Washington, DC: Building Blocks for Youth. http://www.nccdcrc.org/nccd/pubs/2007jan_justice_for_some.pdf.

⁴¹ Ibid.

⁴² Pope, C.E. (2005). *Our Children, Their Children: Confronting Racial and Ethnic Differences in American Juvenile Justice*. The John D. and Catherine T. MacArthur Foundation Series on Mental Health and Development, Research Network on Adolescent Development and Juvenile Justice. Chicago, IL: University of Chicago Press. 358.

⁴³ Ibid.

⁴⁴ Hynton Hoytt, E., et.al. (2001). Reducing Racial Disparities in Juvenile Detention. *Pathways to Juvenile Detention Reform, Volume 8*. The Annie E. Casey Foundation. Online at <http://www.aecf.org/upload/PublicationFiles/reducing%20racial%20disparities.pdf>.

FEDERAL ATTEMPTS TO REDUCE DISPARITIES

It is within this world of myths, falsehoods and conjecture that the federal government has attempted, and mostly failed, to guide local efforts to reduce the pervasive problem of disparities in local juvenile justice systems. A historical look at federal efforts reveals a free-flow of financial assistance without oversight or stringent requirements, and weak directives to States. The results over the span of two decades have been disappointing at best. We begin our exploration with an outline of federal legislation, and then address their inefficiencies.

Juvenile Delinquency Prevention and Control Act (JDPCA) of 1968

Juvenile delinquency was a growing concern in the decade before the first juvenile justice


reform legislation, with some Black civil rights leaders debating how to best deal with “juvenile delinquents” whose destructive behavior might harm delicate race relations in a city,” or, in other words, Black youth who were leading informal desegregation efforts in urban areas.⁴⁵

In 1967, concerns over the lack of due process rights and long periods of incarceration for youth were resolved with the Supreme Court’s landmark *In Re Gault* decision⁴⁶ requiring that most of the due process rights afforded to adults also be granted to juveniles. The following year, public pressure sparked by a National Advisory Commission report that recommended significant juvenile justice reform led to the passage of the JDPCA, referred to as the Four D’s.⁴⁷

They were:

- 1) Decriminalization of status offenders;
- 2) Diversion of first-time and petty offenders out of the juvenile justice system and into community institutions;
- 3) Due process; and
- 4) Deinstitutionalization⁴⁸

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585 Michigan Avenue, Buffalo, New York
SUNDAY, SEPTEMBER 27, 1959 3:30 P.M.
A PANEL DISCUSSION -
"WHAT APPROACH
SHOULD BE USED
TO CURE
JUVENILE CRIME?"



MODERATOR:
The Rev. George J. Lenke, VII's Pastor of Purhan Memorial A.M.E. Zion Church
Mr. Horace Johnson: Detached Worker, Buffalo Youth Board
Mrs. Archie Lewis: Youth Worker, Y. M. C. A.
Captain William J. Sheehans: Michigan Avenue Police Station
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45 Wolcott, V.W. (2006). "Recreation and Race in the Postwar City: Buffalo's 1956 Crystal Beach Riot." *The Journal of American History*. 93(1). Image and article online at <http://www.historycooperative.org/cgi-bin/jsttop.cgi?act=justtop&url=http://www.historycooperative.org/journals/jah/93.1/wolcott.html#FOOT3>.

46 (387 U.S.1,1967)

47 Mahoney, A.R. (1987). *Juvenile Justice in Context*. Boston, Massachusetts: Northeastern University Press. Sponsored by the Office of Juvenile Justice and Delinquency Prevention.

48 i.e. Correctional programs that utilized open community settings as an alternative to incarceration.

While the intent of the Four D's was welcomed, it was undermined by the political salience of the "tough on crime" movement that emerged in the turmoil of the late sixties. The Nixon Administration established another national commission in 1973, the National Advisory Commission on Criminal Justice Standards and Goals, and its report found at least 50 percent of States' detention populations were status offenders who were not alleged to have violated any state law and were often held in deplorable conditions of confinement.⁴⁹ The consensus among juvenile justice and child welfare professionals was that the JDPKA was ineffective, and more reform was necessary.⁵⁰

Juvenile Justice and Delinquency Prevention Act (JJDP) of 1974

The recommendations of advocates and the 1973 National Advisory Commission were reflected in the JJDP, which was signed into law by newly-sworn President Gerald Ford on September 4, 1974. The Act was designed to influence State juvenile justice policy by providing monetary incentives for compliance with federal mandates. In its original form, the JJDP had three primary components. First, the JJDP established institutions within the federal government to coordinate and administer juvenile justice efforts. Second, it established grant programs for the issuance of federal funding to States for juvenile justice efforts. Lastly, it dictated two core requirements that States must meet to receive funding – remove status offenders from pre-trial lock up and deinstitutionalize status offenders.⁵¹

While the JDPKA was administered by the Department of Health, Education and Welfare, the JJDP was to be administered by the new Office of Juvenile Justice and Delinquency Prevention (OJJDP). After initial debate, the OJJDP was placed under the Office of Justice Programs, where it remains today and with that particular positioning sends a clear message that punishment still takes precedence over rehabilitation of youth.

The Coalition for Juvenile Justice (CJJ)

In 1984, the National Coalition of State Juvenile Justice Advisory Groups (now called the Coalition for Juvenile Justice, or "CJJ") began convening annually to address issues and problems that were a priority for the growing field of juvenile justice professionals. The assemblage issued reports to the President, Congress and the Administrator of the OJJDP in order to help shape States' juvenile justice policy at the federal level.

At a 1988 conference in Mississippi, the CJJ outlined disproportionality statistics in its report *A Delicate Balance*. The disproportionality of youth of color in the juvenile justice system was reaching a level that required immediate attention, the CJJ stated in the report, adding, "Disparate juvenile and criminal justice rates for minorities are not a new phenomenon...We are seeing greater attention being given to differential arrest, prosecution, conviction, and sentencing by many States and localities. Unfortunately, the problem is, more often than not, made more difficult by rhetoric and rage, which disturb the delicate balance between equity and justice."

The CJJ's examination of data found that while incarceration rates were dropping overall, youth of color were not benefiting from the reductions. White youth accounted for 75 percent of the entire decline in youth incarceration, while the incarceration of Latino youth had increased by

The CJJ's examination of data found that while incarceration rates were dropping overall, youth of color were not benefiting from the reductions.

⁴⁹ Ibid.

⁵⁰ Rosenheim, M., et.al. (2002). *A Century of Juvenile Justice*. Chicago, Illinois: University of Chicago Press.

⁵¹ Nunez-Neto, B. (2007). "CRS Report for Congress. Juvenile Justice: Legislative History and Current Legislative Issues." Order code RL33947.

10 percent.⁵² The CJJ report also found that White youth were sent to private correctional facilities while youth of color were increasingly sent to public facilities. Overall, youth of color represented 93 percent of the total increase in youth incarceration in public facilities between 1979 and 1982.

Such disproportionality was also brought to light in Congressional hearings. During testimony before the Subcommittee on Human Resources, OJJDP Administrator Ira Schwartz stated:

“Minority youth now comprise more than half of all the juveniles incarcerated in public detention and correctional facilities in the United States and that despite widely held perceptions to the contrary, there is recent research showing that minority youth do not account for a substantially disproportionate amount of serious crime. However, minority youth stand a much greater chance of being arrested than white youth, and once arrested; appear to be at great risk of being charged with more serious offenses than whites who are involved in comparable levels of delinquency.”⁵³

Amendments to Nowhere

In 1988, Congress seized the opportunity to respond to overwhelming evidence that youth of color were coming into contact with the juvenile justice system in greater, and unwarranted, numbers when compared to White youth.

Congress amended the JJDPA to require that States pay specific attention to the problem of the overrepresentation of youth of color in the juvenile justice system. States would have to demonstrate “specific efforts to reduce the proportion of the youth detained or confined in secure detention facilities, secure correctional facilities, jails and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population.”⁵⁴ This requirement to the federal statute is known as Disproportionate Minority Confinement (DMC).

The OJJDP was also required to develop and publish a State Plan of its work around juvenile justice activities and submit an annual report to the President and Congress. Plus, the OJJDP administrator was directed to provide more technical assistance to States, local governments and local private agencies to facilitate compliance with the JJDPA. The amendment was a significant step in establishing disproportionality as a national problem that required a local solution. Great optimism followed, with one academic opining that the new language “absolutely requires that States get seriously involved with their DMC statistics.”⁵⁵

But the euphoria was short-lived. The language in the JJDPA mandated little action from States...States that failed to comply with the requirement were not in jeopardy of losing juvenile justice funding.

But the euphoria was short-lived. The language in the JJDPA mandated little action from States. It required each State *address* the issue of disproportionality in its State Plan, but the Act did not tie funding to this mandate. States that failed to comply with the requirement were not in jeopardy of losing juvenile justice funding.

In 1989, the OJJDP developed a two-stage approach for

⁵² Hawkins, D., et.al. (1987). *Crime Control and Social Justice: A Delicate Balance*. Citing Krisberg, B.

⁵³ Testimony of I. Schwartz before the House Subcommittee on Human Resources. 99th Congress. 2nd Sess. (1986).

⁵⁴ Section 223(a)(23)

⁵⁵ Letman, S. T., & Leslie, K. (2004). Disproportionate Minority Confinement. *Journal of the Institute of Justice and International Studies*, Volume 4. 57.

compliance with the amendment in order to assist States in addressing disproportionality, referred to as the “Technical Assistance Strategy.” First, a State was to demonstrate whether youth of color were overrepresented in their local juvenile justice systems. Second, if overrepresentation did exist, the State was to take steps to account for it. One year later, the OJJDP issued a DMC Technical Assistance Manual to guide States’ efforts to address DMC in three phases: Identification, assessment and intervention.

In 1992, Congress revisited the issue of DMC in its reauthorization of the JJDP and elevated addressing DMC to a core requirement. The reauthorization mandated that future formula grant funding allocations to States under Title II of the JJDP would be linked to compliance with the DMC requirement. Failure to “address” disproportionality would leave States in jeopardy of losing 20 percent of their formula grant funding. But the statutory amendment lacked guidance on what “addressing” DMC entailed and what “compliance” meant — failing again to induce reductions in DMC.

This “check the box” requirement, as some would soon dub it, was exploited by many States, ushering in the current trend of form over substance. To this day, financial penalty for failure to make progress remains a hollow threat. Communities of color continue to suffer the brunt of disparate treatment and child advocates are left battling an edifice of institutionalized indifference.

In 2002, Congress amended the JJDP once again, this time broadening the DMC core requirement. States were directed to address disproportionate contact of youth of color with the juvenile justice system, not just their confinement in secure detention. Specifically, the amendment required that States “address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system.”

Although it appeared promising, the new amendment amounted to little more than a symbolic gesture. The vague federal requirement that States “address” disproportionality still lacked guidance for state and local officials about how to actually work to reduce the overrepresentation of youth of color in their juvenile justice systems. By failing to establish uniformly structured and intentional guidelines, the federal government set the bar so low that today nearly anything — regardless of how attenuated or remote from actual results — done in the name of “DMC” is still considered adequate.

With the next reauthorization of the JJDP, Congress has an opportunity to strengthen the requirement for reducing disparities in the juvenile justice system by outlining the concrete steps that States must take to address DMC and requiring more in State compliance. In doing so, Congress can ensure that states are not simply talking around the issue of disproportionality in the juvenile justice system; they are confronting the problem and taking action.

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ADORATION OF THE QUESTION

There's been a lot of motion but little movement in the last two decades. This inherited culture of the lowest common denominator in disparities reduction has resulted in a class of decision-makers who could have a significant impact on racial and ethnic disparities, but are unmotivated to do so. Instead, they 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.

A Call for Direction

The current state of the art in the field of juvenile justice is that if you meet the minimum base requirement to address disproportionality, you will be provided funds for your attempt, not your results. Delay, diversion and avoidance are rewarded and the intent of federal mandates is circumvented. Meanwhile, the overrepresentation of youth of color climbs.

How many more annual DMC-related conferences will be held to restate what was discussed the year before? How much money will be spent on hotel rooms and catering instead of programming that is intentional, targeted, data-driven, and has been proven to reduce disparities? How many DMC coordinators in less populous states will remain underfunded and without the time or influence needed for transformative impact? How many DMC committees will continue to exist in name only?

Some jurisdictions have grown weary of this merry-go-round of inaction and have tried to enact change. For many, their initial strategies are well-intentioned, but scattershot and poorly informed. Current federal mandates do not provide guidance or engagement, and lack a consistent linear process for reductions. What often results is a local jurisdiction employing some form of a mentoring program, improved data collection or cultural diversity training. In fact, the majority of one State's DMC compliance plan is comprised of efforts to ensure cultural competency among employees, sub grantees providing services to youth, and agencies providing services within their juvenile justice system. Cultural competency is important in an increasingly diverse world, but such attempts to do not translate directly into measurable reductions in racial and ethnic disparities.

Other States mention in their plans that they will provide "technical assistance" to counties to reduce DMC, without elaboration. Thus, they collect federal DMC reduction monies to "address" the problem without offering any viable solutions. A common scenario observed by BI staff involves a jurisdiction that has found through data analysis that youth of color from one particular side of town are overrepresented in their detention facility. But rather than deconstructing their juvenile justice system, and developing a strategic response, the jurisdiction employs a "youth development" approach by instituting a mentoring program for "at-risk" youth at a community center.

It is considerably easier for system stakeholders to blame youth than to do the hard work of examining and transforming the practices and policies that may be contributing to disparities.

Such a strategy is attenuated at best, and at worst, a misuse of resources. The approach wrongly views youth as the problem and steers clear of the need to focus on the structural biases inherent in the system's operation. The example underscores a significant structural barrier in local juvenile justice systems. It is considerably easier for system stakeholders to blame youth than to do the hard work of examining and transforming the practices and policies that may be contributing to the disparities.

Jurisdictions with some modicum of success have been

intentional about gaining traction, often by first hiring a DMC coordinator whose responsibility is to provide a jurisdiction with direction, guidance and funding aimed specifically at achieving measurable results.

Hope for the Future

Law and policy reform help to ensure that juvenile justice practice and procedure do not disparately impact youth of color. But while strengthened legislation is absolutely necessary, it cannot engender the commitment needed to engage in real work to reduce disparities. Individual stakeholders must also foster the *will* to reduce the disproportionality of youth of color.

California is one model for change, for example, as a state that has taken leadership of disparities reduction and provided the funds necessary to make such efforts attainable. In 2006, the State Advisory Group launched a competitive bidding process for counties willing to undertake an intentional disparities reduction effort directed by the state. Approximately \$3.1 million in total was awarded to five counties willing to undertake activities including staff trainings, data analysis and engagement of a wide range of juvenile justice stakeholders. This is a forward-thinking formula: Focus dollars in amounts that will provide support for change; delineate expectation for reductions; and provide intense technical assistance to jurisdictions aimed at measurable results.

By contrast, federal mandates do not provide this level of guidance and engagement. The OJJDP's website points to jurisdictions with best practices, and local efforts to address disparities, but there is little direction regarding how a jurisdiction might negotiate such a process. Moreover, although millions in federal dollars have been allocated to States to address DMC within their juvenile justice systems – funds that have slowly declined in the past few Republican administrations – very few states have achieved measurable sustained reductions.

One solution is clear: Strengthen federal legislation so that it provides the guidance necessary to States and localities in their efforts to reduce disparities in juvenile justice systems. Most of the JJDP's provisions expired in 2007 and remain unauthorized. Congress can reauthorize the JJDP to provide better guidance on reducing disparities, an important first step the Senate has already taken. On July 31, 2008, the Senate Judiciary Committee passed bi-partisan legislation S.3155, the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2008. The bill addresses some of the JJDP'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.

Further federal action is needed to create a nationwide model, and a sense of urgency that reaches down to local stakeholders and decision-makers. Congress and the new Administration should enact such measures and stringent requirements, standards and guidance in order to effectively reduce the complex and persistent problem of disparities. Moreover, local officials with the responsibility of leading disparities reduction efforts must make dramatic efforts including the adoption of systematic data analysis and collaboration with communities and field experts.

In jurisdictions across the country, we have collected statistics that reveal youth of color are overrepresented in probation violations, placement failures and warrants. We will outline in our 2009 publication the model jurisdictions that have reduced disparities by coupling institutional response with political leadership, a willingness by stakeholders and decision-makers to self-examine, and an overarching belief that the fair and equitable administration of justice is a moral responsibility.

CONCLUSION

The nation recently elected its first African American President — a truly historic moment. There will be much talk about whether or not we have reached a post-racial America, and, perhaps, conjecture as to whether working to reduce racial and ethnic disparities in the juvenile justice system is passé.

We believe Barack Obama's ascendancy to the White House should be celebrated and embraced as a significant step forward. But we also believe it will not change unrealistic conditions of probation imposed by courts, or create culturally sensitive alternatives to detention, or lessen case loads, or make the system more rational and data-driven. Our vigilance must be maintained. The status quo is no longer acceptable.

Great minds have long grappled with how to realize the idealism expressed by the nation's architects in the fair and equitable administration of justice. Today, many communities of color continue to view justice systems, adult and juvenile, as coercive. Most have only experienced the punitive and retributive power of the State. Justice, in order to be sustained, requires consensus. The entire justice apparatus requires grand bargaining between the governors and the governed.

But such a bargain is breached if communities of color and low-income communities believe the justice system is unfair and biased. They opt out, while still bearing the brunt of forces that place them at society's margins. The current justice system model, which employs incarceration as the primary tool, is costly and lacks evidence-based correlatives to crime reduction. As a result, millions of people of color are being warehoused and entangled deep within a system with significant structural barriers to addressing its own inequities.

This is a tragedy that strikes at the heart of our nation's democratic ideals. As Eleanor Roosevelt said, "The rights for all humans begin in small places, close to home; such are the places where man, woman and child seek equal justice, equal opportunity and equal dignity." We must embrace the credo that every life in our nation has epic significance. Furthermore, on this 20th anniversary of the Congressional mandate to address disproportionality, we must demand equity and action.

As articulated so often by the 44th President of the United States, Barack Obama, change is inevitable if we are all dedicated to its fruition. The BI has measurably reduced racial and ethnic disparities by working closely with system stakeholders in more than 30 jurisdictions. We have learned from our experiences on the ground that change requires strengthened federal mandates that would provide jurisdictions with requirements, standards and guidance in disparities reductions, and financial incentives based on measurable results and effective work plans. In our 2009 publications, we will discuss specifically how jurisdictions can lead this call and employ proven methods to reduce disparities.

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-W. Haywood Burns Institute



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