

Disproportionate Representation of Minority Youth in the Juvenile Justice System: A Lack of Clarity and Too Much Disparity among States “Addressing” the Issue

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I. Introduction

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. The field of juvenile justice is unique in that the objectives of the system transcend simple offender accountability. Here, judicial officers work collaboratively with law enforcement, probation officers, prosecutors, defense attorneys, and social workers to rehabilitate delinquent youth. A favorable public perception of the juvenile justice system hinges on the belief that children are treated equally, and without regard to their race or ethnicity.¹ Indeed, when asked, most stakeholders firmly discount the idea that any overt discrimination exists in today's juvenile arena.² The multitude of individual participants, government entities, and private agencies, coupled with the mass of proceedings involved in every juvenile delinquency case, seem to ensure a built-in system of checks and balances against any form of race-based evaluation of children.

However, statistics seem to belie this attractive concept. In reality, race weighs heavily on our country's juvenile justice system. One need look no further than the actual kids involved in delinquency proceedings. A quick glance at the numbers reveals a clear overrepresentation of youth of color.³ The percentage of minority youth enmeshed in our country's juvenile justice system far surpasses the percentage of minority youth in the general population.⁴ The rehabilitative agenda necessary to every system of juvenile justice requires that we

¹ U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Disproportionate Minority Contact Brochure* (September 2009).

² See MARGARET L. ANDERSON & HOWARD FRANCIS TAYLOR, *SOCIOLOGY: UNDERSTANDING A DIVERSE SOCIETY* 199 (4th ed., Thomson Learning Inc. 2008) (reporting that racial disparities do not arise from overt discrimination from court personnel such as judges and prosecutors).

³ See U.S. Census Bureau, *CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT* (2010), available at http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/Offense_Race.asp

⁴ *Id.*

not simplistically accept this figure as an accurate measure of minority youth's predisposition to commit crimes.⁵ Prevention and rehabilitation must continue to dominate the juvenile justice framework, and accepting that certain races are intrinsically prone to offend seems counterproductive to this end.⁶

Further evaluation as to the authenticity of a color-blind juvenile justice system is warranted in part because the federal government itself considers that race is a relevant source of concern.⁷ Though each state is charged with implementing its own court programs and procedures, the federal government has provided participating states with a directed agenda – and money – through the vehicle of the Juvenile Justice and Delinquency Prevention Act.⁸ The Office of Juvenile Justice and Delinquency Prevention (OJJDP), a division of the Office of Justice Programs of the Department of Justice, monitors the states' observance of this federal legislation, and is responsible for proactively ensuring successful compliance.⁹ The OJJDP is a parent of sorts to the participating

⁵ See George S. Bridges & Sara Steen, *Racial Disparities in Official Assessment of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554, 555 (1998) (“Recent analyses report... persons of color, despite having similar offense histories, are perceived differently than whites, often as presenting images of threat and danger.” This contributes to “racial differences in legal dispositions.”).

⁶ See Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 Ariz. L. Rev. 871, 877 (2009) (noting that minority parents are “obviously...(not) inherently more likely to abuse and neglect their children than whites” and that they are “victims of historic and ongoing racial and economic injustice that has put them in a seriously disadvantaged position in our society.”).

⁷ NAT'L COAL. OF STATE JUVENILE JUSTICE ADVISORY GRPS., A DELICATE BALANCE (1989) (detailing the unequal numbers of incarcerated youth of color when compared to white juveniles, and providing the impetus for such concern.) This report has been credited as the impetus for Congressional interest in DMC.

⁸ See Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415 § 1, 88 Stat. 1109 (1974) (codified as amended at 42 U.S.C. §§ 5601 et seq.).

⁹ U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *available at* <http://www.ojjdp.gov/about/about.html>

states, helping them create and implement programs in line with the JJDPa's goals and objectives. These goals are described as the JJDPa's "core requirements," toward which the states must focus efforts and resources in protecting their children.¹⁰ One of these goals directly involves race. Specifically, states are required to "address" the overrepresentation of racial minorities in the juvenile justice system,¹¹ or risk losing vital grant allocations from the federal government.¹² This "disproportionate minority contact" ("DMC") of minority youth with the entire juvenile justice arena has created its own cottage industry, with public and private state and local agencies both focused on this issue. Interestingly, of the four "core" areas of JJDPa concern, it is this section – the only one implicating race as a concerning factor – that has not produced results of consequence.

This discord between idealistic national principles and localized pavement-pounding truths reveals, simply, that race matters to the juvenile justice system. Race matters in a system where a disproportionate number of youth of color are locked up compared to the general population.¹³ It matters when even the appearance of disparate treatment due to the race or ethnicity of the child involved casts a dark pall over our deep-seated national concepts of an even playing field for all. "It matters when statistics show that a Black child is three

¹⁰ See 28 C.F.R. § 31.303(c)-(j) (2011).

¹¹ 42 U.S.C. § 5633(a)(22) (2011).

¹² See 28 C.F.R. § 31.301(a)-(e) (2011).

¹³ See e.g., Liane G. Rozzell, *These Are Our Children*, 38 SOJOURNERS MAGAZINE 6, June 2009, <http://www.sojo.net/index.cfm?action=magazine.article&issue=soj0906&article=these-are-our-children>; National Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* (January 2007); Reauthorization of the Juvenile Justice and Delinquency Prevention Act: Protecting Our Children and Our Communities: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 230-31 (December 2007) (statement of Richard Miranda, Chief, Tucson Arizona Police Dep't, noting that "Youth of color comprise 65% of the detained population though they only make up 35% of the total youth in the United States.") available at Center for Juvenile Justice Reform, Georgetown University, <http://cjjr.georgetown.edu/bibjjdpatestimony.html>.

times more likely to live in a prison cell than in a college dormitory.”¹⁴ Race matters to the federal government, as can be seen in the large grants of money it bestows (and threatens to withhold) if states do not comply with the JJDPa legislation.¹⁵ Race matters to the individual states tasked with figuring out how to assess, prevent, and remedy DMC. Thus, the reality that race matters deserves more than an abject acknowledgment of truth. Governmental entities must work together to effectively implement all resources within their power in order to remedy this problem, and the primary resource currently backed by the federal government is the JJDPa. A color-blind system of justice that cares for our wayward children is essential. All children deserve an equal opportunity to achieve success.

The JJDPa promotes both an equitable justice system and the opportunity for juveniles to succeed. But this article queries whether the JJDPa is the proper instrument with which to seek racial parity for minority youth who are already “in contact” with the juvenile justice system. This objective has proven to be the one unrealized “core requirement” of the JJDPa, and perhaps this failure results from a mandate that strains the confines of what the justice system is capable of accomplishing. Effectuating change of this magnitude requires more than the threat of withholding money from one governmental entity to another; it demands more than creating a new item on a “wish list” of unattainable social aspirations. The transformation of the juvenile justice system’s racial composition cannot be met through this piece of federal legislation, at least not as presently constructed. With the JJDPa up for reauthorization, the time to revamp our objectives and this legislation is now.

First, this article provides a brief history and overview of the JJDPa, highlighting three areas of potential concern.

¹⁴ See AP, *More Blacks, Latinos in Jail than College Dorms*, MSNBC.COM (September 27, 2007), http://www.msnbc.msn.com/id/21001543/ns/us_news-life/t/more-blacks-latinos-jail-college-dorms/.

¹⁵ See 28 C.F.R. § 31.301(a)-(e) (2011).

Specifically, the JJDPa's conflicting goals, outdated governing legislation, and unclear instructions to the states are examined. These target issues provoke the theory that requiring the entire juvenile justice system to combat DMC at specifically enumerated points of "contact" might be untenable and unproductive. Second, this article posits that these three focal points hinder, and may actually serve to undermine, the states from completing their mission of reducing and eventually eliminating the disproportionate representation of minority youth in the juvenile justice system. Various states are surveyed, and their limited successes in attempting to comply with the current DMC requirement of the JJDPa are noted. Finally, this article envisions a clear strategy: Capture children before they have any "contact" at all with the justice system, by focusing on precursor behavior to juvenile delinquency.¹⁶ A campaign of such consequence must involve not only the children at risk of delinquency, but also their parents. Collaborative parenting practices can begin with community outreach programs, which may also prevent entry into the system. This article suggests that there are resources outside of the traditional juvenile justice system that can influence positive outcomes in eliminating DMC, and that these valuable assets must be brought into the fold and fully utilized. Eradication of DMC is possible. An immediate reauthorization of the Juvenile Justice and Delinquency Prevention Act, complete with the revisions suggested in this article, is imperative toward achieving this end.

¹⁶ U.S. DEP'T OF JUSTICE, DISPROPORTIONATE MINORITY CONFINEMENT TECHNICAL ASSISTANCE MANUAL: WASHINGTON, DC: OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION § 2-4 . (July 2009) (noting that "indirect effects" of delinquent behavior encompass "economic status, education, location, and a host of risk factors associated with delinquent behavior, among other factors" which have been shown to be linked with race and ethnicity. "These factors, in turn, are related to delinquent activity or to other forms of contact within the justice system.").

II. The Juvenile Justice and Delinquency Prevention Act: History, Overview, and Three Target Issues

A. History and Overview

Each state's juvenile justice system employs a rehabilitative agenda as its cornerstone approach to the care and custody of its children. Though the willingness to use punishment as an effective tool for deterrence and to protect the public from delinquent juveniles has become more accepted, rehabilitation remains the primary goal of juvenile courts nationwide. The United States Supreme Court has noted that children have an "underdeveloped sense of responsibility" and are generally more vulnerable to "negative influences and outside pressures" than are adults.¹⁷ Children "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."¹⁸ By nature, children are impetuous, risk-taking adventure-seekers who cannot appreciate or even comprehend the consequences of their actions. Thus, they are quite amenable to (and often desperately in need of) directed rehabilitation.

The JJDP Act encourages a rehabilitative agenda while promoting "equal and fair treatment for every youth in the juvenile justice system."¹⁹ It has been described as "the single most important piece of federal legislation affecting youth in juvenile justice systems across the country."²⁰ The JJDP Act provides direction for the many state, county, and local agencies in their implementation and assessment of their juvenile justice agendas.²¹ Though many factors contribute to differ-

¹⁷ *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

¹⁸ *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), 180 L. Ed. 2d 310, 323 (2011) (citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

¹⁹ U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PLANNING, IN FOCUS BROCHURE (October 2009), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/226357.pdf>.

²⁰ CENTER FOR CHILDREN'S LAW AND POLICY, DMC ACTION NETWORK, http://www.cclp.org/JJDPAct_reauthorization.php (last visited November 10, 2011).

²¹ See generally, ACT 4 JUVENILE JUSTICE, A NATIONWIDE INITIATIVE

ences in procedures and programs, the JJDPa serves as a centerpiece by which each participating state should model itself. By establishing a uniform guide for juvenile justice systems across the country, the JJDPa reflects a commitment to providing consistent procedural measures for every child.

The JJDPa is not mandatory; states voluntarily elect to comply with its terms. However, every state²² is currently following, or attempting to follow, the JJDPa.²³ Each state receives formula grant money in exchange for setting up a system of governance to comply with the JJDPa.²⁴ This formula grant money is subject to funding reductions for non-compliance as deemed appropriate by the Department of Justice's oversight committee, the Office of Juvenile Justice and Delinquency Prevention (OJJDP). The OJJDP requires that each participating state submit a "report card" to ensure its current conformity with portions of the JJDPa. These report cards indicate the state's goals and objectives in attaining compliance and often list "action steps" taken by the states to achieve this end.

States must also create and staff State Advisory Groups ("SAG"s), which are responsible for not only developing and implementing programs compatible with the JJDPa, but also examining and assessing the programs' effectiveness. SAGs publish an Annual Report of varying detail to the state Governor and/or the state Legislature, which usually contains budgetary information relating to the JJDPa. Each SAG also presents a report, entitled a "Three Year Plan," to

ADDRESSING REAUTHORIZATION OF THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT, www.act4jj.org (last visited November 10, 2011).

²² U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, www.ojjdp.gov/compliance/compliancedata.html (last visited November 10, 2011) ("[T]he term 'state' means any state of the United States, the District of Columbia, and the five U.S. territories except Wyoming (which has opted not to participate in the JJDPa), and Puerto Rico (which was exempted from reporting racial statistics by the U.S. Census Bureau)).

²³ *Id.*

²⁴ See 28 C.F.R. § 31.301(a)-(e) (2011).

the OJJDP.²⁵ This report is required to obtain the Title II funding which finances the states' JJDPA-inspired programs. The OJJDP is tasked with helping each participating state create these programs, assess them, and improve upon the JJDPA's requirements.²⁶

The original version of the JJDPA did not contain any race-monitoring requirements. Its sole concern was to protect children – regardless of ethnicity or race – from improper incarceration. Enacted in 1974, the JJDPA listed only two “core requirements”: the “de-institutionalization of status offenders,” such as truants and chronic runaways, and a “sight and sound” separation of juveniles from adult criminal defendants.²⁷ Six years later, in 1980, a third directive was added to the JJDPA. The “jail removal” requirement obligated states to keep children out of adult jails and lock-up facilities.²⁸ This year also ushered in the additional requirement for the states to each submit a “Three Year Plan.” Replacing the old annually submitted reports, the Three Year Plan consists of a comprehensive report, detailing the state's progress and plan implementation.²⁹

The three “core requirements” have met with much success. Indeed, most states have established their own legislation and protocols, which ban juveniles from incarceration with adults and, relatedly, prohibit juveniles from seeing and hearing adult criminal defendants. The deinstitutionalization of status offenders³⁰ has also become a mainstream model for

²⁵ See 42 U.S.C. § 5633(a)(1)-(28) (2011).

²⁶ See generally, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, <http://www.ojjdp.gov/> (last visited November 10, 2011).

²⁷ Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 42 U.S.C. § 5633 (2002)).

²⁸ 42 U.S.C. § 5633(a)(12)(A) (2011) (requiring, “...juveniles alleged to be or found to be delinquent... will not be detained or confined in any institution in which they have contact with adult inmates.”).

²⁹ See U.S. DEP'T OF JUSTICE, PRIOR FEDERAL JUVENILE DELINQUENCY ACTIVITY, available at www.ojp.usdoj.gov/ojjdp.

³⁰ One might note the irony intrinsic in the states orders not to lock up chronic runaway children, when these children commit the status offense

many state juvenile justice systems. These conditions demonstrate the JJDPAs' rehabilitative philosophy in taking special care of children within the juvenile justice arena. All three of these requirements highlight a demarcation between adult defendants and child offenders, thus furthering the likelihood of effectively placing these children back into society and onto successful, productive lives.

It was not until 1988 that the JJDPAs considered the racial composition of the children within the juvenile justice system.³¹ Congress noted that the representation of minority children in the justice system was unequal relative to their numbers in the general population.³² Accordingly, the JJDPAs began to require participating states to attend to this phenomenon in their state plans. States were required to "develop and implement plans to reduce the proportion of minority³³ youth detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups if they exceeded the percentage of minority groups in the general population."³⁴ The federal government deemed this an important agenda, as was seen four years later in its elevation to a "core requirement" in 1992, and in the linking of 25% of the federal government's

of running away when they are not physically restricted from doing so. The inability to confine such youth results in them often times living on the streets, joining gangs, and doing drugs. These children become victims of the very freedoms that the system gives them. One must question the government's parenting skills in allowing chronic runaways to continue on their downward path of self-destruction. Indeed, if an actual parent employed similar parenting techniques, it might result in a dependency court petition.

³¹ See Act of Nov. 4, 1992, Pub. L. No. 102-586, § 2(f)(3)(A)(ii), 106 Stat. 4982, 4993-94 (codified as amended at 42 U.S.C. § 5633 (2002)).

³² See ASHLEY M. NELLIS, *Seven Steps to Develop and Evaluate Strategies to Reduce Disproportionate Minority Contact (DMC)*, JUVENILE JUSTICE EVALUATION CENTER GUIDEBOOK SERIES (January 2005) available at <http://www.jrsa.org/pubs/juv-justice/dmc-guidebook.pdf> (To be measurable for DMC purposes, a minority group must consist of at least one percent of the total youth population in that State).

³³ See 28 C.F.R. § 31.303(j)(6) (2002) (defining a child's minority status as being of African-American, American Indian, Asian, Pacific Islander, or Hispanic descent).

³⁴ 42 U.S.C.A. § 5633(P)(23) (2002).

grant funds to the states' compliance with this newly anointed "core requirement."³⁵

The most recent change to the JJDPa occurred in 2002. Congressional reauthorization of the JJDPa resulted in the modification of the word "confinement" to "contact."³⁶ This amendment broadened the DMC scope by leaps and bounds. Where the concern once centered solely on the disproportionate incarceration of children of color, attention now focused on the disproportionate representation of children of color within the entire juvenile justice system.³⁷ As it currently stands, the JJDPa "encourages states" to "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.*"³⁸ (emphasis added).

There is considerable appeal for the Department of Justice to promote the JJDPa as a focal point for states to model their DMC protocol. By positioning DMC as a "core requirement," the OJJDP can demonstrate its concern over racial disproportionality within the juvenile justice arena. The OJJDP's statutory creation, the JJDPa, can assuage those worried about the appearance of unfair treatment of youth of color. It can also act as a public monitor of sorts, a vocal advocate that monitors any actual effects of disproportionate numbers of these children who are caught up in justice systems across the country. Statistics show that Black children are incarcerated twice as frequently and are much less likely to be placed on probation when compared to similarly-situated White children.³⁹ Hispanic children are two times as

³⁵ 28 C.F.R. § 31.301(a)-(e) (2002).

³⁶ See Pub. L. No. 107-273, § 12209(1)(P), 116 Stat. 1873, 1878 (2002) (codified as amended at 42 U.S.C. § 5633(a)(22) (2006)).

³⁷ At this time Congress also amended the noncompliance penalty, lowering it to 20%, See 28 C.F.R. § 31.301(a)-(e) (2006).

³⁸ 42 U.S.C. § 5633 (a)(22) (2011).

³⁹ See ACT 4 JUVENILE JUSTICE: A CAMPAIGN OF THE JUVENILE JUSTICE & DELINQUENCY PREVENTION COALITION, ACT4JJ.ORG,

likely to be incarcerated as are their White counterparts.⁴⁰ But a proclamation of sincere concern does not always lead to a triumphant display of results and, upon closer inspection, the JJDPa does not appear to be the epic savior as envisioned by Congress. Its words may be comfortingly attractive, but its impact on reducing DMC has proven illusory. As currently constructed, it may even have a detrimental effect on the cause of reducing DMC. Three primary areas of concern shed doubt on the JJDPa's ability to truly change DMC.

B. Three Target Areas That Encumber the States

1. The missions of the JJDPa appear to contradict each other, providing the first reason to doubt its effectiveness. Friction between the JJDPa's expressed DMC objectives, and its governing ground rules, is evident. Specifically, the JJDPa simultaneously insists on not acknowledging a child's race, while requiring states to do just that: "address" the racial composition of the kids involved in the system, and "address" ways to reduce the number of minorities who have "contact" at various points within the juvenile justice process. The authors of the JJDPa went out of their way to require assurances from the states that ". . . youth in the juvenile justice system are treated equitably on the basis of gender, *race*, family income, and disability."⁴¹ (emphasis added). Yet, the JJDPa then goes on to require 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."⁴²

This inconsistency highlights a real quandary in the JJDPa's ambitious extension in objectives. By undertaking to reduce minority *contact* with the entire juvenile justice system, the JJDPa has placed even further emphasis on the race

http://www.act4jj.org/media/factsheets/factsheet_33.pdf.

⁴⁰ *Id.*

⁴¹ 42 U.S.C. § 5633 (a)(15) (2011).

⁴² 42 U.S.C. § 5633 (a)(23) (2011).

of the children involved in the system. Once “contact” within the confines of the juvenile justice system has occurred, the boundaries between addressing the racial composition of children and treating children equitably regardless of their skin color begin to blur. Stakeholders within the system tasked with creating realistic solutions to DMC once the initial contact has occurred are limited in the ways to achieve this end. A closer look reveals practical flaws.

As noted earlier, states are required to commission State Advisory Groups, which create, and then assess, programs in line with the JJDPAs’ goals. The SAGs are directed to include representatives from key participants in the juvenile justice arena when creating and implementing their plans. Among other vested personnel, they consist of “law enforcement. . . probation. . . and juvenile or family court judges.”⁴³ These players represent the ultimate trifecta of juvenile justice power members; they all exercise considerable discretion in the field, and children come into “contact” with all of them once their journey into the juvenile justice system begins. But while police, probation officers, and judges are certainly the most revered members of the juvenile justice system, their ability to effect change in the racial composition of juveniles making “contact” with the system is often limited.

Though considerable data exists concerning the existence and pervasiveness of a level of unconscious racial bias of key decision makers within the juvenile justice arena,⁴⁴ deci-

⁴³ 42 U.S.C.S. § 5633 (1992).; Act Nov. 4, 1992 § 299(c)(1) (2011).

⁴⁴ See e.g., CARL E. POPE & WILLIAM H. FEYERHERM, *MINORITY STATUS AND JUVENILE JUSTICE PROCESSING: AN ASSESSMENT OF THE RESEARCH LITERATURE (PART I)*, CRIMINAL JUSTICE ABSTRACTS 22, 327-35 (1990); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes about Adolescent Offenders*, 28 *Law & Human Behavior* 5 (2004); U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *MINORITIES AND THE JUVENILE JUSTICE SYSTEM* (1995) available at http://docs.google.com/viewer?a=v&q=cache:XWZOxMku0kwJ:www.ncjrs.gov/pdffiles/minor.pdf+unconscious+racial+bias+juvenile+justice+system&hl=en&gl=us&pid=bl&srcid=ADGEEShv12bnmt89QS_8XimU0SxNkltSDs9bJwXfBG5YMeuTmE9M0HDNRMBVirbcm5Bt91BK1wI5YWDbgsTh-

sion-making powers at this level are drastically curtailed. For example, once a child has admitted a juvenile delinquency petition as true, a judge cannot - in fact, must not - base his sentencing decision on the child's skin color. Probation officers must include all relevant information on the history and background of the child before the court, and should not offer personal opinions about a child's ethnicity in their reports. Police officers must not decide whether to approach a juvenile crime in progress based on the color of the offending children. Indeed, these players would encounter strong constitutional roadblocks if they implemented policies that allowed race to be used as a factor during these critical decision-making situations.⁴⁵

One power that all three of these key participants do share, a hallmark that epitomizes the very essence of the juvenile justice system, is the option to exercise discretion at virtually every point of "contact" which children have with the juvenile justice system. In fact, the OJJDP has provided material to the states detailing nine such specific points of decision-making "contact."⁴⁶ The exercise of discretion by these members revolves around the central concern of placing the child back on track and out of the justice system. Many factors go into these quasi-parental judgment calls, but none of them involves the race of the child at issue.

Regardless of job title, job importance, or the ability to exercise discretion, education is key for all participants at all levels of the juvenile justice system. Members of law en-

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⁴⁵ Racial classifications are subject to strict scrutiny, the most stringent standard of review by a court. *See Loving v. Virginia*, 388 U.S. 1,(1967).

⁴⁶ *See* U.S. DEP'T OF JUSTICE DISPROPORTIONATE MINORITY CONFINEMENT TECHNICAL ASSISTANCE MANUAL: WASHINGTON, DC: OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION § 1-1(July 2009). (identifying nine decision making points in the juvenile justice system as being at arrest, referral to court, diversion, secure detention, petition to juvenile court (charges filed), delinquency findings, probation, confinement in secure correctional facility, and transfer to criminal (adult) court).

forcement make decisions as to which vehicles to stop; probation officers assign motives behind a child's crime. These exercises of discretion are vulnerable to any unconscious thought process regarding youth of color, compared to non-minority children. This article is not meant to question the existence of such bias; much literature has been devoted to this area that suggests its existence.⁴⁷ This article aims at finding a practical solution to combating DMC. Education as to the effects of unconscious racial bias might enlighten various participants within the juvenile justice system as to how their actions are affected by stereotypical views of certain minority groups. Counseling to deter any overt discrimination against minority groups seems obviously well advised. Using the legal system to effectuate social change, no matter how noble the pursuit, is an impermissible strategy.

Community members with the ability to reach children before contact with the system occurs do not run the risk of breaking the JJDPA's promise to not regard the racial and ethnic makeup of the children in the system. These players also may have a better chance at preventing the contact in the first place. Representative SAG constituents in this category include "welfare, social services, mental health, education, special education. . .[and] youth services departments. . . private organizations. . . with a special focus on maintaining and strengthening the family unit," and "those representing parents or parent groups."⁴⁸ These participants are really catching children "pre-system"; that is, before children make "contact" with the juvenile justice system in the first place. The JJDPA has specifically identified these constituents as important advisory members.⁴⁹ Some practical suggestions as to how best utilize these "pre-contact" stakeholders are provided in Section III of this Article.

2. A second bar to success lies in the JJDPA's puzzling administrative arrangement. Quite simply, the JJDPA is not in accord with its attendant regulations. As noted above,

⁴⁷ See *supra* note 46.

⁴⁸ 42 U.S.C.S. § 5633 1992.; Act Nov. 4, 1992. § 299(c)(1) (2011).

⁴⁹ *Id.*

the evolution of the JJDP's "core requirements" established a modification of the DMC mandate from merely addressing the disproportionate *confinement* of minority youth to a much more expansive mission of addressing the disproportionate *contact* of minority youth with the entire juvenile justice system. The applicable federal regulations clearly lay out steps to follow in reducing the confinement of youth of color.⁵⁰ However, these regulations were last revised in 1996 (well before the 2002 replacement of the integral word "confinement" with the current word "contact"), and accordingly do not instruct with any degree of certainty. The federal regulations do not mention disproportionate minority "contact" with the juvenile justice system anywhere.⁵¹

This oversight would appear to severely handicap the states in understanding how the JJDP expects them to meet their goals. The OJJDP's failure to promulgate new, updated regulations with which to properly interpret the JJDP is troublesome. The OJJDP did create a technical assistance manual, intended to give "detailed guidance on DMC identification and monitoring,⁵² assessment,⁵³ intervention,⁵⁴ and

⁵⁰ See 28 C.F.R. § 31.303 (j)(1)-(3) ("Compliance with this provision is achieved when a state meets the requirements set forth in paragraphs (j)(1) through (3) of this section: (1) Identification. Provide quantifiable documentation... in the state's (Formula Grant Plan)... to determine whether minority juveniles are disproportionately detained or confined in secure detention and correctional facilities, jails and lockups in relation to their proportion of the state juvenile population.... (2) Assessment. Each state's (Formula Grant Plan) must provide a completed assessment of disproportionate minority confinement. Assessments must, at a minimum, identify and explain differences in arrest, diversion and adjudication rates, court dispositions other than incarceration, the rates and periods of prehearing detention in and dispositional commitments to secure facilities of minority youth in the juvenile justice system, and transfers to adult court... (3) Intervention. Each state's (Formula Grant Plan) must... provide a time-limited plan of action for reducing the disproportionate confinement of minority juveniles in secure facilities...").

⁵¹ *Id.*

⁵² See U.S. DEP'T OF JUSTICE, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL: WASHINGTON, DC: OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION §§ 1-1 – 1-45 (July 2009).

evaluation.”⁵⁵ However, this is not a substitute for controlling federal regulations. The focus has critically changed from the mere confinement of minority youth to the contact of minority youth with the entire system. Therefore, it seems logical that the OJJDP, as the agency charged with administering the statute, would have followed through with Congress to synchronize the regulations with the statute. Speculatively, one possibility why new rules have not been promulgated might be because Congress has created a piece of legislation that is impossible to enforce. Perhaps the bold ambitions of the JJDPA could never coincide with enforceable regulations. Nonetheless, these procedural deficiencies threaten to sidetrack this important undertaking.

3. The third area in which clarification is needed involves the vague marching orders provided for each state to “address” the fourth and final “core requirement” of DMC. What does it mean to “address” the disproportionate number of minority youth who come into “contact” with the juvenile justice system? As described above, the most recent federal regulations intended to provide guidance are impractically outdated. States are left to their own devices to construct a real method of “addressing” DMC. These federal regulations do detail specific steps for the states to follow when the “c” stood for “confinement.”⁵⁶ But in its eagerness to combat the disproportionate number of minority youth in the juvenile justice system as a whole, the JJDPA apparently overlooked the need for updated instructions when the “c” changed to “contact.” The OJJDP holds the power to withhold 20 percent of a state’s formula grant allocation in the event of noncompliance;⁵⁷ the stakes are high, and these great penalties require each state to strictly follow directions so as to achieve compliance. Without such administrative directions, uniform compliance amongst the states is unlikely.

⁵³ *Id.* at §§ 2-1 – 2-41.

⁵⁴ *Id.* at §§ 4-1 – 4-67.

⁵⁵ *Id.* at §§ 5-1 – 5-54.

⁵⁶ *See* 28 C.F.R. § 31.303 (j)(1)-(3)(2011).

⁵⁷ *See supra* note 38.

To complicate matters further, because each state maintains its own unique demographics, financial issues, and resources, uniform compliance seems unlikely. It is unclear how individual states can all fit the same mold of conformity with such present diversity. Each state is forced to similarly “address” its children, but with distinct methods and procedures; a “one size fits all” model may be impossible to achieve.

On one hand, using the broad term “address” can be seen as an extremely practical, appropriately flexible directive. States “addressing” this issue have the freedom to look beyond traditional points where youth of color make “contact,” falter, and re-enter the juvenile justice system. Perhaps this was a clever message to the states to try to involve less- traditional agencies and participants into the system. Freeing the states to explore indirect reasons as to why youth of color are disproportionately represented in the juvenile justice system would appear to broaden each state’s ability to reach out to those minority youth at issue. It would also provide a more practical solution to this problem. As mentioned previously, once a child has contact with the juvenile justice system, the time for race-based intervention has passed. The constitutional roadblocks that exist once contact has occurred with the juvenile justice system simply are not present for children at the pre-contact stage. Providing specially earmarked resources and programs that directly reflect the color of the participating children’s’ skin can legitimately subsist and thrive outside of the juvenile justice arena; the same cannot be said once the arena has been penetrated. Section III of this Article explores this approach in more depth.

On the other hand, it is hard to imagine that a clear explanation by the OJJDP that simply and practically clarifies what the word “address” is meant to cover would not produce results that are more consequential. Though states do have divergent interests, resource restraints, and distinct population demographics, clarification of directives would undoubtedly help. It might also serve as an impetus for states to move with more urgency toward the creation of DMC development.

To that end, the OJJDP has distributed a multitude of pamphlets and publications, designed to assist the states in navigating through the complexities of the DMC directive. The OJJDP's "DMC Reduction Model" explains five distinct "phases" for states to pass through on their way to eliminating DMC, setting forth guidelines in the areas of Identification, Assessment, Intervention, Evaluation, and Monitoring.⁵⁸ It is difficult to determine whether states are successful in their chosen approaches, as the states markedly vary in their interpretations of these guidelines. They are also at disparate points with regard to the number of "phases" they have actually implemented. Section II of this Article examines these various procedures and explores some of the more common difficulties faced by states attempting to deal with the complexities of the DMC issue.

III. States "Addressing" the Issue in Disparate Ways and with Disparate Results

A. *The OJJDP's Recommendations for Compliance*

Lacking updated federal regulations by which to model their individual DMC programs, states appear to have looked to the OJJDP for guidance. In turn, the OJJDP has periodically produced pamphlets and brochures, which describe how the states should undertake the mandate to "address . . . the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system."⁵⁹ Reviewing these documents reveals the OJJDP's primary model for DMC compliance. Entitled "OJJDP's DMC Reduction Model," this five-phase plan details how, and in what order, states should proceed. A brief description of these phases is necessary to effectively evaluate and compare the states' varying progressions through this five-phase paradigm.

In the first "Identification" phase, states must deter-

⁵⁸ See U.S. Dep't of Justice. (July 2009). Disproportionate Minority Contact Technical Assistance Manual. Washington, DC: Office of Juvenile Justice and Delinquency Prevention. §§ 5-1 – 5-54

⁵⁹ See *supra* note 39.

mine whether DMC exists within their jurisdictions.⁶⁰ This entails calculating minority representation at nine “contact” points throughout the juvenile justice system using a Relative Rate Index (RRI). These nine points consist of the following: arrest; referral to court; diversion; petition (charges filed); secure detention; delinquency findings; probation; confinement in secure correctional facility; and transfer to criminal/adult court. Specifically, states are asked to compare the relative rate of activity for minority and non-minority youth at each of the nine points of contact with the juvenile justice system. The RRI then provides a single index number used to indicate “the extent to which the volume of that form of contact or activity differs for minority youth and majority youth.”⁶¹ This theoretically allows the state to take into account the relative size of the minority and non-minority populations and the relative amount of activity at each contact point.⁶² States then are presumably capable of discussing their RRI and comparing it to past years.

Second, states consider and evaluate possible contributing factors for DMC in the “Assessment” phase. This phase incorporates a “multistage investigative process”⁶³ in which the data collected in the first “Identification” phase is analyzed and discussed in an attempt to shed light on the findings. States may use this phase to identify patterns in minority

⁶⁰ See U.S. DEP’T OF JUSTICE, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL: WASHINGTON, DC: OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION §§ 1-1 – 1-45 (July 2009).

⁶¹ *Id.* at §1-2.

⁶² The word “theoretically” is appropriate because, as Section III of this Article explains, this number is based on Census numbers, which may not accurately reflect the true minority population living within the state. See, e.g., Montana Board of Crime Control, 2009-2011 Disproportionate Minority Contact 3 Year Plan (reporting findings from Montana) at 24 (describing the fact that the many migrant workers living in that state may not be reflected in the State Census data.).

⁶³ See U.S. DEP’T OF JUSTICE. DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL: WASHINGTON, DC: OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION §§ 2-1 – 2-41 (July 2009).

overrepresentation at the nine specific contact points, and detail commissioned and proposed studies.

The third phase, "Intervention," is the action phase; once the states have identified the problem and assessed possible causes, they can now execute strategies to eliminate DMC from their justice systems. The OJJDP describes the implementation of two categories of Intervention activities. The first, "delinquency prevention" programs, are described as including "diversion, alternatives to secure confinement, advocacy, and training and technical assistance on cultural competency with youth and staffing practices."⁶⁴ The second, "systems improvement activities," includes "[a]dvocating for legislative reforms; making administrative, policy, and procedural changes; and implementing structured decision-making tools at various contact points within the juvenile justice system."⁶⁵ At this point the OJJDP does recognize that the states may differ as to specific tactics attempted; with no one "blueprint" for success, the overall theme echoed in this section of the OJJDP literature is to reduce (and eventually eliminate) the overrepresentation of minority youth in each state's juvenile justice system.⁶⁶ It appears that as long as the states are utilizing these two categories of Intervention activities, some individual programming is permissible.

The fourth "Evaluation" phase involves the evaluation of the programs and activities implemented in the third phase of the DMC Model. The conclusion of the OJJDP's DMC Reduction Model is with the fifth "Monitoring" phase, which requires observation of the implemented programs and activities. It also suggests that the states keep current charts of their demographics, noting any changes each year.⁶⁷

⁶⁴ *Id.* at § 4-7.

⁶⁵ *Id.* at § 4-20.

⁶⁶ See U.S. DEP'T OF JUSTICE, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL: WASHINGTON, DC: OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION. §4-4 (July 2009).

⁶⁷ In addition to this "five-phase" plan, the OJJDP has also promulgated a "seven-step" tactic to help states achieve DMC compliance. This methodology focuses on assisting states in evaluating the effectiveness of their DMC programs and initiatives. It offers advice to the states in a similar

States are undoubtedly anxious to comply with the JJDP, and not simply for societal benefit. A recent OJJDP instruction manual warns that the “OJJDP must diligently enforce [the DMC] core requirement by setting uniform standards in its annual determination of states’ DMC compliance status and unfailingly administering the consequences of non-compliance as the JJDP specifies; i.e., by restricting the drawdown of 20 percent of that State’s Formula Grant allocation in the subsequent year.”⁶⁸ The threat of not receiving such vital funds, particularly in recent years where many states have felt the strain of a weak economy, most certainly serves as an impetus for every state to attack the DMC issue with fervor.

B. State Results: General Observations and Specific Findings

Multitudes of documents have been generated which detail the OJJDP’s “five phases” and “nine contact points” necessary for success with DMC reduction. The OJJDP has also published charts summarizing the states’ progression toward realizing success in their DMC-related initiatives.⁶⁹ These summarized documents and charts have been noted as often being “difficult to comprehend,” and replete with both “contradictory and complementary findings.”⁷⁰ The actual “Three Year Plans” provided by the states, though much

manner to the “five-phase” approach, but with emphasis on what are referred to in the “DMC Reduction Model” as the Identification and Intervention phases. See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION *Seven Steps to Develop and Evaluate Strategies to Reduce Disproportionate Minority Contact (DMC)*, JUVENILE JUSTICE EVALUATION CENTER GUIDEBOOK SERIES (January 2005).

⁶⁸ See U.S. DEP’T OF JUSTICE, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL: WASHINGTON, DC: OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (July 2009).

⁶⁹ See e.g., U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP SUMMARY REPORT, *available at* www.ojjdp.gov/dmc/state_activities2007.html.

⁷⁰ See Courtney Charish, Sebastian Davis & Kelly Damphousse, Race/Ethnicity and Gender Effects on Juvenile Justice System Processing at 4 (July 2004) (reporting findings from Oklahoma).

lengthier than summaries and charts, yield far more insight into each state's experiences with the complexities of the DMC mandate.

All participating states do appear to be "addressing" DMC at the Identification phase in a fairly consistent manner, regardless of whether they actually label this phase as "Identification,"⁷¹ and despite the number of "contact points" considered by each state.⁷² They base their findings on the RRI Index discussed above, calculating numbers of children and the races and ethnicities of these children at distinct "contact" points throughout the juvenile justice system. The Assessment phase, however, is much less uniform, with states taking differing approaches to evaluating the data from the first phase. Overall, states have a tendency to remain mired in these first two phases of the OJJDP model, continually identifying, assessing, and re-assessing DMC-related data and never progressing farther.⁷³

Colorado provides a typical example of a state lingering in the Identification and Assessment phases.⁷⁴ Its most re-

⁷¹ See Title II Formula Grants Program Three Year Plan Application (FFY 2009-2011) (reporting findings from California), for an example of a State that did not include these specific categories in its Three Year Plan.

⁷² See e.g., SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, Title II Formula Grant Program 2009 Plan Update at 88-94 (March 2009) (reporting findings from South Dakota) (noting seven contact points); GOVERNOR'S OFFICE FOR CHILDREN & FAMILIES OF GEORGIA, 2009 JJDP Title II Formula Grant Application Three Year Juvenile Justice Plan (2009-2011) at 4 (reporting findings from Georgia) (showing six contact points); STATE OF OREGON, 2009 Formula Grant Application (2009) at 15 (reporting findings from Oregon) (identifying eight contact points); and Nebraska's Comprehensive 3-Year Plan Components for Fiscal Years 2009-2011 (2009-2011) at 6 (reporting findings from Nebraska) (noting twelve contact points).

⁷³ See *South Struggles with JJDP Compliance in '09; What About the Rest of the Country?*, YOUTH TODAY (April 29, 2010), http://www.youthtoday.org/view_blog.cfm?blog_id=340 (declaring "States have gotten away with 'studying' DMC instead of acting on it for decades now...").

⁷⁴ See generally, Colorado's Three-Year Juvenile Justice and Delinquency Prevention Plan, (2009-2011) (March 2009) (reporting findings from Colorado).

cent Three Year Plan admits that the past data used for its Phase One Identification purposes “has serious limitations.”⁷⁵ Specifically, Colorado’s DMC data included Hispanic and White youth together as one race. This calculation was not compatible with the OJJDP’s DMC matrix, which requires a separation of the race and ethnicity of all children coming into “contact” with the state’s juvenile justice system. Therefore, Colorado’s studies as to the ethnicity of children arrested are flawed, and (among other things) cannot accurately be used to identify the first of the nine “contact” points, the “arrest” data point. In anticipation of this error, Colorado attempted to use data compiled on “youth arrested and screened for potential placement in pre-adjudication stage” in lieu of the compromised “arrest” point data. This alternative data separated children into both Hispanic and White categories, but this too was ultimately deemed “suspect.”⁷⁶ Colorado also acknowledges that it “has not undertaken an Assessment study of DMC since 2000.”⁷⁷ Though Colorado does indicate a plan to complete assessment in the future, it somewhat hedges in its forward approach by couching its proposed assessment in vague terms. It proffers that [Colorado] “is beginning the process of developing a request for proposal to solicit an organization or agency to conduct an analysis. . .” of one of the nine decision points discussed by the OJJDP.⁷⁸

The challenge of separating the racial data of children is not unique to Colorado; several states are grappling with this issue.⁷⁹ For example, Idaho recognized a trend of children identifying themselves as an “unknown” race, and has committed to “improving identification and data entry” as a priority.⁸⁰ Pennsylvania describes its Hispanic youth as being “lost”

⁷⁵ *Id.* at 91.

⁷⁶ *Id.*

⁷⁷ *Id.* at 93.

⁷⁸ *Id.*

⁷⁹ See Geoffrey Decker, *Hispanics Identifying Themselves as Indians*, N. Y. Times A16 (July 3, 2011) (in which the author describes 2010 Census data as showing “an explosion in respondents of Hispanic descent who also identified themselves as American Indians.”).

⁸⁰ See IDAHO JUVENILE JUSTICE COMMISSION AND IDAHO DEPARTMENT

statistically for years among either White or Black racial categories.⁸¹ This state created a special guideline on “racial coding”⁸² intended to enhance the accuracy of the racial statistics collected, identified and assessed for DMC purposes. And Oregon, like Colorado, also declined to include “arrest” data in its most recent Three Year Plan, as it was unable to separate children by race and ethnicity “in a fashion that will permit its inclusion in the DMC analysis.”⁸³ Indeed, the OJJDP acknowledges these “issues in counting Hispanic youth” in its most recent technical assistance manual.⁸⁴

Most states claim to be at the third phase of the process, Intervention, although what is described as actual intervention tends to differ dramatically. Some states have created special “pilot programs” that are often targeted to specific areas with a high proportion of minority youth. Generally, states are implementing these programs in “test” counties, and will analyze the results before making commitments that are more widespread.⁸⁵

OF JUVENILE CORRECTIONS, State of Idaho 3-Year Plan (March 2009) at 13 (reporting findings from Idaho).

⁸¹ See Pennsylvania Three Year Plan (reporting findings from Pennsylvania) at 44.

⁸² See PATRICIA TORBET, HUNTER HURST, JR. & MARK SOLER, NATIONAL CENTER FOR JUVENILE JUSTICE, *Guidelines for Collecting and Recording the Race and Ethnicity of Juveniles in Conjunction with Juvenile Delinquency Disposition Reporting to the Juvenile Court Judges' Commission* at 1 (October 2006).

⁸³ See STATE OF OREGON, 2009 Formula Grant Application at 15 (2009) (reporting findings from Oregon).

⁸⁴ See U.S. DEP'T OF JUSTICE, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL: WASHINGTON, DC: OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION §§1-16 – 1-17 (July 2009).

⁸⁵ See e.g., ROBIN JENKINS, LINDA HAYES & JONATHAN WILLIAMS, NORTH CAROLINA STATE ADVISORY GROUP, NORTH CAROLINA THREE-YEAR COMPREHENSIVE PLAN 2009-2011 at 74 (March 2009) (reporting findings from North Carolina) (citing four “demonstration” counties participating in a pilot project); TENNESSEE COMMISSION ON CHILDREN AND YOUTH, 2009 THREE YEAR PLAN at 10, 49-50 (March 2009) (reporting findings from Tennessee) (describing one DMC pilot project, “School House Adjustment Project Enterprise (SHAPE)); Nebraska’s Comprehen-

A handful of states stand out as role models of success in the Intervention phase. For example, Washington State has long been a forerunner in conducting research studies on the overrepresentation of minority youth within the juvenile justice system. It has actively implemented both delinquency prevention programs and systems improvement activities, paving the way for other states' progress in this area. Washington undertook these efforts well prior to the JJDP's most recently updated mandate.⁸⁶ Washington's strategies to reduce DMC in the 1990s focused on three areas: conducting research studies on DMC, lobbying for legislative change, and "developing and sustaining programmatic and administrative initiatives at the state and county levels."⁸⁷ It is thus instructive to look to this state's most recently targeted DMC pilot programs for guidance. Washington was selected to participate in Juvenile Detention Alternatives Initiative (JDAI) sites by the Annie E. Casey Foundation.⁸⁸ The JDAI focused on six counties within the state in which a majority of the state's minority youth resides. The strategies implemented by the JDAI have generated reliable analyses of data collection practices, arrest rates, and detention admissions.⁸⁹ Successful lobbying for legislative changes in prosecutorial practices, along with creating a statewide "Risk Assessment instrument," have both contributed to Washington's reduction in DMC within these

sive 3-Year Plan Components for Fiscal Years 2009-2011 at 32 (reporting findings for Nebraska) (noting its plan to select four counties in which to implement DMC programs is calculated to "go deep, not wide"); See also, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, A CATALOG OF STATE RESEARCH REPORTS ON DMC, *available at* http://www.ojjdp.gov/dmc/state_research_reports.html.

⁸⁶ See generally, HEIDI HSAI, GEORGE S. BRIDGES & ROSALIE MCHALE, DISPROPORTIONATE MINORITY CONFINEMENT 2002 UPDATE (September 2004) (reporting findings from Washington State).

⁸⁷ *Id.* at 19.

⁸⁸ See GOVERNOR'S JUVENILE JUSTICE ADVISORY COMMITTEE, WASHINGTON STATE TITLE II FORMULA GRANTS PROGRAM APPLICATION at 60 (March 2009) (reporting findings from Washington); See also *supra* note 87.

⁸⁹ *Id.* at 61.

JDAI sites throughout each county.⁹⁰ Based on this successful data collection and critical agenda, this state anticipates providing such programs to more counties in the near future. Washington continues to host an annual JDAI-DMC Conference on this topic as well.⁹¹

The other states to emerge from the first two phases are at various stages of this third Intervention phase. Many of these states are implementing programs that tend to look like general juvenile delinquency prevention programs.⁹² Others appear to emphasize all-purpose race studies.⁹³ Some states may appear at first blush to be implementing programs, but are really just restating the goals of this third phase of the OJJDP model.⁹⁴

DMC researchers have lamented, “it is far easier to document the extent of DMC than to explain or address it.”⁹⁵

⁹⁰ *Id.*

⁹¹ See COALITION FOR JUVENILE JUSTICE, BEST PRACTICE BULLETIN at 3 (April 2009).

⁹² See e.g., COLORADO’S THREE-YEAR JUVENILE JUSTICE AND DELINQUENCY PREVENTION PLAN (2009-2011) at 25 (March 2010 Update) (reporting findings from Colorado) (describing how the State’s DMC Coordinator is serving as an expert regarding the grant of \$11.5 million given to the Division of Behavioral Health to “address underage binge drinking of Latino high school students.”); NEW JERSEY THREE YEAR PLAN (2009-2011) at 25 (reporting findings from New Jersey) (describing the need to combat truancy).

⁹³ See e.g., TITLE II FORMULA GRANTS PROGRAM THREE YEAR PLAN APPLICATION (FFY 2009-2011) at 33 (reporting findings from California) (describing a study undertaken in July 2000 to examine perceptions of racial profiling during traffic stops by the Sacramento Police Department.)

⁹⁴ See generally, e.g., STATE OF NEW YORK, THREE-YEAR COMPREHENSIVE STATE PLAN FOR THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION FORMULA GRANT PROGRAM (2009-2011) (reporting findings from New York); JUVENILE JUSTICE & DELINQUENCY PREVENTION MANUAL: A GUIDE TO THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 2002 AND RELATED STATE LAW (2010-2011) (reporting findings from Kansas).

⁹⁵ See Miriam Stohs, *Racism in the Juvenile Justice System: A Critical Perspective*, 2 Whittier J. Child & Fam. Advoc. 97, 111 (2003), citing Robert E. Shepherd, Jr., *Children of Color in the Juvenile Justice System*, 9-SUM Crim. Just. 42, 42 (1994).

This likely explains why most states have the bulk of their research documentation under the first two phases of the DMC Reduction Model, Identification and Assessment. States vary widely in their progress into the third phase of Intervention, and almost every state has encountered problems with (or have not even attempted to delve into) the latter phases of Evaluation and Monitoring.

The three target concerns discussed in this article, *infra*, do appear to be hindering the states' DMC reduction efforts. Some of the more common difficulties for the states confronting the DMC issue are discussed below.

1. *The First Concern: States Appear to Be Confused by the JJDPA's Conflicting Missions, and are Having Difficulty Finding DMC at all Nine Contact Points within the Juvenile Justice System*

The ambitiously broad 2002 amendment to the JJDPA required participating states to "address" any disproportionate minority representation at all points of "contact" within their juvenile justice systems. This expansion has not yielded much (if any) solid proof that DMC is the result of biased juvenile case processing by the stakeholders within the juvenile justice system.⁹⁶ Furthermore, the focus upon the racial composition

⁹⁶ States are recognizing the proposition that the mere fact that minorities are overrepresented in the justice system does not necessarily mean that racial bias is at play. See e.g., DOTTIE CARMICHAEL, GUY WHITTEN & MICHAEL VOLOUDAKIS, STUDY OF MINORITY OVER-REPRESENTATION IN THE TEXAS JUVENILE JUSTICE SYSTEM at 7 (October 2005) (reporting findings from Texas) (noting that a 1997 study, though unable to determine whether system bias occurred prior to arrest or referral to court, was able to conclude that "... at least in the three counties examined, race does not appear to be a significant factor in juvenile case processing."); SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY OFFICE OF JUSTICE PROGRAMS, JUVENILE JUSTICE FORMULA GRANT FUNDING PLAN FEDERAL FISCAL YEARS 2009-2011 at 84 (March 2009) (reporting findings from South Carolina) ("A significant body of research points to 'race' as having effects on the processing of minority youth in the juvenile justice system. While there is convincing evidence that 'race matters' in explaining the large numbers of minority youth in the juvenile justice system across the nation, other research has shown the contrary."); See STATE OF OREGON,

of the children within the justice systems serves to shine a bright spotlight on each child's race, rather than to treat each child "equitably on the basis of race."⁹⁷ This clash of pursuits⁹⁸ seems to bewilder many states. Two examples of states that appear to be struggling with this concept are Oklahoma and South Carolina.

Oklahoma initiated a two-year study, the results of which were captured in a report entitled "Race/Ethnicity and Gender Effects on Juvenile Justice System Processing."⁹⁹ This state acknowledged prominent national studies that revealed an overrepresentation of minority youth at many, if not all, decision points within many juvenile justice systems.¹⁰⁰ These basic race statistics were not disputed. Oklahoma then noted that practical solutions to DMC might in fact be "beyond the reach of juvenile justice stakeholders and practitioners," unless the overly simplistic debate as to the root causes of DMC is put aside.¹⁰¹ This debate has pitted judicial system bias against the theory that minority youth simply are involved in greater criminal activity. Oklahoma appears to favor the exploration of previously undervalued socioeconomic factors affecting juvenile delinquent behavior, including family disruption, parent-child separation and parent criminality, male

2009 FORMULA GRANT APPLICATION (2009) at 20 (reporting findings from Oregon) (noting that counties within the State institute different procedures and philosophies, which may account for why data appears as relevant DMC statistics on the State level but really does not reflect a genuine issue of race or ethnicity.).

⁹⁷ 42 U.S.C. § 5633 (a)(15) (2009).

⁹⁸ Note that even the phrasing of the mandate, to treat children "equitably based on race" appears fraught with inconsistency (emphasis added).

⁹⁹ See generally, Courtney Charish et al., *supra* note 70.

¹⁰⁰ *Id.* at 8 (citing studies developed by Snyder & Sickmund (1999a, 1999b) and Stahl, et. al., (1999) ("[A]lthough African American juveniles accounted for about 15% of the national population ages 10 through 17 in 1997, they represented 26% of all juvenile arrests; 30% of all delinquency referrals; 33% of all petitioned delinquency cases; 46% of all cases waived to adult criminal courts; and 40% of juveniles in public long-term institutions.").

¹⁰¹ *Id.* at 11.

unemployment and household welfare status, and poverty.¹⁰² Oklahoma further studied the effects of individual neighborhoods on juvenile crime, linking minority youth to living in neighborhoods of “concentrated disadvantage,” therefore resulting in higher minority overrepresentation in the juvenile justice system.¹⁰³ In sum, rather than attacking each of the OJJDP’s nine contact points within the system, Oklahoma proposed that a practical way to reduce the DMC evident within the system would be to recognize that “socioeconomic status, family status, and neighborhood are related to juvenile justice outcomes.”¹⁰⁴

Perhaps this emphasis is indicative of Oklahoma’s confusion in being directed to “address” DMC at points that are “beyond the reach” of the participants within the justice system. It appears to show Oklahoma’s willingness to accept the constitutional prohibitions against race as a factor in judicial decision-making. Regardless of its motive, Oklahoma’s study reveals its inclination toward exploring new avenues with which to study and find solutions for reducing DMC.

South Carolina has also queried whether addressing DMC at so many points in the juvenile justice system is feasible and even desirable. It vowed to carry out studies in line with the JJDP’s new directive, despite the unresolved status of its previous “central concern” of disproportionate minority *confinement*.¹⁰⁵ South Carolina conducted both community surveys and quantitative studies to determine the practicality of this new, expanded mandate.

South Carolina surveyed three of its communities to determine the extent that DMC was considered a problem within its juvenile justice system. It found that social and economic factors, such as poverty, single parent households, substance abuse, and gang involvement were seen as the “predic-

¹⁰² *Id.* at 12.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 13.

¹⁰⁵ See South Carolina Department of Public Safety Office of Justice Programs, *Juvenile Justice Formula Grant Funding Plan Federal Fiscal Years 2009-2011*, at 84 (Mar. 2009) (reporting findings from South Carolina).

tors of delinquency,” and that generally “the welfare of youth and their families,” as opposed to DMC specifically, predominated community concern.¹⁰⁶

Its quantitative studies set out to determine whether the case processing of minority and white youth at four different “stages” in the juvenile justice system yielded differences based on race.¹⁰⁷ These four stages encompassed pre-trial detention, prosecution, reception/evaluation, and commitment.¹⁰⁸ Ultimately, no racial disparities were found at either the reception/evaluation stage, nor at the commitment stage.¹⁰⁹ The study also found that “[M]inority youth were more likely to be detained and committed than white youth” but also that “[W]hite youth were more likely to be prosecuted than minority youth.”¹¹⁰ These results concluded that the child’s previous delinquency history “was the most important determinant of outcome.”¹¹¹

These states serve as examples of some of the difficulties encountered in attempting to comply with the JJDPa’s DMC goals. Addressing DMC at nine points of contact within the juvenile justice system provides a challenge to many states, and may ultimately prove untenable. The tendency of states to ascribe socioeconomic factors in place of racially motivated outcomes is revealing. It possibly illustrates their awareness that race is not a constitutionally permissible factor considered by the stakeholders working with children already in “contact” with the juvenile justice system. Perhaps it indicates a desire to involve more community-based leaders in their fight against DMC. These propensities certainly demonstrate the enormous undertaking of the JJDPa, and open up some new areas worthy of examination. Section III of this Ar-

¹⁰⁶ *Id.* at 86.

¹⁰⁷ *Id.* at 85.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (“Location of [the] referral county made a significant difference in the likelihood of being detained. Youth from urban settings had greater probabilities of detention than those from rural counties.”).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 68.

ticle provides such inspection.

2. *The Second Concern: Outdated Governing Legislation Creates a Void in Enforcement*

As previously noted, when the JJDP Act expanded its DMC inquiry in 2002, the relevant federal regulations were left untouched. Therefore, they currently instruct the states with regard to disproportionate minority *confinement* only. Though the OJJDP has substituted its own procedural recommendations in the form of its “five phase DMC Reduction Model,” the states do not uniformly implement them. One can envision a situation where a state claims compliance with the JJDP Act, but the OJJDP does not agree and denies funding. Were this to happen, questions regarding the proper authoritative procedures for acceptance of each state’s Three Year Plan may abound. There remains uncertainty about how closely the states must follow the OJJDP’s five-phase DMC Reduction Model, and if it must be followed at all.

For instance, California earned its recent funding allocation from the OJJDP for complying with the JJDP Act, despite straying from the OJJDP’s five-phase paradigm.¹¹² True to its quirky reputation, California fashioned its own DMC-Reduction Plan, laid out in distinctive fashion in its most recent Three Year Plan.¹¹³ California’s position seems to be that DMC efforts are “an intensely local matter,”¹¹⁴ and its focus is thus centered on assisting each of its 58 counties with their education and program implementation. In its most recent plan, it rather ambiguously describes a “cutting edge” approach to reducing DMC through “collaboration, education, and awareness.”¹¹⁵ California does distribute a “DMC Quarterly Bulletin/Fact Sheet” and supports its juvenile probation

¹¹² See State Compliance with JJDP Act Core Requirements, Office of Juvenile Justice and Delinquency Prevention, www.ojjdp.gov/compliance/compliancedata.html.

¹¹³ See generally, Title II Formula Grants Program Three Year Plan Application (FY 2009-2011) (reporting findings from California).

¹¹⁴ *Id.* at 30.

¹¹⁵ *Id.* at 33.

departments in “understanding and identifying DMC,” but these efforts most certainly do not mimic the OJJDP’s detailed recommendations for compliance.

New Jersey is also currently deemed to be in compliance with the JJDPA.¹¹⁶ This state does follow the OJJDP’s five-phase model, and begins its most recent Three Year Plan by including over four and a half pages of statistics under the first phase of “Identification.”¹¹⁷ However, New Jersey acknowledges that it has not attempted to undertake either the Assessment phase¹¹⁸ or the Evaluation phase.¹¹⁹

The lack of uniformity in procedures could conceivably create anxiety among the States. Like eager children, they may wonder how their “report cards,” in the form of Three Year Plans, equate to satisfactory compliance in the eyes of their parent committee, the OJJDP. Interestingly, the OJJDP’s 2009 Compliance Report indicates that only American Samoa is currently not in compliance with the DMC mandates of the JJDPA.¹²⁰ Perhaps there is no need for worry. But should current practices change, the states could be in for an unprecedented legal battle.

3. *The Third Concern: An Unclear Directive to “Address” DMC is Magnified by the States’ Diversity Issues*

All states have unique attributes, making uniform adherence and analysis of their compliance with the JJDPA troublesome. The success of a state in appropriately “address-

¹¹⁶ See State Compliance with JJDP Act Core Requirements, Office of Juvenile Justice and Delinquency Prevention, www.ojjdp.gov/compliance/compliancedata.html.

¹¹⁷ See Comprehensive Three-Year Plan Components, at 42-47 (reporting findings from New Jersey).

¹¹⁸ *Id.* at 47 (“A statewide DMC assessment has not been conducted or completed.”).

¹¹⁹ *Id.* at 50 (“...[A] formal process or outcome evaluation as a component of the DMC reduction model has not yet been conducted.”).

¹²⁰ See State Compliance with JJDP Act Core Requirements, Office of Juvenile Justice and Delinquency Prevention, www.ojjdp.gov/compliance/compliancedata.html.

ing” any overrepresentation of minority children in its juvenile justice system may vary depending upon the population demographics exclusive to its jurisdiction. Across the country, states are also feeling the effects of a weak economy; budget cuts and a general lack of resources contribute to the States’ DMC struggles.¹²¹ Comparisons among states reveal disparate results.

Arizona provides an illustrative example of a state with distinct immigration and demographic issues. Noting its location “as a border state to Mexico,” Arizona’s most recent Three Year Plan identifies a large influx of families from Mexico,¹²² pushing the Hispanic population at over 40% statewide.¹²³ It describes this population change as “Immigration and Migration Related Mobility,” a major contributor to its DMC concerns.¹²⁴ Arizona reports that language barriers and immigration status fears of its residents factor into higher DMC rates across the state.¹²⁵

Additionally, Arizona is home to a large Native American population, and must therefore share its jurisdictional authority with the Indian tribes, as well as with the federal government.¹²⁶ Native American children who commit crimes on tribal land are not subject to Arizona’s state laws. This results in inaccurate identification numbers for Native American juveniles for purposes of compliance with the JJDP. Further,

¹²¹ States are complaining about a lack of resources in their Three year Plans. *See e.g.*, Arizona Juvenile Justice Commission, State of Arizona Fiscal Year 2009 Arizona’s Comprehensive Three Year State Plan 2008-2011, at 15 (“As with many states across the country, Arizona is in the midst of the most significant recession it’s seen in years. Funding has been slashed across all systems and these cuts will invariably impact the juvenile justice system.”) (reporting findings from Arizona).

¹²² *See* Arizona Juvenile Justice Commission, State of Arizona Fiscal Year 2009 Arizona’s Comprehensive Three Year State Plan 2008-2011, at 44 (reporting findings from Arizona).

¹²³ *Id.* at 9-10.

¹²⁴ *Id.* at 44.

¹²⁵ *Id.*

¹²⁶ The federal government (Federal Bureau of Investigation and the Federal Bureau of Indian Affairs) maintains jurisdiction over Indian Tribal Reservations in every State with these issues.

Arizona recognizes the need for general juvenile delinquency prevention programs to be able to reach these tribal communities, but has been unable to offer such services.¹²⁷

New Mexico has structured three new DMC Continuum Sites, all of which are “distinct and vary in the DMC target population.”¹²⁸ The Las Cruces site is located 30 miles north of the Mexican border, and deals with “the illegal and legal” immigrants from that country.¹²⁹ Latin Americans from Mexico, Central America, and South America reside in the city of Santa Fe, and have done so “dating back to the colonization by Spain in 1500 and 1600.”¹³⁰ The Town of Taos is home to the Taos Pueblo Indians, and their village is described as “the oldest still inhabited Native American village in North America.”¹³¹

New Mexico’s standing as a predominantly rural state furthers its unique position. Its geography situates cities far away from each other, and with “some of the lowest income rated counties in the nation” able to provide only a “limited tax revenue” and “limited public services,” it is lacking in much needed resources.¹³² New Mexico thus created its own “Rural Area Juvenile Program Objectives” to assist these rural communities in helping their children most at risk of becoming delinquent.¹³³

Montana reports that its close proximity to Canada, in combination with its many Indian Reservations, “. . . makes it attractive to gangs choosing to set up shop on reservations to

¹²⁷ Arizona Juvenile Justice Commission, State of Arizona Fiscal Year 2009 Arizona’s Comprehensive Three Year State Plan 2008-2011, at 16 (“In order to best serve . . . tribal communities it is important to fully understand the gaps in services and determine what programming, technical assistance, and capacity building is needed before any type of programming can be instituted.”) (reporting findings from Arizona).

¹²⁸ See Title II Formula Grants Program – 2009 Comprehensive Three-Year Plan Components, at 35 (reporting findings from New Mexico).

¹²⁹ *Id.* at 31.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 53.

¹³³ *Id.*

run drugs into and out of Canada.”¹³⁴ As a state with a population of less than one million residents,¹³⁵ its Census projections indicate that there are very few minorities living within its boundaries. However, Montana is home to two National Parks,¹³⁶ as well as several ski resorts, both of which attract a seasonally greater minority presence than is reflected in the Census statistics.¹³⁷ Montana asserts that its DMC data is therefore skewed.

The District of Columbia describes DMC within its jurisdiction as “particularly perplexing,” given that minority youth represent 83% of the children in DC; here, the “racial minority” is the “statistical majority.”¹³⁸ The OJJDP outlines this phenomenon in its technical assistance manual.¹³⁹ It raises the possibility that the Relative Rate Index (RRI) values may require recalculation, such that the minority youth group and the majority youth group be reversed.¹⁴⁰ However, the District of Columbia’s statistical imbalance is so greatly disproportionate, and “so few white youth penetrated the District’s juvenile justice system” that DC reports that it is unable to calculate the Relative Rate Indices for any of the nine points of contact, with the exception of referrals to juvenile court.¹⁴¹ Since it cannot accurately identify its current rate of DMC, the District of Columbia is obviously limited in its ability to follow through with the OJJDP’s five-phases of

¹³⁴ See Montana Board of Crime Control, 2009-2011 Disproportionate Minority Contact 3 Year Plan, at 24 (reporting findings from Montana).

¹³⁵ *Id.*

¹³⁶ Glacier National Park and Yellowstone National Park are both located in the State of Montana.

¹³⁷ See Montana Board of Crime Control, 2009-2011 Disproportionate Minority Contact 3 Year Plan, at 24 (reporting findings from Montana).

¹³⁸ See Government of the District of Columbia, Executive Office of the Mayor, Justice Grants Administration, at 103 (reporting findings from the District of Columbia), http://www.juvjustice.org/media/resources/public/resource_285.pdf

¹³⁹ See Disproportionate Minority Contact Technical Assistance Manual. Washington, D.C.: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, § 1-20 (July 2009).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

compliance.¹⁴²

Considering the states' unique issues, such as the ones described above, the OJJDP's promise to enact a "diligent enforcement of uniform standards"¹⁴³ in assessing states' efforts in "addressing" DMC seems a bit unfair. The mandate to "address" DMC may also confuse and "perplex" the states, which are scrambling for resources to use in their JJDPa compliance endeavors. Years after the latest DMC iteration, states are still stalled in the first two phases of the OJJDP's DMC-Reduction Model, and are just now realizing that their identification data might be flawed. This system is unsustainable.

IV. A Solution: Narrow the JJDPa's Focus to Broaden the Possibility of Success

Current efforts to eliminate DMC are a decade late and many dollars short. It has been almost ten years since the JJDPa expanded its mission to combat DMC "at all points" in the juvenile justice system and not one state has declared victory. To the contrary, states appear to bemoan their lack of resources, financial and otherwise, while intimating that perhaps a different approach is necessary. A common theme throughout many states' most recent Three Year Plans is to emphasize the importance of "pre-contact" players, activities, and agencies.

For example, Florida notes that socio-economic circumstances appear to be playing a significant role in the disproportionate contact by minority youth within their jurisdiction.¹⁴⁴ Florida remarks that external social factors, such as

¹⁴² As an aside, the identification of DMC is totally dependent upon the random and artificial nature of political boundaries. Nowhere is this more evident than in Washington D.C., which is categorized as a "state" for DMC purposes. Its racially homogeneous demographics completely alter the DMC data; a city equal in size and ethnic composition may present DMC issues that Washington D.C. therefore does not.

¹⁴³ *Id.* at Intro 2-3.

¹⁴⁴ See The Florida Department of Juvenile Justice and The Juvenile Justice and Delinquency Prevention State Advisory Group 2009-2011 Three-Year Comprehensive Delinquency Prevention Plan, at 36 (reporting find-

the media's portrayal of violence, lead children of color to encounter the juvenile justice system.¹⁴⁵ Texas also cites difficulties in determining how much of the minority overrepresentation in its state is due to race, rather than to social and economic factors.¹⁴⁶ It commissioned a study of at-risk children, and found that "juveniles' behavior at school proved to be the most influential determinant of first contact with the justice system."¹⁴⁷ Colorado declares that its "ultimate goal is to address risk factors associated with future delinquency thus avoiding arrest completely."¹⁴⁸ California directs its aim at school districts, which it describes as ". . . the pipeline for our youth of color coming into contact with the juvenile justice system."¹⁴⁹ West Virginia asserts that its cyclical poverty afflictions increase the numbers of children coming into contact with its juvenile justice system. It adds that to break this cycle, the state must "invest in public structures. . . to improve children's outcomes and support long-term economic prosperity, like high quality childcare programs."¹⁵⁰ Washington, too, links poverty with disproportionate minority contact.¹⁵¹ And

ings from Florida) (listing factors such as "low homeownerships (sic) rates" and "low educational attainment rate" as some of the socioeconomic conditions affecting DMC).

¹⁴⁵ *Id.* at 38.

¹⁴⁶ Once the state was able to conduct multivariate analyses it still concluded that "factors other than race" accounted for much of the disproportionate representation of youth of color in its juvenile justice system. *See* Dottie Carmichael, Guy Whitten & Michael Voloudakis, *Study of Minority Over-Representation in the Texas Juvenile Justice System*, at 13-21 (Oct. 2005) (reporting findings from Texas).

¹⁴⁷ *Id.* at 24.

¹⁴⁸ *See* Juvenile Justice and Delinquency Prevention Council & Office of Adult and Juvenile Justice Assistance, *Colorado's Three-Year Juvenile Justice and Delinquency Prevention Plan (2009-2011)*, at 92 (Mar. 2009) (reporting findings from Colorado).

¹⁴⁹ *See* Title II Formula Grants Program Three Year Plan Application, at 33 (reporting findings from California).

¹⁵⁰ *See* West Virginia Three Year Plan 2009-2011, at 14 (reporting findings from West Virginia) (citing to the study 2008 Kids Count.).

¹⁵¹ *See* Governor's Juvenile Justice Advisory Committee, *Washington State Title II Formula Grants Program Application*, at 80 (Mar. 2009) (reporting findings from Washington) ("Disproportionality in juvenile justice

almost twenty years ago, Arizona noted, “Activities or factors that occur before youth enter the juvenile justice web. . . school officials, social service providers and others have great impact on the fate of minority youth.”¹⁵²

The states are not alone in their focus on such pre-contact dynamics. The OJJDP has also acknowledged, “a host of risk factors” correlated with race or ethnicity “may lead to differential offending issues.”¹⁵³ For example, “risk factors such as poor school performance or living in disorganized neighborhoods are more likely to occur to minority youth, putting them at a greater risk of system involvement.”¹⁵⁴ The OJJDP’s “Causes and Correlates Program” itself identified that the child’s community is more predictive of future delinquency, rather than the child’s racial characteristics.¹⁵⁵

Indeed, the prevalent query seems to encompass not whether these front-end variables are important, but how best to utilize them to connect with at-risk youth. Opportunities for the government to step into the role of parent and attempt to rehabilitate these children traditionally present themselves only after the child has had some sort of “contact” with the juvenile justice system. However, with avoidance of the system as a goal, reliance on this approach is unacceptable. To truly draw children away from anti-social, delinquent behavior and toward responsible, productive development, a multifaceted strategy is essential: Undertake early intervention with the

cannot be completely addressed without addressing the culture of poverty.”).

¹⁵² See Peg Bortner et. al., *Equitable Treatment of Minority Youth Project: A Report on the Over Representation of Minority Youth in Arizona’s Juvenile Justice System*, Arizona Juvenile Justice Advisory Council Minority Youth Issues Committee (July 1993).

¹⁵³ See U.S. Department of Justice. *Disproportionate Minority Contact Technical Assistance Manual*. Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, §§ 2-4, 2-5 (July 2009).

¹⁵⁴ *Id.* at §2-5.

¹⁵⁵ See Mark Roscoe & Reggie Morton, *Disproportionate Minority Confinement*, (1994), www.ncjrs.gov/txtfiles/fs-9411.txt (“African-Americans living in non-disadvantaged areas did not have higher rates of delinquency than whites living in non-disadvantaged areas.”).

children, alongside programs to increase parental involvement. The programs must be practical, with a clearly envisioned step-by-step strategy for implementation. To do this, it appears that the OJJDP should narrow its focus for success. Integrating the OJJDP's established truancy reduction plans with the JJDP initiative to combat DMC seems to be a natural fit. Collaboration between efforts to reduce truancy and community assistance and education for the parents might help to prevent children – of all colors – from coming into “contact” with the juvenile justice system.

A. *Focus on Efforts to Reduce Truancy*

The correlation between children who do not attend school and children who become juvenile delinquents is well documented.¹⁵⁶ Truancy has been labeled as the “gateway” to juvenile delinquency and future adult criminal behavior.¹⁵⁷ It has direct links to drug abuse, gang involvement, and violent criminal activity.¹⁵⁸ In California, for example, two thirds of the prison inmates are high school dropouts.¹⁵⁹ Such a seemingly innocuous inactivity most certainly can lead to dangerous, life-altering results.

The OJJDP has long paid attention to the negative effects of truancy on children. In 1998, it created the Truancy

¹⁵⁶ See Elizabeth N. Jones, *School Daze: A Proposal for Education Code Reform in California*, 40 Sw. U. L. Rev. 3 (2011) (citing U.S. Department of Education Manual to Combat Truancy (1996)).

¹⁵⁷ See *Let's End Truancy Brochure*, County of San Bernardino, San Bernardino District Attorney's Office, http://docs.google.com/viewer?a=v&q=cache:y9Id8wzboKIJ:www.sbcounty.gov/da/content/let/LET_Manual_English.pdf+link+between+truancy+and+crime+america&hl=en&gl=us&pid=bl&srcid=ADGEESh75crQTIN204WXXJmfCQPJANRiqTXUnXP8cW00yWM9ohor5GJ4mW13IDRKZjxYvk40LsB-DFj0cAiKKuxo8io0Tne47V1eH5WjzvKidmazP6v5W4WHzbIYGNHzToKRBZX66syc&sig=AHIEtbRtvIsANkoNp09fhDN0geJSYTMtztg.

¹⁵⁸ See Myriam L. Baker, Jane Nady Sigmon & M. Elaine Nugent, *Truancy Reduction: Keeping Students in School*, OJJDP Juvenile Justice Bulletin (Sept. 2001).

¹⁵⁹ See San Francisco District Attorney News Bulletin, City and County of San Francisco, <http://www.sfdistrictattorney.org/page.asp?id=76>.

Reduction Demonstration Program, along with the Department of Education, and the Office of Justice Program's Community Capacity Development Office.¹⁶⁰ The OJJDP used this program to establish seven initial program sites across the country, all of which used collaborative community efforts in combating truancy.¹⁶¹

Studies abound regarding the reasons for truancy, with multiple causes attributed to this phenomenon. These reasons include low grades in reading and mathematics, negative attitudes toward school or teachers, parents who do not value education, poor parenting skills, low socio-economic status, single parent families, and lack of parental involvement in the school, among others.¹⁶² The OJJDP categorized the correlates of truancy into four main areas: family factors, school factors, economic influences, and student variables.¹⁶³ Interestingly, none of these individual factors and causal categories includes the race of the child.

Echoing the truth that children are by nature unable to appreciate what the future holds for them, the OJJDP has seized upon the need to parent through governance. Its truancy programs are effective, and the states have gravitated toward them in recent years. Many states have already identified the significance of a basic schoolhouse education, and expound on its merits in their Three Year Plans.¹⁶⁴

¹⁶⁰ See OJJDP Truancy Reduction Demonstration Program, <http://ojjdp.gov/programs/ProgSummary.asp?pi=36>. See also <http://truancyprevention.org>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Myriam L. Baker, Jane Nady Sigmon & M. Elaine Nugent, *supra* note 160.

¹⁶⁴ See, e.g., New Jersey Three Year Plan (2009-2011), at 25 (reporting findings from New Jersey) (quoting Malcolm X) ("Education is the passport to the future, for tomorrow belongs to those who prepare for it today."); Colorado's Three-Year Juvenile Justice and Delinquency Prevention Plan (2009-2011), at 116 (Mar. 2009) (reporting findings from Colorado) (noting that in preventing children from entering the juvenile justice system to begin with, money may be requested to fund "school-based programs and/or services."); Dottie Carmichael, Guy Whitten & Michael Voloudakis, Study of Minority Over-Representation in the Texas

Therefore, the JJDPa should focus on catching kids “pre-contact” and reform its provisions accordingly. Rather than mandating that states follow a five-phase paradigm that matches minority overrepresentation at nine points in the juvenile justice system, perhaps it should require states to reduce the numbers of truant children. It should also consider backing reform measures to elevate the seriousness of truant behavior, perhaps raising it from a status offense to a misdemeanor crime. This change, along with increased sanctions for violations, might provide motivation for parents and, accordingly, their children, to make attending school regularly a priority. The OJJDP’s successful programs in this area can serve as a model for such an important endeavor.

B. Focus on Increased Parental Involvement

An effort by the government to undertake an increased role in raising our nation’s children must be collaboratively driven alongside a more active role by the actual parents and guardians. Though some parents may be receptive to assistance, it is easy to imagine resistance to such governmental intrusion.¹⁶⁵ To be sure, coercive governmental action is not proposed; parents must retain their autonomy and parental rights. However, they must be educated as to the much-needed support they can provide for their children. They must feel invested in the future of their children. Unfortunately, this can be a difficult missive.

Cultural issues may interfere with the goal of a child-parent educational alliance. For example, Hispanic parents

Juvenile Justice Sys., at 24 (Oct. 2005) (reporting findings from Texas) (“Juveniles behavior at school proved to be the most influential determinant of first contact with the justice system.”).

¹⁶⁵ One might query how to motivate these families to become involved in social assistance, when most have demonstrated a lack of interest in participating in free public education in the first place. *See also* Rebecca Vevea, *School Plan to Engage Parents Arouses Skepticism*, N.Y. Times, July 29, 2011, at A17A, in which the author cites a parents group representative as stating, “[t]here’s a cultural shift that needs to happen... so that it’s more of a proactive engagement with parents and the community rather than reactive.”

have traditionally been described as having only limited involvement in their children's education.¹⁶⁶ This restricted, or in some cases, nonexistent, participation has contributed to a wide disparity in the classroom between Hispanic and White students.¹⁶⁷ Though some test scores for Hispanic students have risen over the past twenty years (most notably in mathematics and reading), the achievement gap has not lessened with the years.¹⁶⁸ Community resources targeting Hispanic parents remain mostly underused.¹⁶⁹

Empirical studies show that increased parental involvement directly correlates with that child's higher achievement levels in school.¹⁷⁰ Yet it is difficult to expect children to strive to excel in school – let alone simply attend class – without parental support. With this aim in mind, the need to educate parents about the importance of their own contribution is paramount. Parents need to feel ownership over their child's education, and know that they, too, are “teachers.”¹⁷¹ A continuum of services must be offered to increase levels of parental participation. Parenting skills courses, community outreach programs, and counseling would facilitate such involvement. Such an approach attacks the root of many of the first “contacts” that children have with the juvenile justice system. Keeping children in school facilitates

¹⁶⁶ See Scott Martindale, *Hispanic Achievement Gap Persists Despite Interventions*, O. C. Register (July 8, 2011), <http://www.ocregister.com/news/gap-307560-hispanic-parents.html>.

¹⁶⁷ See Toby Chaudhuri & Ida Kelley, *U.S. Education Secretary Duncan Challenges Nation to Work Together to Make Hispanic Educational Excellence a Priority*, U.S. Department of Education Press Release (June 23, 2011).

¹⁶⁸ *Id.*

¹⁶⁹ See Scott Martindale, *Hispanic Achievement Gap Persists Despite Interventions*, O. C. Register (July 8, 2011), <http://www.ocregister.com/news/gap-307560-hispanic-parents.html>.

¹⁷⁰ See Andrew J. Houtenville & Karen Smith Conway, *Parental Efforts, School Resources, and Student Achievement*, *The Journal of Human Resources*, 2008.

¹⁷¹ Telephone Interview with Dr. Virginia Mann, Professor of Cognitive Sciences at University of California at Irvine, in Orange County, California (July 19, 2011).

their journey into society as happy, healthy, and productive members. It is hard to imagine a more worthy undertaking.

C. *Focus on the Social Breeding Grounds for Delinquent Behavior*

Aside from truancy, precursors to delinquency often include drug and alcohol use, gang affiliation, bullying, aggressiveness, and general relationship problems.¹⁷² This anti-social behavior must be re-directed at an early stage of child development. Opportunities to reach children “pre-contact” abound, limited only by parental indifference and inadequate resources. This area is ripe for exploration, but is larger than the scope of this Article permits. Expansion of the OJJDP’s Gang Reduction Program¹⁷³ and Girls Study Group¹⁷⁴ might also contribute to a reduction of minority contact with the system. At the very least, it seems to be a righteous enterprise for the OJJDP to pursue.

V. A Final Thought: Uncertain Viability of the JJDPA

The future of the JJDPA is unclear. President Obama’s proposed 2012 budget does not include federal funding for the JJDPA. Accordingly, states would not receive financial benefits for achieving compliance with the DMC “core requirement” (or any of the four core requirements, for that matter).¹⁷⁵ The chances for the reauthorization of the necessary

¹⁷² See generally, Rolf Loeber & David P. Farrington, *Child Delinquents: Development, Intervention, and Service Needs*, Sage Publications (2001). See also Center for Effective Collaboration and Practice, *Preventing Anti-social Behavior* (2000), <http://cecp.air.org/resources/schfail/prevent.asp>.

¹⁷³ See OJJDP Gang Reduction Program, <http://www.ojjdp.gov/programs/ProgSummary.asp?pi=38>.

¹⁷⁴ See OJJDP Girls Study Group, <http://www.ojjdp.gov/programs/ProgSummary.asp?pi=42>.

¹⁷⁵ See Tracy Velazquez, *Obama’s Juvenile Justice Plan Lowers the Bar for National Standards*, Youth Today, YouthWork Talk Blog, http://www.youthtoday.org/view_blog.cfm?blog_id=453. Ms. Velazquez notes that a new line item in the proposed budget would initially appear to incentivize compliance with the JJDPA with a \$120 million grant, but upon closer inspection, this “new” funding does not guarantee monies for

funding seem slim. States are currently struggling with depleted resources, and the federal budget is dreadfully overextended; since juvenile justice programs need finances to survive, a lack of federal grant money bodes ominously for the JJDP.

Furthermore, our nation's ever changing population demographics call into question the continuing relevance of this federal legislation. The 2010 U.S. Census reveals that most large metropolitan areas registered a drop in white child populations, but two-thirds of these areas gained enough minority children to avoid overall losses in the child population.¹⁷⁶ The past decade saw a decrease in white children of 4.3 million.¹⁷⁷ "Ten states and 35 large metropolitan areas now have minority white child populations."¹⁷⁸ Without traditional minority child populations, disproportionate minority contact may soon become an outdated concept. "Minority white" is the new marginalized group. While historically disadvantaged minority groups remain, the term "minority youth" is fast changing its definition.

VI. Conclusion

An overhaul of the JJDP's DMC requirement is in order. With a bleak financial future and questionable reason d'être, the JJDP needs a practical renovation, complete with a realistic methodology that incorporates each state's individual socio-economic issues with updated, complete legislative regulations. Eliminating the over-representation of minority youth in the juvenile justice system is a noble, attainable goal.

States already in compliance (which most States are) and could be disproportionately divided.

¹⁷⁶ *Id.* at 6.

¹⁷⁷ See John D. Sutter, *The Changing Face of America's Youth* (July 6, 2011), http://www.cnn.com/2011/US/07/06/hispanic.youth.majority/index.html?hpt=hp_c1.

¹⁷⁸ See William H. Frey, *America's Diverse Future: Initial Glimpses at the U.S. Child Population from the 2010 Census*, Metropolitan Policy Program at Brookings (Apr. 2011) at 8, www.brookings.edu/papers/2011/0406_census_diversity_frey.aspx.

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But this goal needs to incorporate a recognition that DMC has many cultural and social aspects that cannot be ignored. The states also require latitude in deciding how the diversity in racial and ethnic composition within their boundaries can best be served. Creating a more viable plan of action will reinvigorate the states to continue their DMC reduction efforts. Encouraging school attendance, strengthening family bonds, and honing in on early prevention of delinquency will contribute to an equal opportunity for minority youth to avoid unwarranted contact with the juvenile justice system.

