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Urgent Reform 'in the Name of Our Children': Revamping the Role of Disproportionate Minority Contact in Federal Juvenile Justice Legislation

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URGENT REFORM “IN THE NAME OF OUR CHILDREN”†: REVAMPING THE ROLE OF DISPROPORTIONATE MINORITY CONTACT IN FEDERAL JUVENILE JUSTICE LEGISLATION

*Atasi Satpathy**

Disproportionate minority contact (“DMC”) has plagued the United States juvenile justice system for decades, but federal legislation has lacked the clarity and guidance to battle this affliction. A strong partnership must exist between state and federal entities in order to directly target DMC and thereby decrease the appallingly disproportionate number of minority children who come into contact with the juvenile justice system. This Note discusses the problem of DMC, identifies state and private efforts to combat the crisis, and indicates deficiencies in the Juvenile Justice and Delinquency Prevention Act as well as its reauthorization bill, S. 678. The Note urges Congress to revisit the reauthorization bill and supplement it with stand-alone legislation that will address DMC more effectively. Such law reform is urgent and timely, because the needs of at risk minority children have never been more pronounced than they are today.

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† See Reforming the Juvenile Justice System to Improve Children’s Lives and Public Safety: Hearing on H.R. 6029 Before the H. Comm. on Educ. and Labor, 111th Cong. 1 (2010) (statement of Michael Belton, Ramsey County Deputy Director of Juvenile Corrections) [hereinafter Belton].

* J.D. Candidate, University of Michigan Law School, 2011; B.S., University of Michigan, 2008. I am indebted to Professor Frank Vandervort for inspiring me to write on this topic and providing excellent editorial advice and continual encouragement. I also thank Jason Szanyi for his thoughtful comments and the staff of the *Michigan Journal of Race & Law* for the countless hours it invested in this Note. Finally, I thank my family for impressing upon me the dual importance of passion and perseverance.

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INTRODUCTION

Today's hot topic in reform is undoubtedly education policy. With the recent documentary film *Waiting for Superman*,¹ Facebook CEO Mark Zuckerberg's high-profile donation to the Newark, NJ public school system,² and the December 2010 Senate blocking of the DREAM Act³ in the media, education reform has gained renewed attention and support from American citizens instead of just the usual politicians and lobbyists.

I also became enamored of education reform a few years ago—specifically, I became interested in the education needs of underprivileged children while working in the field of special education law. Improving the education system seemed to be the ultimate policy reform because, with equal access to an adequate education, young people would be able to access more economic opportunities. I believed that improving access to education was a direct path to ending the poverty that plagues America.

However, after I spent a summer working at a juvenile detention center in the District of Columbia, my outlook changed. In D.C., I encountered a forgotten group of children who had faced many more obstacles than simply a sub-par education. While inconsistent and low-quality education was certainly a factor that contributed to their situation, they had also been negatively impacted by involvement with the child welfare system, disproportionate interaction with law enforcement, and intentional as well as institutionalized racism. Of the more than one hundred detained children I worked with that summer, I estimate that almost 100% were Black, and around 85% (children in seven out of the eight floor units) were male. These children—Black, male, low-income and an

1. WAITING FOR SUPERMAN (Paramount Pictures 2010).

2. Richard Pérez-Peña, *Facebook Founder to Donate \$100 Million to Help Remake Newark's Schools*, N.Y. TIMES (Sept. 22, 2010), available at <http://www.nytimes.com/2010/09/23/education/23newark.html>.

3. David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES (Dec. 18, 2010), available at <http://www.nytimes.com/2010/12/19/us/politics/19immig.html>.

average age of 14–16 years old—were detained on pending charges ranging from status offenses (i.e. truancy at their probation group homes) to murder. Because of these charges, they were pegged as the failures of modern-day society, often without any prior criminal record or other record of aberrant behavior. Many of their probation officers, the detention center administration, and the public seemed to view them as uncontrollable elements of society.⁴

The story of one of the children at the detention center continues to plague me. Kyle⁵ was a Black teenager who was not new to the D.C. juvenile justice system. He had spent time both at the detention center and at the New Beginnings Youth Development Center in Laurel, MD, which was a secure correctional facility that housed D.C. youth. Kyle's interactions with facility staff, psychologists, and me indicated that he was an intelligent, kind-hearted young man, and he had parents who were invested in his potential. However, because of the gang-related violence that he became involved in during his time in the juvenile facilities, he found himself being painted in an increasingly unfavorable light by his probation officer. His probation officer's word held such great weight that, even with a superbly-trained public defense attorney by his side, his judge refused to reduce his sentence and agreed that Kyle needed to be sent to a residential facility in a distant state. Such a sentence would last for as long as was required for him to complete successfully a program at the residential facility. He would be torn from his family for months, perhaps years of his young life.

The twist in this story is that when I left the detention facility in August 2010, Kyle had been there for nearly one month past his sentencing court date, awaiting a move to a residential facility. Because Kyle had been assaulted at New Beginnings Youth Development Center, he was moved back to the detention center. However, since he had a history of confrontations with rival gang members at the detention center, Kyle was forced to spend the majority of his day alone in his cell, leaving only a few hours each day that he was permitted to go outside and do required large muscle activity. While his attorney was working feverishly to improve this interim detention and to expedite his transport to the residential placement, it is heartbreaking to imagine the impact of such isolation on Kyle's mental and physical health.

For children like Kyle and others whom I supported in Washington, D.C., access to education is still very important. However, it certainly is not powerful enough to break the momentum that contact with the juvenile justice system has created in each child's life. After detention, many

4. See generally Karen Gray Houston, *Violent Incident at New Beginnings Youth Correctional Facility: Corrections Officer Suffered Broken Jaw*, MyFoxDC.com (June 21, 2010), <http://www.myfoxdc.com/dpp/news/maryland/near-riot-after-incident-at-youth-correctional-facility-062110>.

5. The name of this individual has been changed for purposes of this Note.

of the children may be committed to the state, sent, like Kyle, to residential facilities, or sent to group homes or high-security youth correctional facilities. Even if they successfully complete those programs, they face a high chance of recidivism and a host of collateral consequences.

Thus, the effect of the disproportionate amount of contact that minority youth have with the juvenile justice system, such as the experiences of the detained children I met in D.C., requires more than just state policy reform to address education or other preventative initiatives. The problem of disproportionate minority contact requires a strong partnership between state and federal entities—a partnership that unfortunately does not exist today—in order to target directly and decisively the problem and its myriad root causes with increased financial and human resources. This cause must move forward in the name of over one million children who are affected by the juvenile justice system and disappear down the pipeline to prison each year.⁶

Part I of this Note will discuss the problem of disproportionate minority contact (DMC), which pervades the juvenile justice system and requires increased attention from the federal government in order to ensure fairness and equity in the system. Part II will identify current state and private efforts to combat disproportionate minority contact and will demonstrate the lack of unity among state strategies, in contrast to the common tools private organizations have been able to develop through coalition building and grassroots strategies. Parts III and IV will focus on the current Juvenile Justice and Delinquency Prevention Act (JJDPa) as well as the Senate reauthorization bill, S. 678, and will illuminate why the JJDPa and reauthorization bill do not adequately address disproportionate minority contact. Part V will propose that Congress should revisit the reauthorization bill and supplement it with stand-alone legislation that will address DMC more effectively. Finally, this Note will emphasize the urgency and timeliness of this law reform. Reauthorization cannot wait any longer. The needs of incarcerated minority children in America have never been more pronounced than they are today.

I. UNDERSTANDING DISPROPORTIONATE MINORITY CONTACT

A. *Definition and Causes*

The general definition of DMC is that “a disproportionately large number of minority youth come into contact with the juvenile justice

6. See ACT 4 JUVENILE JUSTICE, JJDPa STATEMENT OF PRINCIPLES 2 (2009), http://www.act4jj.org/media/factsheets/factsheet_11.pdf (noting that juvenile courts process around 1.6 million delinquency cases each year).

system in relation to their representation in the general population.”⁷ The term “DMC” originally referred to “disproportionate minority confinement” before the reauthorization of the JJDP A⁸ in 2002, which broadened the definition to include contact between children and the juvenile justice system at all points.⁹ This broadening resulted from the growing knowledge that the child’s “first contact with the [juvenile justice] system was a key entry point . . .” and thus needed to be focused upon, along with other entry points, just as much as the point of incarceration.¹⁰ Statistics at that time demonstrated that minority children tended to be overrepresented in the juvenile justice system compared to non-minority children at several points. For example, though Black children made up only 15% of the youth population from 1997 to 1998, they comprised 26% of juvenile arrests, 44% of detained youth, and 34% of formally processed youth.¹¹

There are many explanations as to why DMC permeates the American juvenile justice system; common theories include unfair police practices, different delinquent behaviors displayed by White and minority children, and bias of crime victims against minority children versus White children.¹² Besides the fact that the true cause may be a combination of the above theories, intentional and institutionalized forms of racism play a large role in the juvenile justice system.¹³ Thus, the foundation of DMC is extremely deep, and, as a result, combating the problem must be multifaceted.

B. Demographics of Children Affected and Incidence of DMC

The scope of children affected by disproportionate minority contact is astounding. While Black and Hispanic children make up the largest segment of minority children who come into contact with the juvenile

7. Suman Kakar, *Understanding the Causes of Disproportionate Minority Contact: Results of Focus Group Discussions*, 34 J. CRIM. JUST. 369, 370 (2006).

8. Juvenile Delinquency and Prevention Act, 42 U.S.C. §§ 5601–5785 (2010).

9. See JJDP A Reauthorization, CTR. FOR CHILDREN’S LAW & POLICY, http://www.cclp.org/JJDP A_reauthorization.php (last visited Jan. 4, 2011).

10. See Kakar, *supra* note 7.

11. See Eileen Poe-Yamagata & Michael A. Jones, *And Justice for Some*, 8 KY. CHILD. RTS. J. 22, 28 (2000). These statistics have unfortunately persisted, as noted in a study by the National Council on Crime and Delinquency. See NAT’L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 3 (Jan. 2007), available at http://www.nccdcrc.org/nccd/pubs/2007jan_justice_for_some.pdf (stating that, from 2002 to 2004, while Black children made up 16% of all youth, they constituted 28% of juvenile arrests, 37% of detained youth, 34% of youth formally processed in court, and 58% of youth admitted to state adult prison).

12. See Kakar, *supra* note 7.

13. See Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 412 (1996).

justice system,¹⁴ the term “minority” also includes Native Americans, Asian Americans and Pacific Islanders. For over two decades, minority children have been overrepresented at almost every level in the juvenile justice system.¹⁵ Additionally, at each level in the system, overrepresentation generally increases.¹⁶

DMC is increasing each year, and that growing disparity is particularly evident with respect to Black children. In the 1990s, studies tended to show that Black children were only overrepresented at some stages in the juvenile justice system: the initial recommendation for court referral, detention, the actual court referral and incarceration or transfer to adult court.¹⁷ However, recent statistics indicate that the number of delinquency cases involving Black children had increased by 100% by 2007.¹⁸ While Black children made up 16% of the population in 2007, they were involved in 33% of the delinquency cases that year.¹⁹ Children who identify as Hispanic/Latino are also prime examples of the growth in DMC. From 1990 to 2005, the number of people identifying as Hispanic/Latino in prison grew by 43%.²⁰ It is difficult to find similar statistics that isolate factors such as youth imprisonment. As Professor Alex Piquero has noted, juvenile justice statistics may not even begin to capture the disproportionately large number of Hispanic children in contact with the juvenile justice system, since those children are often coded as “White” in data systems.²¹

Though the statistics on minority overrepresentation may be unclear and incomplete, the outcomes that minority children face when they come into contact with the juvenile justice system are certain. Once a child is found to be delinquent for the first time, that designation is held against him in the future. Sociological research indicates that youths with prior criminal records are perceived by probation officers as more

14. See *The Juvenile Justice and Delinquency Prevention Act (JDDPA) Reauthorization: Racial and Ethnic Disparities in the Juvenile Justice System: Hearing on S. 678 Before Senate Comm. on the Judiciary*, 111th Cong. 2 (2007) [hereinafter *Miranda*] (testimony of Richard Miranda, Chief of Police, Tucson, Ariz.); ACT 4 JUVENILE JUSTICE, FACT SHEET: DISPROPORTIONATE MINORITY CONTACT (DMC) (2009), http://www.act4jj.org/media/factsheets/factsheet_33.pdf (last visited Jan. 4, 2011).

15. See ACT 4 JUVENILE JUSTICE, *supra* note 6, at 2.

16. See NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 11 (showing that, for example, Black youth make up 28% of the juvenile justice system population at the arrest stage, 38% of the population in residential placement, and 58% of the population admitted to state adult prison).

17. See Bishop & Frazier, *supra* note 13, at 400.

18. See CHARLES PUZZANCHERRA ET AL., JUVENILE COURT STATISTICS: 2006–2007, 18–19 (2010), <http://www.ncjservehttp.org/ncjjwebsite/pdf/jcsreports/jcs2007.pdf>.

19. See *id.*

20. See Alex R. Piquero, *Disproportionate Minority Contact*, 18 THE FUTURE OF CHILD. 59, 63 (2008).

21. *Id.* at 69.

"chronically delinquent" with a high risk of recidivism.²² In addition, a growing number of state juvenile justice systems use risk assessment instruments such as structured decision-making tools that involve the evaluation of prior criminal acts to make intake, case processing, and sentencing decisions.²³ Aside from the direct effects that minority children face in the juvenile justice system, contact with the system leads to negative consequences in the areas of "education, labor force participation, voting, and family formation" as well.²⁴ Legal scholars and practitioners alike have realized that formerly incarcerated adults, who come primarily from minority communities, face immense damage to their social networks, their understanding of social norms and their ability to engage as citizens when they reenter society.²⁵ One must recognize, then, how difficult it is for a *child* to develop in a healthy manner after contact with the criminal justice system so early and often in his or her life.

C. Defending Disproportionate Minority Contact

A sociological study conducted in 1996 elucidated why some stakeholders in the juvenile justice system believe that DMC is an unfortunate but irreversible by-product of the juvenile justice system. Scholar Donna Bishop and her colleagues conducted focus group discussions with judges, lawyers, social workers, and other decision makers in the juvenile justice system and asked why the participants thought DMC was so prevalent. One judge stated that minority children tended to come from disadvantaged backgrounds and therefore had to be adjudicated in order to receive services at the State's expense.²⁶ Other decision makers said that minority children often had no family support and consequently needed State

22. See George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 562-67 (1998).

23. See Craig S. Schwalbe, *A Meta-Analysis of Juvenile Justice Risk Assessment Instruments: Predictive Validity By Gender*, 35 CRIM. JUST. & BEHAV. 1367, 1367 (2008) (stating that over 86% of states currently use risk assessment instruments in juvenile justice decision making, compared to 33% of states in the 1990s); Jeffrey J. Shook & Rosemary C. Sarri, *Structured Decision Making in Juvenile Justice: Judges' and Probation Officers' Perception and Use*, 29 CHILD & YOUTH SERV. REV. 1335, 1336, 1338 (2007) (describing the factors considered in structured decision-making tools and the purpose of such instruments in the juvenile justice system).

24. See Piquero, *supra* note 20, at 68.

25. See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1276 (2004); *Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated: Hearing Before the H. Judiciary Subcomm. on Crime, Terrorism and Homeland Security*, 111th Cong. 1 (June 9, 2010) (statement of Marc Mauer, Executive Director, The Sentencing Project).

26. See Bishop & Frazier, *supra* note 13, at 409.

supervision to supplant the lack of parental supervision.²⁷ However, Bishop stated in her study that “[w]hat may begin with good intentions at an earlier stage ultimately becomes a self-fulfilling prophecy.”²⁸ While their defensive explanations may comfort decision makers as they perpetuate increasingly disproportionate minority contact, other alternatives exist before a minority child is adjudicated and becomes a ward of the State. These alternatives are already being pursued by state governments and private organizations.

II. STATE AND PRIVATE EFFORTS TO COMBAT DMC

Both state governments and private organizations (non-profit or otherwise) have worked on initiatives to reduce DMC, sometimes in tandem. It is necessary to take a closer look at these efforts in order to identify the holes in advocacy that a reformed federal initiative would help to fill.

A. State Efforts

The JJDPa mandates that states that receive federal funding to work toward juvenile justice improvement goals comply with the legislation’s mandate to reduce DMC, as discussed in Part III(A) *infra*.²⁹ Because DMC is considered a “core” requirement, it is tied to 20% of the funding states may receive. As of 2001, most states were participating in the Formula Grant Program and reported they were implementing strategies to reduce DMC. New Hampshire and Rhode Island did not provide enough information, and thus were under a “drawdown restriction” on their grant funding, and South Dakota and Wyoming chose not to participate in the

27. See *id.*

28. See *id.*

29. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, OJJDP INFOCUS: DISPROPORTIONATE MINORITY CONTACT 2 (2009), <http://www.ncjrs.gov/pdffiles1/ojjdp/228306.pdf> (stating that the Office of Juvenile Justice and Delinquency Prevention requires states receiving Formula Fund Grants to report their progress on reducing disproportionate minority contact through identification, assessment, intervention and monitoring stages); Michael J. Leiber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issue*, 48 CRIME & DELINQ. 1, 4 (2002) (explaining that states applying for those formula grants must indicate their progress on reducing disproportionate minority contact in regards to all four stages).

Formula Grant Program.³⁰ This year, data indicates that all fifty states plus six U.S. territories are participating in the Formula Grant Program.³¹

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) periodically publishes an official report on the details of state compliance and reported particularly dismal results in its 2002 publication. Only thirty participating states used community prevention and diversion programs to reduce DMC, and only twenty states implemented cultural sensitivity programs³²—both strategies that have been found effective by nongovernmental organizations and researchers.³³ Only seven states had begun to use standardized screening tools at various stages in the juvenile justice system, and appallingly, only twenty-one states had established DMC subcommittees as part of their JJDP State Advisory Groups.³⁴ Though DMC is a “core” requirement in the JJDP, it seemed that most states were not making it a substantial priority.

The most recent OJJDP publication on DMC, though not a full compliance report, was published in 2009. It indicates that, while most states have made progress on data collection (part of the assessment stage), states have made otherwise mediocre strides in the seven years since the 2002 report.³⁵ The number of states reporting the implementation of cultural competence programs seems to have decreased, from twenty in 2002 to seventeen in 2009.³⁶ Additionally, only ten more states have instituted the use of standardized screening tools, bringing the total number to nineteen states, and only thirty-seven states had DMC subcommittees, compared to the twenty-one in 2002.³⁷

While the 2009 publication admittedly reports some improvement among states, there has been a lack of unity and standardization with respect to the manner in which states have been complying with the DMC

30. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONTACT: 2002 UPDATE 3 (2004), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/201240.pdf>.

31. See OJJDP FY 2010 Awards-By Solicitation and State, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, <http://www.ojjdp.gov/funding/fy10awards.html> (last visited Jan. 4, 2011) (follow “Title II Formula Grant Program” hyperlink).

32. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 30, at 14.

33. See, e.g., ACT 4 JUVENILE JUSTICE, A FAIR JUVENILE JUSTICE SYSTEM: THE IMPORTANCE OF LINGUISTIC AND CULTURAL COMPETENCY (2007), http://www.act4jj.org/media/factsheets/factsheet_13.pdf.

34. The JJDP mandates that each state requesting federal funding under the statute establish a State Advisory Group to advise the designated state agency on its juvenile justice plan and grant applications, as well as provide recommendations to the state’s executive and legislative branches concerning state compliance with federal mandates. 42 U.S.C. § 5633(a)(3) (2010).

35. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 29.

36. *Id.*

37. *Id.*

mandate.³⁸ At the assessment and identification stages, states' efforts are "fraught with problems" relating to data collection and analysis.³⁹ No standard for evaluation is consistent across all of the states reviewed, and many states do not even focus on specific racial groups when conducting data review (i.e. coding children as White versus non-White, or Hispanic versus non-Hispanic), which has led to an inability to collect data about all possible racial groups that could be affected by DMC.⁴⁰ Aside from a lack of incentive to pursue unified assessment and identification efforts, states' failure to standardize their data collection and analysis strategies may have been influenced by political worries—namely, that states did not want to make a substantial finding of DMC because they would be "perceived as acting in ways . . . that result in disadvantage for minorities."⁴¹

To conclude its 2002 report on states' DMC reduction compliance, OJJDP noted that, despite their progress, states faced lingering challenges and needed to address them all in order to achieve a reduction in DMC. OJJDP advised states to identify what was causing DMC in their communities, since at least eighteen states had not done so yet; implement data systems that were consistent and reliable, because those systems posed a severe obstacle to DMC reduction; evaluate DMC efforts in their jurisdiction in an ongoing manner instead of focusing only on delinquency prevention and intervention; and hire state-level DMC coordinators and subcommittees to oversee DMC efforts.⁴² While these suggestions were sincere, OJJDP left states with little incentive to pursue these goals. States received their formula grant funding whether or not they reached these objectives, as long as they "addressed" DMC in their state plans.

B. Private Efforts

Although some states have achieved successful DMC reduction practices by actually meeting the challenges that the OJJDP cited head-on,⁴³ nongovernmental organizations have devised more successful

38. Standardized screening tools are important to avoid race effects in the decision-making stages of the juvenile justice system. See, e.g., Leiber, *supra* note 29, at 12–13 (describing how perceptions of race affect several stages of state juvenile justice systems). Additionally, organizations have noted that the collection of data based on standardized descriptors of race and ethnicity is necessary to build appropriate, culture-specific services for youth. See, e.g., ACT 4 JUVENILE JUSTICE, *supra* note 6 at 3.

39. Leiber, *supra* note 29, at 15.

40. *Id.* at 14–15.

41. *Id.* at 16.

42. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 30, at 16–17.

43. See Emily R. Cabaniss et al., *Reducing Disproportionate Minority Contact in the Juvenile Justice System: Promising Practices*, 12 AGGRESSION & VIOLENT BEHAV. 393, 395 (2007) (listing successful practices divided into six common categories); ACT 4 JUVENILE JUSTICE,

strategies. They have developed powerful tools and initiatives that can be used in partnership with federally funded state programs to reduce DMC. Three of these initiatives are the Community Justice Network for Youth, the W. Haywood Burns Institute's site-specific DMC reduction projects, and the Building Blocks for Youth Initiative.

The Community Justice Network for Youth (CJNY) is a project of the W. Haywood Burns Institute (the Burns Institute), a non-profit organization based in California and specifically geared toward DMC reduction.⁴⁴ CJNY brings together stakeholders in the juvenile justice systems of twenty-one states to create a free-of-charge support network for grassroots organizations working on juvenile justice reform. With a specific focus on improving outcomes for poor children and children of color, CJNY provides technical assistance, strategy support, and regular conferences to its members. It also encourages "Peer-to-Peer Exchanges" between member organizations⁴⁵ so each group can capitalize on the others' best practices in DMC reduction. CJNY attempts to create a network of support so DMC reduction can be achieved at a more efficient pace across the nation. An added benefit of this strategy, aside from efficiency, is that states can share best practices, which will yield a more unified approach to DMC reduction.

The Burns Institute also concentrates its advocacy at particular sites in order to ensure that projects that reduce DMC succeed. Consultants from the Burns Institute have worked in over forty jurisdictions in the United States and currently have projects in Arizona, California, New Jersey, New York, Washington, Louisiana and Virginia. Through these partnerships, local organizations benefit from the institutional knowledge that the Burns Institute has accumulated by becoming an expert in the field of DMC reduction, and also receive additional funding from the Burns Institute to supplement what may be an inadequate amount of federal funding. One of the projects that the Burns Institute has implemented at many project sites is the Juvenile Detention Alternatives Initiative (JDAI). Through the JDAI, those sites have seen substantial reductions in DMC. The Burns Institute, in recognizing that racial and ethnic disparities must be examined at every stage of the juvenile justice system, developed a comprehensive checklist that each site uses to improve its accountability and effectiveness.⁴⁶ JDAI has been described as one of three major

supra note 14 (describing successes in Illinois, Texas, Pennsylvania, California, and Maryland where a focus on "data-driven strategies" resulted in commendable DMC reduction).

44. See CJNY, W. HAYWOOD BURNS INST., <http://www.burnsinstitute.org/article.php?id=65> (last visited Jan. 4, 2011).

45. See *Activities*, CMTY. JUSTICE NETWORK FOR YOUTH, http://www.cjny.org/index.php?option=com_content&view=article&id=27&Itemid=6 (last visited Jan. 4, 2011).

46. See BUILDING BLOCKS FOR YOUTH INITIATIVE, NO TURNING BACK: PROMISING APPROACHES TO REDUCING RACIAL AND ETHNIC DISPARITIES AFFECTING YOUTH OF COLOR

resources developed between 1994 and 2009 that has helped practitioners determine how to best work with children in their juvenile justice system facilities.⁴⁷

The Building Blocks for Youth Initiative (BBYI), which operated from 1998 to 2005, was also a coalition of public and private organizations. It advanced DMC reduction by focusing on data collection and disseminating the research and advocacy tools from such data to member organizations and the public.⁴⁸ BBYI focused on building more educated constituencies to support juvenile justice reform by reporting on current best practices in DMC reduction and sharing those practices in regular reports.⁴⁹

Despite the fact that these umbrella organizations attempt to bring local organizations together, provide both financial and strategic support to them, and educate them about ongoing practices, membership is purely voluntary. Thus, many local organizations in less progressive states are not receiving the immense level of support received by members of these umbrella organizations. An additional obstacle is that these coalitions have limited human resources. All three organizations discussed above have small staffs and are consequently limited in their advocacy efforts. Though the networks that have arisen over the past ten years to combat DMC are impressive and heartening, it is likely that a stronger federal initiative to reduce DMC would expand those networks greatly, while providing much needed funding to build capacity and spread best practices to all fifty states.⁵⁰

III. DMC'S INADEQUATE PRESENCE IN THE JJDPa AND THE REAUTHORIZATION BILL

As the JJDPa currently stands, DMC reduction plays an extremely weak role. The JJDPa was enacted in 1974 and has been reauthorized several times since then, though the importance of DMC reduction in the legislation has changed very little.⁵¹ Unfortunately, the JJDPa has not

IN THE JUSTICE SYSTEM app. 1 (2005), available at http://www.cclp.org/documents/BBY/ntb_fullreport.pdf.

47. Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y. 483, 510–11 (2009).

48. See *Building Blocks for Youth*, CTR. FOR CHILDREN'S LAW & POLICY, http://www.cclp.org/building_blocks.php (last visited Jan. 4, 2011).

49. See, e.g., *id.*

50. See Soler et al., *supra* note 47, at 541 (urging federal entities to provide technical assistance and training services to states and localities to support ongoing efforts to reduce racial disparities).

51. See *A Disproportionate Minority Contact (DMC) Chronology: 1988 to Date*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, <http://www.ojjdp.gov/dmc/chronology.html> (last visited Jan. 4, 2011) (noting that the most recent JJDPa reauthorization in 2002 led to an expansion of disproportionate minority "confinement" to disproportionate minority "contact").

been reauthorized since 2002, and although Congress passed continuing resolutions to maintain the JJDP's status while it was considering reauthorization legislation, authority for the legislation officially expired in 2007.⁵² Though Congress has approved reauthorization legislation and Senate and House bills have reached subcommittees, critics complain that the reauthorization is years overdue.⁵³ Activists have launched letter-writing campaigns and held meetings with Congressmen to push the reauthorization bills through Congress.⁵⁴

The current Senate JJDP reauthorization bill, Senate Bill 678, is now in the hands of the Senate Judiciary Committee while it awaits further discussion in Congress.⁵⁵ Senators Dick Durbin (D-IL), Herb Kohl (D-WI), Patrick Leahy (D-VT), and former Senator Arlen Specter (D-PA) introduced the bill in 2009. After some changes to the legislation, the four senators reported the amended bill to Senate on December 17, 2009. The bill has been with the Senate Judiciary Committee ever since that time, during which Senator Leahy filed the majority view in Senate Report 111-280 on August 5, 2010, and Senators Tom Coburn (R-OK), Jon Kyl (R-AZ) and Jeff Sessions (R-AL) filed minority views in that same report.⁵⁶ Currently, the bill awaits a position on the 112th Congress' agenda, and similar reauthorization legislation has been introduced in the House of Representatives.⁵⁷

Before and during the period when the Senate was putting together Senate Report 111-280, various individuals and organizations were calling loudly for DMC to take a more pronounced role in the JJDP. They lamented that the vague references to DMC in the JJDP had not been

52. See, *Congress Project*, CTR. FOR CHILDREN'S LAW & POLICY http://www.cclp.org/congress_project.php (last updated March 10, 2011).

53. Alexandra Cox, *Defending Juvenile Justice?*, THE HUFFINGTON POST (Oct. 20, 2010, 3:30 PM), http://www.huffingtonpost.com/alexandra-cox/defending-juvenile-justice_b_769418.html.

54. See, e.g., *Letter: Tell the Senate to Reauthorize Protections for Juveniles in Detention*, W. HAYWOOD BURNS INST., <http://www.burnsinstitute.org/article.php?id=189> (last visited Jan. 4, 2011); ACT 4 JUVENILE JUSTICE, <http://www.act4jj.org/> (last visited Jan. 4, 2011).

55. *Bill Summary and Status, 111th Congress (2009-2010), S. 678*, LIBRARY OF CONG., <http://www.thomas.gov/cgi-bin/bdquery/z?d111:SN00678:@@X> (last visited Apr. 22, 2011).

56. See S. REP. NO. 111-280 (2010). The minority report's main assertion was that the Office of Juvenile Justice and Delinquency Prevention, a product of the JJDP, has been and would continue appropriating and allocating funds incorrectly because of the language of the legislation. The minority view was that reauthorization would simply increase the flow of money into OJJDP without a reevaluation of whether it has been fiscally responsible. Additionally, the minority claimed that juvenile justice is the concern of states and not of the federal government. Therefore, the federal government should pay only half of the grant money to each state grantee, with each state matching its respective grant amounts. *Id.* at 18.

57. See H.R. 6029, 111th Cong. (2010), available at <http://www.thomas.gov/cgi-bin/bdquery/z?d111:h.r.06029> (last visited Jan. 4, 2011).

enough to change the vast number of minority children in contact with the juvenile justice system, and they urged Congress to specify in the legislation *how* states should approach the DMC core requirement in order to effectuate DMC reduction across the nation.⁵⁸

The following analysis shows that, not only was DMC nearly non-existent in the 2002 JJDPa legislation, but it is still barely present in the Senate reauthorization bill. Hardly any section of the bill alleviates the concerns that individuals and organizations have expressed regarding the role of DMC. This is cause for concern and should prompt a stronger call for action to drastically change the role of DMC in the JJDPa.

A. DMC in the Current JJDPa

The current JJDPa, as reauthorized in 2002, only requires that states “address” DMC.⁵⁹ After the 1992 amendments to the legislation, DMC became a “core requirement;” states had to demonstrate their ability to reduce DMC in order to receive JJDPa grant funding.⁶⁰ The requirement to “address” DMC exists in the section of the legislation discussing the Formula Grant Program.⁶¹

The initial JJDPa also authorized the creation of the Office of Juvenile Justice and Delinquency Prevention (OJJDP).⁶² OJJDP has made several publications available, including a Technical Assistance Manual, which is available for states to use in approaching the DMC requirement.⁶³ However, the legislation does not mandate that states utilize OJJDP’s Technical Assistance Manual to guide their DMC activities, and no data seems to exist that shows how many states use this assistance. Furthermore, the Technical Assistance Manual, as revised in 2009, contains 389 pages, which could be a daunting and dense read for state decision makers. The federal government has provided no incentive for states or their advisory groups to reference this vast expanse of information when approaching DMC reduction schemes. Thus, states may “address” DMC to as little or to as great of an extent as they wish.

As stated above, the incentive system that the JJDPa does put into place to encourage states to “address” DMC is the Formula Grant Program. Formula grants are initially awarded based on each state’s

58. See, e.g., Miranda, *supra* note 14; Belton, *supra* note †; CTR. FOR CHILDREN’S LAW & POLICY, *supra* note 9; NAACP, RESOLUTIONS 55 (Fall 2008).

59. See 42 U.S.C. § 5633(a)(22) (2010); ACT 4 JUVENILE JUSTICE, *supra* note 14.

60. See Cabaniss et al., *supra* note 43, at 394.

61. See 42 U.S.C. § 5633; OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 42.

62. 42 U.S.C. § 5611.

63. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL (4th ed. 2009), available at http://www.ncjrs.gov/hnml/ojjdp/dmc_ta_manual/dmcfull.pdf.

proportionate population of youth under eighteen years old. If a state fails to indicate how they are addressing or will address the DMC core requirement (or any of the other core requirements),⁶⁴ despite good faith efforts, that state's formula grant for the next fiscal year is reduced by 20% for each requirement not met.⁶⁵ Additionally, unless the state has a waiver from OJJDP, it must agree to use half of the next fiscal year's allocations to increase compliance with the unmet core requirement. The Formula Grant Program theoretically seeks to put no money to waste. If a state is unwilling to participate in or is ineligible for the Formula Grant Program, OJJDP will make the allocation available to local public and private organizations in order to help the state's stakeholders achieve compliance with the core requirements.

The state entity that is ostensibly charged with responsibility to disburse OJJDP's allocation each year is the State Advisory Group (SAG).⁶⁶ Each State Advisory Group is comprised of fifteen to thirty-three individuals who advise the state agency group receiving OJJDP allocations regarding the entities to which the state should distribute allocations.⁶⁷ While the legislation contemplates an ongoing role for the SAG in that it shall submit "at least annually" reports to the state legislative and executive branches, and it shall "contact and seek regular input from juveniles" within its jurisdiction, the JJDPA does not give the SAG a supervisory or monitoring role over entities receiving funding. The SAG "may . . . review progress and accomplishments of projects funded under the state plan." Consequently, states have no incentive from either federal or state watchdog entities to ensure that the money they receive and subsequently allocate to other organizations is used effectively to satisfy the JJDPA's core requirements.

As of the most recent OJJDP official update on state activities in relation to the JJDPA, forty-eight states, five territories, and the District of Columbia were participating in the Formula Grant Program.⁶⁸ However, other data suggests that most states are not in full compliance with the core requirements.⁶⁹ States might not be in compliance because they have

64. The other core requirements are that states should deinstitutionalize status offenders, restrict juveniles from being housed in adult jails, and separate children from the sight and sound of adults if they must be kept in adult jails. See 42 U.S.C. § 5601-5785; CTR. FOR CHILDREN'S LAW & POLICY, *supra* note 9.

65. Though the 1992 reauthorization of the JJDPA allowed for a 25% reduction in grant money for noncompliance, the 2002 reauthorization reduced the penalty to 20%. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 29.

66. 42 U.S.C. § 5633(a)(3).

67. See *id.*

68. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 30, at 10-11.

69. Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice Delinquency and Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. SOC. JUST. 555, 564 (2009).

too little incentive to create effective programs or to monitor the work that their federal allocations are funding. Thus, the hope has been that the reauthorization bill will provide additional methods to ensure that states comply with the DMC requirement.

B. DMC in S. 678, the Reauthorization Bill of 2009

S. 678, the JJDP A reauthorization bill, does make some progress in placing a greater emphasis on DMC reduction, but ultimately this progress is inadequate. The bill creates a role for DMC in a new section concerning the Formula Grant Program. It states that, in order to receive formula grant funding, each state shall include in its plan “policy, practice, and system improvement strategies . . . to identify and reduce racial and ethnic disparities among youth who come into contact with the juvenile justice system . . . [.]”⁷⁰

However, the methods that the bill provides as a way to achieve identification and reduction of disparities are hardly groundbreaking. The bill calls for the establishment of “coordinating bodies” to oversee this process, the identification of decision points at which disparate contact occurs, the development of data systems to analyze those disparities, and public reporting on an annual basis.⁷¹ Since DMC is a core requirement under the original JJDP A, it is the responsibility of State Advisory Groups to address the issue already. While codifying the other three methods listed above is indeed a strong step forward for Congress, most states are already past the identification and evaluation stages and are struggling with intervention.⁷² Additionally, OJJDP has already identified nine contact points in its plan to reduce DMC.⁷³ Thus, while the bill’s new section discussing DMC moves the legislation forward, it does not move the JJDP A far enough.

Additionally, the bill does little to improve the funding scheme that would incentivize states to pursue DMC reduction. As for addressing noncompliance with the core requirements, the bill only adds that states that do not comply with their responsibility to address DMC and other requirements should submit a report to OJJDP’s Administrator describing why noncompliance occurred and how it will be remedied.⁷⁴ This addition to the legislation might encourage some states to rethink their strategies. However, those states that do not consider DMC a priority still have the option of simply not submitting a state plan, after which OJJDP

70. S. 678, 111th Cong. § 5633(a)(15) (2009).

71. *See id.* § 5633(a)(15)(A)-(E).

72. *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 30, at 10–11.

73. *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 29, at 2.

74. S. 678, 111th Cong. § 5633(c)(3) (2009).

redistributes their allocation to public and private organizations. This result could have occurred through the original JJDPa, too, so it appears that the reporting requirement adds little to nothing to the incentives because states have to comply.

Further, the bill provides another type of reallocation—not to public and private organizations, but *back to the state itself*. If the reporting requirement above added little to nothing to the program, this new section in the bill provides even less of an incentive to states—perhaps even a disincentive, since states can put less effort into compliance with the meager DMC requirement. Under the bill's section 5632(c), if a state is not in compliance, OJJDP can still effectively give the money to the state by creating conditional "improvement" grants. The grants are conditional because the state has to do two things in order to receive the funding: detail specific steps that will aid its compliance with core requirements, and report its progress to the OJJDP Administrator twice per year.⁷⁵ This is not an effective penalty for a state, since the state essentially still receives money even though it has demonstrated an inability or unwillingness to comply with core requirements. In this case, it seems that the bill is actually reversing the progress made in the JJDPa.

IV. REFORMING THE JJDPa AND REAUTHORIZATION BILL: CREATING A SUPPLEMENTAL DMC ACT

Both the JJDPa and the reauthorization bill fail to address DMC in a manner that would push states to take steps that would actually create change. The JJDPa has no prominent role for DMC given the severity of DMC in the nation today. Furthermore, the legislation does not clearly guide state legislative and executive branches as to how they should approach the DMC issue. While the reauthorization bill is an improvement in that it devotes one section to addressing DMC further, it is still inadequate because the funding incentives it creates for states are weak. Additionally, it still fails to provide sufficient guidance as to what initiatives states could undertake in order to reduce DMC successfully.

Several hearings have been held since 2002 to allow the public to comment on the reauthorization bill, and many of the presenters have spoken about the importance of adding more extensive legislation to address DMC. In 2007, Richard Miranda, Chief of Police in Tucson, AZ, said during a Senate Judiciary Committee hearing that the requirements within the JJDPa are "vague."⁷⁶ Chief Miranda pointed out that, "[c]urrently, the JJDPa only requires that states 'address' DMC. It does not require oversight of DMC reduction efforts, mapping of critical decision points, accurate collection of relevant data, development of work plans

75. *Id.* § 5632(c)(2).

76. See Miranda, *supra* note 14, at 4.

with measurable objectives, or regular monitoring, evaluation and reporting.”⁷⁷ He noted that the effect of the JJDPa’s lack of guidance as to DMC is that local and state officials are “without a clear mandate or guidance for reducing racial and ethnic disparities.”⁷⁸

In 2010, Deputy Director of Juvenile Corrections Michael Belton from Ramsey County, MN, stressed the symbolic importance of a greater emphasis on DMC in the JJDPa, which is as important as the technical guidance that such reform would provide. Belton stated that “[b]y strengthening the core requirement of the JJDPa regarding disproportionality in the juvenile justice system, you would be making a statement that you recognize the intentionality necessary to reduce DMC and racial and ethnic disparities in the system and are make [sic] this work a national priority.”⁷⁹

Whether local and state officials wish to emphasize DMC in the JJDPa because they seek technical guidance or because they would like DMC reduction to be a national goal, it is certain that these officials and other stakeholders want more than what was in the initial JJDPa. They would almost certainly also be dissatisfied with the reauthorization bill because it does not provide technical guidance and hardly stresses the importance of DMC as a national goal. Indeed, in the new section regarding minority disproportionality, the term “disproportionate minority contact” is not even used outright. This may demonstrate that Congress is unwilling to take a progressive stand and align itself with the large number of organizations who have coalesced around the importance of that term in the JJDPa reauthorization bill.⁸⁰

The following reform strategy would revamp the JJDPa so that it would meet the needs of the individuals, government actors and private organizations who are calling for more concrete guidance and national unity to reduce DMC in the juvenile justice system. Congress should draft a supplemental act to the JJDPa that addresses DMC in the same way that the Children’s Justice Act (CJA) addresses children in the child welfare system, using the reauthorization bill’s new section on programs to address substance abuse and mental health issues as a prototype. As explained below, the act will be most effective if it is a stand-alone piece of legislation that supplements the underlying purposes of the JJDPa.

77. *Id.*

78. *Id.*

79. See Belton, *supra* note †, at 9.

80. See, e.g. ACT 4 JUVENILE JUSTICE, *supra* note 6, at 5–14; ACT 4 JUVENILE JUSTICE, JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT RECOMMENDATIONS AND BACKGROUND (2008), http://www.act4jj.org/media/factsheets/factsheet_56.pdf (stating, in a list of eight recommendations, that Congress should strengthen the Disproportionate Minority Contact core protection).

A. The Children's Justice Act and JJDPA Reauthorization Bill as Models

1. The Children's Justice Act

The CJA⁸¹ provides a model from which Congress can create new legislation to address DMC because of the incentive-building structure the CJA creates for states that wish to receive federal funds. Congress initially enacted the Child Abuse Prevention and Treatment Act (CAPTA) in 1974, and the legislation has been amended several times since then.⁸² In 1986, Congress amended CAPTA by adding the CJA. The CJA was a new grant program designed to encourage states to aid abused and neglected children in the justice system in more innovative and effective ways. The CJA's purpose was to provide "a much needed Federal financial incentive to the States to encourage them to improve their response to child abuse victims."⁸³ The CJA sought to empower states to create their own reforms, instead of allowing the federal government to impose universal reforms upon the states, because "States are the best judges of what reforms or changes are needed within their boundaries."⁸⁴

Through the CJA, the Administration for Children and Families within the U.S. Department of Health and Human Services (DHHS) has the power to distribute grants based on layered eligibility standards. Generally, "[s]tates must apply for the funds and meet certain eligibility requirements" in order to receive CJA funds.⁸⁵ The CJA funding is supplemental to development grants that states already receive through CAPTA.⁸⁶ In fact, eligibility for a CAPTA state grant is an eligibility requirement for states requesting CJA funds.⁸⁷ In addition to being eligible for the CAPTA development grant, states requesting CJA funds must establish and maintain a multidisciplinary task force to address issues related to children's justice. The task force has two duties: it must investigate and evaluate child abuse and neglect proceedings in the state, and it must make policy and training recommendations that would improve a variety of concerns within the abuse and neglect system. Lastly, in order to receive CJA assistance, the state must agree to submit an annual application with whatever information the Secretary of DHHS considers necessary,

81. 42 U.S.C. § 5106(c) (2010).

82. *Id.* §§ 5101–5119(c).

83. See 132 CONG. REC. S11617–04 (1986) (statement of Sen. Paula Hawkins).

84. See *id.*

85. See *Children's Justice Act*, ADMIN. FOR CHILDREN & FAMILIES (June 2008), http://www.acf.hhs.gov/programs/cb/programs_fund/state_tribal/justice_act.htm (last updated June 2008).

86. See 42 U.S.C. § 5106(a) (2010). States must meet certain eligibility requirements to receive the CAPTA development grants, as well.

87. *Id.* § 5106(b)(1).

and the state must submit an annual report to the Secretary detailing the expenditures made with CJA assistance.⁸⁸

The CJA's requirements do not stop once states receive their grant funds. The legislation creates a general rule that states should adopt their task force's policy and training recommendations before they may receive CJA assistance. The only exemptions from this general rule are if the state is adopting or is making progress toward adopting comparable recommendations.⁸⁹ Additionally, once states receive their CJA grant money, they are required to complete evaluations of the children's justice system and to provide policy and training recommendations at three-year intervals in order to remain eligible for the grant money.⁹⁰ This requirement is separate from the annual reports that states must report to the Secretary of DHHS, as discussed above.

The CJA grant money is different from CAPTA grant money in that it comes from the federal Crime Victims' Fund, which stores money that federal courts collect from convicted criminals.⁹¹ Since 2000, the Crime Victims' Fund has amassed approximately seventeen million dollars for the CJA to distribute among the eligible states, including the District of Columbia and various U.S. territories.⁹² Fifteen percent of the funds are retained by the Attorney General to distribute to Native American tribes.⁹³ The allocations are determined similarly to how CAPTA grants are calculated: a state receives a \$50,000 base grant, plus a dollar amount proportionate to the number of children under eighteen years old who are living in the state. This means that states receive allocations in estimated amounts ranging from \$53,000 to \$1.3 million.⁹⁴ In addition, any excess funds remaining out of the \$17 million (if some states do not meet the eligibility requirements) are distributed to the states on a *pro rata* share basis to be used in conformity with the statutory guidelines.

The CJA has improved the justice system for child victims of abuse and neglect by funding new programs focused on the field. The federal funding has led to the establishment of child advocacy law clinics⁹⁵ and

88. *Id.*

89. *Id.* § 5106(e).

90. *Id.* § 5106(d).

91. Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful?* 42 FAMILY L. Q. 481, 487 (2008).

92. See ADMIN. FOR CHILDREN & FAMILIES, *supra* note 85.

93. *Availability of Fiscal Year 2010 Children's Justice Act Grants to States Under the Child Abuse Prevention and Treatment Act*, ADMIN. FOR CHILDREN & FAMILIES (Mar. 30, 2010), http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2010/pi1003.htm.

94. See *id.*

95. See, e.g., Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J.L. REFORM. 1, 31 (1997).

Court Appointed Special Advocate programs,⁹⁶ programs that have spurred a renewed excitement for promoting the interests of children.

2. Substance Abuse and Mental Health in Reauthorization Bill

Congress made an interesting addition to the JJDPa in the Senate reauthorization bill: a section emphasizing the importance of helping children with substance abuse and mental health problems.⁹⁷ The section calls for incentive grants to be made for partnerships between state juvenile justice authorities and state mental health agencies in order to address issues that children with substance abuse or mental health problems face in the system. For example, states may receive grants to train decision makers on the importance of structured decision-making tools and how to use those screening and assessment tools to help juveniles with mental health and substance abuse problems.⁹⁸

The Senate Judiciary Committee detailed the reasons behind this new emphasis on substance abuse and mental health by quoting a letter to the editor of *The New York Times*, which stated that "children with psychiatric disorders were twice as likely to be involved in the criminal justice system as young adults than children with no disorders[.]" Citing only this authority, the Committee announced that it was "... providing new directives to States, together with new authorizations to implement these directives."⁹⁹

B. Application of CJA and Reauthorization Bill Models to Create New "DMC Act"

Congress should add a supplemental act—the "DMC Act" (DMCA)—to the JJDPa in order to address DMC specifically, just as the CJA was added to CAPTA to emphasize justice for children in abuse and neglect cases, using the incentive grants program proposed in the reauthorization bill's section on mental health and substance abuse programs.

1. Application of CJA Model

While the children affected by the JJDPa are considered perpetrators of crimes rather than victims, the same motivating purpose drives the JJDPa as it does CAPTA—to protect from injustice children who must go through a formal justice system. The CJA model should be adopted

96. See, e.g., Mary Libby Payne, *The Mississippi Judiciary Commission Revisited: Judicial Administration: An Idea Whose Time Has Come?* 14 MISS. C. L. REV. 413, 498–99 (1994).

97. S. 678, 111th Cong. § 271(b)(1)(C) (2009).

98. *Id.* § 271(b)(1)(D).

99. S. REP. NO. 111-280, at 4 (2010).

through a DMCA for three reasons: to provide states with a financial incentive to address DMC specifically, since the JJDP and reauthorization bill only vaguely address the DMC requirement; to create an accountability structure for state task forces working on DMC issues; and to create a set-aside fund solely to fund DMC initiatives.

First, neither the JJDP nor the reauthorization bill provides the strong incentive to create state task forces to address DMC. Modeling a DMCA after the CJA would mandate that each state actually create and maintain task forces that would play an affirmative role in effecting DMC policy change. The DMCA would focus solely on DMC reduction, and therefore states would have greater incentive to actually improve their work in the identification, evaluation, intervention and monitoring stages. Just as CJA funds are a supplement to CAPTA development grants, the DMCA funding would give states additional resources to finance DMC reduction programs.

Second, the DMCA would mirror the post-grant accountability requirements that the CJA requires, which would hopefully lead to more state action than what currently exists under the JJDP. The DMCA would require state task forces to both implement reform recommendations and to reevaluate the state system every three years. Additionally, the state task force would have to update OJJDP each year on the status of its ongoing projects. This requirement would make OJJDP's review of state compliance with DMC requirements much more frequent in comparison with the rate at which it compiles data now—every 5 years, since states are only required to update OJJDP on their compliance every three years.¹⁰⁰

Finally, the DMCA would set aside funds solely devoted to address DMC. In the current JJDP and the reauthorization bill, Congress has not designated a specific proportion of money to fund DMC initiatives. This designation is important because it ensures states are spending adequate funds on addressing the system-wide causes of DMC. It would be entirely appropriate to use portions of the Crime Victims Fund to pay for the DMCA. At the Senate Hearings regarding the CJA, Senator Hawkins noted that it was “appropriate that revenues derived from criminal activity will be used to finance States efforts to protect the rights of the victims of crime.”¹⁰¹ Thus, it would be appropriate to fund efforts to reduce DMC with the Crime Victims Fund since child abuse and neglect constitute a “key risk factor” for delinquency, according to several studies funded by

100. See *Publications*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, <http://www.ojjdp.gov/publications/PubResults.asp> (last visited Jan. 4, 2011) (displaying two Disproportionate Minority Contact Update publications from 1997 and 2002); 42 U.S.C. § 5633(a) (2010) (mandating that states must submit plans applicable to three-year periods).

101. See 132 CONG. REC. S11617-04 (1986) (statement of Sen. Paula Hawkins).

OJJDP.¹⁰² Because of this substantial correlation between child maltreatment and delinquency, many children in the juvenile justice system are likely to have also been victims of criminal child abuse cases. If Congress is unwilling to use the Crime Victims Fund as a financial support for the DMCA, it could set aside some of the appropriated funds set aside for JJDP formula grants—perhaps 25%, since DMC is one of four core requirements—in a fund to address DMC specifically.

Congress could also use the DMCA to encourage states to divert some of the money they spend on juvenile correctional facilities to their DMCA-funded programs. If more money were to fund the types of programs that the DMCA would encourage, then less money would be necessary to house children in juvenile detention and correctional facilities.¹⁰³ This state contribution could be part of a match system, in which each state would pledge to match a certain percentage (or all) of what the federal government pays to the state.

2. Application of Reauthorization Bill Model

The reauthorization bill does not explicitly authorize incentive block grants for DMC programs.¹⁰⁴ While the Committee claimed it was also putting a new emphasis on “reducing racial and ethnic disparities in the juvenile justice system” and cited persuasive authority for the proposition that disparities are a substantial problem in America, the Committee announced that it was merely “asking States to take concrete steps to reduce these disparities.”¹⁰⁵ The “concrete steps” that are mandated in the reauthorization bill are, as has already been noted, inadequate as incentive-building directives for states. The DMCA should include an incentive block grants program focusing on DMC such as that found in the reauthorization bill section on substance abuse and mental health. In fact,

102. Terence P. Thornberry et al., *The Causes and Correlates Studies: Findings and Policy Implications*, 9 JUVENILE JUSTICE 1 (2004), available at <http://www.ncjrs.gov/html/ojjdp/203555/jj2.html> (describing ongoing studies in Denver, Pittsburgh, and Rochester).

103. It is good economic policy to spend less money on incarcerating youth, especially nonviolent offenders, and to spend more money on community-based alternatives. See JUSTICE POLICY INST., *THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 2* (2009) available at http://www.justicepolicy.org/images/upload/09_05_REP_CostsOfConfinement_JJ_PS.pdf. States spend an average of \$5.7 billion per year on incarcerating youth. It costs approximately \$88,000 per year to incarcerate a single youth.

104. Cf. S. 678, 111th Cong. § 271(b)(1)(A) (2009) (allowing for incentive grants to be used broadly to “increase the use of evidence based or promising prevention and intervention programs”). Though DMC reduction strategies may fall under this incentive grant provision, it does not apply purely to DMC programs, and it only focuses on prevention and intervention, not the evaluation and monitoring needs that are also necessary to DMC reduction initiatives.

105. *Id.* (emphasis added).

addressing the DMC problem would probably encompass the children who would be affected by the substance abuse and mental health programs, making it a more effective program.

The new section for DMC incentive grants would both mirror the incentive funding system from the substance abuse/mental health addition to the reauthorization bill and add proposed strategies specific to DMC, as in § 21(b)(1)(D)-(E) of the reauthorization bill. States would receive funding to spend on programs similar to those proposed strategies instead of receiving funding to address DMC generally.

First, the incentive block grants program would encourage partnerships between states and local entities, and between states and private contractors, in order to come up with proposed programs eligible for incentive grants. The authorization of appropriations for this section would last for five years, as it does in the substance abuse section, and funds would be appropriated broadly — namely, “as may be necessary.”¹⁰⁶

Second, the grant program would include proposal ideas incorporating strategies that have proven successful through research and implementation by state and private organizations across the country. Though many models for DMC reduction have proven successful, the legislation would suggest that the state determine which practices are most appropriate within its boundaries. This is a point at which a productive state DMC task force, discussed *supra* in Part IV(B)(i), would be instrumental. The task force would function as a State Advisory Group specifically focused on DMC, instead of the weak DMC subcommittees that exist only in some states and mostly without full-time, state-level coordinators.¹⁰⁷ Such a task force would be necessary to first determine which strategies are appropriate for the state.

The legislation would encourage states to apply for incentive grants to cover more than one program, since research has shown that “[t]he ‘best practices’ concept is not necessarily a set of program models to be emulated” and that “[t]he average juvenile justice program reported in evaluation research has 5.5 service elements.”¹⁰⁸ Recent focus group research with juvenile justice system stakeholders shows that six factors lead to DMC: system, social, family/parental, education, individual, and economic.¹⁰⁹ The new legislation would suggest varied strategies addressing each of these factors to approach DMC from all possible angles. It would emphasize that strategies should be implemented at all nine decision

106. S. 678, § 5671(b).

107. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 29, at 3.

108. See James C. Howell & Mark W. Lipsey, *A Practical Approach to Evaluating and Improving Juvenile Justice Programs*, 55 JUV. & FAM. CT. J. 35, 42 (2004). However, Howell and Lipsey did specifically suggest that states use structured decision-making tools distributed by The National Council of Juvenile and Family Court Judges’ Juvenile Sanctions Center to help agencies and courts “more effectively manage their clients.” *Id.* at 39.

109. See Kakar, *supra* note 7, at 378.

points in the juvenile justice system, since that has been shown to be a critical factor behind DMC.

There is a multitude of research available to help Congress determine which strategies to propose to states in this new section. For example, Emily Cabaniss and colleagues have addressed specific categories of best practices after a study of several states' specific grassroots programs.¹¹⁰ The Act for Juvenile Justice coalition has articulated particular goals that must be met to reduce DMC, which could form the foundation of Congress' proposed strategies.¹¹¹ The Center for Children's Law and Policy has encouraged a four-pronged approach: states should develop oversight committees, plan data-driven approaches, set measurable objectives, and publicly report on progress.¹¹² Any or all of the above strategies would be useful to consider and perhaps incorporate into the new legislation.

C. The Importance of Stand-Alone DMC Legislation

New DMC legislation must stand on its own in a separate section of the JJDP. This stand-alone legislation would consolidate all of the solutions that could potentially reduce DMC into one statute, which would be easier for state and local agencies to follow.

Currently, the only clear guidance that exists to assist state and local agencies in implementing DMC reduction strategies is in the form of OJJDP publications. Those publications are becoming more specific and have admittedly been a large motivator behind the mass of recent research on DMC reduction,¹¹³ but have been fairly vague for the last twenty years. Moreover, the OJJDP has used a hands-off approach that allows federally funded organizations to decide whether or not they want to follow the guidance in the publications. State corrections agencies have publicly requested more clarity about DMC reduction strategies, and non-profit organizations have called for the same increase in guidance.¹¹⁴ The JJDP needs to be supplemented with a stand-alone act that would compile all

110. Cabaniss et al., *supra* note 43.

111. See ACT 4 JUVENILE JUSTICE, *supra* note 80, at 5–6.

112. See CTR. FOR CHILDREN'S LAW & POLICY, *supra* note 9.

113. See Piquero, *supra* note 20, at 67 (noting that federal efforts have largely encouraged research on the nature of disproportionate minority contact).

114. See, e.g., Belton, *supra* note †, at 8 (noting that vague requirements of JJDP are holding enforcement efforts back); CTR. FOR CHILDREN'S LAW & POLICY, *supra* note 9 (describing how JJDP reauthorization could include more specific directives to states); COALITION FOR JUVENILE JUSTICE, DISPROPORTIONATE MINORITY CONTACT FACTS AND RESOURCES 2, http://juvjustice.org/media/factsheets/factsheet_12.pdf (last visited Mar. 22, 2011) (stating that vague DMC legislation has led to "non-standard" DMC efforts by states).

legislation relevant to DMC such that these entities can have clear guidance on implementation strategies that is easy to identify and to follow.

This stand-alone legislation could be a “supplementary act” instead of an amendment, such that the provisions within the current JJDPa would not be “impair[ed],” but rather enhanced.¹¹⁵ The JJDPa would remain as it is currently written, perhaps with the changes suggested by the reauthorization bill, and the supplementary act would add particular findings, policies, definitions and incentive grant programs regarding DMC. Thus, it would take less time for legislators to institute the reforms suggested above, because they would not have to further amend the JJDPa itself.

CONCLUSION

It is urgent and timely that Congress reform the JJDPa now by enhancing the inadequate provisions within the reauthorization bill with a supplemental act to address DMC. The bill fails to resolve the concerns that stakeholders in the juvenile justice system have had since the last reauthorization—concerns that must be addressed in order to see real reductions in minority children’s contact with the system.¹¹⁶

Because this is not the first call to solve the inadequacies of the JJDPa, Congress should heed those other voices as well. For example, Patricia Arthur suggests that the valid court order exception for status offenders should be repealed such that those youth cannot be detained, because such detention is in direct conflict with the idea that status offenders are low security risks.¹¹⁷ Perry Moriearty suggests that attorneys begin making equal protection claims to hold the judiciary accountable and challenge the constitutionality of holding a disproportionate number

115. See NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 22:24 (Thomson/West, 7th ed. 2010).

116. In February, President Barack Obama’s administration proposed a new budget for juvenile justice. The budget proposal required consolidation of the JJDPa’s Formula Grant and Juvenile Accountability Block Grant programs into one funding stream that would compel states to compete for funding according to their compliance with the four core protections within the statute. See *Juvenile Justice in the President’s FY 2012 Budget Proposal*, COALITION FOR JUVENILE JUSTICE, 1, http://juvjustice.org/media/resources/public/resource_557.pdf. Fortunately, after an outcry from the juvenile justice advocacy community that such a proposal would weaken juvenile justice reform, the administration revised its proposal. See Benjamin Chambers, *Obama Administration Drops Controversial Juvenile Justice Funding Overhaul*, RECLAIMING FUTURES BLOG (Apr. 1, 2011), <http://blog.reclaimingfutures.org/juvenile-justice-system-Obama-administration-new-funding-plan-for-states>. However, while the administration’s new budget proposal returns money to the Formula Grants and Juvenile Accountability Block Grants programs, it makes no mention of an enhancement of the role of DMC in the JJDPa. See *id.* Therefore, the issues within this Note must still be addressed.

117. See Arthur & Waugh, *supra* note 69, at 556.

of minority youth in pretrial detention.¹¹⁸ These are both solutions that can be pursued alongside the reforms suggested in this Note. Further, this scholarship indicates that the academic world, in addition to state agencies and non-profit organizations, will continue advocating for creative approaches to improve the JJDP.

Additionally, President Barack Obama must take decisive steps toward appointing an OJJDP Chief Administrator. Though President Obama appointed an Acting Administrator in January 2009, he has yet to appoint a chief for OJJDP. Such an act would be both symbolic and functional: it would signify that the executive branch, in addition to Congress, is serious about reforming juvenile justice and reducing DMC, and it would allow OJJDP to move forward with long-term guidance and initiatives for which only a Chief Administrator could advocate.¹¹⁹ Indeed, the sweeping changes proposed in this Note require a strong leader for OJJDP.

It should be noted that the American public does not seem averse to changes to juvenile justice legislation and systems. A report by the Center for Children's Law and Policy indicates that public perceptions of youth delinquency support enhanced legislation to improve outcomes for children in the juvenile justice system.¹²⁰ More than half of the individuals polled believed that Black youth receive worse treatment than White youth who commit the same crime.¹²¹ Ninety percent of the individuals thought that most youth who commit crimes have the potential for change.¹²² These statistics and other data in the report suggest that the public is ready for Congress to pay more attention to the needs of children in the system and reevaluate its current approach to juvenile justice policy.¹²³

Lastly, the importance of DMC increases every year, as data indicates that the juvenile justice system is beginning to affect more children than simply those in the Black community. Those who are doubtful that DMC is a real problem should realize that more minority communities are beginning to experience overrepresentation—namely, the Latino and Asian communities who lose more of their children to the juvenile justice

118. See Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285 (2008).

119. See Cox, *supra* note 53.

120. See CTR. FOR CHILDREN'S LAW AND POLICY, POTENTIAL FOR CHANGE: PUBLIC ATTITUDES AND POLICY PREFERENCES FOR JUVENILE JUSTICE SYSTEMS REFORM (2007), <http://www.cclp.org/documents/JJDPAPotential%20for%20Change%20Attitudes%20for%20Reform.pdf>.

121. See *id.* at 9.

122. See *id.* at 3.

123. See *id.* at 2 (positing that Congress should "reconsider the wisdom of 'get-tough' policies" since the public supports a shift from such policies to "the principles on which [the juvenile justice system] was founded"—rehabilitation).

system each year. It is pivotal that Congress recognize the alarming rate at which minority overrepresentation is growing and attempt to halt such growth by implementing stronger federal laws to address DMC.

Congress should take immediate steps to reauthorize the JJDPa and develop a supplemental “DMC Act” to address DMC in accordance with this Note. It is highly commendable that the President, Congress, and the American public have attempted to take a stronger stand on education policy in recent months, but in order to attack holistically the obstacles that children from low-income minority communities face, America must take a stand on juvenile justice legislative reform, too. Now is the time to act on the most important civil rights issue of this generation and make the JJDPa’s reform and reauthorization a priority on Congress’s list of legislative reforms. America’s children have waited long enough.