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PROMOTING EQUITY WITH YOUTH DIVERSION

By Nila Bala and Emily Mooney

INTRODUCTION

The youth justice system in the United States is rightly shrinking.¹ And yet, the historic disproportionality between white youth and youth of color in the system remains. Indeed, when it comes to the arrest rate of youth of color relative to that of white youth, the gap has actually widened over time.² For this reason, more reform is needed to further limit youth involvement in the justice system overall and to ensure that those of all racial and ethnic backgrounds are held accountable in the most equitable manner possible.

For this reason, Congress closed 2018 with the reauthorization of the Juvenile Justice Delinquency Prevention Act

1. "Juvenile Arrest Rate Trends," Office of Juvenile Justice and Delinquency Prevention (OJJDP), Oct. 22, 2018. https://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05201.

2. Minority is used in this context by OJJDP to refer to youth who are not white. See "Racial and Ethnic Fairness: Relative rate of juvenile arrest rates, 1980-2017," OJJDP, Oct. 22, 2018. https://www.ojjdp.gov/ojstatbb/special_topics/qa11502.asp?qaDate=2017. See also, Jose Olivares, "Fewer Youths Incarcerated, But Gap Between Blacks and Whites Worsens," *NPR*, Sept. 27, 2017. <https://www.npr.org/2017/09/27/551864016/fewer-youths-incarcerated-but-gap-between-blacks-and-whites-worsens>.

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(JJJPA), a key piece of juvenile justice policy.³ One of its provisions guides states and localities to locate and address racial and ethnic disparities (RED) in the juvenile justice system,⁴ which according to the law, occur when: "Minority youth populations are involved at a decision point in the juvenile justice system at disproportionately higher rates than non-minority youth at that decision point."⁵

Too often, the issue of addressing racial disproportionality in the juvenile justice system has become a partisan issue. But, the problem should concern us all, as it can directly affect the rule of law and procedural justice, and can undermine the efficacy of the system's responses. Furthermore, disparities in how youth are treated at the beginning can compound into disparities further down the line, such as ultimate commitment to the juvenile justice system.⁶ And moreover, reforms to the juvenile justice system will not be meaningful unless we address the reasons youth of color are disproportionately involved in the system today and often face harsher outcomes.

While RED can occur at many decision points in the system, a useful place to focus our attention is at the point of diversion. As shown by developmental research, many youth who make poor decisions today will naturally grow out of these patterns

3. See H.R. 6964, "Juvenile Justice Reform Act of 2018," 115th Congress. <https://www.congress.gov/bill/115th-congress/house-bill/6964/text>.

4. The previous version of the Juvenile Delinquency and Prevention Act included a mandate to reduce Disproportionate Minority Contact (DMC), similar in concept to RED, at all points in the justice system. Research suggests that, in some localities, the DMC mandate did result in a reduction in disparities. See, e.g., *Ibid.*; and Ellen Donnelly, "The Disproportionate Minority Contact Mandate: An Examination of Its Impacts on Juvenile Justice Processing Outcomes (1997-2011)," *Criminal Justice Policy Review* 28:4 (2017), pp. 347-69. <https://journals.sagepub.com/doi/abs/10.1177/0887403415585139>.

5. In this context, minority is used to describe non-white youth. 34 U.S.C. §1133(a) (15)).

6. "Racial and Ethnic Fairness: Juvenile commitment rates by race/ethnicity, 1997-2017," OJJDP, April 23, 2019. https://www.ojjdp.gov/ojstatbb/special_topics/qa11803.asp?qaDate=2017.

as they age.⁷ Given this reality and the potential negative effects of system involvement,⁸ diversion from the juvenile justice system altogether can be an effective solution both to reduce juvenile system involvement overall and to promote racial and ethnic equity. Indeed, even those who have committed more “serious” offenses can benefit from diversion.⁹

Accordingly, the present study will first consider diversion and its overall goals, and how—when best practices are followed—it can be an intervention that supports individual dignity, limited government and the preservation of community. It will then address the need to promote racial and ethnic equity and identify a few causes of disparities at the point of diversion. And finally, it concludes with policy solutions that aim to promote equity and the proper use of diversion.

THE RATIONALE BEHIND DIVERSION

In the context of the juvenile justice system, the concept of “diversion” means that a youth is held accountable outside of the traditional court system and, if successful, he or she does not end up with a juvenile record or a period of incarceration. It can occur at various points throughout a youth’s interaction with the justice system, including prior to an arrest or adjudication. Ideally, diversion takes place as early as possible to avoid all downstream effects of system involvement. Diversion policies and programs can include warn and release, civil citations, service referrals and more formal diversion programs such as drug or truancy court, community service and restorative justice programs.¹⁰

At its core, the purpose of diversion is three-fold: (1) to remove youth who would be better served outside the formal justice system process; (2) to focus justice system resources on those who commit the most serious offenses and are best served by the traditional court system and; (3) to minimize the long-term negative impacts of formal interventions such as probation or incarceration for young people who do not need them. In the process, it also seeks to limit government overreach by empowering better situated actors, such as parents, schools and community organizations, to deal with

behavioral issues and respond to youth in a manner more proportional to the harm committed.

When crafted and implemented well, diversion programs can serve these purposes and bring a variety of positive outcomes to all parties involved.¹¹ For youth, it can mean avoiding the harms of system involvement, including arrest, incarceration and a formal delinquency record. It can also increase access to services, provide role models and minimize the stigmatization that comes with being marked as a “youth offender.”¹² Moreover, since most young people will naturally grow out of impulsive, risk-taking behavior, diversion is a better option than any additional system involvement—not to mention more cost-effective.¹³

For the communities impacted by crime, diversion may also result in reduced recidivism, stronger economic outcomes among diverted youth due to avoidance of a juvenile record, and saved costs from the avoidance of incarceration and re-offense.¹⁴ And, when diverted youth desist from crime, diversion also better serves the goals of victims, who overwhelmingly want the youth to be served effectively.¹⁵ Diversion that utilizes restorative justice programs can provide victims an opportunity to confront the youth who harmed them and for all involved to gain healing.¹⁶ And finally, diversion can reduce the work of juvenile justice practitioners and instead

7. Indeed, youth crime is often a result of adolescents struggling to regulate their emotions, to anticipate the future or of attempts to gain favor with their peers. See Richard Bonnie et al., “Reforming Juvenile Justice: A Developmental Approach,” National Research Council, 2013, pp. 5 and 91-95. http://www.nijm.org/uploads/digital-library/Reforming_JuvJustice_NationalAcademySciences.pdf#page=22.

8. For a summary of some of the possible consequences of prosecuting youth rather than diverting them, see: Amanda Fairchild et al., “Operationalizing Intake: Variations in juvenile court intake procedures and their implications,” *Children and Youth Services Review* 102 (2019), pp. 91-101. <https://www.sciencedirect.com/science/article/pii/S0190740918311447>.

9. See, e.g., Michelle Alexander, “Reckoning with Violence,” *The New York Times*, March 3, 2019. http://www.justicepolicy.org/uploads/justicepolicy/documents/Smart_Safe_and_Fair_9_5_18.pdf; Danielle Sered, *Until we Reckon* (The New Press, 2019), p. 133-34.

10. For a broad overview of the theoretical foundation of diversion and the various forms it can take, see: “Diversion from Formal Court Processing,” OJJDP, February 2017. https://www.ojjdp.gov/mpg/litreviews/Diversion_Programs.pdf.

11. When crafted poorly or not implemented well, diversion can also bring harms. For a description of some of the potential harms and benefits, see: Daniel Mears et al., “Juvenile Court and Contemporary Diversion: Helpful, Harmful or Both?,” *Criminology and Public Policy* 15:3 (2016), pp. 953-81. https://www.researchgate.net/profile/Daniel_Mears/publication/304005166_Juvenile_Court_and_Contemporary_Diversion_Helpful_Harmful_or_Both/links/5a1d8c1ca6fdcc0af3271de2/Juvenile-Court-and-Contemporary-Diversion-Helpful-Harmful-or-Both.pdf.

12. “Diversion from Formal Court Processing.” https://www.ojjdp.gov/mpg/litreviews/Diversion_Programs.pdf.

13. See, e.g., *Ibid*; Bonnie et al., pp. 5 and 91-95. http://www.nijm.org/uploads/digital-library/Reforming_JuvJustice_NationalAcademySciences.pdf#page=22; and “Benefit-Cost Results,” Washington State Institute for Public Policy, December 2018. <http://www.wsipp.wa.gov/BenefitCost>.

14. Formal criminal justice involvement is actually harmful for some youth, particularly those of low risk, and results in poorer public safety outcomes. For these reasons, diversion may be a more effective option. Indeed, two recent meta-analyses suggest that, generally speaking, diversion either brings benefits or at the very least poses no harm to rates of recidivism. Naturally, some diversion programs are more effective than others. See, e.g., Elizabeth Seigle et al., “Core Principles for Reducing Recidivism and Improving Other Outcomes for Youth in the Juvenile Justice System,” CSG Justice Center, 2014, p. 9. <https://docplayer.net/2322522-Core-principles-for-reducing-recidivism-and-improving-other-outcomes-for-youth-in-the-juvenile-justice-system.html>; Holly Wilson and Robert Hoge, “The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review,” *Criminal Justice and Behavior* 40:5 (2013), pp. 507 and 511. http://users.soc.umn.edu/~uugen/Wilson_CJB_13.pdf; Craig Schwalbe et al., “A meta-analysis of experimental studies of diversion programs for juvenile offenders,” *Clinical Psychology Review* 32:1 (November 2011), pp. 26-33. https://www.researchgate.net/publication/51850643_A_meta-analysis_of_experimental_studies_of_diversion_programs_for_juvenile_offenders; and Riya Shah and Jean Strout, “Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records,” *Juvenile Law Center*, February 2016, pp. 10-11. <https://juvenilerecords.jlc.org/juvenilerecords/documents/publications/future-interrupted.pdf>.

15. “Smart, Safe, and Fair: Strategies to Prevent Youth Violence, Heal Victims of Crime, and Reduce Racial Inequality,” Justice Policy Institute, 2018, p. 35. http://www.justicepolicy.org/uploads/justicepolicy/documents/Smart_Safe_and_Fair_9_5_18.pdf.

16. For an overview of the various forms of restorative justice, see: “Restorative Justice,” OJJDP, November 2010, pp. 1-6. https://www.ojjdp.gov/mpg/litreviews/Restorative_Justice.pdf.

promote the involvement of the community, encouraging more efficient, targeted, effective systems for rehabilitation.

However, the full potential of diversion policies and programs are undermined when youth of different racial and ethnic backgrounds do not have the same opportunities to be diverted and are not offered programs with their individual needs in mind. Indeed, racial and ethnic disparities at the beginning of the justice process can exacerbate inequity farther down the road, further concentrating the collateral consequences of our most intensive interventions—probation and incarceration—among our black and Latino communities as well as other racial and ethnic groups. In addition to harming these young people, it deeply threatens our notions of justice and equality.

THE NEED TO PROMOTE RACIAL AND ETHNIC EQUITY

Conversations around racial equity have been long dominated by progressives, but in truth, conservative priorities such as fairness and procedural justice make clear that disparities should concern us all. Youth who are similarly situated and are engaged in similar delinquent behavior should receive the same chance to stay out of the system and succeed.

The available data¹⁷ suggests that there are few differences in rates of actual delinquency among youth of different racial backgrounds when it comes to the two most common types of offenses—property and drug-related crimes.¹⁸ Actual rates of violence present a more complicated picture, since violence is often concentrated in certain neighborhoods that disproportionately suffer from adverse economic and social

conditions and higher rates of victimization.¹⁹ Given these facts and that the majority of youth arrests are made for non-violent offenses, we should expect similar rates of arrest or formal processing across racial and ethnic groups.²⁰ However, this is not the case. Today, youth of color—particularly in the black community—are more likely to be arrested and subjected to the justice system. In 2017, for example, black youth were 2.6 times more likely to be arrested than their white counterparts, and American Indian youth were 1.4 times more likely to be arrested than their white peers.²¹ Previous estimates suggest these disparities have grown in recent years, even as youth arrest rates overall have declined, and jurisdictions have implemented youth justice reform.²² It is thus paramount that policymakers and practitioners ensure that justice reforms, such as diversion, are also promoting racial equity.

Unfortunately, racial disparities do not end at the point of arrest. According to the latest national estimates from the Office of Juvenile Justice and Delinquency Prevention (OJJDP), when compared to white youth, minority youth are 30 percent less likely to be diverted, 20 percent more likely to have their case petitioned to court, 50 percent more likely to be placed in a residential facility and 50 percent more likely to have their case waived to adult court.²³ Research

17. Arrest, victimization and self-report data can be analyzed to provide a picture of the rate of delinquency among certain racial and ethnic groups. Each of these sources of data has its limitations. For example, arrest data is biased when communities of color are more likely to come into contact with police or are assumed to be the perpetrators of harm. Victimization data is largely only helpful to identify the race of the person who commits harm when the victim actually sees the individual who harmed them—even then, it is often under-reported. Finally, self-report data is most likely to depict the full spectrum of criminal activity but, even so, might suffer from under-reporting. See Janet L. Lauritsen, "Racial and Ethnic Differences in Juvenile Offending," in *Our Children, Their Children: Confronting Racial and Ethnic Differences in Juvenile Justice*, ed. Darnell F. Hawkins and Kimberly Kempf-Leonard (University of Chicago Press, 2005), pp. 83-104.

18. Property and drug offenses are more broadly categorized as nonviolent offenses. In the given example, arrest data would suggest black youth are more likely to violate drug abuse laws, however, self-report data actually suggests white youth are more likely to use or sell marijuana, and both black and white youth are about equally as likely to report selling hard drugs. This conflict suggests differential enforcement of drug laws. See *Ibid.*, p. 96; and Robert Agnes, "Race and Youth Crime: Why Isn't the Relationship Stronger?," *Race and Justice* 6:3 (July 1, 2016), pp. 195-221. <https://journals.sagepub.com/doi/abs/10.1177/2153368715597465>.

19. While the likelihood of committing more serious, violent crimes does appear to differ across racial lines, this disparity seems to be driven by a small number of individuals responsible for a disproportionate amount of crime. It is important to note that arrest data likely overestimates violent offenses among black and youth of other racial and ethnic backgrounds as self-reported victimization data still provides evidence of a difference in relative offending but to a lesser extent. For evidence that the violent offense rate varies incredibly by community, with some communities representing a disproportionate share of violence (such as Chicago's South and West communities), see: Lauritsen, p. 92-96; Agnew. <https://journals.sagepub.com/doi/abs/10.1177/2153368715597465>; and Editorial Board, "Why is there so much shooting and killing in Chicago?," *Chicago Tribune*, Aug. 7, 2018. <https://www.chicagotribune.com/opinion/editorials/ct-edit-shooting-chicago-violence-police-20180807-story.html>. Moreover, racial disparities may also result when racial groups are more likely to live within certain areas that suffer from adverse economic and social conditions and higher rates of victimization. When youth spend their childhood in particularly disadvantaged neighborhoods and suffer high rates of victimization, they may be more likely to commit a violent offense. See, e.g., Eric Chyn, "Moved to Opportunity: The Long-Run Effects of Public Housing Demolition on Children," *American Economic Review* 108:10 (2018), pp. 3053-54. <https://pubs.aeaweb.org/doi/pdf/10.1257/aer.20161352>; John Laub, "Understanding Inequality and the Justice System Response: Charting a New Way Forward," William T. Grant Foundation, December 2014, pp. 2-6. <http://wtgrantfoundation.org/library/uploads/2015/09/inequality-and-the-justice-system-response-charting-a-new-way-forward.pdf>.

20. "Estimated number of juvenile arrests, 2017," OJJDP, Oct. 22, 2018. <https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp>.

21. Asian youth have traditionally had the lowest relative rate of arrest and do not appear to follow similar trends. "Racial and Ethnic Fairness," OJJDP, Oct. 22, 2018. https://www.ojjdp.gov/ojstatbb/special_topics/qa11502.asp?qaDate=2017.

22. In 2006, for example, young black youth were two times more likely to be arrested than white youth. See: https://www.ojjdp.gov/ojstatbb/special_topics/qa11502.asp?qaDate=2017. And while some local youth justice reforms have successfully begun to reduce racial disparities, others have not. See "Juvenile Detention Alternatives Initiative: 2013 Annual Results Report Inter-site Conference Summary," Annie E. Casey Foundation, June 2, 2014, pp. 1 and 20-21. <https://www.aecf.org/resources/juvenile-detention-alternatives-initiative-2013-annual-results-report>.

23. This OJJDP table expresses disparities in relative rate indices where a 1.0 ratio connotes equal likelihood for this outcome, whereas a 1.10 connotes a 10 percent greater likelihood, a .9 represents a 10 percent lower likelihood, etc. This data is from 2017. See: https://www.ojjdp.gov/ojstatbb/special_topics/qa11603.asp?qaDate=2017.

shows that racial and ethnic disparities in how youth are held accountable—whether by diversion or commitment—continue to exist in many localities even when controlling for other factors, such as a youth’s previous criminal record or the severity of the offense.²⁴ Put simply, in the United States, justice is far from equal for youth of different racial and ethnic backgrounds.²⁵

WHY RACIAL AND ETHNIC DISPARITIES OCCUR WITH DIVERSION

In order to understand how to promote equity, we must examine why and how disparities occur, sometimes even amidst positive reforms, so that policies can be formulated with these concerns in mind. Racial disparities occur through a variety of mechanisms—many of which are outside the scope of the justice system. For this reason, we have focused on two primary drivers of racial and ethnic disparities at the point of diversion.

Differential Use of Discretion

One way disparities occur is when law enforcement, court officials or other justice practitioners use their discretion differently when dealing with individuals of different racial and ethnic backgrounds.²⁶ For example, in a study of a Mid-west county published in 2016, scholars found that white youth received diversion at a rate over 8 percentage points higher than eligible youth of other racial backgrounds.²⁷

And non-white youth referred to the prosecutor’s office for a theft offense were significantly less likely to be diverted, even when controlling for legal factors, such as the number of counts and previous referrals to the prosecutor.²⁸ New Jersey presents another example. In 2015, white youth in New Jersey accounted for about 70 percent of youth drug arrests and appear to have received over 70 percent of the police diversions for drug, alcohol and tobacco-related offenses made following an arrest.²⁹ By comparison, black youth, who made up 28 percent of these types of arrests, received only 11 percent of police diversions for drug, alcohol and tobacco related offenses after arrest.³⁰ This disparity matters, as more than two-thirds of youth who are diverted in this way were successful and completed the conditions of their diversion, resulting in no formal system involvement.³¹

Differences in how actors use their discretion can either indirectly or directly cause racial and ethnic disparities. For example, in a recent study, African-American youth were diverted pretrial at lower rates, largely because they were less likely to have a traditional two-parent living arrangement.³² Scholars posit this was driven by the belief that a traditional family structure would increase the likelihood of successfully completing the requirements of diversion, although neither race nor family structure influenced the completion of diversion in their research.³³ This demonstrates an indirect, conscious pathway toward disparities.

In other cases, individually held implicit and explicit stereotypes of racial groups may directly bias assessments of both

24. Interestingly, a study of Florida youth found that minority youth who had been diverted were less likely to be diverted to more supportive services such as a delinquency prevention or community-based programs as white youth. Instead, they had a greater likelihood of receiving a warning by a judge as the means of diversion. See Joshua Cochran and Daniel Mears, “Race, Ethnic, and Gender Divides in Juvenile Court Sanctioning and Rehabilitative Intervention,” *Journal of Research in Crime and Delinquency* 52:2 (2015), p. 20. <https://diginole.lib.fsu.edu/islandora/object/fsu:291020/datastream/PDF/view>. Moreover, generally speaking, disparities result in harsher sanctions for black and youth of other racial and ethnic backgrounds when compared to white youth, but this varies widely by jurisdiction and offense type. See, e.g., *Ibid.*; and Ellen Donnelly. <https://journals.sagepub.com/doi/abs/10.1177/0887403415585139>.

25. Often, the presence, extent and direction of racial and ethnic disparities varies incredibly by locality, the type of offense and point in the justice process. See Elizabeth Spinney et al., “Disproportionate minority contact in the U.S. juvenile justice system: a review of the DMC literature, 2001-2014, Part I,” *Journal of Crime and Justice* 5:41 (2018), pp. 573-95. <https://www.tandfonline.com/doi/abs/10.1080/0735648X.2018.1516156?journalCode=rjci20>.

26. Research suggests that these various actors often assess or give weight to different factors when deciding whether or not a youth should be diverted. See, e.g., Fairchild et al. <https://www.sciencedirect.com/science/article/pii/S0190740918311447>; and Fine et al., “And justice for all: Determinants and effects of probation officers’ processing decisions regarding first-time juvenile offenders,” *Psychology, Public Policy and Law* 23:1 (February 2017), pp. 105-17. <https://psycnet.apa.org/buy/2017-04416-003>.

27. It is important to note that the diversion rate differed substantially by agency, with some agencies having larger racial disparities and others having smaller or no racial disparity (in the case of one agency). These numbers reflect the total diversion rate using data from all agencies included in the study. See Rebecca Ericson and Deborah Eckberg, “Racial Disparity in Juvenile Diversion: The Impact of Focal Concerns and Organizational Coupling,” *Race and Justice* 6:1 (2016), p. 46. https://www.researchgate.net/profile/Deborah_Eckberg/publication/281960978_Racial_Disparity_in_Juvenile_Diversion_The_Impact_of_Focal_Concerns_and_Organizational_Coupling/links/5a678d3a4585159da0d9f300/Racial-Disparity-in-Juvenile-Diversion-The-Impact-of-

28. This disparity seemed to be driven, in part, by the fact that prosecutors made different charging decisions based on minority youth’s criminal history whereas this same measure seemed to be a less significant factor in the charging of white youth for similar offenses. It is important to note that previous research did not find a significant interaction between race and prior offending, and that the charging decisions made by prosecutors for youth alleged to have committed offenses other than theft did not significantly differ by race. See, e.g., Michael Leiber, “Race, prior offending, and juvenile court outcomes,” *Journal of Crime and Justice* (2015). https://www.researchgate.net/profile/Michael_Leiber2/publication/284281215_Race_prior_offending_and_juvenile_court_outcomes/links/56562a7a08ae1ef9297df300/Race_prior_offending_and_juvenile_court_outcomes.pdf. Thus, racial disparities at the point of intake and charging may be highly influenced by offense type. See, e.g., Ericson and Eckberg, pp. 50-53. https://www.researchgate.net/profile/Deborah_Eckberg/publication/281960978_Racial_Disparity_in_Juvenile_Diversion_The_Impact_of_Focal_Concerns_and_Organizational_Coupling/links/5a678d3a4585159da0d9f300/Racial-Disparity-in-Juvenile-Diversion-The-Impact-of-Focal-Concerns-and-Organizational-Coupling.pdf.

29. New Jersey refers to post-arrest police diversions as “stationhouse adjustments.” The percentage of stationhouse adjustments made for white youth for the named offenses was conservatively estimated by subtracting the named percentages of stationhouse adjustments made for these offenses by black and Latinx youth included in the report and the total percentage of stationhouse adjustments made for Asian youth. See “Missed Opportunities: Youth Diversionary Programs in New Jersey,” ACLU New Jersey, January 2018, pp. 4 and 9. https://www.aclu-nj.org/files/7615/1621/6649/Youth_Diversionary_Programs_Report.pdf.

30. *Ibid.*

31. *Ibid.*, p. 12.

32. Tony Love and Edward Morris, “Opportunities Diverted: Intake Diversion and Institutionalized Racial Disadvantage in the Juvenile Justice System,” *Race and Social Problems* 11:1, pp. 33-44. <https://link.springer.com/article/10.1007/s12552-018-9248-y>.

33. *Ibid.*

culpability and rehabilitation potential.³⁴ Indeed, research suggests that individuals who are asked to picture a black youth (versus a white youth) are more likely to support severe sanctions, such as life without parole, and are more likely to see the youth as more blameworthy.³⁵ Previous research has noted similar biases.³⁶ Such beliefs can negatively impact decision-making at all points, including diversion.

Unnecessary Limitations on Diversion Eligibility

Limitations upon whom is eligible for diversion also work to exacerbate racial and ethnic inequalities. One example is when it is limited to “first-time offenders” or to those individuals experiencing their first law enforcement encounter or arrest. Black neighborhoods are often overpoliced when it comes to petty crimes—the precise type of crimes for which diversion would most likely be recommended.³⁷ And being of color makes it more likely that a youth will be stopped and arrested compared to their white counterparts.³⁸ When black youth are more likely to have law enforcement encounters, their ability to access first-time-only diversion programs decreases.

Equity is hampered when eligibility for diversion is limited to only a few, minor offenses, particularly if they are disproportionately committed by white youth in the locality. This could occur if, for example, diversion was limited to youth who were arrested for alcohol violations—a category of offense for which white youth are traditionally more likely to be involved—and barred for youth arrested for drug offenses.³⁹ Instead of reducing racial and ethnic disparities at the point of diversion, this program may increase them.

34. Bias can often be seen in the use of heuristics to determine culpability of the individual and amenability for more rehabilitative and less punitive interventions. If minority youth are perceived to be more culpable and less likely to be rehabilitated, discretion would be used less to divert them. See, e.g., Cochran and Mears. <https://diginole.lib.fsu.edu/islandora/object/fsu:291020/datastream/PDF/view>.

35. See, e.g., Jennifer Eberhardt and Aneeta Rattan, “The Race Factor in Trying Juveniles As Adults,” *The New York Times*, June 5, 2012. <https://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/the-race-factor-in-trying-juveniles-as-adults>; Aneeta Rattan et al., “Race and the Fragility of the Legal Distinction between Juvenile and Adults,” *PLoS ONE* 7:5 (2012). <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0036680&type=printable>.

36. For a brief review of the literature, see Fader et al., “The color of juvenile justice: Racial disparities in dispositional decisions,” *Social Science Research* 44 (2014), pp. 127-30, 137-38. https://www.researchgate.net/profile/Jamie_Fader/publication/259955427_The_color_of_juvenile_justice_Racial_disparities_in_dispositional_decisions/links/5b1e4f0f45851587f29fe67f/The-color-of-juvenile-justice-Racial-disparities-in-dispositional-decisions.pdf.

37. L. Song Richardson, “Arrest Efficiency and the Fourth Amendment,” *Minnesota Law Review* 95 (2011), p. 2087. http://www.minnesotalawreview.org/wp-content/uploads/2011/06/Richardson_PDF.pdf.

38. A variety of extralegal factors can influence police decision-making and lead to disparities. See, e.g., “Interactions between Youth and Law Enforcement,” *OJJDP*, January 2018, pp. 8-10. <https://www.ojjdp.gov/mpg/litreviews/Interactions-Youth-Law-Enforcement.pdf>.

39. Lauritsen, p. 96.

To truly promote equity, jurisdictions should expand the possibility of diversion to as many offenses as possible, with the required components of a diversion program matched according to the needs and risks presented by the youth.

Finally, a family’s financial means should not limit access to diversion. Thus, diversion programs should significantly limit (or eliminate) any financial costs to families and youth or base costs on the family’s assessed ability to pay. According to a Juvenile Law Center survey, individuals in over 25 states responded that youth or family members had to pay for diversion.⁴⁰ These fees may serve to disadvantage impoverished youth of color who are otherwise eligible to participate.⁴¹ Additionally, to connect successful diversion to the completion of fine and fee payment may hinder the youth’s exit from the system and result in formal processing—the exact thing diversion is designed to avoid.⁴²

RECOMMENDED REMEDIAL POLICIES

It is possible to reduce racial and ethnic disparities. In fact, in recent years, thirteen states were able to reduce the disparities in rates of white and black youth in custody.⁴³ States and localities should revise policies and laws to make sure they aim to decrease disparities, anticipate when new policies might have racially disparate impacts, and continue to collect data and study outcomes. Although no one solution will fix all problems, the policies noted below can be used to help reduce current racial and ethnic disparities at the point of diversion and to truly increase justice for all.

Avoid Net widening and Net deepening

Net widening refers to the phenomenon when diversion programs end up bringing youth into the system who previously would never have entered.⁴⁴ For example, a low-risk youth arrested for marijuana possession may be referred to a drug treatment diversion program instead of simply being released, thus widening the net. Resources are misallocated as a result since high-risk youth are the best candidates for formal, more-intensive diversion programs, whereas those

40. Jessica Feerman et al., “Debtors’ Prison for Kids? The High Cost of Fines and Fees in the Justice System,” *Juvenile Law Center*, 2016, pp. 12-13. <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf>.

41. *Ibid.*

42. *Ibid.*

43. “Fact Sheet: Black Disparities in Youth Incarceration,” *The Sentencing Project*, September 2017, pp. 1-2. <https://www.sentencingproject.org/wp-content/uploads/2017/09/Black-Disparities-in-Youth-Incarceration.pdf>.

44. See e.g., “Diversion from Formal Court Processing,” https://www.ojjdp.gov/mpg/litreviews/Diversion_Programs.pdf.

same programs are likely to bring minimal benefits, or even harm, to low-risk youth.⁴⁵

Similarly, net deepening is the concern that by involving youth (even tangentially) with the system, diversion can lead young people deeper into criminalization.⁴⁶ In both cases, diversion can increase state control when youth are often best served in their communities without state involvement.⁴⁷ To avoid both net widening and deepening, policy-makers must ensure that they are using evidence-based methods to determine eligibility criteria and focus resources toward those best served by the intervention. Needs assessments can play a vital role in determining youth who can be diverted with no additional services versus those who may benefit from diversion, accompanied with referrals for services in the community.⁴⁸

Policymakers can also examine upstream disparities, which are the reasons why individuals end up in diversion in the first place. This includes inequities in community resources, family support, school referrals and law enforcement stops. For example, Clayton County, Georgia implemented a school referral reduction program to help prevent juvenile system contact as a response for school misbehavior.⁴⁹ By standardizing graduated sanctions for low-level misdemeanors, the county saw a 46 percent reduction in school-based referrals of African-American youth according to a 2015 report by the Sentencing Project.⁵⁰ Such initiatives can also prevent net-widening and deepening. In all cases, the goal of a youth justice intervention should be to hold youth accountable and promote rehabilitation in the least intensive way possible. For some youth, that may mean no justice intervention at all.

Expand Eligibility for Diversion

More progress could be made if diversion was expanded to all youth who are at the appropriate risk level to benefit from it, but who would otherwise be formally system involved.

45. See, e.g., Traci Schlesinger, “Decriminalizing Racialized Youth Through Diversion,” *The Future of Children* 28:1 (Spring 2018), pp. 67-69. <https://files.eric.ed.gov/fulltext/EJ1179190.pdf>; James Austin and Barry Krisberg, “NCCD Research Review: Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform,” *Journal of Research in Crime and Delinquency* 18 (1981): 165-96. <https://doi.org/10.1177/002242788101800110>.

46. Schlesinger, p. 66. <https://files.eric.ed.gov/fulltext/EJ1179190.pdf>.

47. This can occur when youth are referred to more formal diversion programs rather than simple warn- and-release, pre-arrest diversion methods.

48. “Risk/Needs Assessments for Youths,” OJJDP, January 2015, p. 1. <https://www.ojjdp.gov/mpg/litreviews/RiskandNeeds.pdf>.

49. Colin Slay, “Annual Report: Juvenile Court of Clayton County, Georgia,” Clayton County Youth Development and Justice Center, 2018, p. 14. <https://www.claytoncountygga.gov/home/showdocument?id=154>.

50. See, e.g., Nazgol Ghandnoosh, “Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System,” The Sentencing Project, February 2015. <https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/#A.%20Revise%20policies%20and%20laws%20with%20disparate%20racial%20impact>.

Diversion remains underused, and thus many young people remain in the juvenile justice system unnecessarily. The likelihood of a case being diverted and handled outside of the traditional court system continues to drop when we look at more “serious” offenses. For example, only about 27 percent of burglary cases were handled informally in 2017, whereas 73 percent were petitioned to court.⁵¹ Depending on the specific circumstances, however, such serious intervention is likely unnecessary and overreactive—and may cause more issues than it solves. Instead, the justice system should assess the root of these behaviors, such as mental and behavioral health issues, and should deliberately consider whether or not traditional court processing will actually serve to address these underlying problems.

Indeed, diversion programs, specifically those that incorporate a restorative justice model, can work with individuals charged with violent offenses and succeed.⁵² For example, Common Justice, located in Brooklyn, operates a restorative justice curriculum for violent felonies, including gunpoint robberies, serious assaults, shootings and other acts of street violence.⁵³ Participants who complete the program are not incarcerated and the felony charge is removed from their records.⁵⁴ These programs not only encourage healing for both those who have been victimized and those who commit crime but they can also work to reduce racial and ethnic disparities. Similarly, Los Angeles County’s Division of Youth Diversion and Development recommends diversion for all youth who are legally eligible, including for felony offenses (with only the most serious offenses excluded).⁵⁵ Such an approach takes into consideration that black and brown youth are often charged more harshly for the same conduct as white youth and thus restricting diversion only to misdemeanors can exacerbate existing racial inequities and result in missed opportunities to better serve them.⁵⁶

51. Cases handled informally include those dismissed as well as those that result in a term of informal probation or another sanction. See, e.g., “Juveniles in Court: Case Flow by Detailed Offense,” OJJDP, April 23, 2019. https://www.ojjdp.gov/ojstatbb/court/JCSCF_Display.asp?ID=qa06613&year=2017&group=1&estimate=1&text=

52. Danielle Sered, *Until We Reckon* (The New Press: 2019) p. 133-34. At the time of this book’s publication, fewer than 6 percent of participants had been terminated from the program for being convicted of a new crime.

53. For more information, see: “Common Justice Model,” Common Justice, accessed July 8, 2019. https://www.commonjustice.org/common_justice_model.

54. Sered, pp. 133-34.

55. The only legally excluded offenses are listed under California’s Welfare and Institutions Code Section 707(b). They include assaults that result in serious bodily injury, robbery, rape and sexual assault, kidnapping, murder and attempted murder, and several other violent felonies. See, e.g., David Washburn, “LA County Embarks on Sweeping Youth Diversion Plan,” California Health Report, March 8, 2018. <https://www.calhealthreport.org/2018/03/08/la-county-embarks-sweeping-youth-diversion-plan>.

56. Research suggests officers are more likely to consider the same behavior a felony rather than a misdemeanor when it is committed by a minority youth. See, e.g., Liz Krobeth et al., “Advancing Racial Equity in Youth Diversion: An Evaluation Framework Informed by Los Angeles County,” Human Impact Partners, June 2019, p. 17. https://humanimpact.org/wp-content/uploads/2019/06/HIP_EvaluateYouthDiversion_2019.06.03.pdf.

This is not to say that all youth should be diverted for every offense. Law enforcement, court officials and prosecutors should retain some discretion to make a judgment call according to the facts of the individual case. Additionally, there will always be circumstances in which diversion is not the appropriate method of accountability. Still, its limitation to generally the most negligible of all offenses prevents the full realization of the goals it is meant to achieve.

Automatically Divert Individuals for Eligible Offenses

Localities can also make diversion for certain low-level offenses for the first-time automatic. By doing so, all youth who have caused relatively little harm to public safety are held accountable in a similar manner. For example, in Scott County, Iowa, youth who commit a first-time simple misdemeanor offense (i.e. disorderly conduct, unlawful assembly, theft of property under \$200, etc.)⁵⁷ are automatically diverted by police and referred to a juvenile court diversion program instead of being arrested and charged.⁵⁸ The program requires attendance at a roughly two-and-a-half-hour class with a parent or guardian.⁵⁹ During the class, they engage with and hear from speakers who, among other things, explain the consequences of a criminal record and share their own experiences in the juvenile court system.⁶⁰ From July 2017 to June 2018, approximately 132 youth in Iowa's 7th Judicial District, which includes Scott County, were referred to a pre-arrest diversion program, and 116 youth successfully completed the program with only 16 reoffending within a year.⁶¹ This represents about a 12 percent recidivism rate.

In contrast, in fiscal year 2015—prior to the implementation of the new diversion program—78 percent of youth referred to juvenile court in the 7th Judicial District for a first-time simple misdemeanor were diverted post-arrest, with approximately 16 percent reoffending within a year.⁶² And 22 percent were formally charged with 32 percent of those youth reof-

fending within a year.⁶³ As a result of Scott County's changes, more low-risk youth are kept out of the justice system and public safety outcomes have improved. On top of this, juvenile court officers (JCOs) have lower caseloads, which allows them to focus more attention on those who more urgently need their services and the community is working together to improve future outcomes for its young people.⁶⁴

Moreover, automatic diversion for first-time simple misdemeanors has also promoted racial and ethnic equity. Prior to 2016, there were no official pre-arrest diversion programs for simple misdemeanors in the 7th Judicial District.⁶⁵ And in fiscal year 2015, African-American youth made up 82 percent of the youth formally charged for a first-time simple misdemeanor and 70 percent of those diverted post-arrest, whereas white youth composed 18 percent of youth formally charged and 26 percent diverted post-arrest, respectively.⁶⁶ Now, these youth are to be automatically diverted pre-arrest and, if they successfully complete diversion, will avoid a criminal record. Automatic diversion for eligible offenses is thus a particularly powerful way to hold all youth accountable while protecting them from the more severe long-term consequences of youth justice involvement.

Analyze and Evaluate Outcomes of Current Diversion Programs

One of the largest obstacles to addressing racial and ethnic disparities in the system is that diversion is often handled informally, without reporting or tracking of information. Without having more information on which youth receive informal and formal diversion, it is difficult to assess equal access to these initiatives and whether they are successful. Collecting data also allows us to compare the effectiveness of different types of diversion. For example, one analysis found that Florida youth who were offered civil citations versus post-arrest diversion (for civil citation eligible offenses) had a recidivism rate that was 5 percentage points lower—making clear that pre-arrest diversion was favorable.⁶⁷

Additionally, robust data disaggregated by race and ethnicity can help us better address racial inequities. For example, one study found when it comes to diversion, black youth are more likely to have their cases dismissed outright or receive a warning rather than being provided services, as compared

57. Iowa Code 16 §723.1-4 and 16 §714.2 (2019). <https://www.legis.iowa.gov/docs/code/2019/723.pdf>. <https://www.legis.iowa.gov/docs/code/2019/714.pdf>.

58. Juvenile court services and the local law enforcement agencies have established a Memorandum of Understanding (MOU) to ensure compliance with this policy. Personal communication with David Tristan, Juvenile Court Officer, Iowa Judicial Branch, Seventh Judicial District, June 6, 2019 (phone call).

59. Requiring a parent or guardian to attend could hinder participation of non-white youth—this is not the only format for quality diversion programming, and diversion programs should consider family obligations and transportation challenges while setting up programming to promote racial equity. See, e.g., "Advancing Racial Equity in Youth Diversion: An Evaluation Framework Informed by Los Angeles County," p. 27. https://humanimpact.org/wp-content/uploads/2019/06/HIP_EvaluateYouthDiversion_2019.06.03.pdf.

60. Ibid.

61. Reoffending is defined as having a new charge within a year. Data received from Personal communication with David Tristan, Juvenile Court Officer, Iowa Judicial Branch, Seventh Judicial District, July 3, 2019 (email).

62. Ibid.

63. Ibid.

64. Personal communication with David Tristan, Juvenile Court Officer, Iowa Judicial Branch, Seventh Judicial District, June 6, 2019 (phone call).

65. Personal communication with David Tristan, Juvenile Court Officer, Iowa Judicial Branch, Seventh Judicial District, July 3, 2019 (phone call).

66. Personal communication with David Tristan, Juvenile Court Officer, Iowa Judicial Branch, Seventh Judicial District, July 3, 2019 (email).

67. Julie Pla, "Briefing Report: Civil Citation Effectiveness Review," Florida Department of Juvenile Justice, July 1, 2014, p. 2. [http://www.djj.state.fl.us/docs/research2/briefing-report-cc-\(8-6-14\).pdf?sfvrsn=0](http://www.djj.state.fl.us/docs/research2/briefing-report-cc-(8-6-14).pdf?sfvrsn=0).

to white youth.⁶⁸ The scholars assert that “the court may be more likely to intervene with white youth and, for example, divert them in an effort to ‘save’ them through ‘child-saving’ interventions.”⁶⁹ Thus, examining only the number of dismissed cases would not necessarily demonstrate the nuances of racial bias that still pervade the system.

One challenge to collecting data is that certain forms of informal diversion (i.e. warn and release) are favorable precisely because they do not create a formal record of system involvement. Similarly, most youth diversion programs keep track of completion rates, but few keep data on re-offense rates or other markers of success such as educational or employment outcomes.⁷⁰ The lack of information is likely influenced by resource challenges and the practical difficulties of securing and linking different types of data on youth, especially those who do not remain system involved. Still, jurisdictions can strive to find ways to track RED without creating a juvenile record in the process and protecting the personal information of youth.

Ensure Diversion Programs Set Diverse Youth up for Success

Once youth are referred to diversion programs, we should reduce barriers and set them up for success. For example, diversion programs interested in reducing RED should consider eliminating the requirement of a guilty plea to participate. Most programs currently require an admission of guilt to participate, but black and Native American youth—for a variety of reasons—may be less likely to admit guilt than legally similar white youth.⁷¹ There is no reason to predicate access to diversion on an admission of guilt unless a guilty plea predicts likelihood of completion (something research does not currently indicate).⁷²

Barriers also exist to enrollment and completion. For example, Los Angeles County has determined that between 10-25 percent of youth never enroll merely because of practical barriers.⁷³ For example, diversion sometimes requires

attendance during work hours, is far from home and rarely accounts for transportation issues. Additionally, providers may not communicate requirements clearly to youth and their families, and may not account for language barriers. In order to overcome these obstacles, the program itself should be individualized and culturally appropriate. Additionally, programs should identify potential challenges early on and not automatically revoke program participation for technical violations. L.A. County practitioners, for example, recommend a standard of “substantial completeness,” which means that as long as youth have made clear progress toward their goals, their program can be deemed complete. By expanding eligibility for diversion, collecting data on referral, enrollment and completion of programs, and reducing barriers for success, substantial progress can be made to advance racial equity and limit youth involvement in the justice system.

CONCLUSION

While diversion reform is not a panacea to solve racial and ethnic disparities at every point in the justice system, it does present a shift away from traditional court processing and incarceration. Thus, it has the potential to stymie the cumulative effect of disparate treatment. Accordingly, in order to best promote the benefits of diversion and equity, localities should divert youth at the earliest point possible, save formal diversion programs for those who need a higher level of intervention, and expand diversion beyond low-level and first-time offenses. From there, jurisdictions should consider partnering with community programs to decrease barriers to successful completion, as well as continue to track data to make sure programs are serving youth and decreasing disparities. These policy recommendations can help to ensure that our justice system lives up to its promise—namely, justice for all, equality under the law and a dedication to enhancing our communities.

ABOUT THE AUTHORS

Nila Bala is the associate director of criminal justice policy and a senior fellow at the R Street Institute, where she helps to lead criminal justice policy areas generally, and also specifically develops policy to advance reforms in juvenile and economic justice. Previously, she was a public defender in Santa Clara, California and Baltimore City.

Emily Mooney is a criminal justice fellow at the R Street Institute, where she conducts research and writes on topics regarding policing, corrections, reentry, the juvenile justice system and the familial impact of incarceration. Previously, she provided research support for Prison Fellowship’s juvenile justice advocacy efforts.

68. Cochran and Mears, pp. 19-20. <https://diginole.lib.fsu.edu/islandora/object/fsu:291020/datastream/PDF/view>.

69. Ibid, p. 5.

70. “Pretrial Diversion in the 21st Century,” National Association of Pretrial Services and Agencies, 2009, p. 19. <https://netforumpro.com/public/temp/ClientImages/NAPSA/18262ec2-a77b-410c-ad9b-c6e8f74ddd5b.pdf>.

71. Reasons black and Native American youth may be less likely to admit guilt include: (1) they may be less likely to be guilty since their neighborhoods are overpoliced; (2) their relationship with the system is more adversarial or; (3) they view the system as less legitimate. See Schlesinger, p. 64. <https://files.eric.ed.gov/fulltext/EJ1179190.pdf>. Additionally, pleading guilty restricts options for youth who are unable to complete the program. They often must appear in front of the same sentencing judge, who will judge them more harshly for not completing the program and penalize them in a more significant fashion.

72. Schlesinger, p. 70. <https://files.eric.ed.gov/fulltext/EJ1179190.pdf>

73. Liz Kroboth et al., p. 23. https://humanimpact.org/wp-content/uploads/2019/06/HIP_EvaluateYouthDiversion_2019.06.03.pdf.