

DISPARITY RULES

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In 1992, Congress required states receiving federal juvenile justice funds to reduce racial disparities in the confinement rates of minority juveniles. This provision, now known as the disproportionate minority contact standard (DMC), is potentially more far-reaching than traditional disparate impact standards: It requires the reduction of racial disparities regardless of whether those disparities were motivated by intentional discrimination or justified by “legitimate” agency interests. Instead, the statute encourages states to address how their practices exacerbate racial disadvantage.

This Article casts the DMC standard as a partial response to the failure of constitutional and statutory standards to discourage actions that produce racial disparity. A limitation of the disparate impact framework, particularly in the context of Title VI of the 1964 Civil Rights Act, is that courts adopted a narrow view of causation, unwilling to risk holding public actors responsible for broader racial inequality. By contrast the DMC standard, enforced not through litigation but through federal government oversight and advocacy by nongovernmental organizations, requires public actors to address how their practices interact with conditions of racial inequality, even apart from their complicity in creating those conditions.

The DMC approach innovatively responds to the complex mechanisms that sustain contemporary racial inequality. Legal commentary has properly focused on the role of implicit bias, but this Article argues that one must look beyond bias to combat structural patterns of racial inequality. The Article concludes by discussing federal statutes similar to DMC, and suggests that these approaches might be the manifestation of a new civil rights politics.

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INTRODUCTION

African American welfare recipients have less access to education and childcare services than their white counterparts and, in the wake of welfare reform efforts, are less likely to leave welfare for decent-paying jobs.¹ Toxic and polluting facilities are more often sited in minority communities, even when controlling for income levels.² African American youths receive longer, harsher sentences than white youths who commit similar crimes and with similar criminal histories.³ These examples of contemporary racial disparities illustrate the puzzle of modern day racial inequity: Disparities in a wide variety of social indicators exist, yet the causal mechanisms that produce these disparities are not immediately apparent. Racial disparities might result from contemporary bias—either explicit or implicit. They might stem from historically rooted but lingering patterns of racial inequality (what some commentators loosely call “institutional racism”). Or, race-correlated differences in behavior might provide the sole explanation. While a social scientist might undertake an analysis to further uncover and understand the mechanisms that produce these disparities, law has traditionally provided poor tools for understanding these mechanisms and prompting public intervention to address racial disparities.

Law’s failure in this respect has been the chief frustration of civil rights legal commentary. Since the Supreme Court’s decision in *Washington v. Davis*,⁴ the limits of the intent standard in remedying persistent racial inequities have been a leading preoccupation.⁵ In many accounts,

1. See, e.g., Scholar Practitioner Program of the Devolution Initiative, W.K. Kellogg Found., *Racial and Ethnic Disparities in the Era of Devolution: A Persistent Challenge to Welfare Reform 3* (2001) [hereinafter *Racial and Ethnic Disparities in the Era of Devolution*] (documenting that in wake of federal changes in welfare policy African Americans constitute increasing share of welfare population and spend longer periods on welfare than their white counterparts); Susan T. Gooden, *All Things Not Being Equal: Differences in Caseworker Support Towards Black and White Clients*, *Harv. J. Afr. Am. Pub. Pol’y*, 1998, at 23, 23–33 (showing racially disparate treatment by caseworkers in provision of support services in study of welfare programs); see also *id.* at 10 (showing that most of those who left welfare did not earn living wage and that African Americans fared worse than their Hispanic and white counterparts).

2. See, e.g., Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 *Tul. L. Rev.* 787, 790 n.9 (1999) (collecting studies). But see *id.* at 791–92 & n.10 (citing studies finding no racial disparities and stating that all are based on census data, not on different zip codes).

3. See *infra* notes 131–132 and accompanying text.

4. 426 U.S. 229 (1976).

5. See, e.g., Barbara J. Flagg, “Was Blind, but Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent, 91 *Mich. L. Rev.* 953, 989 (1993) (“The

some form of a disparate impact standard—such as the one that exists under Title VII of the 1964 Civil Rights Act⁶—requiring some or all actions producing a disproportionate impact on minority groups to be justified by government actors is offered as a solution.⁷ Yet the emphasis on disparate impact has always been at odds with the realities of disparate impact’s operation in particular statutory contexts. The disparate impact doctrine as set up in the Title VII context of *Griggs v. Duke Power Co.*⁸ is quite modest. It does not, of course, ask institutions to refrain from any actions that perpetuate racial inequality; it only asks that institutions refrain from adopting certain disadvantaging practices and policies if they cannot be reasonably justified. In addition, practical difficulties in satisfying the *Griggs* standard have meant that disparate impact’s reach has been uneven.⁹

position implied by the discriminatory intent rule, that conscious discrimination is blameworthy but unconscious discrimination is not, is counterproductive of the ultimate goal of racial justice.”); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049, 1049–50 (1978) (highlighting difficulties of achieving racial justice under rules set out by Court decisions); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 *Harv. L. Rev.* 1, 50–52 (1977) (arguing that under intent requirement, facially neutral government actions that reinforce “the stigma of caste” will evade heightened review); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 321–22 (1987) (arguing that intent standard ignores fact that “a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1136–37 (1997) (arguing that Supreme Court’s form of discriminatory purpose “is one that the sociological and psychological studies of racial bias suggest plaintiffs will rarely be able to prove”); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 *U. Chi. L. Rev.* 935, 1015 (1989) (arguing that discriminatory intent standards are sometimes useful but that Court has “mistakenly adopted the discriminatory intent standard as a comprehensive account of discrimination” while ignoring “[n]otions like subordination, stigma, and second-class citizenship”). Other commentators, while critical of the intent standard, have noted that the Supreme Court has not applied it consistently so as to pose an insurmountable barrier to relief. See, e.g., Sheila Foster, *Intent and Incoherence*, 72 *Tul. L. Rev.* 1065, 1084–85 (1998) (finding that Supreme Court has allowed different levels of consciousness to satisfy intent standard); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 *Stan. L. Rev.* 1105, 1107 (1989) (arguing that Supreme Court allocates burden of proof to “make judicial intervention more likely” in matters involving voting, jury selection, and, sometimes, education).

6. 42 U.S.C. § 2000e-2(k) (2000).

7. See, e.g., Flagg, *supra* note 5, at 993–94 (suggesting “reformist” disparate impact rule); Siegel, *supra* note 5, at 1144–45. Disparate impact is not, of course, the only proposed solution to the problem of intent. Charles Lawrence, for instance, suggests that courts apply a “cultural meaning” test to help ferret out unconscious bias. See Lawrence, *supra* note 5, at 354–55.

8. 401 U.S. 424 (1971).

9. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 *Cal. L. Rev.* 1, 13–14 (2006) (noting that disparate impact doctrine focuses on discrete employment decisions and difficulty of breaking down most employment decisions into discrete elements); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment*

Beyond the Title VII context, the limitations of disparate impact theory as an alternative to intent seem more fundamental. Disparate impact has been most daringly used to address racial inequality in the context of Title VI of the 1964 Civil Rights Act, which applies to all recipients of federal funds. It is Title VI's disparate impact standard that civil rights advocates utilized to meet intent's shortfall, harnessing the doctrine beyond the usual targets of employment testing and objective employment criteria to reach actions by governments that had powerful disadvantaging effects on minority communities and individuals.¹⁰ Title VI's breadth appeared to give it power to, in effect, attack the structural dimensions of race—the way in which government decisions perpetuate racial inequality. Yet, I suggest, the Title VI disparate impact standard assimilated many of the limitations of the constitutional intent rule, with courts declining to hold governments responsible for structural inequities that they did not cause.¹¹

My aim is not merely to decry the insufficiency of disparate impact standards, but rather to focus attention on potentially promising regulatory avenues for addressing racial disparities. I begin with the premise that racial disparities warrant public intervention even when they are not

Opportunity, 47 *Stan. L. Rev.* 1161, 1162 n.3 (1995) (noting that relatively few employment cases are amenable to disparate impact theory); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?*, 42 *Brandeis L.J.* 597, 598–600 (2004) (offering that disparate impact may be “underutilized” in employment cases because employers have replaced invalid selection devices in response to *Griggs* and because practicing bar has not fully appreciated potential of disparate impact theory, among other reasons).

The empirical picture on the utility of Title VII disparate impact claims is not altogether clear. John Donohue and Peter Siegelman have shown that far fewer disparate impact claims are litigated under Title VII than disparate treatment claims. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *Stan. L. Rev.* 983, 998 (1991) (estimating disparate impact doctrine's “extremely modest” effect on litigation to have generated 101 additional cases in 1989). Christine Jolls rightly notes that the reliance on the number of disparate impact claims understates their importance, since most Title VII disparate impact cases involve a challenge to practices that affect a large group. See Christine Jolls, *Commentary, Antidiscrimination and Accommodation*, 115 *Harv. L. Rev.* 642, 671–72 (2001) (explaining that “[t]he number of disparate impact claims is not a reliable predictor of their actual importance” because plaintiffs must show employment practices that disproportionately harm specific group). Michael Selmi's recent review of Title VII appellate and district court decisions raising disparate impact claims finds that “[d]isparate impact claims are more difficult to prove than standard intentional discrimination.” Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 *UCLA L. Rev.* 701, 734–42 (2006) [hereinafter Selmi, *Mistake*] (reviewing reported appellate and trial decisions over number of years).

10. See *infra* notes 86–96 and accompanying text.

11. Subsequently, Title VI's disparate impact standard lost much of its practical utility when the Supreme Court, in *Alexander v. Sandoval*, 532 U.S. 275 (2001), declined to imply a private right of action to enforce Title VI's disparate impact regulations. Congress currently has before it legislation to make clear that Title VI permits disparate impact claims. See *Fairness and Individual Rights Necessary to Ensure a Stronger Society: The Civil Rights Act of 2004*, S. 2088, 108th Cong. (2004).

explained solely by racial bias. For one, the failure to address pronounced racial disparities can be seen as a denial of equal citizenship. In this vein, Glenn Loury has observed that the public is mute in the face of dramatic racial disparities because the harms suffered by African Americans are not given equal weight or importance in political discourse.¹² This fundamental lack of regard for, or failure to care about, the harms or disadvantages minorities experience reflects the denial of their equal humanity, acting as an impediment to equal citizenship.

Second, racial disparities warrant public intervention because of the continuing role of public policy and institutional practices in generating racial inequality.¹³ As public institutions develop and implement social policy—provide education, reform welfare, develop sentencing policy, operate juvenile justice systems—they make decisions with racial effects that are often predictable and easily observable. These public practices may not “cause” racial inequity in the sense understood by the law of intentional bias, but they can exacerbate persistent and deeply embedded patterns of racial inequality. Given the power of these public institutions to dispense resources, structure opportunity, mete out punishments, and otherwise shape lives, they have a duty to undertake their decisions with care, with the consciousness that their practices might have differential impacts on already disadvantaged communities.

With these premises as a foundation, the primary focus of this Article is to show that new models of public intervention do, in fact, exist that take aim at racial disparity in ways that might hold more promise than traditional disparate impact standards. My prime example is Congress’s surprisingly direct effort to remedy racial disparities in the juvenile justice system. In 1992, Congress required states receiving federal juvenile justice funds to implement strategies to reduce disparities in the confinement rates of minority juveniles where those disparities are found to exist.¹⁴ This provision, known as the disproportionate minority contact standard (DMC), is not often discussed as a civil rights law or grouped with other laws that prohibit certain actions with a discriminatory effect. At least at the time of its initial enactment, the law escaped some of the

12. Glenn C. Loury, *The Anatomy of Racial Inequality* 79–84 (2002) [hereinafter Loury, *Racial Inequality*]; see also Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 *Harv. L. Rev.* 1, 7 (1976) (describing “racially selective sympathy and indifference” as process defect worthy of equal protection review); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 *N.Y.U. L. Rev.* 803, 890 (2004) (proposing structured analysis for determining policies that have racially stigmatizing effects).

13. See discussion *infra* Part I. That public institutions act in ways that exacerbate inequality is not uncontested. Some might put full blame on genetic inferiority, individual failures, or culture differences as an explanation for racial inequality. My aim is not to rebut all these arguments, but later in the Article I provide support for the role of contemporary bias and contemporary public practices. See *infra* text accompanying notes 28–38.

14. See Act of Nov. 4, 1992, Pub. L. No. 102-586, § 2(f)(3)(A)(ii), 106 Stat. 4982, 4993–94 (codified as amended at 42 U.S.C. § 5633 (Supp. III 2005)).

controversy that had plagued other provisions that prohibit practices because of their disparate impact on racial and ethnic minorities. Just a year before adopting the DMC provision, Congress had been embroiled in a debate on codifying an effects standard under Title VII of the Civil Rights Act, raising questions about whether an effects test would place too steep a cost on employers for practices that produced an unintentional impact on minority groups.¹⁵ The DMC provisions escaped controversy perhaps because, in contrast to Title VII, they seemed modest; they applied only to state-run juvenile justice programs receiving federal funds, rather than implicating the practices of thousands of private businesses and employers. But in another sense, the DMC provisions are quite far-reaching: They announced a standard that requires public actors to reduce racial disparities without specifying whether those disparities were motivated by intentional discrimination, caused by the public actor or agency, or justified by the agency's legitimate institutional interests. Rather, the statute takes aim at racial disparity by encouraging institutions to gather information about racially disparate effects, information which then helps reformers and outside advocates better understand the role of public policies in exacerbating inequality and take informed steps to intervene.

The DMC statute stems from concerns about minority overrepresentation in the juvenile justice system, and, more concretely, from evidence that such overrepresentation could *not* be explained solely by higher levels of criminal activity. Rather, evidence showed that African Americans were often treated more harshly than similarly situated whites, suggesting, in effect, that the juvenile justice system's practices were complicit in producing inequality.¹⁶ The legislative record does not provide a comprehensive account of how bias and structural racial inequality might account for these disparities, but it gestures toward a theory that discrimi-

15. The Civil Rights Act of 1990 was introduced to codify the disparate impact standard under Title VII and sought to correct some of the weakening of the standard resulting from the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which held, *inter alia*, that disparate impact plaintiffs bore the burden of persuasion on the question of business justification even after establishing a *prima facie* claim. President George H.W. Bush vetoed the Act, stating it would require employers to adopt quotas in order to insulate themselves from liability, and Congress sustained the veto. See Helen Dewar, Senate Upholds Civil Rights Bill Veto, Dooming Measure for 1990, *Wash. Post*, Oct. 25, 1990, at A15. In 1991, under political pressure after the Clarence Thomas confirmation hearings, President Bush signed the Civil Rights Act of 1991, which was similar to the 1990 bill. See Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101–106, 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. §§ 2000e(m), 2000e-2(k) (2000)) (laying out elements of disparate impact claims and stating that defendants bear burden of persuasion if plaintiffs make out *prima facie* case); see also Peter H. Shuck, *Affirmative Action: Past, Present, and Future*, 20 *Yale L. & Pol'y Rev.* 1, 52 (2002) (discussing enactment of Civil Rights Act of 1991); Andrew M. Dansicker, Note, *A Sheep in Wolf's Clothing: Affirmative Action, Disparate Impact, Quotas and the Civil Rights Act*, 25 *Colum. J.L. & Soc. Probs.* 1, 38–39 (1991) (discussing veto of Civil Rights Act of 1990).

16. See *infra* notes 157–160 and accompanying text.

nation (understood as invidious bias) is not an adequate way of cabining public responsibility for racial inequality. The potential practical power of the resulting statute is that it provides a mechanism for encouraging a public institution not only to uncover bias in its practices (both explicit and implicit), but also to examine more broadly how its practices work to reproduce or exacerbate racial disadvantage.

Part I of this Article directs attention to the continued role of state institutions in generating racial inequality.¹⁷ I argue here that while recent legal commentary has placed great emphasis on implicit bias as key to understanding contemporary racial inequality, even implicit bias theories are inadequate to that task. In addition to examining bias, one must address how public policies and practices exacerbate embedded, cumulative patterns of racial inequality that persist even in the absence of contemporary bias. Part II discusses how current federal constitutional law provides little incentive to public actors to consider the racial impact of their actions; indeed—through its limited conceptualization of causation—it provides incentives for institutions to obscure or avoid knowledge of racial disparities. As has been noted in the commentary, the Supreme Court’s narrow interpretation of equal protection reflects concerns that a constitutional impact standard would require broad restructuring of our social institutions.¹⁸ My argument is that this same fear about the reach of constitutional disparate impact standards persists in judicial interpretations of *statutory* disparate impact standards. As an example, this Part examines a Title VI challenge to a Texas educational assessment program which, I argue, illustrates how disparate impact standards are constrained by the fault-based paradigm of intent. For this reason, disparate impact is generally an insufficient mechanism for encouraging institutions to consider how their policies exacerbate racial inequality.

Part III then argues that, in fact, additional models exist within federal law outside the *Griggs*-based disparate impact standard. This Part offers the juvenile DMC standard as an example of a regime that seeks to prompt institutions to address and remedy racial inequality in much broader ways than the traditional impact standard by requiring institutions to gather and distribute information about racial disparities and to take affirmative steps to remedy those disparities. This model seeks to address not only disparities caused by racial bias—the traditional domain of antidiscrimination law—but also to interrupt a broader set of race-specific patterns of inequality. Part IV argues that the DMC approach can be

17. See Michael K. Brown et al., *Whitewashing Race: The Myth of a Color-Blind Society* 19–20 (2003) (discussing ways in which institutions intentionally and unintentionally generate racial inequality).

18. See, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *Colum. L. Rev.* 857, 897–99 (1999) (noting concern of Supreme Court that effects test could invalidate wide range of statutes leading to “wholesale restructuring of the basic institutions of society”).

observed in contemporary approaches to other problems of racial inequality, and suggests that to address racial inequality, one should consider extending these models further. This final Part also examines the drawbacks of relying on racial disparity as a point of social intervention.

A spate of recent commentary has decried antidiscrimination law's failures in addressing contemporary racial inequality and has put faith broadly in politics or social movements as possible avenues for a solution.¹⁹ But, of course, politics creates law—the statutory disparate impact standards of Title VI and Title VII are creations of the political process, as is the DMC standard discussed in this Article. Rather than opposing law and politics, this Article suggests that we consider the specific kinds of legal interventions that might be created by an imagined political change. The failures of traditional antidiscrimination law need not signal the end of public regulatory interventions to address racial inequity. This Article, while acknowledging some of the limitations of DMC, proposes that commentators examine DMC and other emerging approaches that attempt to respond to the complexities of contemporary race.

I. GENERATING DISPARITY

African Americans have experienced significant gains in their social and economic status over the last forty-five years.²⁰ They continue, however, to lag behind whites in many measures of social and economic well-being.²¹ The frequent cataloguing of racial disparity can promote inaction: Racial disparities can be seen as something to be expected—an understandable vestige of a prior unjust social order—rather than something produced by current policies. Data on racial disparity in health care status, levels of incarceration, and educational attainment does not tell us much about the mechanisms that create those disparities. It is only when more closely examined that racial disparities can provide a clue to the complex ways in which institutions—particularly public institutions—contribute to racial inequality.²²

In examining this complexity, recent legal commentary has focused on the role of bias that is unconscious or implicit. Commentary on implicit and unconscious bias responds to constitutional law and statutory disparate treatment frameworks that contemplate discrimination as con-

19. See, e.g., Bagenstos, *supra* note 9, at 47 (noting promise in structural approach to employment discrimination, but concluding that without “a new politics, it is doubtful that the doctrinal proposals that have emerged from the structural turn will ever have a meaningful effect on employment discrimination”); Selmi, *Mistake*, *supra* note 9, at 780 (arguing that “[w]hat is necessary is a broader social movement that seeks to explain how pervasive discrimination remains”).

20. This Article primarily focuses on African American inequality as compared to white Americans.

21. See, e.g., Brown et al., *supra* note 17, at 13–15 (documenting socioeconomic disparities in income, homeownership, and healthcare access).

22. See *id.* at 19–20.

scious, hostile animus, and to popular conceptions that race discrimination is increasingly irrelevant in contemporary American life.²³ The notion that discrimination results from unconscious mechanisms begins with the work of Charles Lawrence, who borrowed from Freudian theory and cognitive psychology to argue that race discrimination results not simply from conscious animus, but from subconscious beliefs, attitudes, and shared cultural values.²⁴ Subsequently, Linda Krieger, building on empirical research from social cognition theorists, has argued that intergroup bias does not merely result from “motivational processes,” but may be the inevitable result of “cognitive structures and processes involved in categorization and information processing.”²⁵ The conversation continues to advance with commentators such as Jerry Kang making use of increasingly sophisticated research on the pervasiveness of implicit bias toward socially disfavored groups and also on research showing that such bias has behavioral consequences.²⁶

Discussions of implicit or unconscious bias in legal commentary often focus on its operation in private markets or in the private workplace.²⁷ Without minimizing the importance of market settings, implicit bias in government settings—because of the sheer reach of government policy and programs—likely has even more profound effects in maintaining systemic racial inequality. Controlled studies suggest continued disparities in treatment by public actors that may help explain differences in various indicators of social well-being. For instance, police search and detain African Americans more often than similarly situated whites, providing a partial explanation for racial disparities in drug arrests.²⁸ Minor-

23. See Ian Ayres, *Is Discrimination Elusive?*, 55 *Stan. L. Rev.* 2419, 2420 (2003) (“There is mounting evidence that race-contingent decisionmaking is still a pervasive factor in many (but not all) facets of everyday life.”).

24. See Lawrence, *supra* note 5, at 322. Lawrence relies on Freudian theory for the notion that the unconscious self holds onto racist beliefs even as the conscious self knows that these beliefs are wrong, and on cognitive psychology which tells us that pervasive cultural stereotypes can be “transmitted by tacit understandings” which, “because they have never been articulated, are less likely to be experienced at a conscious level.” *Id.* at 322–23.

25. Krieger, *supra* note 9, at 1187.

26. See, e.g., Jerry Kang, *Trojan Horses of Race*, 118 *Harv. L. Rev.* 1489, 1505–17 (2005) (discussing various developments in measuring implicit biases); see also Cass R. Sunstein & Christine Jolls, *The Law of Implicit Bias*, 94 *Cal. L. Rev.* 969, 971–73 (2006) (discussing evidence of implicit racial bias from Implicit Association Test (IAT)).

27. This is primarily because the cognitive bias approach is most developed in the area of employment. See, e.g., Krieger, *supra* note 9, at 1165 (arguing that disparate treatment framework used in employment discrimination cases erroneously assumes that discrimination is motivational rather than cognitive).

28. See, e.g., Peter Verniero & Paul H. Zoubek, Office of the Att’y Gen. of the State of N.J., *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 25–29* (1999), available at http://www.state.nj.us/lps/intm_419.pdf (on file with the *Columbia Law Review*) (collecting “Stop, Arrest, and Search” data across races); Eliot Spitzer, Office of the Att’y Gen. of the State of N.Y., *The New York City Police Department’s “Stop & Frisk” Practices* (1999), available at <http://www.oag.state.ny.us/>

ity status proves more salient than income levels in explaining the siting of environmentally burdensome facilities.²⁹ Controlling for relevant factors, studies have found that black welfare recipients are given less access to employment and education services than are their white counterparts, differences that might affect the rate at which African American women are able to leave welfare for gainful employment.³⁰ And, as discussed in Part IV, African American youth in the juvenile justice system are given harsher, more restrictive dispositions than are their white counterparts, when controlling for relevant factors such as the offense committed.³¹ These studies suggest that the disparities are in part caused by bias, possibly unconscious, in the implementation of social policies.

Yet bias—even implicit bias—is too limited a way of capturing the complex mechanisms that produce racial disparity in particular areas. While recent legal commentary has made much use of research from cognitive psychology, cognitive bias fails to address how institutional arrangements and ongoing practices interact with longstanding, persistent patterns of racial inequality.³² In legal commentary, this terrain beyond bias is sometimes referred to broadly as “institutional racism.”³³ But “institutional racism” like the infamous “amorphous societal discrimination”—

press/reports/stop_frisk/stop_frisk.html (on file with the *Columbia Law Review*) (comparing stop rates of whites and minorities); see also Brandon Garrett, *Remediating Racial Profiling*, 33 *Colum. Hum. Rts. L. Rev.* 41, 51–53 (2001) (describing problem of racial profiling in New Jersey).

29. See, e.g., Comm’n for Racial Justice, *United Church of Christ, Toxic Wastes and Race in the United States 15–17* (1987) (finding that socioeconomic status played important role in location of commercial hazardous waste facilities, but that race was more significant factor); Benjamin A. Goldman & Laura J. Fitton, *Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites 2* (1994), available at <http://www.stateaction.org/publications/pdf/toxicwastes.pdf> (on file with the *Columbia Law Review*) (finding that during period “people of color became even more disproportionately represented in communities with toxic waste facilities”); see also U.S. Gen. Accounting Office, *GAO/RCED-83-168, Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities app. I* (1983) (collecting relevant data from “four hazardous waste sites”); Mank, *supra* note 2, at 790 n.9 (collecting studies).

30. See, e.g., Gooden, *supra* note 1, at 27–33 (providing evidence of racially disparate treatment by caseworkers in provision of information about self-sufficiency services (education, employment, and transportation assistance) to women receiving assistance under federal Temporary Assistance for Needy Families (TANF) program). For a discussion of TANF, see *infra* notes 198–202 and accompanying text.

31. See *infra* notes 131–132 and accompanying text.

32. Jerry Kang acknowledges this point, when he notes that: “Durable inequality may also be maintained by structural arrangements that are no longer tightly connected to bias, implicit or explicit. Implicit bias should not circumscribe the content of our concerns.” See Kang, *supra* note 26, at 1593.

33. Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 *Stan. L. Rev.* 2365, 2413 (2003) (“[T]he key challenge [of race scholars] is to move from the phrase ‘institutional racism’ to comprehensive accounts of the patterns and practices that generate racial disadvantage in public institutions, market settings, and private life.”).

the impermissible rationale for race-based affirmative action³⁴—also has limitations. The term conjures racial disparity that is too pervasive to be quantified or remedied. But much of how race operates and how disparities are generated by particular institutions is knowable.³⁵ Decades of discrimination have created a social structure that shapes in distinctly racial terms where people live,³⁶ their access to wealth and social welfare programs,³⁷ their educational resources, and the networks and social capital that enable employment and mobility.³⁸ Much like recent efforts to understand gender- and race-based inequalities as a partial function of workplace structures,³⁹ racial inequalities across a variety of social and economic areas can be addressed by understanding the specific ways in which government policies and practices interact with this social structure of race.⁴⁰ As I discuss in Part IV, racial disparities in the juvenile justice system are created in part by bias, likely unconscious, but also by

34. See Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. Rev. 1575, 1582–601 (2002) (cataloguing affirmative action cases holding that “societal discrimination” is not a compelling interest). But cf. Clark D. Cunningham, Glenn C. Loury & John David Skrentny, *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 Geo. L.J. 835, 857 (2002) (arguing that affirmative action cases should not be read to hold that remedying “societal discrimination” is un compelling but rather that affirmative action plans at issue were inadequately tailored to that goal).

35. But cf. *Milliken v. Bradley*, 418 U.S. 717, 756 n.2 (1974) (Stewart, J., concurring) (noting that causes of segregation are “unknown and perhaps unknowable”).

36. See, e.g., Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 3, 7–9 (1993) (contending that residential segregation is primary factor in creation and perpetuation of so-called “urban underclass”); see also *id.* at 222 tbl.8.1 (presenting data showing general stasis or only small declines in black-white segregation in thirty metropolitan areas from 1970 to 1990).

37. See, e.g., Brown et al., *supra* note 17, at 74–80 (describing discrimination in distribution of veterans’ benefits and housing benefits during post-World War II era and into 1960s); Ira Katznelson, *When Affirmative Action Was White* 25–52 (2005) (describing black exclusion from social and economic programs of New Deal and post-World War II era); Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* 50–52 (1995) (describing how exclusion of blacks from key methods of asset accumulation, e.g., home ownership and access to self-employment, has resulted in persistent gap in wealth between blacks and whites).

38. See, e.g., Deirdre A. Royster, *Race and the Invisible Hand: How White Networks Exclude Black Men from Blue-Collar Jobs* 144–78 (2003); Glenn C. Loury, *Discrimination in the Post-Civil Rights Era: Beyond Market Interactions*, J. Econ. Persp., Spring 1998, at 117, 118 (urging consideration of social capital and not just labor market discrimination in explaining income-based inequality).

39. See Bagenstos, *supra* note 9, at 2. For a prominent example, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 470–71 (2001) (describing how “ongoing patterns of interaction shaped by organizational culture . . . influence workplace conditions, access, and opportunities for advancement over time” (footnote omitted)).

40. See Brown et al., *supra* note 17, at 19 (“Any analysis of racial inequality that routinely neglects organizations and practices that, intentionally or *unintentionally*, generate or maintain racial inequalities over long periods of time is incomplete and misleading.”).

the way in which government decisions—sentencing policy, for instance—affect minority communities that are poorer, are less likely to be composed of two-parent families, have less access to private counsel, and so on.⁴¹ We may lack the proper language for describing the process by which institutions generate unequal outcomes—“discrimination” seems to suggest only bias and “institutional racism” seems too vague.⁴² Given this language vacuum, the only hope may be to trace with much greater specificity⁴³ how our social policies interact with racially differential socio-economic conditions and access to opportunity.⁴⁴

Unpacking with greater specificity how racial disparities are generated also might help counter the inclination to accept disparities as a given, a vestige of an inherited unjust social order. As later discussed, the story of DMC lends support to this idea: The legislative history suggests that DMC was, at least in large part, the response to research showing that similarly situated youth were treated differently within the justice system. Providing such data would not, of course, be sufficient to counter policies motivated by racial hostility, yet such an approach might help to unsettle at least those policies that persist because of a lack of regard for minority groups. As Glenn Loury explains, racial inequality persists because racial disparities fail to produce consternation, and because the differential racial impacts of social policies are met with indifference.⁴⁵ One way of addressing racial inequality then is by highlighting that these disparities

41. See *infra* notes 134–144 and accompanying text.

42. Glenn Loury has suggested that discrimination be “demoted, dislodged from its current prominent place in the conceptual discourse on racial inequality in American life,” arguing that the concept of “development bias”—the unequal chance to realize one’s productive potential—is a better way to explain the persistence of racial inequality. See Loury, *Racial Inequality*, *supra* note 12, at 92–93. Similarly, Loury explains that his concept of “stigma” is a better way to understand persistent inequality than discrimination or bias: “The stigma idea is more flexible, providing insight both into race-constrained social interactions and race-influenced processes of social cognition. Thinking in terms of stigma helps us to better understand the operations of causal feedback loops that can perpetuate racial inequality from one generation to the next.” *Id.* at 160.

43. Cf. Ian Ayres, *Pervasive Prejudice?: Unconventional Evidence of Race and Gender Discrimination* 425–26 (2001) [hereinafter Ayres, *Pervasive Prejudice*] (arguing for greater efforts to quantify role of contemporary discrimination in marketplace).

44. See William Julius Wilson, *The Bridge Over the Racial Divide: Rising Inequality and Coalition Politics* 98 (1999) (discussing “social structure of inequality”); see also Brown et al., *supra* note 17, at 19–22 (describing how small policy decisions interact to create cumulative racial inequalities).

45. Loury describes racial inequality as maintained by “a disregard for the effects of a policy choice on the welfare of persons in different racial groups.” Loury, *Racial Inequality*, *supra* note 12, at 166. Loury explains: “A racial group is stigmatized when it can experience an alarming disparity in some social indicators, and yet that disparity occasion no societal reflection upon the extent to which that circumstance signals something having gone awry in OUR structures” *Id.* at 83. Loury illustrates this point in discussing racial disparities in incarceration rates:

Dramatic racial disparity in imprisonment rates does not occasion more public angst, I claim, because this circumstance does not strike the typical American observer at the cognitive level as being counterintuitive. It does not to a sufficient

are in fact created and maintained by contemporary public practices. To the extent that racial disparities reflect racial stigma—who a disfavored minority “*at the deepest cognitive level [is] understood to be*”⁴⁶—highlighting the mechanisms that sustain racial inequality will not, of course, lead to the immediate eradication of the problem. Building on the specific example of DMC which I discuss in greater detail in Part III, my suggestion is that presenting specific empirical information of how social policies generate racial inequality can provide a first step.

In sum, data on the fact of racial disparity does not by itself tell us much about the mechanisms that sustain racial inequality, nor alone lead to change. Such information can, as later discussed, provide a point of departure for addressing the complex ways in which public practices generate or maintain racial inequality.

II. FEENEY’S LEGACY

Traditional law provides little incentive for public institutions to address how their policies and practices perpetuate racial inequality. Constitutional law is, of course, concerned only with those racial disparities caused by a public actor’s intentional discrimination. Moreover, I suggest that even statutory disparate impact rules, while seemingly far-reaching, are effectively constrained by judicial concerns that broad disparate impact rules might render the government liable for racial disparities that it did not cause.

A. *The Feeney Problem*

The failure of the constitutional regime to provide a remedy for contemporary racial disparities has been the subject of extensive commentary, most of which centers on the limitations of *Washington v. Davis*.⁴⁷ The Supreme Court in *Davis* made clear that, standing alone, the discriminatory effects of a policy would not be sufficient to violate the Equal

degree disappoint some deeply held, taken-for-granted expectations and assumptions about the nature of our society.

Id. at 81. For the argument that constitutional law should account for racial stigma, rather than intentional discrimination, as the main source of racial harm, see generally Lenhardt, *supra* note 12, at 809.

Legal commentary also relies on the concept of indifference. For Paul Brest, “racially selective . . . indifference[,] the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group,” amounts to a process defect that, in his argument, should be constitutionally remediable. Brest, *supra* note 12, at 7–8. And in Charles Lawrence’s account, indifference to the racial harm generated by state decisions or laws—which for Lawrence stems from unconscious biases—is the condition that preexists racial harm. See Lawrence, *supra* note 5, at 354–55; see also *id.* at 322–23 (describing his theory of race discrimination as resulting not simply from conscious animus, but from subconscious beliefs and attitudes about racial groups).

46. Loury, *Racial Inequality*, *supra* note 12, at 167.

47. 426 U.S. 229 (1976).

Protection Clause.⁴⁸ To some extent, the Court's decision a year later in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*⁴⁹ mitigates the difficulty of meeting that test in holding that invidious purpose could be inferred from circumstantial evidence, including evidence of disparate impact.⁵⁰ But just two years after *Arlington Heights*, the Court narrowed the formulation of discriminatory purpose in *Personnel Administrator of Massachusetts v. Feeney*.⁵¹ *Feeney* held that an absolute lifetime preference for veterans in civil service jobs in Massachusetts, which excluded virtually all women from 60% of public jobs in the state, did not violate the Equal Protection Clause.⁵² Rejecting the plaintiffs' argument that the impact on women's employment opportunities was "too inevitable to have been unintended," the Court defined intent to require more than awareness of the impact or even reckless disregard of foreseeable impact.⁵³ Instead, the Court required that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."⁵⁴

As other commentators have noted, *Feeney*'s definition of intent as "because of, not in spite of" requires "a legislative state of mind akin to

48. See *id.* at 242 ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."). The Court, while noting that disparate impact may be relevant to invidious discriminatory purpose, stated that "we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." *Id.*

49. 429 U.S. 252, 265–66 (1977).

50. *Arlington Heights* allows that "[t]he impact of the official action—whether it 'bears more heavily on one race than another'—may provide an important starting point [for determining invidious discriminatory purpose]." *Id.* at 266 (citation omitted) (quoting *Davis*, 426 U.S. at 242). The *Arlington Heights* Court explains that invidious purpose could be implied not only from the fact of impact, but from looking at the processes surrounding the adoption of a decision, the historical background leading to the decision, whether there were procedural or substantive departures from normal procedures, and the legislative or administrative history surrounding adoption of the decision. *Id.* at 266–68.

51. 442 U.S. 256 (1979). By making insufficient the inferences to be drawn from indirect evidence of discrimination, *Feeney* takes away much of what *Arlington Heights* allowed. See *id.* at 280 (considering "totality of [relevant] legislative actions" and concluding no discriminatory purpose existed).

52. The preference was defined in gender inclusive language ("any person, male or female, including a nurse"), and women who served in official United States military units during wartime were eligible for the preference. *Id.* at 268. Yet because of the small number of women involved in military units during wartime, the overwhelming majority (ninety-eight percent) of veterans in the state were men and the statute benefited "an overwhelmingly male class." *Id.* at 269; see also *id.* at 269 n.21 (discussing limited role of women in military units). The Court acknowledged that a veterans' hiring preference was "inherently . . . gender-biased," but concluded that the State's decision to "intentionally incorporate[] into its public employment policies the panoply of sex-based and assertedly discriminatory federal laws that have prevented all but a handful of women from becoming veterans" was not sufficient to show discriminatory purpose. *Id.* at 276–77.

53. *Id.* at 276.

54. *Id.* at 279.

malice.”⁵⁵ In that sense, the problem with *Feeney* is that it is unresponsive to unconscious discrimination.⁵⁶ One cannot prevail under a malice standard by pointing out that the government would likely not adopt a provision that would deny ninety-eight percent of all men preferences for public jobs. A related limitation of *Feeney* is that it is unresponsive to the structural aspects of inequality: the embeddedness of gender inequality in the social structure. The history of discrimination in the armed services, which helps to create the gender disparity of the veterans’ preference, becomes irrelevant.⁵⁷ By holding that discriminatory purpose requires more than knowledge of disparate impact (“awareness of consequences”),⁵⁸ but rather action taken specifically to harm a particular group, *Feeney* provides little incentive to public actors to consider how their policies help maintain or generate racial inequality or to adopt policies to mitigate those impacts.

The Court’s decision a few years later in *McCleskey v. Kemp*, where the Court rejected a claim of racial discrimination in the administration of the death penalty, shows how *Feeney*’s formulation provides disincentives to examine racial impacts.⁵⁹ The petitioner in *McCleskey*, a black man sentenced to death in Georgia for the killing of a white police officer, challenged Georgia’s administration of the death penalty as racially discriminatory.⁶⁰ In rejecting the plaintiff’s equal protection claim, the Court held that even if the plaintiff’s evidence that race was a key deter-

55. Siegel, *supra* note 5, at 1135.

56. See Foster, *supra* note 5, at 1083–84 (suggesting *Feeney* requires subjective evidence of legislature’s discriminatory purpose); Siegel, *supra* note 5, at 1134–35 (suggesting *Feeney* requires an “express purpose” and “state of mind”). Siegel observes that after *Feeney* a plaintiff could not prevail simply by showing that “legislators had acted with unconscious bias of the sort Paul Brest had termed ‘selective sympathy and indifference.’” *Id.* at 1134 (quoting Brest, *supra* note 12, at 7–8). Similarly, Cass Sunstein has noted that *Feeney*’s intent test “disregards the phenomenon of selective racial care and indifference.” Cass R. Sunstein, *Lochner’s Legacy*, 87 Colum. L. Rev. 873, 897 n.119 (1987) (“[T]he equality question should be whether the actor would have made the decision *regardless of which group was helped and which hurt*. Such an inquiry would also turn on intent, but it would call into question a larger number of government decisions.”). Note that after *Davis*, legal process scholars like Paul Brest suggest that an intent standard is not inconsistent with the invalidation of legislative actions motivated by selective racial indifference, see Brest, *supra* note 12, at 14–15, but *Feeney*’s definition of intent is inconsistent with this view.

57. Similarly, the Court acknowledged that the “enlistment policies of the Armed Services may well have discriminated on the basis of sex,” but that discrimination was not caused by the veterans’ preference itself, and the “history of discrimination against women in the military is not on trial in this case.” *Feeney*, 442 U.S. at 278. To the Court, plaintiffs could not prevail by showing that the policy was indifferent to its absorption of a discriminatory status quo or that the law had been adopted in the face of its foreseeably exclusionary effects. Rather, the plaintiffs would have to show that the preference was adopted in order “to exclude women from significant public jobs.” *Id.* at 277.

58. *Id.* at 279.

59. 481 U.S. 279 (1987).

60. See *id.* at 279–80 (identifying *McCleskey*’s challenges under Eighth and Fourteenth Amendments).

minant in sentencing for the death penalty were true, this would not be sufficient to establish that the state had a discriminatory purpose.⁶¹ It was not sufficient to show that the death penalty was maintained in the face of this disparity. Rather, the Court would have required that the plaintiff show that the Georgia legislature had “enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.”⁶² Under the *McCleskey-Feeney* formulation, public actors need not be aware of racial disparities, and in fact, inaction in the face of known discriminatory effects will not violate equal protection.⁶³

Feeney and *McCleskey* reflect concerns about the comparative competence of courts to remedy disparate racial impacts,⁶⁴ but also about the redistributive reach of a constitutional disparate impact standard that

61. *Id.* at 298–99 (concluding that sentencing’s “alleged [] discriminatory application” would not itself sustain equal protection challenge). *McCleskey*’s evidence included the Baldus study, which examined 2,000 murder cases in Georgia and found that defendants charged with killing white persons were substantially more likely to receive the death penalty. See *id.* at 286–87. Controlling for a range of variables, the Baldus study found that defendants charged with killing whites were 4.3 times more likely to receive the death penalty than those charged with killing blacks. *Id.* at 287.

62. *Id.* at 298.

63. The *McCleskey* dissent notes that the majority’s holding will do little to prompt states to address disparities in the administration of criminal justice. Justice Stevens notes that a finding that the system was racially discriminatory might prompt the State to limit the death penalty to certain categories where race-based imposition was less likely. See *id.* at 367 (Stevens, J., dissenting). Justice Blackmun, who would find the evidence sufficient to lead to an inference of discriminatory purpose by prosecutors in seeking the death penalty, suggests that as a remedy prosecutors could develop a consistent set of guidelines in exercising their discretion to seek the death penalty. See *id.* at 365 (Blackmun, J., dissenting). Indeed, the majority’s holding seems designed to avoid subjecting public practices to an analysis of racial impact. The majority openly worries that allowing *McCleskey*’s claim would destabilize other criminal justice penalties. *Id.* at 315 (majority opinion). By contrast, to the dissent, prompting public examination of racial effects is a positive: The possibility of additional constitutional challenges might “lead to a closer examination of the effects of racial considerations throughout the criminal justice system,” potentially benefiting “the system, and hence society.” *Id.* at 365 (Blackmun, J., dissenting).

64. The *Feeney* Court notes that “[t]he calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.” *Pers. Admin’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). This concern about judicial competence begins with the *Davis* Court’s direction that disparate impact rules “should await legislative prescription.” *Washington v. Davis*, 426 U.S. 229, 248 (1976). As Robert Post and Reva Siegel put the point, these statements reflect that the Court’s “embrace of discriminatory purpose doctrine is rooted in concerns relating to the institutional legitimacy and competence of Article III courts.” Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *Yale L.J.* 441, 471 (2000). Post and Siegel contend that the *Davis* line of cases suggests a role for legislatures in making judgments about what violates the Equal Protection Clause that may differ from that of the Supreme Court. See *id.* at 469 (“[T]he doctrine of discriminatory purpose is not justified by the requirements of the Equal Protection Clause, but by reference to the particular institutional limitations of the Court as a nonrepresentative body within a democracy.”).

would potentially apply to a broad range of actions.⁶⁵ This concern is evident in the *Davis* Court's argument that a constitutional rule would destabilize too many public policies and statutes.⁶⁶ *McCleskey* too is concerned with what Justice Brennan in dissent calls "too much justice"⁶⁷—the concern that allowing *McCleskey* to prevail would open up many additional challenges to the fairness of the criminal justice system.⁶⁸

I revisit these concerns not to reopen discussions of preferable alternative constitutional standards,⁶⁹ but rather to suggest that these concerns may hamper judicial implementation of any disparate impact standard. Disparate impact standards are often touted as a solution to the requirement of intent, yet their potency has been limited both by practical difficulties in establishing disparate effect, and, more fundamentally by judicial concern with cabining government responsibility for remedying structural racial inequities. We see this most compellingly in attempts by civil rights advocates to use the disparate impact standard of Title VI of the 1964 Civil Rights Act to, in effect, counter the limitations of the constitutional intent standard.

B. *Title VI: Power and Limits*

Most scholarly discussion of disparate impact standards center on Title VII of the 1964 Civil Rights Act. Title VII's disparate impact standard was first given shape by the Supreme Court in *Griggs v. Duke Power Co.*,⁷⁰ and, after a series of Supreme Court decisions in the late 1980s narrowing the scope of *Griggs*,⁷¹ Congress responded by explicitly codifying the *Griggs* standard.⁷² Title VII's disparate impact standard is sometimes cast as having far-reaching power to shape employment practices,⁷³

65. See Levinson, *supra* note 18, at 897–99 (arguing that equal protection impact rule reflects institutional concerns about potential breadth of any remedy for racial inequality); see also *id.* at 899 ("Once existing racial inequality becomes a matter of equal protection concern, it is hard to imagine any nonarbitrary stopping point . . . short of . . . wholesale restructuring of . . . basic institutions of society to redistribute resources and power more fairly . . . [T]his is not [a] project courts would be inclined (or allowed) to undertake.").

66. See *Davis*, 426 U.S. at 248.

67. 481 U.S. at 339 (Brennan, J., dissenting).

68. *Id.* at 315 (majority opinion).

69. For proposals of alternative constitutional approaches, see, e.g., Lawrence, *supra* note 5, at 365–68 (recommending that courts apply "cultural meaning test"); Lenhardt, *supra* note 12, at 878–82 (stating that courts should evaluate racially stigmatic meaning of particular law or policy).

70. 401 U.S. 424 (1971).

71. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656–58 (stiffening burden of proof for employees attempting to prove discrimination with disparate impact test).

72. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k) (2000)).

73. See, e.g., Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 *Chi.-Kent L. Rev.* 1, 1–2 (1987) (arguing that "[f]ew decisions of our time . . . have had such momentous social consequences"). Even more recent commentary assumes that the theory has been successful in shaping employer behavior.

but a spate of recent commentary has challenged both the practical utility of the standard in changing employment practices, and whether the theory underlying *Griggs*—never well-defined—has the normative power to move beyond fault-based conceptions of equality inherent in the intent standard.⁷⁴ As a result, several commentators have concluded that Title VII disparate impact theory has had little impact outside of the area of written employment tests, many of which were not validated and thus could not meet *Griggs*'s requirement that practices with a disparate impact be justified by business necessity.⁷⁵

My interest, here, is in the operation of disparate impact theory under Title VI of the 1964 Civil Rights Act, because Title VI is the federal statute most specifically concerned with discrimination and racial disparities generated by public actors. Title VI of the 1964 Civil Rights Act prohibits racial discrimination in federal agencies and by recipients of federal funds,⁷⁶ and thus applies to a broader range of public regulatory

See, e.g., Jolls, *supra* note 9, at 652 (finding that “important aspects of disparate impact law are in fact accommodation requirements” because they require employers “to incur special costs in response to the distinctive needs or circumstances . . . of particular groups”).

74. See, e.g., Bagenstos, *supra* note 9, at 21–26 (discussing “courts’ unwillingness to engage in rigorous scrutiny of employers’ subjective employment practices”); see also *id.* at 45 (arguing that courts are hostile to disparate impact law because they are wedded to “paradigm of a fault-based understanding of ‘discrimination’”); Selmi, *Mistake*, *supra* note 9, at 705–07 (“Outside of the original context in which [disparate impact] theory arose, . . . [it] has produced no substantial social change and there is no reason to think that extending the theory to other contexts would have produced meaningful reform.”); George Rutherglen, *Abolition in a Different Voice*, 78 Va. L. Rev. 1463, 1476 (1992) (book review) (noting that Title VII disparate impact standard worked great changes until it was made more challenging by series of Supreme Court decisions in late 1970s); see also Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 530–32 (2003) (“Rather than aiming to integrate the workplace, perhaps disparate impact doctrine should be understood as aiming only to foster as much integration as would occur if employers stopped using unjustified business practices that reinforced the effects of historical discrimination.”).

75. Title VI and Title VII are not, of course, the only examples of civil rights laws with effects tests. Arguably the most successful effects test is the one contained in the Voting Rights Act, see Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973), which does not follow the *Griggs* framework. The Fair Housing Act does not contain an explicit effects test in its regulation or statute, but it has been construed by most circuits to allow disparate impact causes of action. See generally Dana L. Kaersvang, *The Fair Housing Act and Disparate Impact in Homeowners Insurance*, 104 Mich. L. Rev. 1993, 2007 n.117 (2006) (citing cases applying disparate impact theory to Fair Housing Act claims).

76. Section 601 of Title VI prohibits discrimination based on race, color, or national origin in any “program or activity” receiving “Federal financial assistance.” 42 U.S.C. § 2000d. Federal financial assistance includes not only federal grants, but loans and indirect assistance such as federal financial aid to students or Medicaid reimbursements. See, e.g., *Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984) (holding that Title IX—modeled on Title VI—applies where institution’s students receive federal financial assistance); Dep’t of Health & Human Servs., 45 C.F.R. § 80.6 (2005) (setting forth disparate impact regulations).

contexts than Title VII.⁷⁷ Because it can reach into almost as many areas as a constitutional impact rule, a Title VI effect rule has the power to encourage public decisionmaking that is attentive to racial disparities, and to reach toward the goal of disestablishing state-maintained racial inequality.⁷⁸ If part of the goal of disparate impact theory is to encourage a broad range of institutions to change their practices to help to achieve racial equality,⁷⁹ it is Title VI's disparate impact standard that could best be marshaled to achieve that goal. The Supreme Court eventually held in *Alexander v. Sandoval* that Title VI's disparate impact standard was not privately enforceable, though it remains enforceable at the administrative level.⁸⁰ And Congress currently has legislation before it to make explicit that Title VI's disparate impact standard can be privately enforced. Yet, even before *Sandoval* the Title VI disparate impact standard, while almost certainly an improvement over the intent standard, was subject to judicial interpretations that limited its power to encourage public actors to address racial disparities. A key problem, as a recent commentator has noted, is the lack of explicit guidelines by agencies for enforcing Title VI disparate impact.⁸¹ More broadly, the theory underlying Title VI disparate impact has never been well articulated by administrative agencies or

77. At the time of Title VI's enactment, Congress was primarily concerned with segregated education, see Charles F. Abernathy, Title VI and the Constitution: A Regulatory Model for Defining "Discrimination," 70 Geo. L.J. 1, 1 (1981), and, to a lesser extent, discrimination in hospitals, see Kenneth Wing, Title VI and Health Facilities: Forms Without Substance, 30 Hastings L.J. 137, 152 n.56, 153 n.58 (1978) (documenting legislative concern with prohibiting discrimination in health care, particularly in hospital services). But the statute was written broadly to prohibit discrimination in all federally funded programs. Subsequent amendments to Title VI make clear that the statute is not limited to the particular program or unit receiving federal funds, but applies to all of an entity's operations and programs. The Supreme Court in *Grove City* had interpreted the "program or activity" requirement in Title IX—which is modeled on Title VI—narrowly, as limited to the particular office or program receiving federal funds, but in 1988, Congress passed the Civil Rights Restoration Act of 1987 to correct *Grove City's* interpretation. See Pub. L. No. 100-259, § 6, 102 Stat. 28, 31 (1988) (codified at 42 U.S.C. § 2000d-4a) (defining "program or activity" under Title VI, Title IX, and Section 504 of the Rehabilitation Act to include "all . . . operations" of an entity, "any part of which is extended Federal financial assistance").

78. In calling for the enactment of Title VI, President Kennedy argued that "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." H.R. Doc. No. 88-124, at 12 (1963).

79. See Selmi, Mistake, *supra* note 9, at 712 (discussing origins of disparate impact theory and its goal of providing opportunities to African Americans); Siegel, *supra* note 5, at 1145 (arguing that if Supreme Court had adopted disparate impact theory as matter of constitutional law, equal protection litigation might have led to elimination of historic patterns of race and gender stratification).

80. 532 U.S. 275 (2001).

81. See Charles F. Abernathy, Legal Realism and the Failure of the "Effects" Test for Discrimination, 94 Geo. L.J. 267, 286-97 (2006) [hereinafter Abernathy, Legal Realism] (arguing that lack of explicit guidelines requires judges to engage in "an ad hoc balancing" of practice's harm to minorities against its social benefit).

by courts, in particular the extent to which Title VI disparate impact theory extends beyond fault-based conceptions of intent. As I discuss below, with this lack of clarity, some courts appeared reluctant to use Title VI to require public actors to remedy racial disparities that they did not cause.

Title VI's breadth and its potential power derive from its application to a wide range of funding programs. Most federal agencies that provide funding to states and localities have adopted regulations under Title VI prohibiting the use of "criteria or other methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin,"⁸² and, in giving meaning to those regulations, courts have adopted the *Griggs* framework of proof.⁸³ Despite its broad application, until the 1980s there was little attempt to judicially enforce Title VI's statutory requirements, much less to enforce Title VI's effects regulation,⁸⁴ leading some to call Title VI the "sleeping giant" of civil rights.⁸⁵

82. Dep't of Justice, 28 C.F.R. § 42.104(b)(2) (2005) (Justice Department regulations); see Dep't of Health and Human Servs., 45 C.F.R. § 80.3(b)(3) (2005) (regulations promulgated by the Department of Health and Human Services). Title VI does not define the prohibited discrimination but, in section 602 of the Act, directs agencies that distribute federal funds to "effectuate" the regulations by issuing "rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. Congress required presidential approval of the regulations, and also directed that the regulations be "consistent with achievement of the objectives of the statute authorizing the financial assistance." *Id.*

83. See *Lau v. Nichols*, 414 U.S. 563, 566-67 (1974) (applying *Griggs* standard, without discussion, to Title VI impact case); *Powell v. Ridge*, 189 F.3d 387, 393 (3d Cir. 1999) ("[T]he courts of appeals have generally agreed that the parties' respective burdens in a Title VI disparate impact case should follow those developed in Title VII cases."); see also *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1418 (11th Cir. 1985) (applying *Griggs* to Title VI litigation); *Larry P. v. Riles*, 793 F.2d 969, 982 & n.9 (9th Cir. 1984) (same).

84. One commentator suggests that Title VI was relatively underutilized by private litigants because the statute contains no explicit private right of action, and there was uncertainty about its enforceability prior to the Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979), implying a private right of action under Title IX (which is modeled on Title VI). See Alan Jenkins, Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs, in *Civil Rights Litigation and Attorney's Fees Annual Handbook* 173, 180 (Steven Saltzman & Barbara M. Wolvovitz eds., 1995). Compare *Clark v. Louisa County Sch. Bd.*, 472 F. Supp. 321, 323 (E.D. Va. 1979) (finding pre-*Cannon* that Title VI did not provide private right of action), with *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments*, 496 F. Supp. 522, 526-27 (N.D. Ill. 1980) (implying cause of action for declaratory and injunctive relief, but not money damages). Not until the decisions in *Guardians Ass'n v. Civil Service Commission of New York*, 463 U.S. 582 (1983) (plurality opinion), and *Alexander v. Choate*, 469 U.S. 287 (1985), did the Court clarify that the Title VI statute itself prohibited only intentional discrimination, while the agency regulations allowed actions based on "unjustifiable disparate impact." See *Alexander*, 469 U.S. at 293.

85. Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 *Tex. J. C.L. & C.R.* 1, 25 (2002); *The Forum Debriefs Deval Patrick*, *Civ. Rts. F.*, Winter 1997, at

Beginning in the 1980s, however, scholars and advocates began to focus on the potential use of Title VI's disparate impact test to challenge racial disparities in the allocation of environmental burdens.⁸⁶ In other cases, Title VI's disparate impact standard has been used to challenge discrimination in the siting of highway facilities,⁸⁷ the closing of hospitals serving high-minority communities,⁸⁸ and the use of IQ tests to place black school children in classes for the mentally retarded.⁸⁹ Until the Supreme Court's 2001 decision in *Alexander v. Sandoval*, which declined to imply a private right of action to enforce Title VI's effects regulation,⁹⁰ the hope among civil rights proponents was that Title VI could systematically be employed to address racial inequities in public health and insurance programs, education, and transportation programs.⁹¹

The faith in Title VI's disparate impact regulations was not altogether misplaced. A handful of important cases succeeded under the disparate impact approach, most of which would likely have stumbled if intent had to be proved, and none of which could easily have been brought under other civil rights statutes.⁹² A powerful example of the potential use of Title VI's disparate impact regulations is the 1994 suit challenging the decision of the Los Angeles County Metropolitan Transportation Authority (MTA) to raise bus fares serving predominantly minority communities, and, more broadly, the MTA's allocation of funds to rail systems at

<http://www.usdoj.gov/crt/cor/Pubs/forum/97win.htm> (on file with the *Columbia Law Review*).

86. See, e.g., James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 *Stan. Envtl. L.J.* 125, 152–56 (1994) (urging use of Title VI effects test as alternative to Equal Protection Clause).

87. See *Coal. of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127–29 (S.D. Ohio 1984) (accepting defendant's proffered justification for selecting predominantly minority community for location of highway).

88. See *Bryan v. Koch*, 627 F.2d 612, 619 (2d Cir. 1980) (finding that city demonstrated appropriateness of its choice to close hospital serving high-minority community).

89. See *Larry P. v. Riles*, 793 F.2d 969, 981–83 (9th Cir. 1984) (upholding district court's finding of Title VI violation).

90. 532 U.S. 275, 293 (2001). For a critique of the Court's decision in *Sandoval*, see Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 *U. Ill. L. Rev.* 183, 198 (critiquing Court's emphasis "on whether § 602 creates individual rights, rather than whether it contemplates allowing private parties to enforce the obligations that regulations impose on the recipients of federal funds"). In dissent in *Sandoval*, Justice Stevens suggests that Title VI's regulations could be enforced using § 1983. See *Sandoval*, 532 U.S. at 299–300 (Stevens, J., dissenting). The Court's 2002 decision in *Gonzaga University v. Doe*, 536 U.S. 273, 285 (2002), threatens this route to enforcement through its holding that the § 1983 analysis of whether Congress intended to create an enforceable right is no different than in the implied right of action cases. See also *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 274 F.3d 771, 774 (3d Cir. 2001) (finding that § 1983 could not be used to enforce disparate impact regulations).

91. Jenkins, *supra* note 84, at 173.

92. See, e.g., *Larry P.*, 793 F.2d at 981–83.

the expense of minority bus riders.⁹³ The MTA actions in the case could be characterized as a classic example of racially selective indifference—the development of transportation policy without meaningful analysis or concern for the needs of racial minorities.⁹⁴ After plaintiffs brought suit under Title VI, relying on both an intent and an effects theory, and under the Equal Protection Clause, the district court enjoined the MTA from raising bus fares, holding that the plaintiffs were likely to succeed in their claim that the proposed increase in bus fares violated Title VI’s effects regulation.⁹⁵ After considerable public and political pressure was brought to bear,⁹⁶ the MTA settled the case, signing a consent decree with terms favorable to the plaintiffs. The decree established goals to improve bus services by halting fare increases, expanding service, and decreasing overcrowding. The Title VI effects claim likely played a significant role in creating the conditions for adoption of the consent decree.

From the MTA case one can imagine how a judicially enforced Title VI disparate impact rule might create incentives for public institutions to consider whether they are applying their policies in a racially selective manner, and to consider how to mitigate racial impacts through examination and evaluation of alternatives. Yet, even before *Sandoval*, Title VI

93. The case began when the Board of the MTA voted to raise bus fares by twenty-three percent (from \$1.10 to \$1.35) and to eliminate monthly passes that enabled frequent riders to save money. See *Labor/Cnty. Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, No. 94-05936-TJH, slip op. at 1 (C.D. Cal. Sept. 21, 1994) (Findings of Fact and Conclusions of Law re: Preliminary Injunction).

94. Eric Mann, head of the Labor/Community Strategy Center, noted in describing the case:

[R]acism is mainly the politics of impact, rather than overt behavior—which is why it’s so hard to prove legally. The MTA didn’t sit around and say “Let’s hurt people of color.” They said, “Let’s drain the budget and put it all [rail funds] into our own districts.” We were the ones who had to stand up and say, “Wait a minute. Do you understand the effect of your actions?”

Karen Klabin, *Back of the Bus: Eric Mann Gives the MTA a Run for Its Money*, L.A. View, Jan. 12–18, 1996, at 7. According to one account, the public hearing preceding the decision to raise fares points to official indifference: While poor, minority, and disabled bus riders were often emotional in their pleas against fare increases, MTA board members were “distracted, laughing with each other and eating—often taking little notice of the testimony being delivered before them.” Penda Hair, *Louder than Words: Lawyers, Communities and the Struggle for Justice* 89 (2001) (on file with the *Columbia Law Review*).

95. See *Labor/Cnty. Strategy Ctr.*, No. 94-05936-TJH, at 4–5. The disparate impact claim relied on evidence showing that the MTA’s actions had a statistically significant adverse impact on bus riders, who were more likely to be minority (and poor) while benefiting white, middle-class commuters. The plaintiffs also argued that the evidence of disparate funding subsidies for services to predominantly minority commuters violated Title VI adverse impact. In finding that a preliminary injunction was warranted, the court also found that the plaintiffs had raised “serious questions” on the merits of their intentional discrimination claim. *Id.* at 5.

96. See Hair, *supra* note 94, at 93–97 (describing campaign to force settlement involving media coverage, political advocacy, and public protests).

claims were never easy to win.⁹⁷ For one, as in the Title VII context, the *Griggs* standard is hard to satisfy⁹⁸ and courts tend to defer to the defendant's justifications.⁹⁹ Second, there is a more fundamental limitation of the *Griggs* approach that becomes particularly apparent in the context of Title VI: The very questions posed by the *Griggs* approach—involving primarily an institution's justification for its practices—are ill-suited to examine the complex questions that underlie disparate impact cases, specifically the way in which government policies and practices (e.g., a decision to grant a permit to a polluting facility or to fund transportation services) interact with the structure of race in American society (e.g., residential segregation or racial disparities in poverty rates). Because of its application to a broad array of regulatory contexts, Title VI disparate impact theory risks appearing like disparate impact theory uncabined, provoking judicial concerns about whether it would require the judiciary to broadly restructure social institutions—echoing the Court's concerns in *Feeney* and *Davis*.

An example of how Title VI disparate impact assimilated the limitations of the constitutional regime in addressing structural racial inequities can be found in *GI Forum v. Texas Education Agency*, an unsuccessful challenge to Texas's high school graduation exit exam (known at the time as the Texas Assessment of Academic Skills (TAAS)), a test that African American and Latino students disproportionately failed.¹⁰⁰ The

97. See Abernathy, *Legal Realism*, supra note 81, at 294 (“[L]ower appellate courts shied away from the effects test in a remarkably stark pattern.”); see also *id.* at 312 (reviewing appellate court decisions and finding consistent pattern of courts sustaining government's interest over plaintiffs' claim of disparate impact).

98. For instance, there are challenges in generating the statistics necessary to make an appropriate comparison between populations necessary to satisfy the first step of the *Griggs* standard. See, e.g., *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1038 (2d Cir. 1995) (finding no disparity between subsidies for commuter rail and subsidies for subway commuters where plaintiffs had failed to determine “the extent to which one system might have higher costs associated with its operations”). One commentator who advocates a disparate impact rule has noted the difficulties that the Supreme Court's approach to the relevant labor market raises in proving adverse effects and would allow proof of disparate effects based on comparison to the general population pool. See Flagg, supra note 5, at 995–96.

99. See, e.g., *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1420 (11th Cir. 1985) (finding that state's achievement grouping system was educationally justified). One commentator notes in the Title VI context, “[i]n practice, many courts have been disturbingly deferential to defendants in reviewing their asserted justifications for discriminatory policies, often inferring institutional necessity from scant evidence and unsubstantiated rationales.” Jenkins, supra note 84, at 189; see also *id.* at 190–91 (comparing deference in *Georgia State Conference*, 775 F.2d at 1420, with scrutiny in *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984)). What seems like deference might, of course, simply reflect a failure of proof by plaintiffs in these cases, or contested understandings of the legal standard of institutional necessity.

100. 87 F. Supp. 2d 667 (W.D. Tex. 2000). Even in the MTA case, the plaintiffs' disparate impact claim was buttressed by evidence of intentional discrimination. See *Labor/Cnty. Strategy Ctr.*, No. 94-05936-TJH, at 5 (granting preliminary injunction after finding that “plaintiffs raise serious questions going to the merits of their disparate impact

TAAS test was the culmination of decades of education reforms in Texas, similar to those taking place in other states and in federal programs, that center on improving school accountability for student progress.¹⁰¹ Students are required, after up to eight attempts, to pass the three portions of the exit level version of TAAS—reading, writing, and math—before they can graduate from high school, regardless of their high school grades.¹⁰² The State Board of Education then relies on the test, among other factors, to rate the performance of schools and school districts.¹⁰³ Several Mexican American organizations and students¹⁰⁴ brought suit in a Texas District Court arguing that the test violated Title VI’s disparate impact standard.¹⁰⁵ While there were some differences in their analyses,

claim under Title VI, as well as their intentional discrimination claim[s]”); see also *Labor/Cnty. Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041, 1043 (9th Cir. 2001) (characterizing case as involving claim of “intentional[] neglect[]” of inner-city minority bus riders). Finally, though impossible to quantify, the advocacy efforts surrounding the case—a model of combining litigation with extensive community organizing, media advocacy, and political advocacy—may have been the central factor in persuading the Authority to settle this case. See Hair, *supra* note 94, at 94 (describing “key elements” of winning strategy as research expertise, public pressure, and media coverage); Eric Mann, *Radical Social Movements and the Responsibility of Progressive Intellectuals*, 32 *Loy. L.A. L. Rev.* 761, 780–84 (1999) (providing account of organizing and other advocacy efforts by lead organizer of MTA suit).

101. In 1984, the Texas legislature passed an education reform law that, among other reforms, established a statewide curriculum, required teachers to pass proficiency tests, and implemented an “exit” test (known as the Texas Educational Assessment of Minimum Skills (TEAMS)), passage of which was required for receipt of a high school diploma. See *GI Forum*, 87 F. Supp. 2d at 671; Keith L. Cruse & Jon S. Twing, *The History of Statewide Achievement Testing in Texas*, 13 *Applied Measurement in Educ.* 327, 329–30 (2000); Walt Haney, *The Myth of the Texas Miracle in Education*, *Educ. Pol’y Analysis*, Aug. 19, 2000, at Part 2, at <http://epaa.asu.edu/epaa/v8n41/part2.htm> (on file with the *Columbia Law Review*). In 1990, Texas designed a new test to replace the TEAMS test known as TAAS. TAAS, developed by a national testing company with substantial involvement by Texas educators, was intended to measure higher-order thinking and problem solving skills rather than simply measuring basic skills. See *GI Forum*, 87 F. Supp. 2d at 671–72; Haney, *supra*.

102. *GI Forum*, 87 F. Supp. 2d at 673. Students are first administered the exit level TAAS exam in the tenth grade, and are given seven additional attempts to pass the exam before their scheduled graduation date. *Id.*; Cruse & Twing, *supra* note 101, at 330 (noting that exit level tests were moved to tenth grade in 1994).

103. See Haney, *supra* note 101. Schools rated as low performing in two consecutive years are subject to sanctions. *Id.* State law requires that schools disaggregate student performance data by race, ethnicity, and socioeconomic status, and schools are rated on whether they achieve success for all subgroups. *Id.*

104. The plaintiffs included an organization of Mexican American veterans, an educational advocacy organization for Mexican Americans, and nine Texas minority students who did not pass the TAAS test before their scheduled graduation date, and were represented by the Mexican American Legal Defense Fund. See *GI Forum*, 87 F. Supp. 2d at 668 & n.1.

105. *Id.* at 667. The plaintiffs also argued that the test was intentionally discriminatory and that it violated due process. *Id.* The court dismissed the equal protection and Title VI intentional discrimination claims on summary judgment, but held a trial on the Title VI disparate impact and due process claims. *Id.* at 681 n.11, 683 n.12.

both plaintiffs' and defendants' experts agreed that the first administration of the test had a significant adverse impact on minorities,¹⁰⁶ and that significant, though lower, racial and ethnic disparities existed in the cumulative passage rates.¹⁰⁷ The court agreed that the plaintiffs had made out a prima facie case that the TAAS test had a disproportionate impact on minority students.¹⁰⁸

On the question of whether the adverse impact was educationally justified, however, the court was persuaded by the state's argument that the TAAS Exit Test was intended "to hold schools, students, and teachers accountable for education and to ensure that all Texas students receive the same, adequate learning opportunities,"¹⁰⁹ and it rejected the plaintiffs' attempts to prove that the test was not necessary to further accountability and was not a valid measure of student learning.¹¹⁰ The test, the

106. Adverse impact was measured using the eighty percent rule, the rule generally applicable in employment cases which considers whether the selection for any race, gender, or ethnic group is less than four-fifths (or eighty percent) of the rate for the group with the higher selection rate. In 1998, for instance, the tenth grade white passage rate for all three tests was eighty-five percent. The black passage rate was fifty-five percent and the Hispanic passage rate fifty-nine percent, which are below eighty percent of white pass rates (sixty-eight percent passage). Haney, *supra* note 101, at Part 3, at <http://epaa.asu.edu/epaa/v8n41/part3.htm>. The plaintiffs' experts also presented evidence that these differences were statistically significant, see *id.*, and that these differences had "practical significance" because "there were at least 45,000 students since 1994 who would have completed their high school diplomas but for the TAAS Exit Test." Plaintiffs' Post-Trial Brief at 9–10, *GI Forum*, 87 F. Supp. 2d 667 (No. SA-97-CA-1278EP). In addition, plaintiffs presented evidence that minority dropout rates increased after the implementation of the TAAS Exit Test. See *id.* at 13–14 (explaining that gap between white and minority rates of high school completion went from fifteen percent in early 1980s to twenty-two percent after implementation of TAAS Exit Test, with "most precipitous increases" occurring "immediately after the implementation of the TAAS Exit Test").

107. Plaintiffs' Post-Trial Brief, *supra* note 106, at 9–10.

108. See *GI Forum*, 87 F. Supp. 2d at 676 (stating that "'no rigid mathematical threshold of disproportionality . . . must be met to demonstrate a sufficiently adverse impact'" (omission in original) (quoting *Cureton v. Nat'l Collegiate Athletic Ass'n*, 37 F. Supp. 2d 687, 697 (E.D. Pa. 1999), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999))); see also *id.* at 679 ("The variances are not only large and disconcerting, they also apparently cut across such factors as socioeconomics.").

109. *Id.* at 679.

110. First, plaintiffs argued that using TAAS as a diploma requirement, rather than as an indicator of whether students had learned certain materials, was not necessary to further accountability or monitoring of schools. Second, plaintiffs contended that the exit test did not assure the legitimacy of a high school diploma, pointing to evidence indicating that grade point averages and teacher evaluations were better indicators of student success and ability to do college work. Third, the plaintiffs sought to demonstrate that the TAAS Exit Test had negative educational effects, including the increase that had led to a rise in the attrition rates of minority students. Finally, plaintiffs presented expert evidence that the test lacked construct validity. Specifically, they argued that the test was not content valid because it failed to test what students learned in schools; that the test lacked criterion validity because the test score did not relate to other criteria such as student grades or performance on other tests; and that the defendants had provided no proof of predictive validity—that is, that the test helped predict later performance in college or work. As part of the argument that the test lacked content validity, the plaintiffs presented evidence that

court held, validly measured a set of skills and knowledge that the state has deemed of value, and the use of cutoff scores represented the state's considered judgment and was based on input from educators and field test data.¹¹¹ The court also found that the use of the test as a "high-stakes" graduation requirement was justified on the ground that it "boosted student morale and encouraged learning."¹¹² Finally, the court rejected the plaintiffs' proffer of equally effective alternatives (for example the use of a sliding-scale system that would allow graduation decisions to be made from grades along with test scores rather than just using a cutoff score), holding that the plaintiffs had failed to present evidence that these alternatives would sufficiently motivate schools and teachers to provide a quality education and motivate students to learn.¹¹³

In short, the plaintiffs did not persuade the court that the defendants lacked a legitimate justification for a practice that produced a disparate impact. This can be read as a failure of plaintiffs' proof: The court found, for instance, that the plaintiffs had provided insufficient evidence to counter the defendant's claims that the test motivated students, and had failed to establish that the test contributed to student attrition.¹¹⁴ It also can be read as a function of the court's deference to the state's asserted rationale: The court found that "assertions" by the defendants as to the educational interests served by the test were sufficient to meet the state's burden of showing that the test was justified.¹¹⁵

Behind the failure of proof, however, lie concerns about judicial competence and the broad reach of disparate impact rules that are in many ways evocative of *Feeney*. Despite the fact that defendants bear the burden of proof on the question of justification, the court deferred to the state's justifications, repeatedly explaining that deference to the state's policy choices was appropriate given that the case involved state decisions on questions of education.¹¹⁶ In disposing of plaintiffs' argument that minorities, because of racial and ethnic disparities in access to education,

African Americans and Hispanics had less opportunity to learn the test materials: They were more likely to attend low-performing schools with lower percentages of certified teachers and fewer resources. Plaintiffs also argued that the use of the test as a graduation requirement and the cutoff score (seventy percent) were not educationally valid. See Plaintiffs' Post-Trial Brief, *supra* note 106, at 13–15, 33, 35–38, 43.

111. *GI Forum*, 87 F. Supp. 2d at 679–81.

112. *Id.* at 681.

113. *Id.* at 681–82.

114. The court held that the plaintiffs had failed to demonstrate that the TAAS increased minority drop-out and retention rates. See *id.* at 681.

115. *Id.* at 680 ("[T]he assessment of legislatively established minimum skills as a requisite for graduation . . . [is] well within the State's power and authority.").

116. See, e.g., *id.* (deferring to state's determination of appropriate cutoff score for passage of test); *id.* at 670 ("[T]he court cannot pass on the State's determination of what, or how much, knowledge must be acquired prior to high school graduation."); *id.* at 671 (finding that resolution of case "turns not on the relative validity of the parties' views on education but on the State's right to pursue educational policies that it legitimately believes are in the best interests of Texas students").

had less of an opportunity to learn the test material than their white counterparts, the court demanded something like satisfaction of the *Feeney* standard. According to the court, the disparities in access to education would be relevant only if there were “some link between the TAAS test and these disparities,” which would have to be established via a showing, “by a preponderance of the evidence, that the TAAS test was implemented in spite of the disparities or that the TAAS test has perpetuated the disparities.”¹¹⁷ In other words, for the court, the background educational disparities were not properly part of the analysis of TAAS’s disparate impact, any more than the history of exclusion of women in the armed services was relevant to the constitutionality of the veterans’ preference in *Feeney*.

GI Forum’s causal standard is not, of course, as stringent as the one that operates in *Feeney*, which rejects even proof that the action was adopted “in spite of” its harm.¹¹⁸ But as in *Feeney*, the court searches, even in the disparate impact context, for some conscious awareness by the State that the testing policy would worsen the plight of minority students. As in *Feeney* and *Davis*, the court is concerned with limiting state responsibility. Under Title VI disparate impact doctrine, Texas might be held responsible for the development of an educationally invalid test, the court’s reasoning suggests, but not necessarily for the unequal educational conditions of minority students.¹¹⁹ As the court puts the point: “This case is . . . not directly about the history of minority education in the State. . . . [T]hat history has . . . some bearing . . . [but] what is really at issue here is whether the TAAS exit-level test is *fair*.”¹²⁰

While traditional disparate impact analysis is concerned primarily with fairness as the lack of arbitrariness (in this case of the high school graduation tests), plaintiffs’ case implicitly is concerned with the way in which testing policies might exacerbate racial inequality in education and potential government indifference to high minority failure rates—the possibility that high minority failure rates might fail to prompt government action to correct racial disparities. The burden shifting of disparate impact can be useful in providing a check on disparity-producing action—such as by discouraging the adoption of an educationally invalid test—but only to a point. *GI Forum* stands as an example of how the questions posed by the *Griggs* disparate impact regime prove inadequate in dealing with policies and practices that cause disparate racial impacts not simply because they are arbitrary (as in the case of an invalid test), but due to the interaction of these practices with structural and embedded

117. *Id.* at 670.

118. See *supra* note 55 and accompanying text.

119. This is despite the court’s acknowledgement that the state bears responsibility for some of these inequities. *GI Forum*, 87 F. Supp. 2d at 670.

120. *Id.*

racial inequalities.¹²¹ The language of *GI Forum*, in particular its emphasis limiting government's responsibility for remedying the condition of racial inequality, makes the case particularly illustrative of the limits of Title VI's disparate impact theory, but the paucity of successful Title VI disparate impact cases also bears this out.¹²²

Title VI's breadth may have made the absence of a theory of disparate impact more troubling for courts. The power of Title VI from a civil rights plaintiff's perspective derives from the statute's application to a large number of entities that receive federal funds and also to a broad range of programs and activities. Most federal agencies adopted a Title VI disparate impact rule, but they all adopted a broad prohibitory rule with little elaboration of what sorts of disparate impacts are unjustified in, for instance, transportation programs or in welfare programs and why.¹²³

If one goal is to encourage public institutions to address more complex forms of racial inequality, we are left with an unsatisfying account of the power of the disparate impact standard to effectuate this goal. Yet, there are in fact other regulatory approaches, which can be characterized as a species of disparate impact theory, that may bring us closer to that goal. In the next section, I examine the federal requirement that states take steps to reduce the disproportionate confinement of minority juveniles as an example of a mechanism that prompts questions not simply about the boundaries of institutional responsibility for a particular problem, but the way in which specific public policies and practices might serve to perpetuate racial inequities. The juvenile justice provision is concerned not with whether government actors can justify a policy based on a goal or value unrelated to race, but the extent to which government practices contribute to racial disparity and what actions can be taken to counter this disparity. This approach is not entirely untethered to traditional notions of intentional discrimination, but it is potentially more responsive to bias that is not explicit, and to the problem of embedded and cumulative patterns of racial inequality. One virtue of the regime, as discussed below, is that it operates not simply by prohibiting unspecified disparate impacts, but by requiring state recipients of federal funds to understand how racial disparity is generated in the juvenile justice system and then to develop appropriate remedies.

III. BEYOND GRIGGS-BASED DISPARATE IMPACT

In 1992, Congress quietly amended the federal Juvenile Justice and Delinquency Prevention Act to make, as a core requirement of the Act,

121. Stronger administrative enforcement of Title VI disparate impact rules might provide greater incentives for recipients of federal funds to consider the racial impact of their programmatic practices. See *infra* note 175.

122. See Abernathy, *Legal Realism*, *supra* note 81, at 294–312 (reviewing Title VI disparate impact cases and finding few successful lower court cases).

123. Some federal agencies have attempted to develop more specific guidance. See *infra* note 175.

recipients of federal aid take efforts to reduce the disproportionate confinement of minority juveniles.¹²⁴ The relative ease with which Congress managed this change contrasts sharply with the controversy attending its codification of the disparate impact standard in Title VII, a year earlier, after a two-year battle over whether the standard would force employers to adopt quotas.¹²⁵ In 2002, Congress extended the Act to require that recipients of federal aid make efforts to reduce the disproportionate number of minority juveniles who come into *contact* with the juvenile system.¹²⁶ This standard applies only to state-run juvenile justice programs that receive federal funds and it contains no explicit private right of action. Yet the standard that the Act puts in place is potentially far-reaching in that it requires public actors to generate information about and attempt to understand how racial disparities are produced, and is not limited to those disparities for which a court applying Title VI disparate impact analysis, for instance, might find a public actor responsible.

A. *The Problem of Racial Disparity in Juvenile Justice*

The problem of racial disparity in the juvenile justice system can be seen as a typical example of the complexity of modern day racial inequality: A significant disparity exists in the involvement of African American youth in the juvenile justice system, yet the reasons for the disparity are more complicated than one might first assume. One piece of data is clear: African American juveniles are overrepresented in juvenile justice institutions as compared to their levels in the general population.¹²⁷ While about fifteen percent of all youth are African American, forty per-

124. Act of Nov. 4, 1992, Pub. L. No. 102-586, 106 Stat. 4982 (codified as amended in scattered sections of 42 U.S.C.).

125. More controversy surrounded the attempt in 1999 to reauthorize and extend the DMC provision. Several prominent Republicans opposed reauthorization, claiming that disparities were not linked to “discrimination” in the juvenile justice system but to higher rates of crime commission by minorities, and that the bill would establish an unconstitutional racial classification. See, e.g., 145 Cong. Rec. S5563 (1999) (statement of Senator Hatch).

126. See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (codified as amended at 42 U.S.C. § 5633(a)(22) (2000)). The Act requires that states develop a plan to “reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system.” *Id.*

127. Some studies have also found that Latinos are overrepresented at various points in the juvenile justice system, though there is substantially less research seeking to understand this problem. For a recent study on Latino overrepresentation, see Francisco A. Villarruel et al., *¿Dónde está La Justicia? A Call to Action on Behalf of Latino and Latina Youth in the U.S. Justice System* (2002), at http://www.buildingblocksforyouth.org/latino_rpt/full_eng.html (on file with the *Columbia Law Review*) (finding that Latino youth are “significantly overrepresented in U.S. justice system and receive harsher treatment than white youth even when charged with same offenses”).

cent of the juveniles confined in institutions are African American.¹²⁸ Without further information, however, comparisons to general population statistics tell us little about the causes of the racial disparity. For reasons that are not racial on their face—higher poverty rates, less access to quality education, and fewer employment opportunities—African American young people might be more likely to be involved in criminal activity and to be arrested.¹²⁹ However, research shows that the overrepresentation of African American youth in juvenile institutions is not explained simply by racial differences in criminal activity, but by differential treatment in the juvenile justice system itself.¹³⁰ A given juvenile justice case will involve multiple decision points: the initial delinquency referral from police or other sources; the decision on whether to detain (which can be made by intake staff, law enforcement officials, and the state's attorneys); referral to prosecution for delinquency or for transfer to adult court; and a judicial disposition which may involve returning a child to a community (for community service, informal, or formal probation), commitment to a residential facility, or transfer to adult court. A number of studies have found that minority juveniles receive more severe dispositions at each of these stages of juvenile processing even when controlling for relevant factors such as age, seriousness of the offense, and prior records.¹³¹ For instance, one study found that nonwhite youths referred

128. See Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Disproportionate Minority Confinement 2002 Update 3* (2004) [hereinafter *DMC 2002 Update*].

129. In 2003, the arrest rate for African American youth was more than 1.5 times the arrest rate of white youth. See Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Juvenile Arrest Rates by Offense, Sex, and Race (1980–2004)*, available at <http://ojjdp.ncjrs.org/ojstatbb/crime> (last visited Oct. 18, 2006) (on file with the *Columbia Law Review*). The arrest rate of African American youth has decreased by almost sixty percent since 1995. See *id.* The overrepresentation of minority youth in secure juvenile detention and secure correctional facilities decreased slightly between 1995 and 1997. See *DMC 2002 Update*, *supra* note 128, at 1 (citing most recent data).

130. See, e.g., Barry C. Feld, *The Social Context of Juvenile Justice Administration: Racial Disparities in an Urban Juvenile Court*, in *Minorities in Juvenile Justice* 66, 93 (Kimberly Kempf Leonard et al. eds., 1995) (finding disparities at different points throughout a Minnesota county's juvenile justice system when controlling for present offense and prior records); Kimberly Kempf Leonard & Henry Sontheimer, *The Role of Race in Juvenile Justice in Pennsylvania*, in *Minorities in Juvenile Justice*, *supra*, at 98, 119 (finding disparities in confinement when controlling for offense characteristics and prior record); Michael J. Leiber, *Toward Clarification of the Concept of "Minority" Status and Decision-Making in Juvenile Court Proceedings*, 18 *J. Crime & Just.* 79, 97 (1995) (finding racial disparities in intake, petition, and severity of disposition in four counties in Iowa). One commentator notes that two-thirds of studies on racial disparity in juvenile justice identify race as a factor, while one-third find that race has no effect. See Darlene J. Conley, *Adding Color to a Black and White Picture: Using Qualitative Data to Explain Racial Disproportionality in the Juvenile Justice System*, 31 *J. Res. Crime & Delinq.* 135, 135–36 (1994) (stating that majority of research has shown "race makes a difference").

131. See, e.g., Donna M. Bishop & Charles E. Frazier, *The Influence of Race in Juvenile Justice Processing*, 25 *J. Res. Crime & Delinq.* 242, 258 (1988) (finding, in study of large southern state, that blacks were more likely to be "referred to court, adjudicated

for delinquent acts “are more likely than comparable white youths to be recommended for petition to court, to be held in pre-adjudicatory detention, to be formally processed in juvenile court, and to receive the most formal or the most restrictive judicial dispositions.”¹³²

The explanations for these racial disparities are complex. Some qualitative studies suggest that what we typically understand as bias plays a role. A study by George Bridges and Sara Steen of why African American youths received harsher sentencing recommendations than their white counterparts found that juvenile probation officers were more likely to characterize crimes by minority youth as caused by “internal forces,” such as personal failure or weak moral character, and more likely to see crimes by white youth as caused by “external forces,” such as poor home life and inadequate role models.¹³³

Racial disparities are also related to race in ways that are not simply suggestive of subjective bias, but rather are linked to what some researchers call “indirect” race effects—the consideration by juvenile justice decisionmakers of factors that are race-related.¹³⁴ Minority youth might be treated differently because of characteristics that are unrelated to the of-

delinquent, and given harsher dispositions than comparable white offenders”); Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 *J. Crim. L. & Criminology* 392, 412–13 (1996) [hereinafter Bishop & Frazier, *Race Effects*] (finding “clear indications of race differentials in justice processing”); James B. Johnson & Philip E. Secret, *Race and Juvenile Court Decision Making Revisited*, 4 *Crim. Just. Pol’y Rev.* 159, 167–71 (1990) (finding that African American youth receive harsher dispositions at detention, petition, and penalty stages). There are also some studies either of particular decisionmaking points in the juvenile system, or of multiple decision points, that found limited or no racial disparities in the jurisdictions studied after controlling for relevant factors. See, e.g., Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 *J. Crim. L. & Criminology* 314, 336–37, 342, 346–47 (1990) (finding bias did not explain racial disparities in decisions to waive violent juvenile offenders to adult criminal court in Boston, Detroit, Newark, and Phoenix, and that waiver decisions were made “inconsistent[ly]”); Feld, *supra* note 130, at 75–94 (finding only limited race effects); Bohsiu Wu et al., *Assessing the Effects of Race and Class on Juvenile Justice Processing in Ohio*, 25 *J. Crim. Just.* 265, 271–74 (1997) (studying thirteen Ohio counties and finding that African American youth were more likely to be detained but white youth were more likely to be adjudicated, and that there were no racial disparities in ultimate disposition); Joan Petersilia, *Racial Disparities in the Criminal Justice System: A Summary*, 31 *Crime & Delinq.* 15, 19–21 (1985) (finding disparities caused by higher involvement by youth of color in serious and violent crime and that African American youth were treated more leniently at some stages of processing).

132. Bishop & Frazier, *Race Effects*, *supra* note 131, at 405–06. Bishop and Frazier’s study found that, on the other hand, whites received harsher dispositions than nonwhites in status offense cases. *Id.* at 406.

133. See George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 *Am. Soc. Rev.* 554, 562–64 (1998).

134. See, e.g., William H. Feyerherm, *The DMC Initiative: The Convergence of Policy and Research Themes*, in *Minorities in Juvenile Justice*, *supra* note 130, at 1, 11 [hereinafter Feyerherm, *DMC Initiative*].

fense level or prior history but are still related to race, such as family characteristics or availability of community resources. Juvenile justice decisionmakers may be more likely to detain a youth from a single-parent family who they perceive as having poor family supports. A state might decide to make youths ineligible for diversion programs (which allow delinquent children to avoid residential placement) when their family cannot be contacted, are not present for an intake interview, or are considered uncooperative by intake staff.¹³⁵ For race-dependent reasons, an African American family may be more likely to be employed in a low-wage sector and less able to take time from their job; more likely to be composed of a single parent, and thus have fewer childcare and family supports; and less likely to have access to the transportation resources necessary to make visits or participate in counseling.¹³⁶ Juvenile justice officials may also perceive African American families, who are more likely to be poor and more likely to be from single-parent families, as less able to provide adequate supervision and support to delinquent youth.¹³⁷ While consideration of family supports may be justified to ensure success of a diversion program, placing great weight on these factors may contribute to racial disparities in the decision to detain that are unrelated to prior record or offense characteristics.

In addition, African Americans have less access to private, retained counsel that sometimes provide superior representation.¹³⁸ Because of higher poverty rates and less access to comprehensive health insurance, African Americans have less access to private treatment options—such as psychological counseling and drug treatment—that allow a child to avoid commitment to residential facilities.¹³⁹ Additionally, what one researcher calls “justice by geography” is often at play: A state’s minority youth pop-

135. See Bishop & Frazier, *Race Effects*, supra note 131, at 407–08 (describing procedure in Florida).

136. See *id.* at 407. The study recounts the view of an intake supervisor: Our manual told us to interview the child and the parent prior to making a recommendation to the state’s attorney. We are less able to reach poor and minority clients. They are less responsive to attempts to reach them. They don’t show. They don’t have transportation. Then they are more likely to be recommended for formal processing. Without access to a client’s family, the less severe options are closed. Once it gets to court, the case is likely to be adjudicated because it got there. It’s a self fulfilling prophecy.

Id. at 407–08.

137. See *id.* at 409. Such findings lead Bishop and Frazier to discount prejudicial attitude or individual bias as a contributing factor, and instead see “institutional racism” as the cause of racial disparities in delinquency processing. See *id.* at 412.

138. See *Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio* 25–29 (Kim Brooks et al. eds., 1995) (finding racial disparities in access to counsel in Ohio); Bishop & Frazier, *Race Effects*, supra note 131, at 408; Jolanta Juskiewicz, *Youth Crime/Adult Time: Is Justice Served?*, available at <http://buildingblocksfor youth.org./ycat/ycat.html> (last visited Nov. 15, 2006) (on file with the *Columbia Law Review*) (finding white youth twice as likely as African American youth to retain private counsel).

139. See Bishop & Frazier, *Race Effects*, supra note 131, at 408.

ulation may be concentrated (because of residential segregation and other factors) in communities with fewer prevention and diversion resources.¹⁴⁰

Similarly, evidence shows that a major contributing factor to racial disparity in the juvenile justice system is that African American youth are more likely to come into contact with that system. In part, this is a function of the way in which minority communities are policed, and the way in which police respond to young minority men in particular. For instance, one study of racial disparity in Georgia's juvenile justice system found that African American youth received more severe dispositions because they tend to have more prior police contacts than their white counterparts.¹⁴¹ The study's authors explicitly leave open the question of whether disparities in police contacts are the result of race discrimination, noting that the "fact that law enforcement officials have considerable discretion in the determination of how many and what types of charges to place against an alleged offender complicates the interpretation of [the gross racial disparities in Georgia's juvenile justice system]."¹⁴² Another qualitative study suggests that the way in which minority communities and individuals are policed affects the likelihood that a juvenile will come into contact with police, and also how a juvenile of color's actions and behaviors are recorded by the police.¹⁴³ Evidence suggests that the war on drugs in particular led to great increases in the confinement of minority youth because it concentrated police attention in communities with high per capita rates of drug dealing (and often associated levels of violence) while paying less attention to drug use and trafficking in nonminority communities.¹⁴⁴

140. See Feyerherm, DMC Initiative, *supra* note 134, at 11.

141. See Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Minorities and the Juvenile Justice System* 14–15 (1995), available at <http://www.ncjrs.gov/pdffiles/minor.pdf> (on file with the *Columbia Law Review*) (citing L.L. Lockhart et al., *Georgia's Juvenile Justice System: A Retrospective Investigation of Racial Disparity* (1990)).

142. *Id.* at 15 (citing L.L. Lockhart et al., *Georgia's Juvenile Justice System: A Retrospective Investigation of Racial Disparity* 10 (1990)).

143. Darlene Conley's quantitative and qualitative study of racial disparity in a western state examines the effect of police interaction in producing racial disparity. See Conley, *supra* note 130, at 137. Her research shows that African American and Hispanic youths came into frequent contact with police patrolling their neighborhoods for drug activity, were subject to surveillance in predominantly white communities (such as shopping malls), and were frequently stopped when driving in cars. *Id.* at 141–42. Her study also suggests that because of police and community attention to the problem of gang violence, African American and Hispanic youth were more likely to be labeled as gang members at the point of arrest. See *id.* at 144; see also Jeffrey Fagan et al., *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 *Crime & Delinq.* 224, 235–38 (1987) (reporting research results that police decisions on how to respond to youthful offenders are affected by race of youth).

144. See Feyerherm, DMC Initiative, *supra* note 134, at 11 (citing research that war on drugs increased confinement of minority youths "despite evidence that drug use and trafficking is not primarily a minority behavior"); Howard N. Snyder, *Growth in Minority*

Understanding how overrepresentation occurs in juvenile justice requires understanding both the actions of the prosecutors and judges and how they treat racial minorities when all other things are equal—what the law might understand as an unjustified disparate impact. Yet another dimension involves how the practices of the juvenile justice system interact with the race-based actions of other institutions, and understanding how deeply race is embedded in all the institutions—that is, the police, the community-based organizations, the family structure—with which the juvenile justice system interacts. The race effects caused by other actors (the police) might be considered to fall outside a typical disparate impact analysis, because they are not seen as caused by the juvenile justice system.

B. *The DMC Regime*

The problem of disproportionate confinement of minority youth came to national attention as the result of the National Coalition of State Juvenile Justice Advisory Groups' 1988 annual report to Congress entitled *A Delicate Balance*.¹⁴⁵ The Juvenile Justice and Delinquency Prevention Act (JJJPA) authorizes the creation of juvenile justice advisory groups in each state and the District of Columbia to provide assistance to each state in meeting the core requirements of the JJJPA and administering federal funds. In 1984, the state advisory groups formed the national organization, now called the Coalition of Juvenile Justice. The 1988 report presented findings that minority youth were overrepresented at every stage of the juvenile justice system compared to their numbers in the general population—including a minority incarceration rate three to four times greater than the white incarceration rate—and that higher rates of minority involvement in more serious crimes did not fully explain the disparity.¹⁴⁶ The report added to concerns expressed by members of Congress as early as 1986 and by experts testifying before Congress during hearings leading to the 1988 reauthorization of the federal juvenile justice act.¹⁴⁷

As a response to concerns about overrepresentation of minorities in the juvenile justice system, Congress in its 1988 amendments to the JJJPA required states to develop yearly plans to “reduce the proportion of

Detention Attributed to Drug Law Violators, OJJDP Update on Stat. (Dep't of Justice, Wash., D.C.), Mar. 1990, at 1, 6 (stating that war on drugs was “major factor[] in the substantial increase in the number of nonwhite youth detained by the juvenile courts”).

145. Nat'l Coal. of State Juvenile Justice Advisory Groups, *A Delicate Balance* (1989).

146. See *id.* at 5–6 (explaining that higher minority arrest rates do not alone account for minority overrepresentation in correctional facilities); *id.* at 8 (citing data showing racial disparity in decisionmaking in juvenile justice system when controlling for offense severity).

147. See Feyerherm, *DMC Initiative*, *supra* note 134, at 8–9. Feyerherm recounts testimony in 1986 and 1987 from advocates at the National Council on Crime and Delinquency and from the Center for the Study of Youth Policy on the increasing rates of minority incarceration in Minnesota.

juveniles detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population.”¹⁴⁸ Between 1988 and 1991, the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) provided technical assistance to states, largely through the publication of guides and manuals.¹⁴⁹ In 1991, OJJDP funded five competitively selected states to develop model programs for reducing disparities in confinement and to assess the successes of these programs.¹⁵⁰

In 1992 Congress again amended the JJDPA to make reducing disproportionate minority confinement a “core” requirement of the Act, meaning that states must make good faith efforts toward addressing disparities or risk losing up to twenty-five percent of their federal funding.¹⁵¹ To that point, the core requirements of the JJDPA—the result of decades of advocacy by juvenile justice providers and child advocacy organizations—were the separation of juvenile offenders from adults in institutions, the deinstitutionalization of status offenders (e.g., runaways and other children in need of supervision who have not committed delinquent acts), and the removal of juvenile offenders from adult jails and institutions. JJDPA requires that all of a state’s “formula” funds—block grants—be directed to these core requirements until compliance is achieved. The 1992 amendments, in making the reduction of disparities in confinement a “core” requirement, tied twenty-five percent of a state’s formula grant funds to meeting the DMC requirement.

In 2002, Congress changed the requirement for reducing disparity from disproportionate minority confinement to disproportionate minority *contact*, requiring that possible disproportionate effects be examined at all decision points in the juvenile justice continuum. The Act requires that to receive federal funding states must develop plans to “address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system.”¹⁵²

148. Heidi Hsia, Office of Juvenile Justice and Delinquency Prevention, Dep’t of Justice, A Disproportionate Minority Contact (DMC) Chronology: 1988 to Date, available at <http://ojjdp.ncjrs.gov/dmc/about/chronology.html> (last visited Nov. 16, 2006) [hereinafter Disproportionate Minority Contact] (on file with the *Columbia Law Review*); see Pub. L. No. 100-690, 102 Stat. 4181 (1988).

149. See Disproportionate Minority Contact, *supra* note 148.

150. See Heidi M. Hsia & Donna Hamparian, U.S. Dep’t of Justice, Disproportionate Minority Confinement 1997 Update 2 (1998).

151. See Act of Nov. 4, 1992, Pub. L. No. 102-586, 106 Stat. 4982 (codified in scattered sections of 42 U.S.C.).

152. See 42 U.S.C. § 5633(a)(22) (2000).

States must first identify whether disproportionate minority confinement is a problem in their state.¹⁵³ Second, states must assess the cause of disproportionate minority confinement, by, at a minimum, identifying and explaining differences at various points in the juvenile justice system (such as arrest, diversion, adjudication, and court disposition).¹⁵⁴ States in which racial and ethnic disparities in confinement are a problem must develop an intervention plan. Federal regulations give states broad discretion in developing the plan, though it must address certain specified areas, such as increasing the availability and quality of juvenile diversion programs, improving the capacity of prevention programs in minority communities, and providing training to staff.¹⁵⁵

Under the DMC model, the federal government through OJJDP provides ongoing funding for DMC as part of the Formula Grants programs, and special funding for DMC projects in particular states. OJJDP, in partnership with contractors and grantees, provides technical assistance and training to states and disseminates research on effective strategies to reduce DMC.¹⁵⁶ Advocates disseminate information on model programs, conduct trainings, issue reports highlighting problems, and press states to adopt reform practices. While the DMC standard is fairly open-ended, the back and forth between states, policymakers, and advocates allows for guidance.

At the federal level, OJJDP provides technical assistance to explore the causes of and solutions to racial disparity in confinement. This assistance has included collecting research on the problem of racial disparity in the juvenile justice system; cataloging innovative state efforts to address the problem; and publishing assessments on model programs. Over the years, Congress has also provided states with funding to develop some of

153. See 28 C.F.R. § 31.303(j)(1) (2006). OJJDP provides guidelines for calculating disproportionate minority confinement. See *id.* Initially, OJJDP required that states calculate disproportionate confinement by comparing minority youth as a percentage of confined youth to the minority youth as a percentage of the total population. Under the new system, known as the relative rate index, a state determines disparity by comparing the rate of confinement of white youth to the rate of confinement of the particular minority group. The rate ratio method is considered better because it develops a measurement that is unaffected by the relative proportion of minorities in the total youth population, and permits comparison of more than one ethnic group. See William H. Feyerherm & Jeffrey Butts, Proposed Methods for Measuring Disproportionate Minority Contact, available at <http://ojjdp.ncjrs.org/dmc/pdf/dmc2003.pps> (last visited Jan. 25, 2007) (on file with the *Columbia Law Review*); see also OJJDP, Dep't of Justice, Implementing the Relative Rate Index Calculation: A Step-by-Step Approach to Identifying Disproportionate Minority Confinement Within the Juvenile Justice System, available at <http://ojjdp.ncjrs.org/dmc/pdf/StepsinCalculatingtheRelativeRateIndex.pdf> (last visited Jan. 25, 2007) (on file with the *Columbia Law Review*) (providing "step by step instructions for completing the initial identification stage for examining Disproportionate Minority Contact").

154. See 28 C.F.R. § 31.303(j)(2).

155. See *id.* § 31.303(j)(3)(i)-(v).

156. See DMC 2002 Update, *supra* note 128, at 5-7.

these model programs designed to reduce racial disparity in confinement.

C. *Informing Disparity*

While it cannot yet be said that nationwide racial disparities in juvenile justice have been substantially reduced, the federal DMC requirement has encouraged states to assess the extent and causes of racial disparity;¹⁵⁷ resulted in the development of promising programs and initiatives some of which have reduced racial disparities in particular states;¹⁵⁸ and provided a focal point for advocacy for system improvements by private providers and outside advocacy organizations.¹⁵⁹ Assessments of the success of the DMC initiative nationally and its success in particular states are underway.¹⁶⁰ What is so far clear is that the DMC regime creates incentives both to generate information regarding causes of racial disparity and to develop solutions—incentives that differ substantially from the statutory disparate impact regimes in several promising ways.

157. See, e.g., Feyerherm, DMC Initiative, *supra* note 134, at 12–13, 15 (noting “explosion of data surrounding the DMC issue” since 1986). But see DMC 2002 Update, *supra* note 128, at 16 (noting that in 2002 at least eighteen states had yet to identify factors contributing to racial disparities in juvenile justice due to uncompleted “quality assessment[s]”).

158. See Eleanor H. Hoytt et al., Reducing Racial Disparities in Juvenile Detention 46–52, 54–64 (2004), available at http://www.aecf.org/publications/data/8_reducing.pdf (on file with the *Columbia Law Review*) (describing successes in Santa Cruz, California and Multnomah County, Oregon); DMC 2002 Update, *supra* note 128, at 13–15 (describing state efforts to address racial disparity by funding community-based intervention programs, exploring alternatives to detention, providing diversity training to staff, and developing standardized screening instruments to encourage objective decisionmaking). For example, the W. Haywood Burns Center, based in California, has been working with state administrators to reduce racial disparity in ten sites across the country. Telephone Interview with Michael Harris, Deputy Dir., The W. Haywood Burns Inst. for Juvenile Justice Fairness & Equity, in New York, N.Y. (Oct. 26, 2005).

159. For instance, in 1998, the Youth Law Center formed the Building Blocks for Youth Initiative (with support from OJJDP) in collaboration with other nongovernmental organizations including the American Bar Association. The Building Blocks Initiative conducts research on minority overrepresentation in juvenile justice, promotes understanding of model interventions, and directs advocacy for minority youth in the justice system (OJJDP funds do not support this latter activity). See DMC 2002 Update, *supra* note 128, at 7–8 (describing Building Blocks initiative). Advocates have also sought to hold states accountable for failure to adequately address identified disparities. For instance, in May 2003, the ACLU published a report faulting Massachusetts for failing to implement plans to reduce juvenile disparity, properly spend allocated money on programs to reduce racial disparity, or conduct adequate research to identify the causes of racial disparity. See ACLU, Disproportionate Minority Confinement in Massachusetts: Failures in Assessing and Addressing Overrepresentation of Minorities in the Massachusetts Juvenile Justice System (2003), available at http://www.aclu.org/FilesPDFs/dmc_report.pdf (on file with the *Columbia Law Review*).

160. See, e.g., Hoytt et al., *supra* note 158, at 8–9 (analyzing success of DMC in five states).

First, the DMC model is designed to analyze how racial disparities arise and develop solutions stemming from those analyses. The inquiry under DMC begins not simply with an analysis of the reasonableness of the institutional practices of government—the inquiry under Title VI disparate impact—but consists of attempting to understand the multiple causes of racial disparity and the extent to which decisions by public actors might contribute to disparities in minority involvement with the juvenile justice system. In developing the DMC mandate, Congress was explicitly responding to research on the increasing levels of confinement of minority youth, and specifically to evidence that the racial disparity was not caused simply by higher levels of delinquency among minority youth.¹⁶¹ The congressional and public discourse on disparities in juvenile justice recognized that higher rates of incarceration were not explained solely by higher rates of minority crime.¹⁶² By providing data and at least some amount of empirical evidence on the causes of disparity, these studies on DMC can be seen as unsettling Loury's notion of racial indifference because they confront the implicit assumption that racial disparities are something to be expected or part of the natural course.¹⁶³ That these studies reveal patterns suggestive of disparate treatment is noteworthy as well; although the DMC remedy addresses issues beyond disparate treatment, evidence suggestive of systemic bias might have provided additional political incentives to devise a remedy. Information generation is also a constitutive part of the remedy.¹⁶⁴ To address disparity under the DMC model means to identify, assess, and examine the extent and causes of this disparity at every decision point in the juvenile justice system. A singular solution is not prescribed. This can be a potential weakness by providing states insufficient direction.¹⁶⁵ But allowing states some flexibility is responsive to the reality that the solution will differ depending on the causes of the disparity and the particular context, and

161. See Feyerherm, DMC Initiative, *supra* note 134, at 7–8.

162. *Id.* at 9–10.

163. Cf. Ayres, *Pervasive Prejudice*, *supra* note 43, at 396 (arguing that government should play greater role in providing empirical information about extent and causes of disparate treatment in consumer and other markets).

164. As a judge involved with Oregon's efforts to reduce racial disparity put it, "once we had real data, we were able to move from anecdotal information to data-based strategies, because now we knew how real the problem was." Hoytt et al., *supra* note 158, at 56 (citation omitted).

165. OJJDP's initial instructions provided states discretion "because of the belief that the resources and data needed to ascertain the extent of DMC, determine the cause(s), and address the problem could vary by jurisdiction." Michael J. Lieber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issue*, 48 *Crime & Delinq.* 3, 16 (2002) (citation omitted). Lieber also argues that the DMC standard was kept vague in order to diffuse state resistance to the mandate. See *id.* Lieber finds that initial enforcement of DMC was hampered by the fact that many states did not know how to conduct disparity assessment studies, though he also notes that OJJDP has subsequently worked to provide more specific technical assistance to states on how to collect and analyze data. See *id.* at 17–19.

that the solution might be informed by model programs from other states and localities, and the insights of government, researchers, and nongovernmental organizations.¹⁶⁶ Solutions to the problem of racial disparity stem from ongoing study and assessment of successful interventions by federal, state, and private actors.¹⁶⁷

Second, in contrast to the concern that both the constitutional standard and Title VI's disparate impact standard will limit public agency responsibility for underlying racial inequality, the DMC regime requires public agencies to assess how their decisions might contribute to disparity even where the agency is not responsible for the underlying condition. Thus, a detention screening instrument might consider factors such as family structure or school involvement in deciding whether to detain. These factors might be considered reasonable in a Title VI disparate impact case in that they might be indicative of recidivism or likelihood of appearing in court. And any adverse impact in considering these factors might be said to be caused not by these screening factors but by higher rates of single-parenthood or lower rates of school involvement by minority youth. By contrast, in addressing DMC, a county in Oregon considered how criteria in its screening instruments such as "good family structure" might lead to disparities in minority communities with higher rates of single-parent families. The county now asks "whether there is an adult willing to be responsible for assuring the youth's appearance in court."¹⁶⁸ The county also decided that, instead of "school attendance," it would consider "productive activity" which takes into account participation in training or employment.¹⁶⁹ In other words, public actors consider how their practices interact with racial differences in family structure and school attendance rates.¹⁷⁰

In addition, because the DMC standard requires recipients of federal money to assess and address the cause of disparity, the policies and practices of a full range of agencies—police, courts, as well as the human services agency generally responsible for juvenile justice—are all at issue. As a practical matter, securing cooperation of multiple agencies can

166. The dependence on research can also be a challenge. A 2002 OJJDP study found that a number of states (eighteen) had not identified the factors contributing to disparities in juvenile involvement because they lacked the resources or technical ability to collect data and perform analysis. See DMC 2002 Update, *supra* note 128, at 16–17.

167. Feyerherm notes: "No quick universal fix nor any permanent fix appears possible. This means that policy progress will require ongoing access and use of quality information and analysis." Feyerherm, DMC Initiative, *supra* note 134, at 14.

168. Hoytt et al., *supra* note 158, at 57.

169. *Id.*

170. Jurisdictions might also, of course, credit all the disparity to socioeconomic factors that are beyond their capacity to remedy. See Judith A. Cox & James Bell, Addressing Disproportionate Representation of Youth of Color in the Juvenile Justice System, 2001 J. Ctr. for Fams., Child. & Courts 31, 33–34 (describing how Santa Cruz County originally characterized disparities as justifiable in terms of offense history and presenting offenses, but then began examining their own policies, procedures, and programs to consider how they contributed to racial disparities).

thwart achievement of the DMC mandate.¹⁷¹ Yet plans adopted in some states have addressed a broad range of practices across a variety of agencies. For instance, in response to the DMC mandate, Washington State enacted legislation mandating the development of standards for prosecution of juvenile offenders, enhanced training of juvenile court personnel, developed standardized risk assessment in all juvenile courts, and adopted community- and school-based prevention programs in minority communities.¹⁷² Even examination of practices by a single agency can play a substantial role in reducing DMC, by prompting juvenile justice agencies to examine the way that the policies over which they have direct control interact with the practices of other public agencies.¹⁷³ In this manner, the DMC standard evades the limitation of traditional disparate impact remedies: It prompts institutional reform without consideration of whether a disparity producing practice is “justified” by institutional necessity or “caused” by the juvenile justice system. The ideal of the DMC regime is that it leads public institutions to assess how public practices contribute to racial inequality, not for the purpose of allocating blame or as a condition of intervention but rather to understand the nature of the problem.

A final feature worth noting is that the DMC standard does not simply announce a broad prohibitory rule forbidding actions with a particular racial impact, but requires recipients of federal aid to take affirmative steps to reduce the racial impact of their actions. This is not to say that the DMC provides detailed rules on what states should do. Indeed as noted above, the DMC rules leave much discretion to states on how to reduce racial disparities, a potential virtue of the scheme. Yet, as evidenced in unsuccessful cases like *GI Forum* and even in the successful cases like *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*, part of the judicial resistance to Title VI’s disparate impact standards occurs because Title VI applies to a wide set of public activities with potentially broad redistributive effect.¹⁷⁴ Moreover,

171. See Hoytt et al., *supra* note 158, at 45 (documenting difficulties in including law enforcement agencies in Sacramento).

172. DMC 2002 Update, *supra* note 128, at 21–24.

173. For instance the Santa Cruz Probation Department sought to address racial disparities by increasing diversity in hiring and training to address bias, as well as by changing institutional practices such as beginning weekend intake procedures, addressing barriers to minority involvement in detention alternative programs, and developing services in rural minority communities. See Hoytt et al., *supra* note 158, at 47–48. The result was a twenty-five percent decrease in the average daily population of minority youth who were detained. See *id.* at 50. Still, there is a danger that juvenile justice agencies might pay insufficient attention to the impact of their own practices. An assessment by OJJDP suggests that states are more likely to invest in delinquency and intervention programs in minority communities than in system changes (e.g., increase in cultural diversity and sensitivity among staff or changes in their screening instruments to allow objective decisionmaking). See DMC 2002 Update, *supra* note 128, at 17.

174. See, e.g., *Labor/Cmty. Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041, 1043 (9th Cir. 2001).

the regulations provide no serious guidance on what constitutes an unjustified racial impact in the context of a particular programmatic area, e.g., education, health, environment, or transportation.¹⁷⁵ The absence of specific regulatory guidance along with limited administrative and judicial enforcement even in the pre-*Sandoval* era,¹⁷⁶ might result in recipients who are unlikely to consider themselves to have an affirmative duty to consider racial effects.¹⁷⁷ In the context of DMC, even as the federal administrative agency continues to define how to analyze data and pro-

175. Some federal agencies have initiated some rulemaking to require funding recipients to more affirmatively consider racial impact in the operation of their programs. See 65 Fed. Reg. 39,650 (June 27, 2003) (providing guidance regarding environmental permitting programs); Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7 (2000); Policy Guidance on the Prohibition Against National Origin Discrimination as It Affects Persons with Limited English Proficiency, 65 Fed. Reg. 52,762 (Aug. 30, 2000). Greater agency enforcement of Title VI rules and clarification of the requirements of disparate impact could provide incentives to consider impact much like those of the DMC regime. See Note, After *Sandoval*: Judicial Challenges and Administrative Possibilities in Title VI Enforcement, 116 Harv. L. Rev. 1774, 1789–93 (2003) (arguing that focus on facilitating compliance will aid regulatory agencies in meeting heightened enforcement obligations); see also Sara Rosenbaum & Joel Teitelbaum, Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of *Alexander v. Sandoval*, 3 Yale J. Health Pol’y L. & Ethics 215, 233 (2003) (explaining how increased Title VI enforcement in healthcare could help reduce racial disparities in healthcare).

176. Outside the area of education, agency enforcement of Title VI, and of the disparate impact regulations in particular, has been limited. See U.S. Comm’n on Civil Rights, Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs 223–25 (1996), available at <http://eric.ed.gov/ERICWebPortal/Home.portal> (on file with the *Columbia Law Review*) (finding that Department of Health and Human Services (HHS) “has hardly developed its Title VI enforcement program since [HHS became a separate department] in 1980” and that HHS Office of Civil Rights “lacked individual civil rights policies, precedents, standards, and procedures necessary to operate an effective civil rights enforcement program”); Luke W. Cole, Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964, 9 J. Envtl. L. & Litig. 309, 392 (1994) (recounting that until August 1994, EPA had one staff person dealing with all civil rights complaints and lacked procedural or substantive guidelines for responding to Title VI complaints); Rosenbaum & Teitelbaum, *supra* note 175, at 230–33 (detailing lack of enforcement of Title VI by Department of Health and Human Services).

177. A poignant example is Luke Cole’s description of the reaction of Mississippi state officials to a Title VI disparate impact challenge to the permitting of a waste facility in a predominantly black community:

“We evaluate the project and make sure it’s up to our standards, and we don’t look at the racial or economic makeup . . . I don’t know what’s on their minds when they decide where to locate a site . . . The problem is, right now there are no requirements that say we ought to consider the economic status of a community or the racial status of a community in determining whether or not to approve a permit for a facility . . .”

Cole, *supra* note 176, at 346 (first omission in original) (quoting Charles Chisolm, Dir. of Pollution Control, Miss. Dep’t of Envtl. Quality); see also Rosenbaum & Teitelbaum, *supra* note 175, at 234 (“[A]lthough Title VI compliance is a condition of federal funding, this simple fact is not stated anywhere in federal regulations governing Medicare’s conditions of participation.”); *id.* at 234–35 (finding that because of lack of clear requirements,

vide technical assistance on model programs, the basic duty of states to consider racial effects—and more specifically to assess racial disparities and devise solutions—is clear.

None of this is to mask the limitations of the DMC approach. The DMC statute affords no explicit private right of action for judicial enforcement, and the DMC requirement would be difficult to enforce using § 1983 under the Court's holding in *Gonzaga University v. Doe*.¹⁷⁸ While most states have taken initial steps to address the law's requirements, several states, according to OJJDP's analysis, have not complied with the most basic requirements of the DMC mandate.¹⁷⁹ After years of inaction, OJJDP has started to withhold funds from noncompliant states.¹⁸⁰ Still, it is likely that funds will only be withheld from states that fail to comply with basic plan requirements, a fairly low threshold.

When DMC succeeds, however, it is unlikely to be the result of coercion by the federal government, but by its potential to empower internal and external advocates concerned about the problem of racial disparity in the juvenile justice system. Some states have gone far in excess of what is required under the statute, either because of pressure by nongovernmental organizations or because internal advocates now have a hook to spur reform.¹⁸¹ Information production is a significant component of the DMC regime. States are now required to produce data on disparities in juvenile justice, and to report their programmatic efforts. With this new transparency, the public now has access to information, as advocates are able to publish data on levels of disparity, and compare juvenile justice systems across states.¹⁸² A consortium of juvenile justice organizations receive funding from national foundations as well as from OJJDP to publicize the problem of disparities in juvenile justice and to disseminate information on promising approaches to reducing disparity.¹⁸³ Advo-

funding recipients repeatedly issue policies that are facially neutral “but are capable of producing devastating racial effects”).

178. See 536 U.S. 273, 283 (2002) (holding that § 1983 analysis of whether Congress intended to create an enforceable right is no different than in implied right of action cases).

179. See, e.g., DMC 2002 Update, *supra* note 128, at 10–11.

180. Telephone Interview with Heidi Hsia, DMC Coordinator, Office of Juvenile Justice & Delinquency Prevention, Dep't of Justice, in New York, N.Y. (Oct. 27, 2005).

181. Telephone Interview with Michael Harris, *supra* note 158.

182. See, e.g., W. Haywood Burns Inst. for Juvenile Justice Fairness & Equity, State Disproportionate Minority Confinement Data, at <http://www.burnsinstitute.org/dmc> (last visited Oct. 18, 2006) (on file with the *Columbia Law Review*). Scholars have written about the role of public information in institutional reform in other public law contexts. See, e.g., Bradley Karkkainen, Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?, 89 *Geo. L.J.* 257, 295–300 (2001) (describing successes of EPA program requiring firms to publicly report toxic emissions). The effect is likely to be smaller in the DMC context, as racial disparities in juvenile justice are less likely to generate the level of public outcry generated by toxic waste, for instance.

183. This consortium is known as the Building Blocks for Youth Initiative. See *supra* note 159.

cates are also conducting nonlitigation advocacy to ensure enforcement, producing reports on states that are not taking sufficient steps to comply with the mandate, and applying political pressure to increase state compliance and boost oversight at the national level.¹⁸⁴ The production of information also provides concrete data to internal reformers to help guide their policymaking, and makes available a pool of information about effective or promising programmatic developments from other jurisdictions.

This is not to deny that the DMC regime might be more effective with stronger enforcement and accountability measures, such as the conditioning of federal funding on state progress in reducing racial disparities in particular areas, or providing bonuses to states that have made progress. The DMC standard's flexibility helps federal and state governments develop expertise on the causes of racial disparity in juvenile justice and on effective solutions. The statute, however, would be stronger if it included greater accountability measures as governments gain more concrete information about specific, promising approaches.¹⁸⁵

IV. IMPLICATIONS

DMC points to regulatory innovation in addressing racial disparities, not yet acknowledged in the legal commentary, that moves beyond the limitations of traditional impact theory. The DMC regime responds to the problem of public indifference to racial disparities by requiring that states become conscious of racial harm. It seeks to interrupt what some commentators have called the “[r]outine, [o]rdinary [g]eneration of [i]nequality” by institutions in intentionally or unintentionally producing racial inequality over time.¹⁸⁶ The DMC framework meets the complexity of the problem of racial disparity by aiming at racial inequality caused by bias (unintentional or intentional), but also at the way in which government practices interact with race-specific structures of opportunity.

This final Part turns to the portability of the DMC approach to other problems of racial inequality, the existence of this model outside the domain of judicial enforcement, and the normative implications of using racial disparity—as opposed to racial discrimination—as a trigger for social intervention.

184. See, e.g., ACLU, *supra* note 159 (documenting and publicizing Massachusetts's failure to comply with DMC mandate).

185. The literature on experimentalist regimes has detailed how to use benchmarks and “rolling rules” as a way of incorporating learning from better performing entities. See, e.g., Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 *Yale L. & Pol'y Rev.* 261, 291–92 (2004) (describing use of performance benchmarking and experimentation in education reform); Charles F. Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* 1015, 1069–70 (2004) (describing judicial remedies in public law litigation that take form of provisional, rolling rules which are revised to respond to new information and contingencies).

186. Brown et al., *supra* note 17, at 19.

A. *Emerging Model?*

DMC is not the only area where legislation has been developed to address racial disparities by requiring public agencies to collect data, make the data more publicly available, and monitor the extent and cause of racial disparities. At the federal level, the No Child Left Behind Act (NCLB), though controversial for its reliance on tests and its imposition of federal mandates on states,¹⁸⁷ like DMC requires that states report achievement data according to race and ethnicity, and take steps to reduce racial disparities in test scores and other indicia of achievement (such as high school completion rates).¹⁸⁸ An animating concept behind the legislation was that requiring states to report data and measure yearly progress for racial and ethnic subgroups would smoke out differences in educational attainment by race that had been obscured by aggregating data on statewide achievement, resulting in targeted interventions to underachieving groups of children.¹⁸⁹ Some commentators and nongovernmental organizations have urged the use of this data as a focal point for advocacy and information sharing about best practices.¹⁹⁰ To be sure,

187. Commentators disagree on whether NCLB unduly emphasizes rote testing and intrudes on state authority. Compare Garrett & Liebman, *supra* note 185, at 311 (arguing that these criticisms “misunderstand[] the experimentalist nature of the remedy—the NCLB rejects inflexible testing goals imposed from above and instead asks that states set their own achievement and progress goals and standards”), with Gail L. Sunderman & Jimmy Kim, *Expansion of Federal Power in American Education: Federal-State Relationships Under the No Child Left Behind Act, Year One*, at 17 (2004), at http://www.civilrightsproject.harvard.edu/research/esea/Federal_report.pdf (on file with the *Columbia Law Review*) [hereinafter Sunderman & Kim, *Expansion of Federal Power*] (finding, among other things, that NCLB expands testing requirements, mandates which subjects are to be tested, and establishes timelines for those assessments).

188. Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended at 20 U.S.C. § 6301 note (Supp. II 2002)). NCLB is the name of the 2001 Act reauthorizing Title I of the Elementary and Secondary Education Act (ESEA), which, among other things, provides funds to states for educating low-income students. NCLB builds on state accountability systems, such as those in Kentucky, North Carolina, and Texas, that measure educational outcomes, set goals, and attempt to improve educational practices. See Garrett & Liebman, *supra* note 185, at 309–10. As discussed earlier, see *supra* text accompanying notes 100–121, the plaintiffs GI Forum challenged portions of that system, though, it should be noted, they challenged not the use of tests to hold schools and districts accountable, but the use of tests in making promotion and graduation decisions for individual students. The federal NCLB, while allowing states to set achievement goals using standardized tests, does not mandate the use of tests in making high-stakes educational decisions for children.

189. See 20 U.S.C. § 6301 (2000) (describing Act, in Statement of Purpose, as aimed at “[c]losing the achievement gap between high and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers”); Garrett & Liebman, *supra* note 185, at 314.

190. See Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act’s Race-Conscious Accountability*, 47 *How. L.J.* 243, 295–96 (suggesting how civil rights advocates might leverage NCLB’s race-conscious accountability mechanisms).

whether the NCLB approach will help close the achievement gap is still unclear. Some critics claim that NCLB—which involves much tighter benchmarking and accountability measures than DMC and mandates sanctions for failure to meet goals—rests on unsupported assumptions about the expected pace of educational reform and the efficacy of sanctions in prompting better educational practices.¹⁹¹

Other efforts are emerging to address racial disparities by providing incentives to public institutions to gather information on the extent of the problem and devise responsive solutions. For instance, states and localities have sought to address the complex problem of racial profiling by police by mandating the collection of racial data on those subject to police stops.¹⁹² Pending federal legislation would require state recipients of federal funds to collect racial data information, and would fund model reforms. Many of these efforts remain quite superficial, particularly when compared to the DMC statute.¹⁹³ And while there appears to be a consensus against “racial profiling,” upon closer examination much is contested, including the definition of racial profiling,¹⁹⁴ the standards on

191. See, e.g., Sunderman & Kim, *Expansion of Federal Power*, *supra* note 187, at 6. Some commentators also claim that the subgroup accountability requirement harms predominantly minority and integrated schools because they will have to make substantial gains in order to meet the adequate yearly progress requirement and avoid sanctions, and because they have to meet more achievement targets than predominantly white schools. See Gail L. Sunderman & Jimmy Kim, *Large Mandates and Limited Resources: State Response to the No Child Left Behind Act and Implications for Accountability 12–13* (2004), available at http://www.civilrightsproject.harvard.edu/research/esea/state_report.pdf (on file with the *Columbia Law Review*); see also Thomas J. Kane & Douglas O. Staiger, *Racial Subgroup Rules in School Accountability Systems 21* (Sept. 27, 2002) (unpublished manuscript, on file with the *Columbia Law Review*), available at <http://www.spspr.ucla.edu/faculty/kane/kanestaigerracialsubgroupsrevision.pdf> (concluding that subgroup accountability systems “arbitrarily single out schools with large minority subgroups for sanctions and exclude them from awards . . . or statistically disadvantage diverse schools that are more likely to be attended by minority students”). Civil rights groups have also been divided about the law.

192. Twenty-five states currently have legislation mandating data collection, and at least twenty states voluntarily collect data. See R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 *Stan. L. Rev.* 571, 575 n.15 (2003) (noting extensive data collection efforts by jurisdictions across country on law enforcement officers’ stop-search practices); Garrett, *supra* note 28, at 81–82 n.127 (same); Data Collection Res. Ctr., *Northeastern Univ., Background and Current Data Collection Efforts: Jurisdictions Currently Collecting Data*, at <http://www.racialprofilinganalysis.neu.edu/background/jurisdictions.php> (last visited Oct. 18, 2006) (on file with the *Columbia Law Review*) (showing states with mandatory and voluntary data collection). Many police departments also voluntarily collect data, largely in response to political pressures, see Garrett, *supra* note 28, at 82 n.128, and federal law enforcement collects data under an executive order issued in 1999 by President Clinton. See Memorandum on Fairness in Law Enforcement, 35 *Weekly Comp. Pres. Doc.* 1067 (June 9, 1999); Banks, *supra*, at 575 n.16.

193. See Garrett, *supra* note 28, at 83 (criticizing most state legislation as “incomplete and vague”).

194. See *id.* at 51–52 (“[A]ny definition of racial profiling is confounded by the motivation of individual actors.”); see also Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 *Colum. L. Rev.* 1413, 1415, 1416 n.6 (2002) (describing racial

collecting data and benchmarking,¹⁹⁵ and, particularly in the wake of September 11, 2001, whether profiling is ever effective or justified.¹⁹⁶ Yet, the data collection requirements could potentially lead to greater understanding of racial disparities in police-citizen contacts and partnerships with community groups to advance concrete reform efforts.¹⁹⁷

Similarly, advocates have recently focused attention on collecting information to understand and address racial disparities in social welfare programs. In the wake of the 1996 changes to federal welfare for poor families, known as Temporary Assistance for Needy Families (TANF),¹⁹⁸ blacks and Latinos comprise a greater percentage of the welfare rolls than before the 1996 law and are less likely to leave welfare than their white counterparts.¹⁹⁹ As Congress seeks to reauthorize TANF, nongovernmental organizations have presented Congress with proposals that would require states to track welfare outcomes according to race and ethnicity in order to understand and address these disparities.²⁰⁰ These

profiling as stops, arrests, searches, or investigations where “the officer believes that members of that person’s racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating” and noting existence of narrower definitions of racial profiling).

195. See Banks, *supra* note 192, at 581–86 (describing ambiguous meaning of evidence of racial disparities in stop and search rates); Garrett, *supra* note 28, at 84–92 (indicating problems with scope and evaluation of data collection).

196. See, e.g., Gross & Livingston, *supra* note 194, at 1413–14 (describing how events of September 11, 2001 changed public opinion on appropriateness of racial profiling); *id.* at 1423–24 (describing shift in public opinion from eighty-one percent against racial profiling to seventy-nine percent in favor of program targeting Arabs). Not all commentators agree that the racial profiling campaign, with its focus on irrational police practices and innocent victims, is the best emphasis. See Banks, *supra* note 192, at 602–03 (urging instead that policy analyses focus on race-specific consequences of drug war).

197. See Garrett, *supra* note 28, at 84–89, 115–40.

198. In 1996, Congress passed the Personal Responsibility and Work Reconciliation Act (PRWORA), which replaced the Aid to Families with Dependent Children (AFDC) federal entitlement program for poor families with a block granted program known as TANF (Temporary Assistance for Needy Families). See Personal Responsibility and Work Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 7, 8, 20, 21, 25, and 42 U.S.C.). Eligible families can only receive TANF aid for five years; nonexempt TANF recipients are required to participate in work activities. PRWORA gives states flexibility, including allowing them to set their own eligibility criteria, cap grants based on family size, determine exemptions from work activities, and determine how and under what circumstances to sanction recipients who fail to comply with work requirements or other rules.

199. See, e.g., Elizabeth Lower-Basch, U.S. Dep’t of Health & Human Servs., TANF “Leavers,” Applicants, and Caseload Studies: Preliminary Analysis of Racial Differences in Caseload Trends and Leaver Outcomes fig.1 (Dec. 2000), available at <http://aspe.hhs.gov/hsp/leavers99/race.htm#fig1> (on file with the *Columbia Law Review*) (documenting decrease in white families receiving TANF).

200. See, e.g., U.S. Comm’n on Civil Rights, *A New Paradigm for Welfare Reform: The Need for Civil Rights Enforcement* (2002), at <http://www.usccr.gov/pubs/prwora/welfare.htm> (on file with the *Columbia Law Review*) [hereinafter *A New Paradigm for Welfare Reform*]; Letter from the ACLU to the U.S. House of Representatives Regarding HR 4700, *The Personal Responsibility, Work and Family Promotion Act of 2002* (May 14,

efforts come in response to studies showing that minority applicants face race-specific barriers in the administration of TANF. On one level, some research points to differential treatment of minority TANF recipients: Minorities receive sanctions for violations of program rules at higher rates than white recipients who commit similar violations,²⁰¹ and minority women are less likely to receive services, such as education and childcare, that help promote successful transitions to higher-paying jobs.²⁰² As with racial disparities in the juvenile justice system, the root of racial disparities likely extends beyond bias in the administration of welfare programs to race-specific opportunity structures. Blacks on welfare, the data suggests, may have less access to employment and childcare because they are more likely to live in neighborhoods with fewer resources and higher

2002), available at <http://www.aclu.org/rightsofthepoor/welfare/13439leg20020514.html> (on file with the *Columbia Law Review*). Researchers and advocates are also asking state agencies to improve their data collection and monitoring. See, e.g., Racial and Ethnic Disparities in the Era of Devolution, *supra* note 1, at 21–22 (calling for policy analysts and researchers to work with state policymakers to improve data collection).

201. See, e.g., Dep't of Workforce Dev., State of Wis., Wisconsin Works (W-2) Sanctions Study 10–11 (2004), available at <http://www.dwd.state.wi.us/DWS/w2/pdf/SanctionsFinalReport.pdf> (on file with the *Columbia Law Review*). The Wisconsin study was prompted by a Title VI OCR complaint filed by the ACLU of Wisconsin and the Milwaukee Branch of the NAACP against the State of Wisconsin for, among other things, discrimination in the application of sanctions. See Letter from Karyn Rotker, ACLU of Wis., to Patricia Lucas, Office for Civil Rights, U.S. Dep't of Health & Human Servs. (Feb. 19, 2002), available at http://www.aclu-wi.org/wisconsin/rights_of_poor/ocrada.shtml (on file with the *Columbia Law Review*) [hereinafter Letter from Karyn Rotker]. For additional data on racial disparities in sanctions, see Kenneth Finegold & Sarah Staveteig, Race, Ethnicity, and Welfare Reform, in *Welfare Reform: The Next Act 203*, 214–15 (Alan Weil & Kenneth Finegold eds., 2002) (discussing survey indicating states with higher black populations are also more likely to have adopted strong sanctions); A New Paradigm for Welfare Reform, *supra* note 200 (discussing racial disparities uncovered in results from survey on welfare recipients from thirteen states (citing Rebecca Gordon, Applied Research Ctr., Cruel and Unusual: How Welfare “Reform” Punishes Poor People 5, 33–34 (2001), available at <http://www.arc.org/pdf/285cpdf.pdf> (on file with the *Columbia Law Review*))); Racial and Ethnic Disparities in the Era of Devolution, *supra* note 1, at 13 (describing survey data from Wisconsin that shows higher percentages of blacks have had food stamp benefits reduced or cut); see also *id.* at 20 (discussing disparities in use of preemployment tests as condition of employment). Studies are often limited by the paucity of available data, particularly on those who leave welfare. See *id.* at 16–21 (noting gaps in data on racial and ethnic disparities).

202. See Gooden, *supra* note 1, at 27–30 (finding, based on survey of thirty-nine white and black welfare recipients, disparate treatment by case worker with regard to job notification, educational support, transportation assistance, and overall fairness); A New Paradigm for Welfare Reform, *supra* note 200, at 3–4 (citing studies finding that minorities on TANF have less access to social support services and that they are more likely to be subject to sanctions and other punitive policies); Racial and Ethnic Disparities in the Era of Devolution, *supra* note 1, at 15 (citing studies in Mississippi showing that whites were more likely than blacks to receive help with job placement, childcare, transportation, mental health counseling, and drug treatment). Under TANF, caseworkers have discretion in connecting recipients to support services such as childcare and transportation, and educational services such as GED services.

concentrations of poverty,²⁰³ are likely to face bias as they try to transition from welfare to employment,²⁰⁴ have less access to informal job networks, and have thinner familial resources to draw upon for financial and social supports.

Under current law, state agencies must comply with Title VI in the administration of TANF, and individuals and groups can file Title VI complaints to address bias in the administration of the program and practices with an unjustified disparate impact.²⁰⁵ Nothing in the current TANF structure, however, requires that states collect and disseminate data by race or ethnicity on sanction rates or welfare leavers, for instance. Nor does Title VI, by itself, encourage states to analyze how their own policies interact with other barriers that minorities face. As with DMC, a new approach would not simply attach civil rights law requirements—but would uncover evidence of racial disparities, to promote transparency and to develop solutions responsive to the complex factors at play.

Thus, in areas other than DMC, efforts exist to address racial disparity by encouraging institutions to be cognizant of racial impact—through the collection and analysis of race-specific data—and to reform practices that generate racial inequality. The examples are sufficiently different as to warrant some caution in proclaiming a coherent model. Each effort to generate information takes on a slightly different shape given the context. Under DMC, research and data are collected to understand the multiple contributors to racial disparities and to develop research-informed solutions. Yet, in the area of racial profiling, as Richard Banks and others have noted, data collection is often aimed merely at proving or disproving the irrationality of racial profiling.²⁰⁶ While proposals to gather data and monitor racial impacts in TANF are oriented toward avoiding bias as well as understanding the structural dimensions of racial disparities, no proposal goes so far as to mandate that states take steps to reduce racial disparities.

While it may be too early to proclaim that a new disparity model has arrived, what the DMC and the models described above suggest is an emerging, unarticulated normative reorientation of civil rights law at the regulatory level. It suggests a shift to the realization that uncovering bias is not the only way of addressing how racial disparities are generated.

203. Racial and Ethnic Disparities in the Era of Devolution, *supra* note 1, at 6–9 (reporting data on “sub-optimal living conditions” in states of Washington and New York).

204. See Finegold & Staveteig, *supra* note 201, at 212–13 (discussing obstacles, such as employer discrimination, that minority welfare recipients face in trying to secure employment).

205. For instance, the ACLU office in Wisconsin filed a Title VI complaint challenging racial disparities in how the state agency granted time limits for welfare receipt. See Letter from Karyn Rotker, *supra* note 201.

206. See Banks, *supra* note 192, at 577–80 (discussing several empirical arguments aimed at demonstrating irrationality of racial profiling); see also Garrett, *supra* note 28, at 45, 86–87 (noting that data on racial profiling is often used solely to disprove racial profiling or postpone reform).

B. *Enforcement Challenges*

DMC and the models discussed in the previous Part are not, of course, enforced primarily by the judiciary. As discussed above, the federal government has the power to withhold a percentage of funds from states that fail to comply with the DMC requirement, and the federal government has used that power in recent years. In addition, some states have adopted implementing legislation to further the goal of reducing racial disparities in juvenile justice.²⁰⁷ State compliance is also procured, as detailed earlier, by the work of internal advocates and by pressure and cooperation from external groups. Indeed, the DMC statute and funding scheme quite explicitly build in involvement of nongovernmental organizations as collaborators, thus maintaining pressure for reform. The effectiveness of external efforts to secure compliance is of course contingent on the political landscape in particular states, the existence of internal reform agents, the skill of the nongovernmental organizations in applying political pressure and educating the public, and the facility of engaging the public. These factors will differ depending on the issue at hand.

The potential role of the judiciary in securing compliance under this regime is unclear. For instance, in theory the federal government could be sued for completely failing to enforce the DMC statute.²⁰⁸ States that have adopted legislation implementing DMC could be challenged under state law for failing to comply with specific requirements. In addition, as best practices and model approaches to combating racial disparities become known, plaintiffs could have some success with deliberate indifference claims. A state's failure to adopt proven methods for addressing racial disparity after being made aware of these alternatives could raise an inference of intent.²⁰⁹

Ultimately, however, the question is whether the model's strength depends on the limited role it grants the judiciary. As a practical matter, Congress or state legislatures may be reluctant to include explicit private rights of action. For instance, on the federal level, NCLB failed to include a private right of action for the accountability provisions as part of a political compromise. Beyond the politics, a tension might be created by requiring states to generate information about a problem, engage in a difficult process of discovering solutions, and then authorize them to be subject to suit. A compromise position would allow a private right of action for states that fail to comply with the statute's requirements by, in the

207. See, e.g., DMC 2002 Update, *supra* note 128, at 21–24 (describing legislative efforts in Washington State).

208. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832, 833 & n.4 (1985) (stating that while agency action not to take enforcement action is presumptively unreviewable, presumption is rebuttable where statute provides guidelines and agency consciously abdicates responsibility to enforce statute).

209. See *Pryor v. NCAA*, 288 F.3d 548, 564–65 (3d Cir. 2002) (holding that *Feeney* did not bar deliberate indifference claim at motion to dismiss stage); cf. *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 254 F. Supp. 2d 486, 497–99 (D.N.J. 2003) (same).

context of DMC for instance, failing to evaluate racial disparities or to develop a remedial plan. A safe harbor would be created, however, for states that are producing information and taking steps to address the problem.

Another concern is that legislation on issues of race and civil rights is not easy to pass at either the state or the federal level. Indeed, the same forces that make public officials indifferent to particular racial disparities will come into play. This likely means that passage of legislation will require some minimum social or legal consensus about the existence of a particular problem, and more specifically about the kinds of racial impacts one is willing to tolerate. Here, the story of the passage of DMC is instructive. The legislation built political support based on research showing that racial disparities in juvenile dispositions could not be explained solely by differences in criminal activity. What began as a concern about arbitrariness transformed into a general concern about minority overrepresentation, which then produced a standard that seeks to address both unjustified disparity as well as simple overrepresentation. However, because the public is likely to be willing to tolerate some racial disparities in juvenile justice outcomes in the interest of reducing crime, arguments that the disparities are not justified by the rate of crime commission must continually be remade to sustain the legislation.²¹⁰ In other areas, such as education, where there is arguably a greater consensus on equity as a goal, arguments based solely on disparities might be sufficient to support disparity legislation.²¹¹

C. *Disparity-Reducing Justice*

The DMC model raises a final question about the meaning of using racial disparity as a point of intervention. In other contexts, commentators have argued that disparate impact does not provide a strong basis for civil rights intervention. Ian Ayres, for instance, makes this argument largely on pragmatic grounds, believing that disparate impact provides too weak a basis for political organizing, in contrast to particularized evi-

210. See, e.g., *supra* note 125.

211. DMC and similar models rely heavily on data collection on the basis of race and ethnicity, which raises constitutional and policy concerns. Such data collection is controversial in many quarters, most famously exemplified by the recent unsuccessful effort to abolish the collection of racial data in California. See generally Richa Amar, Note, Unequal Protection and the Racial Privacy Initiative, 52 *UCLA L. Rev.* 1279, 1281–93 (2005) (describing California’s “Racial Privacy Initiative” (RPI), including its defeat by popular vote in 2003, and arguing even modified RPI would have violated Equal Protection Clause). There may also be constitutional objections to racial data collection or to the creation of racial incentives based on race. But unless the Supreme Court adopts a view that prohibits all race consciousness, most of the actions taken under these disparity regimes are unlikely to sufficiently harm another racial group to justify standing or heightened review. One could imagine extreme examples—for instance redirecting all government resources to minorities or arresting only white juveniles to “cure” racial disparities—but as a practical matter states are unlikely to take such steps.

dence of continuing disparate racial treatment.²¹² Similarly, Michael Selmi argues that in the employment context disparate impact theory mistakenly shifts attention away from the persistence of disparate treatment discrimination.²¹³ These arguments point to the hazards of the disparity framing, which can obscure the role of both past and present intentional discrimination in accounting for contemporary racial inequality.

The example of DMC, however, reveals a more complex role for disparity arguments. As detailed in the prior section, a virtue of the disparity frame is that it has the power to encompass racial inequities caused by disparate treatment—typically understood as bias—as well as by race-specific differences in opportunity structures. Moreover, as a descriptive matter, remedying racial disparity might be sufficient to provide a basis for civil rights intervention, at least where there is some empirical evidence of racially disparate outcomes for similarly situated groups. As occurred with DMC, one could propel disparity remedies by presenting evidence to policymakers that race (as opposed to some other factor) continues to be salient in explaining differences in social outcomes in particular areas, rather than relying on the broad notion of institutional discrimination.²¹⁴

The disparity frame has the power to propel social intervention if racial disparities are revealed as generated by public policies and institutions. Empirical evidence about the mechanisms that sustain racial inequality can then unsettle notions that these inequalities are inevitable, something to be expected. While society might not understand disparities as a normative wrong on the same scale as that of intentional discrimination, many racial disparities can begin to be understood as arbitrary, unjustified, and unnecessary.²¹⁵

212. See Ayres, *Pervasive Prejudice*, *supra* note 43, at 426 (“[U]njustified disparate impacts are an appropriate concern for law and policy, [but] I do not believe that they provide as firm a moral basis for political organizing.”).

213. See Selmi, *Mistake*, *supra* note 9, at 782 (“[A] broader judicial definition of intent would not have led to less inequality, but it may have opened our eyes to the persistence of discrimination in a way that the disparate impact theory could not.”).

214. This is not entirely inconsistent with Ayres’s argument that providing empirical evidence of “race-contingent” behavior counters arguments that race no longer matters and thus can help spur reforms. See Ayres, *Pervasive Prejudice*, *supra* note 43, at 426 (“[V]isual images of disparate treatment . . . are the key to convincing whites that unjustified race-contingent behavior persists in the modern marketplace.”).

215. As Loury has suggested, if race itself is a social construct then racial disparities are also constructed by society. See Loury, *Racial Inequality*, *supra* note 12, at 5 (describing “race” as “a socially constructed mode of human categorization” and racial disparity as “a social artifact—a product of the peculiar history, culture, and political economy of American society”).

CONCLUSION

The virtue of the DMC approach is its potential to prompt public institutions to consider how to address racial disparity, less constrained by the concern about cabinining public responsibility that I argue has hampered the judicial regime. Rather than abandon civil rights legislation as necessarily ineffective in addressing complex, systemic inequality, examination of the DMC approach might lead scholars, policymakers, and advocates concerned about racial inequity to consider the efficacy of the new forms of civil rights regulatory interventions that we see emerging today. These interventions are not always recognized by commentators as civil rights laws, since their mandate extends beyond remedying discrimination. Nongovernmental organizations, too, will have to reshape their advocacy strategies to make these new approaches meaningful. The ingredients of this new form of advocacy are already evident in the work of the organizations working on DMC. In the absence of a clear avenue for judicial enforcement, nongovernmental organizations are undertaking strategies to broaden political support for reforms to reduce DMC, exposing the failures of states that have made inadequate progress, and highlighting best practices for reducing disparities in minority confinement. Of course these efforts are relatively young, and more remains to be seen about whether the DMC strategy is successful in reducing disparities in minority involvement in the juvenile justice system.

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