American Indian Law Journal

Volume 7 | Issue 1 Article 4

12-21-2018

The Colourful Truth: The Reality of Indigenous Overrepresentation in Juvenile Detention in Australia and the United States

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THE COLOURFUL TRUTH: THE REALITY OF INDIGENOUS OVERREPRESENTATION IN JUVENILE DETENTION IN AUSTRALIA AND THE UNITED STATES

Rachel Thampapillai[*]

I. INTRODUCTION

History has witnessed overrepresentation in the incarceration of juvenile Indigenous Australians and Native Americans in Australia and the United States, respectively.[1] This disproportionality persists despite each nation's efforts to develop progressive policies in accordance with their promises to address the issue. Likewise, the international community's efforts to frame disproportionate incarceration as a vital human rights issue has done little to actually correct the problem.

This paper attempts to frame the high rates of incarceration affecting Indigenous Australian and Native American youths by analyzing the jurisdictional issues that have contributed to this problem. In doing so, this paper aims at contributing to the relevant body of literature. The comparative analysis here provided suggests that the cycles of incarceration in both Australia and the United States bear a number of similarities. While the finer details of demographic distribution as well as historical and contemporary subtleties in race relations may vary, the overarching causal and consequential determinations are alarmingly alike.

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[*] *LLM UC Berkeley School of Law 2018, BA/LLB Australian National University 2014. Both racial and ethnic justice has a significant place in my own narrative. My family fled the civil war in Sri Lanka and came to Australia in 1983. As a first generation Australian, I have both experienced and witnessed how racial injustice manifests in all facets of life. As such, I have a long standing passion for promoting social justice for all Indigenous communities and those who have been affected by racial or ethnic injustice. Thank you to Professor Oppenheimer for providing me with guidance and direction when writing this article and everyone at the American Indian Law Journal who worked tirelessly on the edits for this article. Lastly, thank you to my family for their unwavering support and sacrifice.

[1] Author is aware that other minority races also face issues in the criminal justice system. However, this paper is limited to a comparison of Indigenous Australians and Native American Indians.

The aforementioned precis is vital from a methodological perspective, since it suggests that overrepresentation in the juvenile justice system across multiple jurisdictions must be both understood as the result of cascading effects and interpreted through a historical, socioeconomic, and cultural lens. Only then will it be possible to arrive at an accurate assessment of the underlying structural design that perpetuates the problem and, thereafter, to offer suggestions towards constructive policy reform.

This paper first outlines the historical background of Indigenous Australians and Native Americans. Afterwards, it provides an analysis of incarceration as a means of control and then, finally, suggests structural reforms needed in the sphere of juvenile justice.

II. THE HISTORY

The indigenous populations of Australia and the United States share a history of colonial subjugation carried out through forcible eviction from native lands, the commission of mass atrocities, and forced servitude, all of which were premised on a mythical narrative of racial and cultural inferiority. As such, higher rates of youth incarceration in the present day can be seen as ripple effects of spatially separate intimately related darker histories. The historical accounts provided in this paper, while necessarily limited, aim to shed light on the systematic discrimination that each of these groups has endured.

A. *The History of Indigenous Australians*

In Australia, indigenous children were forcibly separated from their families at the onset of European settlement.[2] Historically, these children were often referred to as the "stolen generation."[3] In the nineteenth century, confrontations over land, food, and water characterized hampered indigenous-colonial relations.[4] In 1810, governments and missionaries initiated the

[2] AUSTRALIAN HUMAN RIGHTS COMMISSION, BRINGING THEM HOME: NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FORM THEIR FAMILIES 2 (1997) [hereinafter BRINGING THEM HOME].
[3] *Id.*
[4] *Id.*

deliberate removal of indigenous children from their families so that they might be employed to serve colonial settlers.[5] In 1814, Governor Macquarie funded the first school for Aboriginal children in order to further a policy aimed at distancing children from their families and communities.[6] Although colonial governments mouthed expressions of abhorrence at the brutal treatment of the indigenous population, they provided no tangible solution.

In 1837, the British government, after learning of the atrocities being committed in Australia, appointed a "Select Committee" to inquire into the condition of Aboriginal people.[7] During this period, the jurisdiction of each state had a separate legislative regime aimed at controlling Indigenous Australians, which include the Aboriginal and Torres Strait Islander people. These regimes forced segregation on the reserves, religious indoctrination through missions, and the removal of children from their communities.

This policy of "protection" and the segregation of indigenous peoples endured throughout the nineteenth century, and by 1911, every state and territory except Tasmania had passed a law appointing a Chief Protector as the legal guardian of every Aboriginal and "half-caste" child.[8] Enforcers of the protectionist legislation were usually police officers.[9] The colonial government's intention was to systematically destroy long-established cultural and socioeconomic structures of the indigenous population in order to encourage their conversion en masse to Christianity and to disincentivize indigenous practices, capacities, and unity.

For example, at a 1913 Royal Commission in South Australia, it was debated whether indigenous children should be removed at birth or at the age of two.[10] Laws such as the *Aboriginals Ordinance* 1918 (Cth) controlled the autonomy of Indigenous Australians in their movement across locations such as reserves,

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] Australian Human Rights Commission, *Track the History Timeline: The Stolen Generations*, https://www.humanrights.gov.au/track-history-timeline-stolen-generations (The term "half-caste" is and was an offensive term but is used to describe someone of mixed descent).
[9] BRINGING THEM HOME, *supra* note 2, at 4.
[10] ANNA HAEBICH, BROKEN CIRCLES: FRAGMENTING INDIGENOUS FAMILIES, 1800 – 2000 316 (2000).

homes, missions, and compounds.[11] Under the misnomer of "protection," Indigenous Australians were subjected to self-serving colonial revision, which suspended their rights to easements on, access to, and communal ownership of land. It also served to strictly regulate marriage and employment.[12]

The period following 1940 experienced the egregious and systematic removal of indigenous children from their families, which was governed by general child welfare law.[13] The policies that inspired these laws were reified and perfected throughout the 1950s and 1960s—decades which saw a massive upsurge in forcible removals and attempts at assimilation.[14] The ultimate purpose of the removal were to control the reproductive capacities of indigenous peoples as well as to "merge" and "absorb" them into the non-Indigenous population.[15] There was a specific focus on half-caste children being merged into non-indigenous society, for it was seen that children with lighter complexions would be more readily accepted into non-indigenous society once they lost their Aboriginality.[16]

In addition to being removed, indigenous children were taken to schools in distant places, given medical treatment, and adopted out at birth.[17] At the third Native Welfare Conference in 1951, the government agreed that assimilation was the aim of "native welfare measures." At the conference, *assimilation* was described as bringing about an eventuality: "[I]n the course of time, it is expected that all persons of aboriginal blood or mixed blood in Australia will live like other white Australians do."[18] This policy relied on controlling and repressing the reproduction of half-caste young women.[19]

By the early 1960s, however, it was evident that despite the mandatory assimilation policy, Indigenous people were not being

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[11] 1 ROYAL COMMISSION INTO THE PROTECTION AND DETENTION OF CHILDREN IN THE NORTHERN TERRITORY, REPORT OF THE ROYAL COMMISSION AND BOARD OF INQUIRY INTO THE PROTECTION AND DETENTION OF CHILDREN IN THE NORTHERN TERRITORY 166 (2017) [hereinafter 1 ROYAL REPORT].
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *See* BRINGING THEM HOME, *supra* note 2, at 27.
[19] *Id.*

assimilated, but the oppressive character of colonial policies continued to manifest in two profound ways: first, the separation from their families and culture and, second, the prejudicial attitudes shared in the non-indigenous communities they were entering into.[20] In the aftermath of activism engaged in by both Indigenous and non-Indigenous Australians, a 1967 referendum led to the amendment of the Australian Constitution which allowed for the inclusion of Aboriginals in the census and authorized the Commonwealth Government to pass national laws for the benefit of Indigenous Australians.[21]

This history of control has led to chronic disadvantages for Indigenous Australians in terms of physical health, mental health, disability, employment, housing, and education, most of which persist even today.[22] Although these practices, along with the semantic dismantling of the colonial-settler project, waned, they have left long-term effects within indigenous communities. These cascading effects of the stolen generation have undermined the prospects of successive generations of Indigenous Australians.[23]

B. *The History of Native American and Alaskan Natives in the United States*

Similar to their Australian counterparts, Native American communities in the United States experienced forced eviction from their homelands, mass killings, exposure to European diseases, the forced cultural alienation of Native children in boarding schools, and broken or damaged family ties resulting from adoption and relocation. Taken cumulatively, these experiences continue to place Native American youth at greater risk of becoming involved in the juvenile system.[24]

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[20] *Id.*
[21] *Id.*
[22] *See* 1 ROYAL REPORT, *supra* note 11, at 167.
[23] *Id.* at 163.
[24] Addie C. Rolnick, *Locked Up: Fear, Racism, Prison Economics, and the Incarceration of Native Youth*, 40 AM. INDIAN CULTURE & RESEARCH JOURNAL 55, 59 (2016) [hereinafter Rolnick, *Locked Up*].

From the late 1800s onwards, a federal policy was initiated to forcibly assimilate Native American people.[25] The goal was to ensure that once Native American people were disconnected from their tribes, they would be absorbed into the American polity and forced into subservient positions and, thereby, leave tribal lands open to the expansion of colonial settlements. While land transfer was also a primary motivation behind this federal policy, the enforcement mechanism relied on imposition of criminal laws to suppress Native American traditions as well as the removal of Native American children.[26]

During this time, the federal government established and operated Native American boarding schools.[27] Parents were forced or coerced into giving up their children, who were sent to these far away schools and prohibited from returning home for extremely long periods of time. [28] The aim of boarding schools was the acculturation of Native youths so as to convert them into subservient Americans.[29] In order to achieve this end, Native American children were forced to cut their hair and were punished for speaking Native languages.[30] Professor Addie Rolnick posits that "the boarding school philosophy linked the idea of rehabilitation with the practices of removal, education and punishment, leaving a shadow that looms large over the use of juvenile courts and facilities for Native American youth today."[31] Seen as such, the narrative of kidnapping and loss is central to the history of the Native American population.

In the 1870s, the number of federal boarding schools began to increase dramatically.[32] According to the Bureau of Indian Affairs (BIA), these federal boarding schools had specific aims regarding their students: to replace Native languages with English, to replace

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[25] Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country,* 19 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 61 (2016) [hereinafter Rolnick, *Untangling the Web*].

[26] *Id.* at 62.

[27] *See generally* K. TSIANINA LOMAWAIMA, THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL (1994) (detailing the Indian experience of assimilation through the boarding school program).

[28] *See* Ann M. Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services,* 43 TULSA L. REV. 149, 150–55 (2013).

[29] Rolnick, *Untangling the Web*, *supra* note 25, at 63.

[30] *See generally* LOMAWAIMA, *supra* note 27.

[31] *Id.*

[32] Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 15 (1998).

communal ethics with individualistic ethics, to inculcate the Native youth with Christian ethics, and to teach them the history of the United States through a colonial lens.[33] Richard Henry Pratt, who was responsible for the first reservation boarding school in 1879, made no attempt to disguise these intentions when he stated that boarding school education was intended to "kill the Indian and save the man."[34] This policy of ideologically violent assimilation continued well into the 1930s.

In the 1950s, after two decades of implementing a federal policy favoring tribal self-government, the federal government revived its strategy of forced assimilation; this marked the beginning of what is often called the "Termination Era."[35] During this time, the U.S. Congress attempted to dismantle tribal sovereignty under the guise of altruism, using the tribal-federal trust relationship as a justification for further forced assimilation.[36] The era is so titled due to a series of statutes which terminated the relationship between Congress and particular tribal governments. A federal relocation program was also established to move Native people from reservations to urban areas.[37] Further, the Indian Adoption Project was established under the guidance of the federal government in 1958.[38] It was created to place Native American children with non-Native parents under the misconception that Native children would then receive better care than they would from their biological parents.[39] Before it ceased operating, the Indian Adoption Project had placed nearly 400 Native children with white parents.[40] The involvement of states in Native child welfare decisions created jurisprudence that failed to account for the profound importance of Native cultures and, instead, facilitated the assimilation of Native American children.[41]

Therefore, one finds similar historical trajectories in the mistreatment of Indigenous people in Australia and Native

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[33] *Id.*
[34] *Id.*
[35] Rolnick, *Untangling the Web*, *supra* note 25, at 64.
[36] *Id.* at 64.
[37] *Id.* at 65.
[38] Ryan Seelau, *Regaining Control Over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice that Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63, 87 (2012).
[39] *Id.*
[40] *Id.*
[41] *Id.*

Americans in the United States. However, the reason for the over-incarceration of Indigenous and Native youth is not rooted solely in past discrimination faced by both racial groups. Rather, discrimination exists and continues to inform extant and potentially harmful policies and legislation of incarceration. The following sections attempt to shed light on this correlation while conducting a cursory analysis of the present legal architecture of juvenile justice in both systems.

III. INCARCERATION PAST AND PRESENT

The historical narratives of Native Americans and Indigenous Australians is important because they contextualize the mass incarceration of Native and Indigenous youths in the present day.

Aboriginal and Torres Strait Islander minors have been historically of overrepresented in the juvenile justice system in Australia.[42] Even though less than six percent of young people aged ten to seventeen in Australia are Indigenous, nearly half (forty-eight percent) of minors aged ten to seventeen under supervision in 2015–16 were Indigenous.[43] This proportion was even higher for Indigenous juveniles in detention, which make up fifty-nine percent of the incarcerated juvenile population.[44] In 2015–16, the rate of supervision of Indigenous minors aged ten to seventeen was 184 per 10,000 compared with eleven per 10,000 for non-Indigenous young people.[45] The sad reality is that Indigenous young people aged ten to seventeen are seventeen times more likely to be under supervision than non-Indigenous young people.[46] Across Australia, police formally charge Aboriginal youth at a rate of five to ten times more than they do non-Aboriginal offenders aged ten to fourteen.[47] The number of Aboriginal children apprehended by the police in the

[42] Youth Justice in Australia 2015-16, AUSTRALIAN GOVERNMENT: AUSTRALIAN INSTITUTE OF HEALTH AND WELFARE, Bulletin 139, 2 (2017).
[43] *Id.*
[44] *Id.*
[45] *Id.* at 6.
[46] *Id.*
[47] *Id.*

Northern Territory in 2015 was 1,766,[48] which is in stark contrast to the 334 non-Aboriginal children apprehended in 2015.[49]

Minority races in the United States, which encompass African American, Latin American, and Native American/Alaskan Natives, accounted for sixty-nine percent of youth in residential placement in 2015. In 2013, Native American juveniles were nearly four times as likely to be committed compared with white juveniles.[50] Approximately ninety percent of Native American juveniles live in twenty-six states. In twenty-four states, less than one percent of youth are Native American.[51] As such, state-by-state data concerning Native American juveniles is obscured on account of their relatively small number.[52] However, data compiled during 2013 from three states—Minnesota, Illinois and Vermont—show that Native American youth are more than ten times as likely as white juveniles to be committed.[53] From data collected between 2012 and 2014, Native Americans in the city of Minneapolis are 7.7 times more likely to be arrested than white youth.[54]

The data raise a number of fundamental questions, one being whether these disparities result from implicit or explicit racism within systems of justice or from the fact that juvenile Native Americans and Indigenous Australians are committing more crimes than their white counterparts. This section will attempt to answer this question by exploring whether structural disadvantages and implicit and explicit racism perpetuate the cycle of disproportionate crime rates and rates of incarceration. Another question which deserves consideration is whether the criminalization of the conduct of Indigenous Australian and Native American youth can be seen agnostically as a result of bad policy decisions or a deliberate policy to control indigenous peoples via criminalization.

The idea that criminal justice systems have been instituted as a form of racial control has found expression in a vast amount of

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[48] 1 ROYAL REPORT, *supra* note 11, at 176.
[49] *Id.*
[50] *Racial Disparities in Youth Commitments and Arrests,* THE SENTENCING PROJECT 1 (April, 2016), http://www.sentencingproject.org/wp-content/uploads/2016/04/Racial-Disparities-in-Youth-Commitments-and-Arrests.pdf.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*

persuasive legal scholarship. For instance, Professor Rolnick posits that "in the United States, imprisonment has . . . been a primary means of containing, controlling and 'reforming' oppressed classes, including . . . indigenous peoples."[55] Disempowered groups have been contained through other means as well, such as child welfare. But the use of criminal imprisonment has increased in importance as other methods of control have declined.[56] A theory posed by Michelle Alexander in *The New Jim Crow* is that mass incarceration is perhaps a mere replacement of Jim Crow laws, which is a replacement of slavery.[57] She espouses that it is simply a different legal method, steeped in the acceptable semantics of the day, deployed to guarantee the continued subordination and control of African Americans.[58] Luana Ross posits that criminal justice is a mechanism for racial control over Native Americans.[59] She writes of Native Americans, "we are reminded . . . that Indian country had no prisons" before colonization.[60] Tribal communities administered criminal justice through methods like restitution and banishment.[61] Arguably, the same can be argued in the context of Australia regarding its Indigenous population.

Rolnick hypothesizes that minorities face high rates of imprisonment due to high rates of criminality.[62] However, this explanation obfuscates the role that definitions and treatment of crime have played in determining who is considered a criminal. For example, the rise in imprisonment of Black men since the 1970s can be largely explained by long prison sentences imposed for relatively low-level drug crimes.[63] Such statistics can be explained by the fact that up until 2008, the mere possession of crack cocaine carried a five year mandatory minimum sentence.[64] Prior to 2010, a five year mandatory minimum existed for trafficking five grams of crack

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[55] Rolnick, *Untangling the Web*, *supra* note 25, at 70.
[56] *Id.*
[57] Rolnick, *Locked Up*, *supra* note 24, at 71.
[58] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010), 9-11.
[59] Rolnick, *Locked Up*, *supra* note 24, at 71.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Data show Racial Disparity in Crack Sentencing,* US NEWS (April 2010) https://www.usnews.com/news/articles/2010/08/03/data-show-racial-disparity-in-crack-sentencing

cocaine whereas an offender would have to be convicted for possessing at least 500 grams of powdered cocaine in order to receive a similar sentence.[65] Not only is this disparity grossly unfair, but given that the abuse of crack cocaine predominantly affects African American communities, it reflects the racism that exists within legislation. Although one can hypothesize that the aforementioned high rates of incarceration correlate to an "increase in crime," it can also be seen as a consequence of laws that more harshly criminalize the behaviors of particular racially defined communities.[66] In applying this example to that of Indigenous Australian and Native American youth, a similar argument can be made regarding incarceration for low-level crimes.

A prime exemplar of how the prosecution of low level crimes contributes high rates of incarceration for Indigenous youths may be found in the mandatory sentencing laws of the Northern Territory. Seventeen year olds who are found guilty of certain property offenses are subject to a mandatory minimum terms of fourteen days for their first of these offenses, ninety days for their second, and one year for their third.[67] Those aged fifteen or sixteen with one prior conviction for a similar offense were subject to detention for a minimum of twenty-eight days[68].

There is also a tendency to disregard historical factors that contribute to the injustices facing indigenous juveniles in America and Australia. Data indicates that for youth in the Northern Territory, the most common crimes are unlawful entry with intent, theft, property damage, and public order offenses. These crimes are often fueled by alcohol.[69] Native American youth are most commonly charged for liquor law and drug abuse violations, larceny, theft, disorderly conduct, and running away.[70] This indicates that the crimes most commonly committed by indigenous youth are indeed reflective of the historical context of alcohol and drug abuse in these indigenous communities. This reflects a need to address these crimes with an awareness of the fact that both Indigenous Australians and Native Americans personally or indirectly face issues regarding alcohol and drug dependency. With

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[65] *Id.*
[66] *Id.*
[67] 1 ROYAL REPORT, *supra* note 11, at 172.
[68] *Id.*
[69] *Id.*
[70] *Id*.

regard to conduct such as theft, property damage, and disorderly conduct, there is also a need to ascertain the motivations for these offenses in order to better understand whether they are socio-economic or related to other social pressures. In turn, this endeavor will help us understand whether the detention of either of these juvenile populations achieves any constructive rehabilitative purpose.

Because their cultures were viewed as inferior and dysfunctional, Indigenous Australian youth and Native American youth were characterized as a deviant class of peoples by European colonizers.[71] The fact that both groups face trauma as a result of colonization, forced assimilation, and racialist policies that continue to damage their families has resulted from the fact that their communities and cultures has been obscured and marginalized by fascistic academic proclivities that rarely find mention in policy formulation. To an extent, many of the crimes committed by Australian Indigenous and Native American youth can be correlated with the traumas resulting from criminalization. Acknowledging historical trauma and its impact on the wellbeing of families and children is arguably a better process by which our societies can curb recidivism than sending these youth to non-indigenous penal systems and subjecting them to forms of discipline that harken back to the assimilative boarding school systems of the past.

The trajectory outlined above suggests an unremitting pattern of victimization and incarceration of minors belonging to two historically disadvantaged communities. At best, this is owed to an inadvertent failure on the part of Australian and United States polities to empathize with the crippling intergenerational effects of prolonged socio-economic disadvantages that may predispose the youth of Indigenous Australian and Native American communities to what is perceived as criminal activity. At worst, it demonstrates willful ignorance or deliberate apathy toward these circumstances in the service of entrenched social and political interests and the preservation of the status quo in our societies.

IV. POLICY REFORM

The preceding sections suggest that the interplay of entrenched racism and the cycle of recidivism and incarceration

[71] *Id.*

negatively and disproportionately impacts both Indigenous Australian and Native American youth. As such, policy reforms are needed to address and ameliorate the causal factors contributing to this trend. To that end, this section discusses two policy reforms: the institution of diversion programs and the recognition of tribal/community justice systems for addressing juvenile criminal behavior. While these policy shifts will help address the issues faced by Indigenous Australian and Native American youth, their deliberate criminalization demands a larger institutional change to our criminal justice systems.

A. *Overall Harm Reduction*

In the United States juvenile system, the overall rate of juvenile detention has decreased over the past decade.[72] Despite this overall decline, the number of minority juveniles in detention in 2015 was 2.2 times that of white juveniles.[73] Yet, there is a question academics often confront by way of apologia: Can one disregard the overrepresentation of Native youth in the juvenile justice system simply because juvenile incarceration has declined across the board? The straight and simple answer to this strawman is a resounding no. The reduction does suggest that there have been general policy reforms to the juvenile justice in the United States. This is perhaps owed to the little pressure that global best practices and institutions such as the United Nations have played in bringing the issue to the forefront of public consciousness and debate.

However, general reform in this field cannot be a substitute for specific reforms that target the problem of disproportionate representation of a particular community. The underlying principle that needs salvaging is the equality of treatment among distinct groups and sub-groups. Further, as is the case in Australia, one cannot say that either general or specific policy reforms have addressed or ameliorated the plight of young Indigenous Australians. With that in mind, this paper seeks to traverse beyond generalities to consider policies and reforms that specifically target the overrepresentation of indigenous youth in the criminal justice system.

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[72] SARAH HOCKENBERRY, DEP'T OF JUSTICE, JUVENILES IN RESIDENTIAL PLACEMENT, 2015 1 (2018).
[73] *Id.* at 12.

B. *Diversion*

The purpose of diversion programs is to re-direct youth who have crossed paths with the authorities with the goal of diverting them away from the justice system.[74] Diversion refers to measures such as verbal or written warnings, formal cautions, referrals to youth justice conferences, and community-based programs. Under this model, the youth's first (and oftentimes next subsequent) involvement with the police results in a warning instead of a formal summons and arrest.[75] Cautioning schemes can be used in connection with the diversionary process or at the discretion of individual police officers. For minority communities, diversion programs that move toward community-based settings and solutions facilitate the involvement of tribal justice systems and community leaders. This is particularly relevant for Indigenous Australians and Native American youth because of the importance that has traditionally been placed on their communities and elders.

In Australia, however, select states and territories have under-utilized diversion as a policy measure. In 2015–16, for instance, 2,082 indigenous youth were apprehended by police in the Northern Territory, yet there were only 729 individual youth diversions.[76] Such statistics demonstrate that only thirty-five percent of the youth apprehended during this period were diverted.[77] These juveniles were denied access to diversionary measures despite the fact that police data from the Northern Territory for 2015–16 showed that eighty-five percent of juveniles who participated in a diversion program did not reoffend.[78] These successful diversions included, among others, youth justice conferences, verbal and written warnings, and referrals to drug treatment programs such as those run by the Council for Aboriginal Alcohol Program Services,

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[74] 2B ROYAL COMMISSION AND BOARD OF INQUIRY INTO THE PROTECTION AND DETENTION OF CHILDREN IN THE NORTHERN TERRITORY, 249 (2017) [hereinafter 2B ROYAL REPORT]..
[75] Australian Law Reform Commission, *A Statistical Picture of Australia's Children*, https://www.alrc.gov.au/publications/2-statistical-picture-australias-children/juvenile-justice-systems [https://perma.cc/8SJ8-9PPT] (last visited Oct. 27, 2018).
[76] 2B ROYAL REPORT, *supra* note 74, at 258.
[77] *Id.* at 259
[78] *Id.*

the CatholicCare NT Drug and Alcohol Intensive Support Program for Youth, and BushMob.[79]

In the United States, little funding is invested in diversionary programs for American Indian and Alaskan Native juveniles. In 2014, the Attorney General's task force on *Native Youth Exposed to Violence* found that most Native youth in the juvenile justice system were charged with offenses that do not usually warrant detention. However, the "…lack of alternatives and diversion programs force the system to use detention as a shelter."[80]

Diversion transcends the idea of a blanket punishments for crime and attempts to engage with each individual juvenile delinquent. Its intrinsic value and effectiveness lies in the ability of those involved in the diversion process to ask the right questions surrounding the nature and severity of a crime so as to understand the true intentions of an offender. If it turns out that a delinquent act involved alcohol and drug consumption, then workers can ascertain whether diversion should include drug and alcohol treatment programs. By tailoring efforts to individuals, diversion programs promote rehabilitation, which is the primary goal of the juvenile system. Diversion helps prevent equivocation with an arbitrary sentence that does not actually address the question of why the crime was committed. The benefits of diversions are enhanced with regards to Indigenous Australians and Native American juveniles across both countries. Diversionary programs can also be tailored to communities such as New South Wales, Australia, where indigenous and non-indigenous youth are intermingled in big cities rather than distinct communities. This is important because rehabilitation in such a city would necessarily differ from that found on an Indian reservation where the population is primarily composed of the members of a single tribe.

C. *Tribal and Community Justice*

Tribal justice systems in Native American countries that incorporate tribal culture and tradition tend to be more focused on

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[79] *Id.*

[80] Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence so Children Can Thrive*, https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf [https://perma.cc/M7KT-SE2C] (Nov. 2014).

restorative justice, community well-being, and treatment. As a result, those tribal justice systems are less focused on the adversarial process.[81] The main element of tribal justice is that Native youth are at the center of the process. Further, each delinquent act can be considered in light of historical and social contexts, which in turn keeps youth connected to the histories of their families and communities. This is surely more beneficial than and preferable to sending Native youth to non-Native systems, which can lead to recidivism.[82] While this is an established practice in tribal communities, nothing in Indian country is purely local, since federal and possibly state governments exercise some level of authority over Indian country.[83] As such, there are improvements to be made in Indian country, including ensuring that there is an effective system of justice in place that is not obfuscated or demeaned by outside actors. Professor Rolnick has argued that increasing tribal power is a necessary part of the solution to Native American juvenile delinquency; however, this is not a one-stop composite solution.[84]

Practically speaking, tribal authority is sometimes cabined by reliance on the federal government because it provides services and funding to Native communities.[85] In order to provide the greatest benefit to Native youths, tribes must be the first point of authority for Native American delinquents.[86] Second, Native American youth should only be prosecuted under federal and state law with the tribe's consent so that tribal proceedings are not undermined or duplicated. This approach is consistent with how federal law treats juvenile delinquency matters outside of Indian country, and it also emphasizes the importance of tribal authority when it comes to Native American youth and their welfare.[87]

Aboriginal peoples in Australia have one of the oldest cultures in the world and are extremely family and community centric.[88] It is important to recognize that Indigenous Australian kinship extends beyond immediate family and cannot be understood through a western conception of family. Youth are guided by their

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[81] Rolnick, *Untangling the Web*, *supra* note 25, at 77.
[82] *Id.* at 77, 78
[83] *Id.* at 84, 85
[84] *Id.* at 110.
[85] *Id.*
[86] *Id.* at 132.
[87] *See generally* Indian Children Welfare Act of 1978, 25. U.S.C. §§ 1901-1963 (2014).
[88] 1 ROYAL REPORT, *supra* note 11, at 182.

entire community and elders. Therefore, the involvement of the community and elders in their youth justice process is pivotal. For Indigenous Australians, a reform that provides for community courts would be particularly helpful in areas such as the Northern Territory, where indigenous youth live within indigenous communities. For example, in Lajamanu, a remote Aboriginal community in the Northern Territory, community courts were established.[89] The Lajamanu Kurdiji Law and Justice Committee, which engages with community elders, has proven to be more effective in responding to low-level crimes.[90] Against a backdrop of escalating rates of Indigenous Australian incarceration, the community court list recorded a fifty percent decline in the overall number of criminal cases between 1996 and 2014 in Lajamanu.[91] This statistic reflects the important role that indigenous cultures and communities may play in combatting crime. However, the continued existence of these courts is highly dependent on outside funding and resources.

As with Native Americans, in order for Indigenous Australians to have effective tribal justice systems, it is essential to ensure that federal agencies support the tribes and communities in their efforts to pursue these initiatives suggested above.

D. *Systemic Change*

While the aforementioned reforms address criminal behavior, they do not address the interplay of bias, policy, and legislation in the incarceration of Indigenous Australian and Native American youth. When a juvenile is caught committing an offense, his or her initial experience with the criminal justice system is with the police. Depending on whether police choose to issue a warning or make an arrest, a child can end up in remand. During the Royal Commission into the Protection and Detention of Children in the Northern Territory, an indigenous youth testified about the first time that he or she was arrested by a police officer as follows: "I got arrested for fighting and the police pepper sprayed me. I was trying to spit the spray out of my mouth and then the police charged me for assault for trying to spit on them."[92] This illustrates the need to

[89] *See Id.* at vol. 2b, 328.
[90] *See Id.*
[91] *Id.*
[92] *Id.* at vol. 1, 25.

retrain police to utilize diversionary measures and caution rather than making immediate arrests and remands. Use of restraint is necessary not only for police officers but also for courts and their officers. Judges in both Australia and the United States should be conscious of the crime with which a defendant has been charged and consider the pervasive factors that may have landed any particular defendant in the courtroom. Further, legislative changes to mandatory sentencing laws are needed to prevent necessary incarceration for the commission of a crime without any consideration for defendants or the unique situations in which they live. Ultimately, a paradigm shift in the approach to Indigenous Australian and Native American youth is a vital piece to curbing their overrepresentation in the criminal justice system.

V. CONCLUSION

This paper's analysis suggests that the overrepresentation of Indigenous Australian and Native American youth in juvenile incarceration results from the interplay of historical disadvantages and contemporary social destitution. In order to curb the recidivism young indigenous offenders and postpone or prevent their entrance into the criminal justice system, officers should be trained to value diversion as it can assist in rehabilitation and prevent these offenders from entering a cycle of detention. While there is a myriad of promising policy measures that can serve to remedy the problem, these measures are unfortunately under-subscribed. As long as communities and governments continue to make hollow promises concerning this problem and its attendant circumstances, little change can be expected. Once political will becomes focused on the matter, a rigorous examination the individual diversionary approaches that will hopefully result will be required. These may then be weaved together into a comprehensive policy framework. Over time, that framework will require repeated adjustments to better address new issues and dynamics that may arise.

Through it all, political will and social pressure to resolve the issue must be sustained. Without it, the sheer irony of disproportionately incarcerating youth from historically disadvantaged communities at the behest of the very system that is supposed to promote equality, will persist. Perhaps our legislators and policy makers will do well to remember the following

prescription of Miriam Van Waters, an American prison reformer in the 20th century: "The first idea that should be grasped concerning the juvenile court is that it came into the world to prevent children from being treated as criminals."[93]

[93] FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 33 (Oxford University Press, 2005).