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### Native Youth & Juvenile Injustice in South Dakota

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# NATIVE YOUTH & JUVENILE INJUSTICE IN SOUTH DAKOTA

ADDIE C. ROLNICK†

## I. INTRODUCTION

Three themes are critically important to understanding the experience of Native youth in the juvenile justice system: racism,<sup>1</sup> jurisdiction, and tribal sovereignty. Racial disparities are a widely acknowledged problem in juvenile justice.<sup>2</sup> While public conversation most often focuses on the over-representation and over-incarceration of African American youth,<sup>3</sup> Native also youth face significant disparities in places where they live in large enough numbers to register in statistical analyses.<sup>4</sup> These disparities do not exist in a vacuum; they occur most starkly in “border town” communities—places where Indian reservations abut predominantly white communities and where the most salient racial divide is white/Indian.<sup>5</sup>

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† Associate Professor, University of Nevada, Las Vegas, William S. Boyd School of Law. I am grateful to my collaborator Neelum Arya, Ashley Brost, and the participants in the South Dakota Law Review symposium on juvenile justice for making this essay possible. I also thank Lena Rieke and Laura Vlieg for exceptional research support.

1. The term “racism” often connotes an individual belief in racial superiority, an unduly narrow definition that over-emphasizes individuality, psychology, and phenotype. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 465 (1996). Bonilla-Silva instead suggests a structural definition of racism that focuses on racialization and its effects. See *id.* at 475 (stating that “[a]fter a society becomes racialized, racialization takes on a life of its own”). In a racialized social system, “economic, political, social, and ideological levels are partially structured by the placement of actors in racial categories,” and racial categories are structured into a hierarchy. *Id.* at 469. The effects of this hierarchy may be far-reaching and can be identified without the necessity of pointing to a single culpable individual or diving that individual’s thought process. See Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 965 n.31 (2011) (defining racialization as “the discursive process by which particular groups have been classified as non-white, specific meanings have been attached to those groups, and those meanings have been used to support the hierarchical distribution of power, land, and resources”) [hereinafter Rolnick, *The Promise of Mancari*].

2. See generally Joshua Rovner, *Disproportionate Minority Contact in the Juvenile Justice System*, THE SENTENCING PROJECT (2014), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf> (explaining longstanding concerns about minority over-representation and the tools that have been developed to measure it).

3. See, e.g., *Disproportionate Minority Contact: Juvenile Justice Guide Book for Legislators*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/documents/cj/jjguidebook-dmc.pdf> (last visited Sept. 22, 2017) (defining disparities with reference to statistics about African American and Latino youth).

4. Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. PUB. POL’Y & LEGIS. 49, 106 n.263 (2016) [hereinafter Rolnick, *Untangling the Web*]; Neelum Arya & Addie C. Rolnick, *A Tangled Web: American Indian and Alaska Youth in Federal, State, and Tribal Systems*, CAMPAIGN FOR YOUTH JUSTICE, 19-24 (2008) [hereinafter Arya & Rolnick].

5. See Nick Estes, *Border Town, USA: An Ugly Reality Many Natives Call Home*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 15, 2014), <https://indiancountrymedianetwork.com/news/politics/border-town-usa-an-ugly-reality-many-natives->

Jurisdiction is significant because of the web of rules affecting juvenile delinquency jurisdiction on reservations. Native youth may live on reservations or in non-reservation cities and towns. Native children may therefore end up in the tribal, state, or federal justice systems based on the jurisdictional rules that apply to each place.<sup>6</sup> The task of locating Native youth amid overlapping systems is difficult and it is even more challenging to propose effective reforms to improve how Native youth are treated in these systems. In particular, young people who commit offenses on South Dakota reservations are subject to federal legislative, administrative, and prosecutorial power. While juvenile delinquency is typically a local matter, federal decision-makers, sometimes distant ones, have an outsize effect on how juvenile justice is administered to Native youth living on these reservations.

Finally, tribal sovereignty is important because tribal authority over juvenile justice strengthens and formalizes the connection between children and their communities, and permits tribes to craft systems that meet the unique needs of their youth.<sup>7</sup> The lesson of child welfare demonstrates that this connection and flexibility are important factors in improving children's lives and ensuring that tribes survive as sovereign governments.<sup>8</sup>

This essay uses these three themes of racism, jurisdiction, and tribal sovereignty to provide a snapshot of the juvenile justice system in South Dakota as it impacts Native youth. First, it describes the tribal juvenile justice systems in the state. Tribal systems should rightfully play a central role handling Native youth offenders, but they are underfunded and may not therefore be sufficiently responsive to young offenders' needs. Second, this essay examines the impact of federal power over youth on reservations in South Dakota. Specifically,

call-home/ (describing Native Americans' experiences in border towns); Nick Estes, *Border Towns: Colonial Logics of Violence*, OWASICU OWE WASTE SNI (Dec. 17, 2012), <https://oldwars.wordpress.com/2012/12/17/border-towns-colonial-logics-of-violence/> (defining border towns); Melanie K. Yazzie, *Brutal Violence in Border Towns Linked to Colonization*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 22, 2014), <https://indiancountrymedianetwork.com/news/politics/brutal-violence-in-border-towns-linked-to-colonization/> ("Border towns are named as such because they border Indigenous land bases like Pueblos, the Navajo Nation, or Pine Ridge that sustain large populations and retain viable political power.").

6. Rolnick, *Untangling the Web*, *supra* note 4, at 82-110.

7. Rolnick, *The Promise of Mancari*, *supra* note 1, at 1039-41.

8. See, e.g., U.S. Dep't of the Interior, Bureau of Indian Affairs, Indian Child Welfare Act Proceedings, Final Rule, 81 Fed. Reg. 38,778, 38,780-84 (Jun. 14, 2016) (describing the harm caused to children and tribes by state court's removal of Native children and how the Indian Child Welfare Act has stemmed this removal, and better connecting children with their tribes and cultures, thus ensuring tribal survival); Brief of Casey Family Programs, et al., *Carter v. Washburn*, No. 2:15-cv-01259-NVW (D. Ariz. Oct. 23, 2015) (explaining why the law embodies the "gold standard" of child welfare practices by ensuring that children remain connected with family and community); David E. Simmons, *Improving the Well-being of American Indian and Alaska Native Families through State Level Efforts to Improve Indian Child Welfare Act Compliance*, NAT'L INDIAN CHILD WELFARE ASS'N, 9-11 (2014) (describing how implementation of the Indian Child Welfare Act has resulted in greater tribal involvement and improved access to culturally appropriate services, which has benefited Native children). See also Carol A. Hand, *An Ojibwe Perspective on the Welfare of Children: Lessons of the Past and Visions of the Future*, 28 CHILD & YOUTH SERVS. REV. 20, 26, 31-37 (2006) (describing the damage done to Ojibwe children by past child welfare policy and exploring one community's vision for improving children's lives by ensuring a connection to tribe and culture).

federal juvenile jurisdiction, as well as federal financial and administrative power, can interfere with tribal jurisdiction, complicating the possible consequences and protections that should be available to Native youth. Finally, the essay describes the state and county juvenile justice system in South Dakota, where Native youth have long made up a disproportionate share of children who are arrested and incarcerated.

This essay has two purposes. The first is to sketch a more complete picture of the various juvenile justice systems that affect Native youth in South Dakota for academics and policymakers. The existing literature lacks even a basic description of these systems and this essay will attempt to reveal where further inquiry and updated research is needed.

The essay's second purpose is to make the case that the situation of Native juvenile offenders cannot be improved without simultaneous attention to racism, jurisdiction, and tribal sovereignty. Complicated jurisdiction rules frustrate efforts to count Native youth in order to measure racial disparities, but these rules are also valuable because they recognize and empower tribal governments. Racism explains why Native people are under federal and state jurisdiction, and is also a significant reason why tribal juvenile systems have been largely excluded from modern reform efforts. Tribal sovereignty is a critical tool to counteract racism and protect Native youth, but sovereignty can also mean that Native youth under tribal jurisdiction are outside of the reach of nationwide reform efforts. This essay illustrates how careful consideration of the delicate interplay between these three forces is essential to helping Native youth in South Dakota and throughout the country.

## II. TRIBAL SOVEREIGNTY: MAPPING TRIBAL SYSTEMS

South Dakota sits on the ancestral territory of the Oceti Sakowin nation, also called the Great Sioux Nation.<sup>9</sup> The history of tribal-federal relations in South Dakota is usually framed as a story of betrayal and loss. Throughout the 1700s and 1800s, the United States engaged in a string of armed conflicts, and

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9. Oceti Sakowin, or Seven Council Fires, refers to the seven major divisions among the Dakota people: Mdewakanton, Wahpekute, Wahpeton, Sisseton (all Santee/Eastern Dakota), Yankton, Yanktonai (both Yankton/Nakota), and Lakota (Teton). Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1104, 1108 (2012). All are subdivisions of the Dakota peoples who occupied most of the Northern Plains in the 1700s and 1800s. *Id.* at 1107-08. Historians and anthropologists trace their location from the Eastern Seaboard and further westward. *Id.* at 1107. By the early 1800s, Dakota occupied an area of the Mississippi Valley to just west of the Missouri River, generally. *Id.* From here, the Lakota, Teton, or Western Sioux continued to move west to present-day North Dakota, South Dakota, and Wyoming. *Id.* at 1113-14. The Lakota are further subdivided into seven bands: Oglala, Brule, Hunkpapa, Miniconjou, Sans Arc, Two Kettle, and Blackfeet. EDWARD LAZARUS, *BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT* 4 (1991). Today, Lakota, Nakota, and Dakota communities are located across Minnesota, North Dakota, South Dakota, Nebraska, Montana, and parts of Canada. Of these present-day states and territories, South Dakota is unique in that it is the ancestral home of only the Oceti Sakowin people, and the reservations within its borders are all Sioux reservations. South Dakota is the heart of Oceti Sakowin territory.

signed and broke several treaties with the Great Sioux Nation.<sup>10</sup> With each treaty, the nation ceded additional swaths of its territory in return for a promise that the remaining territory would be protected. In each case, that promise was not kept.

Perhaps the most significant abrogation occurred when the United States violated the 1868 Treaty of Fort Laramie by authorizing and encouraging survey, excavation, and settlement of the Black Hills: sacred Sioux land reserved to the nation under the treaty.<sup>11</sup> Although the United States Supreme Court held that the federal government violated the treaty and ordered it to pay a record-breaking settlement,<sup>12</sup> the lost land was never returned. The tribes continue to advocate for restoration of their land, and the settlement money has remained untouched because to accept it would signify tribal agreement to the loss of land.<sup>13</sup>

Although it is the most famous, the taking of the Black Hills is hardly the only significant loss of Sioux land against the will of its Native occupants. On the eve of South Dakota statehood, the Sioux Act of 1889 broke up the Great Sioux reservation, over the objections of the people, into six smaller areas and reduced its overall size by nine million acres.<sup>14</sup> In the 1950s, the federal government took and flooded Sioux lands to build several dams as part of the Pick-Sloan initiative.<sup>15</sup> Most recently state and federal governments authorized

10. See generally Angelique Townsend Eaglewoman, *Wintertime for the Sisseton-Wahpeton Oyate: Over One Hundred Fifty Years of Human Rights Violations by the United States and the Need for a Reconciliation Involving International Indigenous Human Rights Norms*, 39 WM. MITCHELL L. REV. 486 (2013); Richard Pemberton, Jr., *I Saw the Land and It was Holy: The Black Hills and the Concept of Sacred Land*, 3 L. & INEQ. 287 (1985); PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE (1983).

11. See LAZARUS, *supra* note 9, at 71-95 (describing the federal government's military and starvation campaign against the Sioux to induce the sale of the Black Hills after gold was discovered there). The 1868 treaty itself enshrined a reduction in the Sioux land base from that secured by the 1851 Fort Laramie Treaty, and sought to confine the Oceti Sakowin to a single reservation and adjacent hunting areas. *Id.* at 47-51; Krakoff, *supra* note 9, at 1106. While the land set aside for the Great Sioux Nation by the 1851 Treaty was much larger than that protected in the 1868 agreement, encompassing half of South Dakota and parts of present day Wyoming, North Dakota, Nebraska, and Montana, that treaty also confined the various Oceti Sakowin groups to specific areas, preventing them from traveling freely across the entire Northern Plains as they had previously done. Krakoff, *supra* note 9, at 1106-14.

12. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423-24 (1980).

13. *Native Sun News Interviews Attorney Mario Gonzalez about Black Hills Claims Settlement*, NATIVE SUN NEWS (Mar. 23, 2016), [http://www.nativesunnews.today/news/2016-03-23/More\\_News/Native\\_Sun\\_News\\_interviews\\_attorney\\_Mario\\_Gonzalez.html](http://www.nativesunnews.today/news/2016-03-23/More_News/Native_Sun_News_interviews_attorney_Mario_Gonzalez.html) (quoting attorney that "[t]he Oglala Sioux Tribe, and the other Sioux tribes, have continually rejected the distribution of the \$102 million award since the 1980s, and have demanded that any legislation passed by Congress must include the restoration of federal lands to the Sioux tribes"); Francine Uenuma & Mike Fritz, *Why the Sioux are Refusing \$1.3 Billion*, PBS NEWS HOUR (Aug. 14, 2011, 3:57 PM), [http://www.pbs.org/newshour/updates/north\\_america-july-dec11-blackhills\\_08-23/](http://www.pbs.org/newshour/updates/north_america-july-dec11-blackhills_08-23/); Frank Pommersheim, *Making All the Difference: Native American Testimony and the Black Hills (A Review Essay)*, 69 N.D. L. REV. 337, 348-52 (1993); Ed Bruske, *The Black Hills Suit: A Will of Its Own*, WASH. POST (Aug. 19, 1980), [https://www.washingtonpost.com/archive/politics/1980/08/19/black-hills-suit-a-will-of-its-own/c6bc8f6c-fb34-48a9-b450-618acd93b355/?utm\\_term=.21e34c83a3dc](https://www.washingtonpost.com/archive/politics/1980/08/19/black-hills-suit-a-will-of-its-own/c6bc8f6c-fb34-48a9-b450-618acd93b355/?utm_term=.21e34c83a3dc) (discussing the tribes' initial refusal to accept the settlement).

14. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888.

15. Lower Brule and Crow Creek land was condemned for the Big Bend Dam. Cheyenne River and Standing Rock land was condemned for the Oahe Dam. Crow Creek, Lower Brule, Yankton, and Rosebud land was condemned for the Fort Randall Dam. MICHAEL L. LAWSON, DAMMED INDIANS

construction of the Dakota Access pipeline across the Missouri River just upstream from the Standing Rock and Cheyenne River reservations and through territory to which the Sioux claim treaty rights.<sup>16</sup>

Today, the Oceti Sakowin people in South Dakota are recognized by the federal government as nine different tribal entities, each with a separate reservation land base: Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, Lower Brule Sioux Tribe, Flandreau Santee Sioux Tribe, Yankton Sioux Reservation, and Crow Creek Sioux Reservation.<sup>17</sup> Five of these reservations (Standing Rock, Cheyenne River, Oglala/Pine Ridge, Rosebud, and Sisseton Wahpeton) comprise a land mass that spans one or more counties, with the tribal government as the primary provider of government services. These tribes are among the largest nationally in terms of both population and reservation acreage.<sup>18</sup>

At least eight of the nine tribes operate their own juvenile courts,<sup>19</sup> along with various intervention and diversion programs for youth.<sup>20</sup> These courts have

REVISITED: THE CONTINUING HISTORY OF THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX 46-51 (2009). See also Carla F. Fredericks & Jesse Heibel, *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*, \_\_ U. Colo. L. Rev. \_\_, \*37 (forthcoming 2018) (“Overall, the Pick-Sloan Act has been the direct cause of more damage to Indian land and resources than any other public works legislation, with the Oahe Dam specifically destroying more Indian land than any other infrastructure project in American history.”).

16. See generally *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-1534 (JEB) (D.D.C. Jun. 14, 2017), <https://turtletalk.files.wordpress.com/2017/06/mionre238orderoncross-motionsforpartialsummaryjudgment.pdf> (describing history of the pipeline and tribal concern about its potential effects on treaty rights); see also Fredericks & Heibel, *supra* note 15, at \*46-58 (describing the tribes’ treaty claims against the backdrop of prior violations of Sioux treaties).

17. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019 (Jan. 29, 2016). Although groups of families and individuals have always moved between communities, the eastern and central South Dakota reservations (Sisseton Wahpeton, Flandreau, and Crow Creek) and Spirit Lake (in North Dakota) roughly correspond with the four Santee Council Fires. Yankton corresponds with the two Yankton council fires, although members of those groups also reside at Standing Rock and Crow Creek. The five westernmost Sioux reservations correspond roughly with various sub-bands of the Lakota: Standing Rock (Hunkpapa), Cheyenne River (Oohenunpa/Two Kettle, Miniconjou, Itazipco, Shasapa), Rosebud (Sicangu/Upper Brule), Pine Ridge (Oglala), and Lower Brule (Lower Brule). Krakoff, *supra* note 9, at 1104-1105.

18. *The American Indian and Alaska Native Population: 2010 15*, U.S. CENSUS BUREAU (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>; *Indian Lands of the Federally Recognized Tribes of the United States*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/cs/groups/webteam/documents/document/idc1-028635.pdf>. Tribes with large populations and large land bases may encounter unique issues. For example, a tribe that occupies a large reservation in a remote, rural area must be able to provide governmental services to communities that may be 20-40 miles or more apart. At the same time, these tribes may not be able to rely on gaming to raise revenue in the way that tribes located adjacent to urban areas have done. Rob Capriccioso, *Coalition of Large Tribes Forms to Aid Big Tribes*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 26, 2011), <https://indiancountrymedianetwork.com/news/coalition-of-large-tribes-forms-to-aid-big-tribes/>.

19. OGLALA SIOUX TRIBE LAW AND ORDER CODE ch. 5, § 1.01 (1996), [http://www.narf.org/nill/codes/oglala\\_sioux/chapter05-juvenile.html](http://www.narf.org/nill/codes/oglala_sioux/chapter05-juvenile.html); LAW AND ORDER CODE OF THE ROSEBUD SIOUX TRIBE § 3-1-4 (2004), <http://www.narf.org/nill/codes/rosebudcode/title3juveniles.html>; CHEYENNE RIVER SIOUX TRIBE-TRIBAL CODE § 5-3-1 (2012), [http://www.narf.org/nill/codes/cheyenne\\_river\\_sioux/](http://www.narf.org/nill/codes/cheyenne_river_sioux/); FLANDREAU SANTEE SIOUX TRIBAL LAW AND ORDER CODE § 5-4-1 (2000), [http://santeesioux.com/wp-content/uploads/2016/11/fsst\\_law\\_and\\_order\\_code\\_2014.pdf](http://santeesioux.com/wp-content/uploads/2016/11/fsst_law_and_order_code_2014.pdf); YANKTON SIOUX TRIBAL JUVENILE CODE, § 5-1-1 (1995), <http://www.narf.org/nill/codes/yanktoncode/yanktoncodet5juvenile.html>;

jurisdiction over any behavior by Indian youth defined as delinquent under tribal law, regardless of whether other governments have concurrent jurisdiction.<sup>21</sup> Rosebud, Oglala, and Cheyenne River operate their own juvenile incarceration facilities so that delinquent youth under tribal jurisdiction can be housed in the community near their families. Lower Brule, Standing Rock, and Yankton have on-reservation juvenile facilities that are currently closed. Sisseton Wahpeton, Crow Creek, and Flandreau do not have juvenile incarceration facilities on the reservation, so delinquent youth must be housed in another tribe's facility or in a county facility if incarceration is used at all.<sup>22</sup> Sisseton Wahpeton operates its own substance abuse treatment facility. Although the tribe provides inpatient services for adults only, it offers an extensive adolescent outpatient treatment program.<sup>23</sup>

The Wanbli Wacon Tipi Wellness Center is located on the Rosebud reservation in Mission, South Dakota. The facility is operated and staffed by the

CHILDREN'S CODE OF THE STANDING ROCK SIOUX CODE OF JUSTICE, §6-301 (2003), [http://standingrock.org/data/upfiles/media/1097\\_001.pdf](http://standingrock.org/data/upfiles/media/1097_001.pdf); TRIBAL CODE OF THE LOWER BRULE SIOUX TRIBE ch. 4 (1973), <http://nill.softlinkliberty.net/liberty/opac/basic.do?corporation=NARF&action=search&anonymous=true&queryTerm=id%3D1448&operator=AND&url=%2Fliberty%2Fopac%2Fbasic.do>. I was unable to verify whether Crow Creek Tribal Court has a separate juvenile division or has vested its tribal court with jurisdiction over juvenile delinquency.

20. Many of these programs are funded by short-term grants or assistance from federal agencies or private funders. For example, Cheyenne River and Lower Brule were selected in 2014 to participate in the Juvenile Justice Diversion for Tribal Youth initiative, funded by the federal Substance Abuse and Mental Health Administration and the John D. and Catherine T. MacArthur Foundation, to "support development and implementation of effective front-end diversion programs for youth with behavioral health disorders . . ." *Juvenile Justice Diversion for Tribal Youth Project Description*, NAT'L CTR FOR MENTAL HEALTH & JUV. JUST. (2015), <https://www.ncmhjj.com/wp-content/uploads/2015/08/JDTC-Project-Description-030315.pdf>. Some of these short-term grants support existing tribal youth programs. Others seek to train tribal officials in new approaches to juvenile justice. Even if these programs are successful, however, the shortage of long-term, reliable funding for non-detention programs makes them difficult to sustain. Tribes that run one or more aspects of their own justice systems receive formula funding from the BIA. But the portion devoted to incarceration is usually greater than the portion that can be used to fund alternative youth programs affiliated with the juvenile court, and restrictions may prevent tribes from moving money between programs. See Addie C. Rolnick, *Locked Up: Fear, Racism, Prison Economics, and the Incarceration of Native Youth*, 40 AM. INDIAN CULTURE & RES. J. 55, 66-67 (2016) (comparing federal funding for incarceration and alternatives) [hereinafter Rolnick, *Locked Up*]; Rolnick, *Untangling the Web*, *supra* note 4, at 113 (describing limits on tribes' ability to reprogram federal money from corrections to non-corrections uses).

21. See Rolnick, *Untangling the Web*, *supra* note 4, at 87-99 (examining the scope of inherent tribal jurisdiction over juvenile matters). Federal law limits only the term of incarceration, which may not be a significant limitation in the juvenile context. *Id.*

22. The BIA provides law enforcement and correctional services at Flandreau and Crow Creek. Sisseton Wahpeton runs its own law enforcement and corrections programs pursuant to a self-determination contract, but does not have a juvenile facility. *Dakotah Pride Center*, SISSETON WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION, <http://www.swo-nnsn.gov/departments/human-services-department/dakotah-pride/> (last visited May 6, 2017) [hereinafter *Dakotah Pride Center*]. The tribe runs a teen court program for substance abuse offenders in partnership with Roberts County designed to keep youth out of incarceration. *About*, ALIIVE ROBERTS CTY, <http://www.aliive.org/about/> (last visited May 6, 2017). See Christina Rose, *Lock 'Em Up with a Hug: Native Detention Programs Connect Youth to Community*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 28, 2015), <https://indiancountrymedianetwork.com/news/politics/lock-em-up-with-a-hug-native-detention-programs-connect-youth-to-community/> (describing program successes) [hereinafter Rose, *Lock 'Em Up*].

23. *Dakotah Pride Center*, *supra* note 22.

tribal government pursuant to a contract with the Bureau of Indian Affairs (“BIA”).<sup>24</sup> It includes a thirty-six bed juvenile detention center, a day reporting school, and an eleven bed temporary holding area.<sup>25</sup> The Rosebud facility is sometimes cited as a model Indian country juvenile detention program because of its emphasis on cultural-appropriate programming, its embrace of Lakota values, its majority-Lakota staff, and its partnerships with tribal community organizations.<sup>26</sup> The degree and quality of programming available, however, can vary a great deal depending on federal funding, staff, volunteer availability, and the status of community partner organizations.<sup>27</sup>

The Ki Yuxsa O’Tipi Reintegration Center is a thirty-two-bed facility located on the Pine Ridge reservation in Kyle.<sup>28</sup> It is operated by the Oglala Sioux Tribe pursuant to a BIA contract.<sup>29</sup> In addition to bed space, it includes a separate holding area and space for programming.<sup>30</sup> The Cheyenne River Sioux Juvenile Detention Center is a ten-bed juvenile correctional facility in Eagle Butte.<sup>31</sup>

Three reservation facilities are closed as of the publication of this essay. The Standing Rock Sioux Youth Services Center is in Fort Yates.<sup>32</sup> The tribe planned and built the eighteen-bed juvenile facility with the assistance of federal grants.<sup>33</sup> Construction was completed in 2011,<sup>34</sup> but it has not yet opened.<sup>35</sup>

24. The Indian Self-Determination and Education Assistance Act directs agencies to enter into contracts, at a tribe’s request, enabling the tribe to plan, conduct, and administer any program that the agency is authorized to administer for the benefit of Indians. 25 U.S.C. § 5325(a)(1) (2017). Under a self-determination contract, the tribe receives the same amount of base funding, plus administrative contract support costs, that the BIA would have allocated for itself to run the program directly. § 5325(a)(2)-(3).

25. *Home*, WANBLI WICONI TIPI, <http://www.wanbliwiconitipi.com/web/index.php?siteid=1> (last visited May 6, 2017).

26. *E.g.*, Rose, *Lock ‘Em Up*, *supra* note 22. The facility itself reflects these values: it is a round building with pods opening into a central area; it has a large gymnasium and greenhouse; it has large windows, including in the residential areas; and thirty percent of the facility space is dedicated to programming. *Id.*; Sari Horwitz, *From Broken Homes to a Broken System*, WASH. POST (Nov. 28, 2014), [http://www.washingtonpost.com/sf/national/2014/11/28/from-broken-homes-to-a-broken-system/?utm\\_term=.55e81e4b22d7](http://www.washingtonpost.com/sf/national/2014/11/28/from-broken-homes-to-a-broken-system/?utm_term=.55e81e4b22d7) [hereinafter Horwitz]; Shelley Zavlek, *Video Tours Bring Facilities to Planning Teams*, CORR. NEWS (Dec. 21, 2011), <http://correctionalnews.com/2011/12/21/video-tours-bring-facilities-planning-teams/>.

27. *See* Horwitz, *supra* note 26 (describing a lack of programming and education services in detention centers, a situation that left youth sitting in cells for most of the day).

28. *Jails in Indian Country, 2013*, BUREAU OF JUST. STATS., 11 (2014), <https://www.bjs.gov/content/pub/pdf/jic13.pdf>.

29. This information is based on the author’s visit to the facility in September 2016.

30. *Id.*

31. *Jails in Indian Country, 2015*, BUREAU OF JUST. STATS., 11 (2016), <https://www.bjs.gov/content/pub/pdf/jic15.pdf>.

32. The Standing Rock reservation straddles the border of North and South Dakota. The tribe’s juvenile facility is located on the North Dakota side, but would be able to house youth from anywhere on the reservation.

33. *Overview of Correctional Facilities on Tribal Lands Grants*, BUREAU OF JUST. PROGRAMS, [https://www.bja.gov/Programs/Tribal\\_corrections/index.html](https://www.bja.gov/Programs/Tribal_corrections/index.html) (last visited May 7, 2017) [hereinafter *Overview of Correctional Facilities*]. *See Standing Rock Sioux Youth Services Center*, JUST. SOLUTIONS GROUP, <http://justicesolutionsgroup.com/projects/project/standing-rock-sioux-youth-services-center> (last visited May 6, 2017) (stating that the cost of construction is \$10,800,000). The Tribe received a Department of Justice grant in 2004 to plan and build the facility, and received additional smaller grants



The Yankton Sioux Correctional Facility was planned and built in Wagner, South Dakota to include adult housing and ten juvenile beds in a separate wing.<sup>36</sup> The center became operational in 2012, but as of this writing, the center only houses adults.<sup>37</sup> Despite urging from the tribe, the juvenile wing remains closed. Lower Brule has a twenty-six-bed juvenile facility that opened in 2012,<sup>38</sup> but at the time of this writing it has been closed for a year.<sup>39</sup>

At Standing Rock, Lower Brule, and Yankton, detention services are administered directly by the BIA, rather than by the tribe pursuant to a federal contract—an arrangement referred to as “direct services.”<sup>40</sup> Tribes typically secure funding to build these facilities, often receiving grants from the federal Department of Justice. Once built, the facilities are operated and staffed by the BIA.<sup>41</sup> This means that the BIA ultimately determines when the facility will open and under what conditions. Disputes between tribes and the BIA regarding facility standards have kept several juvenile facilities from opening,<sup>42</sup> including the facilities at Standing Rock and Lower Brule.<sup>43</sup>

Native youth under tribal jurisdiction will be housed in that tribe’s local facility if one exists and if space is available. If a local facility is unavailable, a young person may be housed in another tribe’s facility, in a county facility, or in any available BIA-run facility anywhere in the country. Even if a young person is placed in the custody of another government, youth remain under tribal jurisdiction. The placement is most accurately viewed as simply a contract for services between the tribe and the other government. In theory, this means that the juvenile courts on each of the nine Sioux reservations ought to be able to exercise a significant degree of control over what happens to delinquent youth

for renovation in fiscal year 2009. *Award to: Standing Rock Sioux Tribe*, OFF. OF JUST. PROGRAMS (May 7, 2017), <https://external.ojp.usdoj.gov/selector/awardeeDetail?awardee=Standing%20Rock%20Sioux%20Tribe&po=BJA>; *Audit of the Office of Justice Programs’ Tribal Justice Infrastructure Program*, OFF. OF THE INSPECTOR GEN., 66 (Jan. 2017), <https://oig.justice.gov/reports/2017/a1710.pdf>.

34. *Overview of Correctional Facilities*, *supra* note 33.

35. *Id.* See also Horwitz, *supra* note 26 (stating that as of 2014, the Standing Rock facility “has been empty for more than four years because it was not built to code”).

36. *Overview of Correctional Facilities*, *supra* note 33. The Tribe received federal funding in 2009 to renovate their existing facility. *Audit of the Office of Justice Programs’ Tribal Justice Infrastructure Program*, OFF. OF THE INSPECTOR GEN., 66 (Jan. 2017), <https://oig.justice.gov/reports/2017/a1710.pdf>.

37. *Overview of Correctional Facilities*, *supra* note 33. This was also confirmed by the author’s visit to the site in September 2016.

38. *Jails in Indian Country, 2012*, BUREAU OF JUST. STATS., 11 (June 2013), <https://www.bjs.gov/content/pub/pdf/jic12.pdf>. This is the first year the facility appears in the BIA’s inventory. *Id.*

39. Horwitz, *supra* note 26 (stating that as of November 2014, Lower Brule juvenile facility “has been closed for a year because of structural problems”). See also *Jails in Indian Country, 2015*, BUREAU OF JUST. STATS., 11 (Nov. 2016), <https://www.bjs.gov/content/pub/pdf/jic15.pdf> (showing the Lower Brule facility does not appear in the BIA’s inventory in 2015).

40. See generally Rolnick, *Untangling the Web*, *supra* note 4, at 116, 120-21 (discussing service arrangements between tribes and the BIA).

41. *Id.* at 116.

42. *Id.* at 116, 121.

43. Horwitz, *supra* note 26.

under their jurisdiction. Tribes that run their own programs, can direct youth into community-based programs to keep them out of incarceration, and can design, build, and administer their detention and corrections programs to emphasize rehabilitation, treatment, and cultural values. Direct service tribes must adhere to BIA policies, but have a leading role in planning and construction, and can request that the BIA operate and staff facilities as they see fit.<sup>44</sup>

In South Dakota, as is the case nationally, tribal governments have invested in the vision of culturally appropriate programs integrated within the reservation community. In reality, tribes' ability to maximally implement their visions depends on whether they can find enough funding and staff. South Dakota's tribes are among the poorest in the country,<sup>45</sup> and the tribal governments must allocate the little money they have in order to provide services over relatively large areas. Many of South Dakota's reservations also have higher-than-average adult crimes rates<sup>46</sup> and a lack of critical infrastructure.<sup>47</sup> Tribal sovereignty means that tribes can protect and heal their young people by building better systems, and several tribes in South Dakota have tried to do so. Whether they realize that goal is likely a matter of creativity, money, personnel, and community infrastructure.<sup>48</sup>

Despite their important role in South Dakota juvenile justice, these nine justice systems remain relatively invisible and poorly understood. Juvenile justice reform efforts have been slow to acknowledge and reach out to tribal governments. Even discussion about Indian country justice fails to center on tribal justice systems.<sup>49</sup> This invisibility, combined with the tribes' lack of

44. The choice whether to contract is made on a program-by-program basis. Standing Rock and Lower Brule run their own tribal courts, but the BIA administers their policing and detention/corrections programs. Yankton has a tribally run court and police department, but the BIA runs its detention/corrections program.

45. *2013 American Indian Population and Labor Force Report*, BUREAU OF INDIAN AFFAIRS, 57 (Jan. 16, 2014), <https://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf>. See also Tim Giago, *The "Poorest County in America,"* HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/tim-giago/the-poorest-county-in-ame\\_b\\_47191.html](http://www.huffingtonpost.com/tim-giago/the-poorest-county-in-ame_b_47191.html) (describing Pine Ridge and other South Dakota reservations as among the nation's poorest counties for decades).

46. For example, Standing Rock was one of four reservations selected for additional federal law enforcement funding directed at reducing violent crime in high priority areas. *Crime Reduction Best Practice Handbook: Making Indian Communities Safer*, BUREAU OF INDIAN AFFAIRS, 4 (2012), <https://www.bia.gov/cs/groups/xojs/documents/text/idc-018678.pdf>. Rosebud later received targeted funding through the same program. Vi Waln, *Rosebud Hosts Tribal Summit*, LAKOTA COUNTRY TIMES (May 16, 2012), [http://www.lakotacountrytimes.com/news/2012-05-16/Front\\_Page/Rosebud\\_hosts\\_tribal\\_summit.html](http://www.lakotacountrytimes.com/news/2012-05-16/Front_Page/Rosebud_hosts_tribal_summit.html).

47. See, e.g., John Christopher Fine, *Profile: Cheyenne River Sioux Tribal Police*, 9-1-1 MAGAZINE (Feb. 22, 2012), <http://www.9-1-1magazine.com/Fine-Cheyenne-River-Sioux-Tribal-PD> (describing outdated police radios, a 9-1-1 system unable to read a caller's location, and lack of education and prevention services in the Cheyenne River Sioux Tribal community).

48. A fuller picture of how each of these nine tribal justice systems works will require close examination of each tribe's law, policies, budgets, programs, and crime statistics, as well as longer site visits.

49. Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 U.C.L.A. L. Rev. 1638, 1642 (2016).

resources, ensures that any effort to improve the situation of minority youth in South Dakota will, at best, be only partially effective.

### III. JURISDICTION: THE OVERLAY OF FEDERAL POWER

The federal government shares juvenile jurisdiction with the tribes on all the reservations in South Dakota. Under a network of statutes establishing territorial jurisdiction over land occupied by a tribe but held in fee by the U.S. government, the federal government exercises jurisdiction over all major crimes committed by Indians,<sup>50</sup> all crimes committed by Indians against non-Indians, and all crimes committed by non-Indians against Indians.<sup>51</sup> The federal government also exercises criminal jurisdiction over anyone anywhere who commits a limited category of federal crimes. So an Indian who commits a federal crime on a reservation may be prosecuted without the use of Indian country statutes.<sup>52</sup> Prosecution of a juvenile alleged to have committed any of these offenses is governed by the Federal Juvenile Delinquency Act, which establishes federal jurisdiction over acts of juvenile delinquency.<sup>53</sup> The Act sets forth the procedures for cases involving a “violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.”<sup>54</sup>

Between 1999 and 2008, an average of ninety-nine Native youth had petitions filed in federal court each year.<sup>55</sup> The district of South Dakota had the most Indian country arrests and referrals of any district, and South Dakota was responsible for more than one third of all Native youth incarcerated under federal jurisdiction.<sup>56</sup> It is difficult to measure racial disparities in a system that is jurisdictionally guaranteed to have a disproportionate share of Native youth, and federal law’s limited jurisdictional scope means that youth in federal court are almost always there for serious offenses, complicating state-federal comparisons. Nevertheless, there is some evidence that youth in federal court spend more time locked up than their counterparts in state systems,<sup>57</sup> and that Native youth may receive disproportionately harsh sanctions compared to other youth under federal

50. 18 U.S.C. § 1153 (2017).

51. *Id.* § 1152.

52. Federal jurisdiction exists because the crime affects a federal constitutionally defined interest. See Rolnick, *Untangling the Web*, *supra* note 4, at 101 n. 237.

53. 18 U.S.C. § 5031 (2017).

54. *Id.* The Assimilative Crimes Act fills the gaps that are left in federal enclaves when federal law does not define an offense. 18 U.S.C. § 13 (2017). It simply provides that state law definitions should be incorporated to define any offenses not spelled out by federal law. *Id.*

55. WILLIAM ADAMS ET AL., *TRIBAL YOUTH IN THE FEDERAL SYSTEM* 51 (2011). The number of Native youth with cases filed varied from a high of 139 in 1999 to a low of seventy in 2008. *Id.* From 1999 to 2002, more than half the cases filed in federal court each year were Indian country cases. *Id.* at 49. From 2003-2008, slightly less than half were Indian country cases. *Id.*

56. *Id.* at 39, 43, 60. During the same period, Native youth were less likely than non-Native youth to be transferred to the adult system, and the district of South Dakota was less likely than other districts to transfer Native youth into the adult system. *Id.* at 64.

57. Arya & Rolnick, *supra* note 4, at 25.

jurisdiction.<sup>58</sup> Incarceration is expensive, so the choice to incarcerate a juvenile offender stands in stark contrast to complaints about federal under-enforcement in Indian country, including slow investigations and declined prosecutions.<sup>59</sup>

The federal government does not have special juvenile courts, nor does it run juvenile correctional facilities. Youth adjudicated delinquents are placed in the custody of the federal Bureau of Prisons (“BOP”), which then places them in one of a network of contract facilities around the country.<sup>60</sup> Due to proximity, Native youth under federal jurisdiction from any South Dakota reservation would likely be housed at the Western South Dakota Juvenile Services Center in Rapid City (WSDJSC) in Pennington County. The WSDJSC has one of only three current contracts to hold youth in BOP custody, along with a facility in Texas and a facility in Washington, D.C.<sup>61</sup> In other words, Native youth in South Dakota are held in the very same county facilities from which federal jurisdiction is supposed to have removed them.

Department of Justice agencies are responsible for arrest, prosecution, detention, and incarceration of Native youth under federal jurisdiction. Through other agencies, the federal government is also deeply involved in determining the fates of youth under tribal jurisdiction. On some South Dakota reservations, including Standing Rock, Lower Brule, Crow Creek, Flandreau, and Yankton, the BIA directly provides policing and/or corrections, which means that federal officials make decisions affecting every stage of a juvenile case.<sup>62</sup> Even where the tribe administers these services, a large portion of the tribe’s budget likely comes from federal base funding—the amount the BIA would have spent if it provided the service directly. All tribes, then, are dependent on congressional and executive budget decisions to determine their base level of justice program funding.<sup>63</sup> Tribes with significant alternative economic resources can reduce or eliminate reliance on federal base funding, but most of the tribes in South Dakota are not in that category.

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58. For example, Native youth accounted for thirty-nine percent of youth arrested for federal offenses between 1999 and 2008, but they accounted for fifty-three percent of the juveniles incarcerated during the same period. ADAMS, ET AL., *supra* note 55, at 37, 59. Many Native people perceive the federal system to be unfair as well. See *Final Report and Recommendations*, S.D. EQUAL JUST. COMM’N, 12 (2006), [http://uj.s.sd.gov/uploads/docs/Equal\\_Justice\\_Commission\\_Report.pdf](http://uj.s.sd.gov/uploads/docs/Equal_Justice_Commission_Report.pdf).

59. Timothy Williams, *Higher Crime, Fewer Charges on Indian Lands*, N.Y. TIMES (Feb. 20, 2012), <http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html>; Michael Riley, *Promises, Justice Broken*, DENVER POST (Nov. 10, 2007), <http://www.denverpost.com/2007/11/10/promises-justice-broken/>.

60. Rolnick, *Untangling the Web*, *supra* note 4, at 125.

61. Tiffany Tan, *Juvenile Justice Reforms Taking Shape, and Leading to Fewer Inmates*, RAPID CITY JOURNAL (Apr. 8, 2017), [http://rapidcityjournal.com/news/local/juvenile-justice-reforms-taking-shape-and-leading-to-fewer-inmates/article\\_ca41b8a8-d0f0-50a9-b79e-fe04b32a1da4.html](http://rapidcityjournal.com/news/local/juvenile-justice-reforms-taking-shape-and-leading-to-fewer-inmates/article_ca41b8a8-d0f0-50a9-b79e-fe04b32a1da4.html).

62. Even a focus on the BIA oversimplifies the story of federal involvement. The Bureau of Indian Education, another Interior agency, is responsible for educating incarcerated youth. The Indian Health Service, part of the Department of Health and Human Services, is responsible for providing health care to incarcerated youth and for funding and administering some substance abuse and mental health treatment programs. See Rolnick, *Untangling the Web*, *supra* note 4, at 116 n.308.

63. Rolnick, *Untangling the Web*, *supra* note 4, at 114-16.

Tribes also rely on competitive grants to fund their juvenile justice systems, but the availability of these grants depends on federal priorities. For example, Standing Rock, Cheyenne River, Yankton, Oglala, Rosebud, and Lower Brule have all received one or more federal grants to plan, build, or renovate their juvenile correctional facilities. While many of these tribes also received federal grants for juvenile early intervention services and alternatives to incarceration, the amount of federal money invested in incarceration in recent decades has dwarfed the amount spent on alternatives.<sup>64</sup>

#### IV. RACISM: NATIVE YOUTH IN STATE AND COUNTY CUSTODY

South Dakota's history and culture are marked by Indian-white racial tension, and criminal law and justice is an integral part of managing the racial hierarchy.<sup>65</sup> Against this backdrop, state and local juvenile courts exercise jurisdiction over Native youth who live or commit offenses anywhere outside reservation land, including in Rapid City and Sioux Falls. Native youth, the largest minority group in South Dakota,<sup>66</sup> have long been over-represented in South Dakota's state and county juvenile justice system.<sup>67</sup> They are more likely than white youth to be arrested, to be detained, and to end up in secure

64. Rolnick, *Locked Up*, *supra* note 20, at 66-67.

65. Nick Estes, *Racist City, S.D.: Life is Violent, and Often Deadly in Rapid City*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sep. 5, 2014), <https://indiancountrymedianetwork.com/news/politics/racist-city-sd-life-is-violent-and-often-deadly-in-rapid-city/>; Nick Estes, *Chamberlain, South Dakota: A Border Town and Its 'Indian Problem'*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 25, 2014), <https://indiancountrymedianetwork.com/news/opinions/chamberlain-south-dakota-a-border-town-and-its-indian-problem/>. See also THOMAS BIOLSI, *DEADLIEST ENEMIES: LAW AND THE MAKING OF RACE RELATIONS ON AND OFF THE ROSEBUD RESERVATION* (2001) (describing the relationship between civil jurisdiction controversies and race relations); S.D. EQUAL JUST. COMM'N, *supra* note 58, at 2 (noting the overrepresentation of Native Americans in the South Dakota criminal justice system).

66. *Unbalanced Juvenile Justice: 2013 South Dakota (state) Raw Numbers*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/decision-points/42/south-dakota#comparison=2&placement=1&aces=2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=0&dmp=1&dmp-comparison=1&dmp-decisions=1,2&dmp-county=-1&dmp-races=1,2,3,4,7,5,6&dmp-year=2013> (last visited May 7, 2017) [hereinafter BURNS INST.]. South Dakota's youth population is 77% white and more than 22% minorities. *Id.* Native Americans make up 14% of the total youth population and 60% of the minority population. *Id.*

67. Gary R. Leonardson & Roland Loudenburg, *An Assessment of Disproportionate Minority Contact in South Dakota* 6 (June 24, 2005), <https://doc.sd.gov/documents/about/grants/dcm/FullDMCReportFinal.pdf> [hereinafter Leonardson & Loudenburg]; S.D. EQUAL JUST. COMM'N, *supra* note 58, at 6. Researchers studying the adult criminal system have reached different conclusions regarding whether there is a racial disparity in sentencing. See Richard Braunstein & Steve Feimer, *South Dakota Criminal Justice: A Study of Racial Disparities*, 48 S.D. L. REV. 171 (2003) (finding disparity at case disposition and sentencing); Chris Hutton et al., *I Fought the Law and the Law Won*, in NATIVE AMERICANS, CRIME, AND JUSTICE 209, 220, 218 (Marianne O. Neilson & Robert A. Silverman eds., 1996) (finding no racial disparity in women's sentences); Frank Pommersheim & Steve Wise, *Going to the Penitentiary: A Study of Disparate Sentencing in South Dakota*, 16 CRIM. JUST. & BEHAV. 155, 163 (1989) (finding no sentencing disparity when controlling for other factors). Despite disagreement over whether the racism of decision-makers is the key explanatory factor, the fact of overrepresentation has been a consistent theme.

confinement after adjudication.<sup>68</sup> Although these statements hold true for Native youth nationwide to some extent, the disparities in South Dakota are particularly pronounced. Despite the state's recent overhaul of its juvenile justice system, these disparities seem likely to persist.<sup>69</sup>

### A. DISPARITY

The following data on minority youth in the justice system was collected by the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) and analyzed for comparative disparities by the W. Haywood Burns Institute.<sup>70</sup> Information is presented for 2013, the most recent year available. Although there are significant gaps in the data,<sup>71</sup> it nevertheless presents the best available picture of juvenile justice system involvement across states and racial groups.<sup>72</sup> It provides only a glimpse into the contemporary situation of Native youth in South Dakota. However, periodic reports and investigations demonstrate that discriminatory policing, justice system overrepresentation, and reliance on punitive interventions have long been features of South Dakota's system.

#### 1. Arrest and Referral

Nationwide, Native youth are overrepresented in arrests for offenses related to family and children, driving under the influence, liquor laws, drunkenness,

68. See Leonardson & Loudenburg, *supra* note 67, at 2 (finding disparity at arrest, detention, and commitment to the Department of Corrections, but not in placement in secure confinement after commitment to DOC).

69. Christina Rose, “Terrible Racial Disparities” Not Fixed by SD Juvenile Justice Reform, INDIAN COUNTRY TODAY MEDIA NETWORK (June 24, 2015), <https://indiancountrymedianetwork.com/news/politics/terrible-racial-disparities-not-fixed-with-sd-juvenile-justice-reform/>.

70. *Unbalanced Juvenile Justice: About the Data*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/about> (last visited October 31, 2017). The same data is accessible directly through the OJJDP website, but I rely on the Burns Institute's analysis and presentation in this essay because it appears in a more user-friendly format and highlights racial disparities.

71. States report data on racial disparities to the federal OJJDP, which aggregates it into a single database. Thus, the federal database includes only what states reported, but does not necessarily count all youth in the state and does not always break down youth into subcategories. For example, federal law previously required states to track and report information only from the three counties with the greatest proportion of minority youth, so South Dakota data is from Pennington, Minnehaha, and Roberts counties. While data is reported by race, information on Native youth is rarely disaggregated further by gender, tribal membership, or other subcategories. Moreover, data collection and reporting inconsistencies can greatly affect statistics on Native youth in rural states because the raw overall numbers of youth are so low. This essay describes what is known about Native youth in the juvenile justice system in South Dakota based on the limited information available, but the need for further research is glaring.

72. The existence of a single national dataset provides a useful basis for comparison across states. Although the data is no doubt incomplete, and states likely differ somewhat in their collection and reporting strategies, the unified categories and comparative rate information compiled by OJJDP and the Burns Institute help to illustrate how a given state's numbers compare to those of other states. The overall themes of over-representation of Native youth and overuse of incarceration remain consistent over time and in every report or collection of data.

and disorderly conduct.<sup>73</sup> While they represent about one percent of all youth, they are about two percent of youth arrested for these crimes, meaning they are arrested at a rate double their proportion of the population.<sup>74</sup> For all other offenses, Native youth are arrested at a rate similar to that of white youth.<sup>75</sup>

South Dakota's youth population demographics are very different from the rest of the nation. In terms of raw numbers, white and Native youth make up the majority (more than ninety percent) of youth in the state,<sup>76</sup> and the majority of youth arrested.<sup>77</sup> While Black youth face significant arrest disparities, as described below, South Dakota's juvenile system is overwhelmingly white and Native, and Native youth are disproportionately represented at nearly every stage.

In South Dakota, unlike at the national level, Native youth are overrepresented in total arrests. They are 3.5 times as likely as white youth to be arrested (147 arrests per 1,000 youth for Native youth versus forty-one arrests per 1,000 for white youth).<sup>78</sup> As a comparison, Black youth are 3.6 times as likely as white youth to be arrested (149 per 1,000 youth), Latino youth are twice as likely (eighty-four arrests per 1,000 youth), while Asian youth are less likely than white youth to be arrested (thirty-nine arrests per 1,000 youth).<sup>79</sup>

Once arrested, Native and Black youth are less likely than white youth to be referred to court, while Asian youth (under-represented at arrest) are slightly more likely than white youth to be referred to court.<sup>80</sup> At this decision point, non-Asian minority youth seem to be treated less harshly than white and Asian youth. Lower referral rates may indicate that decision-makers chose to proceed

73. *Juvenile Offenders and Victims: 2014 National Report*, NAT'L CTR FOR JUV. JUST., 118 (Dec. 2014), <https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf>.

74. *Id.*

75. *Id.*

76. *Quick Facts: South Dakota: Persons under 18 by Race and Hispanic Origin, 2016*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/SD/AGE295216#viewtop>.

77. *Annual Decision Points: South Dakota, 2013 Youth Arrests Raw Numbers*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/decision-points/42/south-dakota#comparison=2&placement=1&racess=2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=0&dmp=1&dmp-comparison=1&dmp-decisions=2&dmp-county=-1&dmp-races=1,2,3,4,7,5,6&dmp-year=2013>.

78. *Annual Decision Points: South Dakota, Youth Arrests Disparity Gap Based on Rate per 1,000 Youth*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/decision-points/42/south-dakota#comparison=2&placement=1&racess=2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=0&dmp=1&dmp-comparison=4&dmp-decisions=2&dmp-county=-1&dmp-races=1,2,3,4,7,5,6&dmp-year=2013> (last visited October 31, 2017); *2013 Youth Arrests Rate per 1,000 Youth*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/decision-points/42/south-dakota#comparison=2&placement=1&racess=2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=0&dmp=1&dmp-comparison=2&dmp-decisions=2&dmp-county=-1&dmp-races=1,2,3,4,7,5,6&dmp-year=2013> (last visited October 31, 2017).

79. *Id.*

80. *Annual Decision Points: South Dakota, 2013 Youth Arrests/Referred to Court/Petition Filed/Found Delinquent Rate per Prior Decision Point*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/decision-points/42/south-dakota#comparison=2&placement=1&racess=2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=0&dmp=1&dmp-comparison=3&dmp-decisions=2,3,6,7&dmp-county=-1&dmp-races=1,2,3,4,7,5,6&dmp-year=2013> (last visited October 31, 2017). According to the same dataset, Latino youth, also over-represented at arrest, are the least likely to be referred to court. *Id.*

less harshly against Native, Black, and Latino youth by releasing them post-arrest. On the other hand, in light of the disparities at other decision points, it may indicate that these youth are subject to more baseless arrests, as evidenced by the proportion who are never referred to court.<sup>81</sup>

## 2. Detention

Youth awaiting adjudication may be detained or released. State law requires that a child be released unless the parents are unavailable or the child's home is unsuitable, and at least one additional condition warrants detention.<sup>82</sup> The statutory conditions relate to: likelihood of non-appearance (record of failure to appear or failure to comply with program requirements, or being a fugitive from another jurisdiction); present condition (under the influence of alcohol, inhalants, or drugs); previous delinquent conduct (a record of violent or serious property crimes, or is already on supervised release for a prior offenses); and the seriousness of the instant offense.<sup>83</sup> If detained, the child must come before a judge within forty-eight hours for a determination of whether continued detention is warranted.<sup>84</sup>

Native youth are nearly twice as likely as white youth to be detained. Forty-five percent of white youth who have been referred to court are detained prior to adjudication, whereas eighty-two percent of Native youth and ninety percent of Black youth are detained.<sup>85</sup> Detention prior to adjudication is particularly detrimental (because short-term detention does not involve significant programming, rehabilitation, or treatment services) and usually

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81. Where youth are referred to court, a petition is filed in most cases, with a similar filing rate across all groups. A petition is filed for eighty-six percent of white youth who have been referred to court, eighty-eight percent of Native youth, eighty-nine percent of Latino youth, eighty-four percent of Black youth, and seventy-four percent of Asian youth. *Id.* (table showing 2013 South Dakota annual decision points, rate per prior decision). When a petition is filed, youth across all groups are adjudicated delinquent at similar rates. According to the dataset, ninety-seven percent of white youth for whom petitions were filed were adjudicated delinquent, as were ninety-two percent of petitioned Native youth, ninety percent of petitioned Black youth, and eighty-seven percent of petitioned Latino youth. (The reported rate for Asian youth is 112 delinquent adjudications per 100 youth petitioned. This likely reflects a reporting inconsistency and a small overall number of youth). *Id.*

82. S.D.C.L. § 26-7A-14 (2016).

83. S.D.C.L. § 26-8C-3. To hold a child who is under the influence, the officer must determine that "detention is the least restrictive alternative in view of the gravity of the alleged offense and is necessary for the physical safety of the child, the public, and others." S.D.C.L. § 26-8C-3(7). If other short-term placement options do not exist, or are closed at the time the child is picked up, this standard may provide minimal protection against detention.

84. S.D.C.L. § 26-7A-20.

85. *Annual Decision Points: South Dakota, 2013 Detained Rate per Prior Decision Point*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/decision-points/42/south-dakota#comparison=2&placement=1&racess=2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=0&dmp=1&dmp-comparison=3&dmp-decisions=5&dmp-county=-1&dmp-races=1,2,3,4,7,5,6&dmp-year=2013> (last visited, October 31, 2017). Fifty-eight percent of Latino youth, and fifty-one percent of Asian youth, who have been referred to court are detained prior to adjudication. *Id.*



unnecessary. Federal agencies recommend that pre-adjudication detention be used only as a last resort.<sup>86</sup>

### 3. Secure Confinement

Even after adjudication, experts recommend that youth be placed in the least restrictive setting, with out-of-home placement only when needed and secure confinement as a last resort.<sup>87</sup> Nationally in 2013, 114 out of every 100,000 youth were placed in secure, out-of-home placement, and in most states, the overall rate was similar or lower.<sup>88</sup>

South Dakota has one of the highest overall secure confinement rates; in 2013 over 302 out of every 100,000 youth were placed in a secure setting post-adjudication.<sup>89</sup> Unsurprisingly, it also has one of the highest placement rates for Native youth. Native youth across all states are placed in secure confinement post-adjudication at a rate of 254 per 100,000, which is greater than the rate for white youth (69) and all youth of color (171).<sup>90</sup> In South Dakota, Native youth are placed in secure post-adjudication confinement at a rate of 1,041 per 100,000, compared with 167 per 100,000 for white youth and 742 per 100,000 for all youth of color.<sup>91</sup> According to the Burns Institute's analysis of 2013 one-day count data, this was second highest rate of Native incarceration in the country.<sup>92</sup> According to annual decision points data, Native youth adjudicated

86. James Austin et al., *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, 1 (Sept. 2005), <https://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf>.

87. Rolnick, *Untangling the Web*, *supra* note 4, at 77.

88. *Unbalanced Juvenile Justice: 2013 Commitment Rates for All Youth, Per 100,000 Youth, All offenses*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/#comparison=2&placement=4&racess=1,2,3,4,5,6&offenses=5,2,8,1,9,11,10&year=2013&view=map> (last visited Oct. 10, 2017) [hereinafter *Commitment Rates*, BURNS INST.]. Commitment rate per 1,000 youth is based on an annual one-day count of youth in secure confinement. This essay uses data collected by the OJJDP, as reported by the Burns Institute. OJJDP data reflects the number of youth placed in secure confinement outside the home post-adjudication; including those in secure treatment, secure correctional facilities, and post-adjudication placement in jails or detention centers. According the Burns Institute website, its "commitment" category—used here—includes any "[c]ourt-ordered placement of juvenile to a facility following adjudication." *Unbalanced Juvenile Justice: Glossary*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/about/definitions> (last visited Sept. 25, 2017).

89. *Commitment Rates*, BURNS INST., *supra* note 88. The Burns Institute website notes that states like South Dakota, with an overall youth population less than 100,000 "may have the highest rates of incarceration and/or disparity gaps, while detaining or committing the fewest number of youth of color." *Id.* *Accord 2014 Annual Report*, PUB. SAFETY IMPROVEMENT ACT OVERSIGHT COUNCIL (Nov. 2014), <http://psia.sd.gov/PDFs/2014AnnualReportwithAppendices.pdf> (discussing South Dakota's overall secure placement rates).

90. *Commitment Rates*, BURNS INST., *supra* note 88.

91. *Id.*

92. *Id.* One-day count data from 2015 shows a drop in commitment rates for all youth, including youth of color and Native youth, both across the country and in South Dakota. *Unbalanced Juvenile Justice: 2015 Commitment Rates for All Youth, Per 100,000 Youth, All offenses*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/#comparison=2&placement=4&racess=1,2,3,4,5,6&offenses=5,2,8,1,9,11,10&year=2013&view=map> (last visited October 31, 2017). In 2015, seven states had higher commitment

delinquent in South Dakota were 1.6 times as likely as white youth to be placed in secure confinement.<sup>93</sup> As a comparison, Black youth were 1.4 times as likely as white youth, and Latino youth were 1.6 times as likely as white youth, to be placed in secure confinement.<sup>94</sup>

Another measure of the use of confinement and disparities faced by youth of color is to compare the number of youth in secure confinement (including both detention and post-adjudication confinement) on a given day. Here again, South Dakota is one of the states with the highest Native-to-white disparity. South Dakota's Native-to-white disparity is 6:1.<sup>95</sup> In 2013 Native youth across all states were incarcerated at a rate of 329 per 100,000, which was greater than the rate for white youth at ninety-eight and for all youth of color at 263.<sup>96</sup> In South Dakota, Native youth were incarcerated at a rate of 1,239 per 100,000, compared with 207 per 100,000 for white youth and 935 per 100,000 for youth of color.<sup>97</sup>

This issue—that Native youth are more likely to be removed from their homes and are more likely to be locked up once removed—appears to be a

rates for Native youth than South Dakota. *Id.* This essay describes 2013 data because 2013 is the last year for which South Dakota annual decision points data is made available.

93. *Unbalanced Juvenile Justice: National Map: South Dakota: Annual Decision Points: South Dakota, 2013 Incarceration Disparity Gap Based on Prior Decision Point*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/decision-points/42/south-dakota#comparison=2&placement=4&racess=1,2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=0&dmp=1&dmp-comparison=5&dmp-decisions=9&dmp-county=-1&dmp-races=1,2,3,4,7,5,6&dmp-year=2013> (last visited Sept. 25, 2017) [hereinafter BURNS, *South Dakota, Disparity Gap*]. For its comparison of annual decision points, the Burns Institute uses the category “incarceration,” which includes youth placed in a secure residential or correctional facility following a court disposition. It does not include youth confined in a group home or secure treatment facility, nor does it include adjudicated youth held in detention facilities while awaiting transfer or placement. *Unbalanced Juvenile Justice: Glossary*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/about/definitions> (last visited Sept. 25, 2017).

94. BURNS, *South Dakota, Disparity Gap*, *supra* note 93.

95. *Unbalanced Juvenile Justice: National Map: South Dakota: One-Day Count: Incarceration Rates for All Youth, Disparity Gap, All Offenses*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/decision-points/42/south-dakota#comparison=3&placement=3&racess=1,2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=1&dmp=0&dmp-comparison=5&dmp-decisions=9&dmp-county=-1&dmp-races=1,2,3,4,7,5,6&dmp-year=2013> (last visited October 31, 2017) [hereinafter BURNS, *South Dakota One-Day Count*]. According to one-day count data from 2015, South Dakota's Native-to-white disparity fell to 4.6:1. *Id.* Most of that states with the worst Native to white disparities are clustered in the Northern Plains and upper Midwest, regions that encompass many reservations and border communities. Minnesota, where the state has delinquency jurisdiction over most of the reservation communities, has the worst disparity rate at 14:1. *Unbalanced Juvenile Justice: National Map: Minnesota: One-Day Count*, W. HAYWOOD BURNS INSTITUTE, <http://data.burnsinstitute.org/decision-points/24/minnesota#comparison=2&placement=3&racess=1,2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=1&dmp=1&dmp-comparison=2&dmp-decisions=5&dmp-county=-1&dmp-races=1,2,3,4,7,5,6&dmp-year=2013> (last visited May 10, 2017).

96. *Unbalanced Juvenile Justice: 2013 Incarceration Rates for All Youth, Rate per 100,000 Youth, All Offenses*, W. HAYWOOD BURNS INSTITUTE, <http://data.burnsinstitute.org/#comparison=2&placement=3&racess=1,2,3,4,5,6&offenses=5,2,8,1,9,11,10&year=2013&view=map> (last visited October 31, 2017).

97. *Id.* All rates, including those for white youth, youth of color, and Native youth in South Dakota and nationwide, were lower in 2015. *Unbalanced Juvenile Justice: 2015 Incarceration Rates for All Youth, Rate per 100,000 Youth, All Offenses*, W. HAYWOOD BURNS INSTITUTE, <http://data.burnsinstitute.org/#comparison=2&placement=3&racess=1,2,3,4,5,6&offenses=5,2,8,1,9,11,10&year=2015&view=map> (last visited October 31, 2017).

lifetime reality for Native people in South Dakota. The state is ranked seventh out of thirteen states with the highest rates of Native American over-representation in the foster care system.<sup>98</sup> In *Oglala Sioux Tribe v. Van Hunnik*,<sup>99</sup> a federal judge found that state child welfare officials were routinely removing Native children from home and placing them in non-Native homes with little or no due process.<sup>100</sup> In the adult criminal justice system, Native people are also over-represented in prison.<sup>101</sup>

## B. CHANGING MODELS

The state of South Dakota has traditionally operated juvenile facilities in several locations designed to house youth for long periods. These sites have been home to boot camps, training schools, and correctional institutions.<sup>102</sup> The names and apparent character have changed over time—a reflection of prevailing trends in delinquency policy—but the locations and much of the physical infrastructure have remained the same. Several past incarnations were infamous for their brutal treatment of youth; brutality that affected Native youth in particular.<sup>103</sup>

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98. *Disproportionality Statistics*, NAT'L INDIAN CHILD WELFARE ASS'N (2014), <http://fosteringtogether.org/wp-content/uploads/2013/02/ICWA-Current-Stats-for-WA-State-1.pdf>.

99. 100 F.Supp.3d 749, 773 (D.S.D. 2015).

100. *See id.* at 754 (finding that the removal of the plaintiffs' Indian children from their custody violated the Indian Child Welfare Act and U.S. Constitution).

101. *See supra* notes 65 and 67. I acknowledge the debate described in the previous notes about whether, when controlling for other factors, Native people are in fact more likely to be sentenced to incarceration. I argue, however, that the presence of so many Native people in South Dakota's prisons is a racial problem—as is the relationship between prisons and colonization—regardless of whether it can be traced to a disparity at the point of sentencing.

102. *See Aurora Plains Plains Academy*, S.D. DEP'T OF CORR., <https://doc.sd.gov/juvenile/programs/aurora/index.aspx>. For example, Aurora Plains Academy, a privately-run, euphemistically named placement for delinquent youth, sits on the former site of the Dakota Reform school, which has also housed a juvenile boot camp for girls, a reform school/juvenile prison for boys, and a program for serious female offenders. *Id.* In 2007, the site reopened as a residential treatment facility under the supervision of Clinicare, a Wisconsin company that runs several juvenile programs around the country. *Id.* In Custer, on the Western edge of the state, sits another site on which the state has run boot camps and youth detention facilities. The last state-run facility in Custer, STAR Academy, closed in 2015. Tom Griffith, *Camp for Troubled Teens Closes*, RAPID CITY JOURNAL (Nov. 16, 2015), [http://rapidcityjournal.com/news/local/camp-for-troubled-teens-closes/article\\_48282098-a61a-5800-8bc3-4255380388e8.html](http://rapidcityjournal.com/news/local/camp-for-troubled-teens-closes/article_48282098-a61a-5800-8bc3-4255380388e8.html). Sequel Transition Academy, a privately-run group home, is in Sioux Falls on the site of the former West Farm, a working farm that was part of the state prison system. *Sequel Transition Academy*, S. D. DEP'T OF CORR., <https://doc.sd.gov/juvenile/programs/sequel/index.aspx>.

103. *See Settlement Agreement, Christina A. v. Bloomberg*, No. Civ. 00-4036 (D.S.D. Nov. 6, 2000), <http://www.ylc.org/wp/wp-content/uploads/christinaasettlement.pdf>. The Plankinton Youth Training School was the object of a lawsuit by the Youth Law Center. *Id.* The suit settled in 2000, and the agreement required the state change its practices regarding the use of restraints on suicidal youth and the use of rubber and beanbag bullets on girls, and provision of mental health services. *Id.* *See also Youth Law Center: It Caused Change at Plankinton, Demands Legal Fees*, YANKTON DAILY PRESS & DAKOTAN (Jan. 8, 2001), [http://www.yankton.net/news/article\\_8693cf75-62d9-54ce-b0f3-f2924d739679.html](http://www.yankton.net/news/article_8693cf75-62d9-54ce-b0f3-f2924d739679.html) (recounting the law suit with the Plankinton Youth Training School); Christina Rose, 'Cooked to Death': Inside South Dakota's Juvenile Justice Reign of Terror, INDIAN COUNTRY MEDIA NETWORK (Aug. 17, 2015), <https://indiancountrymedianetwork.com/news/politics/cooked-to-death-inside-south-dakotas-juvenile-justice-reign-of-terror/> (describing the conditions of South Dakota

The state recently overhauled its juvenile justice system,<sup>104</sup> implementing several changes intended to reduce secure confinement and expand the use of diversion and evidence-based alternatives.<sup>105</sup> As part of this shift, the state stopped operating long-term youth correctional institutions, opting to refer youth to private or out of state facilities. Under the new model, if youth are committed to state Department of Corrections custody, they are referred to private treatment-based facilities.<sup>106</sup> Yet, the two main private facilities are situated in the same buildings as the former state-run facilities.<sup>107</sup> It is not at all clear that this shift to privatization will signal any significant change in the reality of youth incarceration beyond a reduction in state oversight.

At the county level, South Dakota employs a regional model for juvenile justice. One of five county facilities houses pre- and post-adjudication youth in

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juvenile facilities); Vincent Schiraldi & Mark Soler, *Locked Up Too Tight*, WASH. POST (Sept. 19, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A30534-2004Sep17.html> (comparing the conditions of the Plankinton Juvenile Training School to other juvenile detention centers in the United States as well as prison conditions in Iraq); Bruce Selcraig, *Camp Fear*, MOTHER JONES (2000), <http://www.motherjones.com/politics/2000/11/camp-fear> (detailing the death of Gina Score at the Plankinton facility and describing conditions of juvenile detention centers in the United States). The Department of Justice investigated the state facility in Custer, an investigation that the state initially refused to allow them access to complete. Letter from Assistant Attorney General Ralph F. Boyd, Jr., to Governor Bill Janklow (Dec. 19, 2002), <https://www.justice.gov/crt/investigation-custer-youth-correctional-center-south-dakota>. The Department found numerous violations of federal law concerning provision of mental health services, provision of education, including special education, and use of isolation. *Id.* The Chamberlain Academy, a private, for-profit prison, was sued in 2000 by several young people who said they were sexually abused by a staff member. *Brown v. Youth Servs. Int'l. of South Dakota, Inc.*, 89 F.Supp.2d 1095, 1098 (D.S.D. 2000). The lawsuit eventually settled, but the facility closed in 2015, and the company continues to be the subject of the complaints alleging abuse at its facilities in other states. See C. A. Heidelberger, *Troubled For-Profit Youth Prison Company Closes Chamberlain Academy*, MADVILLE TIMES (Jan. 9, 2014), <http://madvilletimes.com/2014/01/troubled-for-profit-youth-prison-company-closes-chamberlain-academy/> (recounting lawsuits against other youth treatment centers run by Youth Services International).

104. *South Dakota's 2015 Juvenile Justice Reform*, PEW CHARITABLE TRS. (Jan. 19, 2016), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/south-dakotas-2015-juvenile-justice-reform>.

105. PEW CHARITABLE TRS., *South Dakota's 2013 Criminal Justice Initiative* (June 2013), <http://psia.sd.gov/PDFs/SouthDakotaBrief.pdf>. In 2013, the state implemented a package of reforms to the adult criminal justice systems. *Id.* In 2014, the state began a review of its juvenile justice system. Reviewers found that it had one of the highest commitment rate in the country, that juveniles were routinely committed to the Department of Corrections for probation violations and low-level offenses, and that diversion and evidence based alternative were unavailable or inconsistently used. *Juvenile Justice Public Safety Improvement Act (SB 72) Executive Summary*, JUV. JUST. REINVESTMENT INITIATIVE, <http://jjri.sd.gov/docs/Executive%20Summary.pdf> (last visited Sept. 25, 2017). Pew Charitable Trusts, *supra* note 104. To combat these problems, the Juvenile Justice Public Safety Improvement Act was passed, which, in part; restricts the circumstances under which youth may be committed to the Department of Corrections; limits the presumptive length of probation; and requires judges to provide a written justification any time a juvenile is committed to detention for more than fourteen days in any thirty-day period. S.D.C.L. § 22-8b-6 (2016); S.D.C.L. § 26-8B-8 (2016); S.D.C.L. § 22-8C-7 (2016). The state also adopted a risk assessment tool to be used prior to detention and a system of graduated responses. S.D.C.L. § 26-8C (2016); S.D.C.L. § 26-8E (2016).

106. *Juvenile Corrections*, S.D. DEP'T OF CORR. (2017), <http://doc.sd.gov/juvenile/> (last visited Sept. 25, 2017).

107. See *supra* note 102 (discussing the history of the South Dakota Department of Correction's two main private facilities, Sequel Transition Academy and Aurora Plains Academy).

custody from a cluster of neighboring counties.<sup>108</sup> Pennington and Minnehaha counties have partnered with the Juvenile Detention Alternatives Initiative since 2011, implementing reforms intended to reduce incarceration.<sup>109</sup> Yet, the 2013 data indicates that Native youth are overrepresented in county juvenile systems and continue to face some disparities. In Pennington County, Native youth are nine times as likely as white youth to be arrested, 1.3 times as likely to be detained, and 1.5 times as likely to be sent to secure confinement.<sup>110</sup> In Minnehaha County, Native youth are nine times as likely to be arrested, 2.5 times as likely to be detained, and twice as likely to be sent to secure confinement.<sup>111</sup> Except for the decision to detain in Pennington County, these county-level decision point disparities are worse than they are at the state level.

According to recent reports, new commitments to the Department of Corrections have declined, as have the total number of youth in custody and the average length of stay in residential placement.<sup>112</sup> But the state still incarcerates

108. See *Intake Centers 2017*, S.D. KIDS COUNT 2017, BEACOM SCHOOL OF BUSINESS, UNIVERSITY OF SOUTH DAKOTA, <http://ujs.sd.gov/uploads/docs/StatewideIntakeCenterAssignmentsMap.jpg>.

Pennington County houses youth from Bennett, Butte, Corson, Custer, Dewey, Fall River, Haakon, Harding, Lawrence, Meade, Oglala Lakota, Perkins, and Ziebach counties. *Id.* This includes the Pine Ridge, Cheyenne River, and Standing Rock Reservations. Youth who commit offenses on tribal land would end up in tribal or federal custody, but some young people from these reservations likely commit offenses on land under state/county jurisdiction, and would be held in Pennington County. Pennington County also includes Rapid City, the state's largest metropolitan area and home to many Native youth.

Hughes County houses youth from Beadle, Brule, Buffalo, Gregory, Hyde, Hand, Jackson, Jones, Jerauld, Lyman, Mellette, Potter, Sanborn, Stanley, Sully, Todd, and Tripp counties. *Id.* This includes the Crow Creek, Lower Brule, and Rosebud reservations, as well as the city of Chamberlain.

Minnehaha County houses youth from Aurora, Bon Homme, Brookings, Clay, Charles Mix, Davison, Douglas, Hanson, Hutchinson, Lake, Lincoln, McCook, Miner, Moody, Turner, Union, and Yankton counties. *Id.* This includes the Flandreau reservation and most of the Yankton reservation. It also includes Sioux Falls and Brookings.

Brown County houses youth from Day, Campbell, Edmunds, Faulk, Grant, Marshall, McPherson, Roberts, Spink, and Walworth counties. This includes the Sisseton Wahpeton reservation. *Id.*

Codington County houses youth from Clark, Codington, Deuel, Hamlin, and Kingsbury counties, that area that includes the Watertown. *Id.* Codington County runs a Juvenile Intensive Probation Supervision program: a community-based program for youth who have a suspended sentence to the State Department of Corrections. *Juvenile Probation*, S.D. UNIFIED JUD. SYS., [http://ujs.sd.gov/Third\\_Circuit/Probation/juvenile.aspx](http://ujs.sd.gov/Third_Circuit/Probation/juvenile.aspx) (last visited Sept. 25, 2017).

109. *Juvenile Detention Alternatives Initiative*, S.D. UNIFIED JUD. SYS., <http://ujs.sd.gov/Information/jdai.aspx> (last visited Sept. 25, 2017). JDAI has since been expanded statewide. *Id.*

110. *Unbalanced Juvenile Justice: National Map: South Dakota: Annual Decision Points: Pennington*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/decision-points/42/south-dakota#comparison=2&placement=3&racess=1,2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=0&dmp=1&dmp-comparison=5&dmp-decisions=2,5,9&dmp-county=2390&dmp-races=1,2,3,4,7,5,6&dmp-year=2013> (last visited Sept. 25, 2017).

111. *Unbalanced Juvenile Justice: National Map: South Dakota: Annual Decision Points: Minnehaha*, W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/decision-points/42/south-dakota#comparison=2&placement=3&racess=1,2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=0&dmp=1&dmp-comparison=5&dmp-decisions=2,3,5,9&dmp-county=2384&dmp-races=1,2,3,4,7,5,6&dmp-year=2013> (last visited Sept. 25, 2017).

112. *South Dakota Juv. Just. Pub. Safety Improvement Act: 2016 Annual Report*, JJPSIA OVERSIGHT COUNCIL, 13, 15-16 (2016), <http://jjri.sd.gov/docs/JJPSIA%202016%20Annual%20Report.pdf> [hereinafter *Annual Report*].

juveniles at a higher rate than other states,<sup>113</sup> and incarceration remains a feature of county systems. Despite the outside effect of South Dakota's juvenile justice policies on Native youth, the state's reform effort has not framed juvenile incarceration as a racial issue. The reform legislation only requires that the State Department of Tribal Relations "evaluate and make recommendations" to improve outcomes for Native youth.<sup>114</sup> Indeed, because of their jurisdictional status, some Native youth in the state may fall outside the scope of the new protections.<sup>115</sup>

One manifestation of South Dakota's border community racism is that Native youth have long been overrepresented and over-incarcerated in the state, despite mounting evidence that incarceration is harmful to them. After decades of debate about the reasons why and several major shifts in juvenile justice policy, this reality has not changed. Disproportionate minority contact is a familiar story, but what makes the story of Native youth in South Dakota unique is the role of federal jurisdiction and tribal sovereignty—both of which could potentially ameliorate the disproportionality.

The extension of federal criminal jurisdiction over reservations was premised in part by the idea that federal jurisdiction would protect Native people from state hostility (and vice versa).<sup>116</sup> This premise has since been strongly criticized.<sup>117</sup> Indeed, federal jurisdiction may worsen the problem of over-incarceration in that the federal system is also incarceration-based, and is less equipped to handle the special needs of juveniles. It may also reproduce some of the same disparities. Moreover, in South Dakota, federal jurisdiction likely means commitment to a county-run juvenile facility in Rapid City.

The doctrine of tribal sovereignty positions tribes to intervene in the cycle of over-incarceration on behalf of their own children by creating space for tribes to build and control their own systems. In South Dakota's tribal systems, there are at least five separate reservation incarceration facilities with a total of more

113. *Id.* at 15, 17. Stay lengths for residential placement have not decreased, and a greater share of youth whose aftercare status is revoked by the Department of Corrections are committed to residential placement. *Id.* Whether secure treatment is an improvement over other types of secure confinement depends substantially on the character and effectiveness of the treatment facilities. *See supra* note 102 (describing how former training schools, boot camps, and correctional facilities have been reinvented as privately-run secure treatment). The average length of time that youth are committed to DOC custody has also remained steady. *ANNUAL REPORT, supra* note 112, at 18.

114. S.D.C.L. § 26-8D-5 (2016).

115. *See South Dakota RAI Training Manual 1.3*, S.D. UNIFIED JUD. SYS., 1 (2016), <https://ujs.sd.gov/uploads/docs/SouthDakotaRAITrainingManual.pdf> (stating that law enforcement officers need not complete detention risk assessments for youth transferred from tribal or federal court).

116. *United States v. Kagama*, 118 U.S. 375, 384 (1886); Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 *TULSA L. REV.* 73, 73–74 (2007); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 *N.C. L. REV.* 779, 808 (2006). *But see* Washburn, *supra* at 804–805 (identifying assimilation, enlargement of federal power, and "fanciful" concerns about public safety as the primary motives for enactment of the Major Crimes Act).

117. *See, e.g.,* Fletcher, *supra* note 116, at 82 ("The foundational principle that excludes states from Indian affairs is no longer necessary, nor is it viable. The political and social circumstances justifying exclusive federal authority in Indian affairs have changed."); Washburn, *supra* note 116, at 827–830 (explaining that Indian country federal criminal jurisdiction undermines tribal self-determination while failing to improve public safety).

than 100 juvenile beds. Some stand silent and unused; the operational ones are rarely full.<sup>118</sup> This suggests that tribes may also be over-invested in detention and incarceration, and that tribal systems may not always incorporate a broad range of alternatives.<sup>119</sup> In addition, all tribes in the state face a crippling lack of financial resources that makes it a challenge to create and staff effective treatment and alternative programs.

## V. EPILOGUE

I visited several South Dakota juvenile incarceration facilities in September 2016 as part of my research for this essay. Native youth made up the majority or totality of youth in every facility. Whether the facilities housed youth in federal, county, or tribal custody, and whether located on tribal or non-tribal land, all felt like prisons. While some of the young people were being held for violent or very serious offenses, many of them seemed to be detained or incarcerated because there was nowhere else to put them or no better way to get them services.

The night before I visited the first facility, I spent the night at the Oceti Sakowin camp, one of several camps created in the spring and summer of 2016 to protest construction of the Dakota Access Pipeline. Many people have described the camp, and the larger movement it symbolized, as a symbol of freedom and decolonization.<sup>120</sup> One night was enough to show me that sense of freedom. At the time I visited, several thousand people were living at the camps and exercising a shared governance that respected Oceti Sakowin leadership and principles and resulted in a near-complete exclusion of violence, drugs, and drinking without a formal justice system.

The contrast between the camp and the detention centers I visited the same week was vivid and painful. Young people from Standing Rock are credited with starting the “#NoDAPL” movement,<sup>121</sup> but the young people locked in brightly lit cells for hours on end appeared bored and resigned. While many people had relatives at the drug-free camps, youth in the facilities were often locked up for alcohol and drug-related offenses. Facility administrators struggled to find services of any kind for the youth under their supervision. Some did not even have the staff required to provide basic schooling. All relied on unpaid volunteers to bring in any kind of cultural or religious activities,

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118. See *Jails in Indian Country, 2013*, BUREAU OF JUST. STATS., 11 (2014), <https://www.bjs.gov/content/pub/pdf/jic13.pdf> (showing the average number of juveniles in custody at each facility and the facilities' capacity).

119. *But see supra* notes 22-23 (describing treatment and diversion programs run by Sisseton Wahpeton).

120. See, e.g., Jaskiran Dhillon, *Indigenous Youth are Building a Climate Justice Movement by Targeting Colonialism*, TRUTHOUT (June 20, 2016), <http://www.truth-out.org/news/item/36482-indigenous-youth-are-building-a-climate-justice-movement-by-targeting-colonialism>.

121. Saul Elbein, *The Youth Group That Launched a Movement at Standing Rock*, N.Y. TIMES (Jan. 31, 2017), [https://www.nytimes.com/2017/01/31/magazine/the-youth-group-that-launched-a-movement-at-standing-rock.html?\\_r=0](https://www.nytimes.com/2017/01/31/magazine/the-youth-group-that-launched-a-movement-at-standing-rock.html?_r=0).

despite embracing the values of healing and reconnecting with culture. The central function of these places was to lock kids up.

Non-tribal officials seemed to view the tribes as having given up on their own children, while tribal officials seemed saddled with the responsibility of maintaining detention programs ill-suited to the youth being housed there. This story echoes the textbook history of the Oceti Sakowin people as defeated. But, like the textbook history, it erases Native resistance.<sup>122</sup> The 1868 treaty and its subsequent abrogation came on the heels of two major Great Sioux Nation military victories over the United States. The taking—and the legal doctrines that provided no satisfactory remedy for wholesale land loss—can be understood as a disciplinary response to Sioux resistance against federal power, and against the inevitability of state encroachment. The primacy of federal and state jurisdiction over Native youth is an outgrowth of this same era, and the federal and state juvenile justice systems can similarly be understood as a disciplinary response to Native resistance.<sup>123</sup>

During the fall of 2016, North Dakota law enforcement officers again responded to Sioux resistance with increasing force and brought the full machinery of criminal justice to bear on Native people through arrests, charges, and detention. Against this backdrop, the children sitting in cells (on and off reservation) were a reminder of the disciplinary function of criminal justice. Yet, all the Native people I encountered within South Dakota's juvenile justice systems had some connection to the people at the camp, and this connection was a reminder of their continued resistance. In tribal facilities, it was a connection shared by the children and their jailers, and it challenged the narrative of hopelessness that haunts Native youth in South Dakota.

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122. Nick Estes, *Fighting for Our Lives: #NoDAPL in Historical Context*, RED NATION (Sept. 18, 2016), <https://therednation.org/2016/09/18/fighting-for-our-lives-nodapl-in-context/>.

123. LUANA ROSS, INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY 11-33 (1998); Heidi Kiiwetinepinesiik Stark, *Criminal Empire: The Making of the Savage in a Lawless Land*, THEORY & EVENT (2016), <https://nycstandswithstandingrock.files.wordpress.com/2016/10/stark-2016.pdf>.