FAQs
Ending Racial Disparity in Juvenile Justice
06.24.09

1. **What's newsworthy about the Racial Justice Initiative?**

A legal remedy has just been unveiled to finally break through the stubborn barriers to eradicating the pervasive racism in the juvenile justice, child welfare and other systems. The release of a law review article—*An Offer They Can't Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives that Work (*Volume XIII of the UDC Law Review October, 2009—will be the last step in the launch of TimeBanks USA's Racial Justice Initiative. For decades, injured parties have faced challenges proving intent to discriminate. The Initiative is designed to put judges, government officials, advocates and legislators on formal notice of the injuries resulting from juvenile confinement practices and of the availability of validated more effective and less expensive alternatives to youth incarceration.

Using a new legal doctrine that establishes intent to discriminate by finding "deliberate indifference", officials will have two choices: change their practices voluntarily or change them as a result of successful litigation against them. Any continuation of current practices will represent an informed and deliberate choice to continue inflicting injury in lieu of better alternatives. As such, the article presents a basis for alleging and proving "deliberate indifference" or "intentional disregard."

Through TimeBanks USA's Racial Justice Initiative, there is now a moral, economic and legal force to compel officials to choose from an array of proven practices that help (not harm) America's youth.

2. **Are minority youth really disproportionately represented in populations that are incarcerated?**

Yes. Really. And undeniably. Today, according to sources cited in *An Offer They Can't Refuse,* African Americans, Latino, Native, Asian and Pacific Islanders are 35% of the U.S. youth population but comprise 65% of all youth who are securely detained before finding of guilt. Youth of color are four times more likely to be arrested for a drug trafficking offense even though white teens self-reported experiences of using and selling drugs at rates greater than African American teens. The length of incarceration compounds both the disparity and the injury inflicted: on average, African American and Latino juveniles are confined, respectively, 61 and 112 days longer than white youth.

3. **What are the effects of incarceration and detention on youth?**

Removing young people from their communities and holding them in secure detention halts their development while causing long-term injurious consequences. Many young people who have been incarcerated and returned to the community become unable to break out of behaviors that they might have outgrown as adults if they had not been incarcerated. Detention often propels a youth in a direction that leads to behaviors responsible for the recidivism rates of 50% to 80% for incarcerated youth. Incarcerating delinquent youth in close proximity to one another promotes the development of antisocial behavior. Furthermore, incarcerated youth typically do not receive the education or healthcare that would have been available to them had they been sent home under supervision.

4. Is it possible that these disparate outcomes are solely the product of race neutral factors?

No. Multi-regression research that controls for other causal variables has revealed a statistically significant "race effect" on decision-making at multiple points in juvenile justice courts and administrations across the nation. The evidence is incontrovertible: race bias affects critical decisions leading to detention or confinement.

5. Are the alternatives to detention and confinement really all that effective?

Absolutely. An extensive body of knowledge has emerged over the past 20 years showing that alternatives to the overuse of detention and confinement of minority youth would save vast amounts of money, reduce Disproportionate Minority Contact (DMC), and mitigate incarceration's most injurious effects. Community-based evidence-based models provide rock-solid evidence of consistently successful alternatives to incarceration that are more effective and less expensive. The annual cost of detention can average at least $50,000 per minor while most community-based programs cost less than one-fourth that amount.

In Washington, D.C., The Time Dollar Youth Court (TDYC) provides alternative youth peer sentencing to first-time juvenile offenders in the District of Columbia, providing a constructive means of instilling respect and responsibility for self and others. After a year, the recidivism rate for Youth Court participants was 9% for those who successfully completed the Youth Court Diversion Program (as opposed to 30% for those in the D.C. area who were not referred to Youth Court).

6. What's been done so far to address the racial disparity in our juvenile justice system?

Sound and fury signifying very little, unfortunately. One study cited in *An Offer They Can't Refuse* asserted that efforts to address these racial disparities have thus far produced little more than a "multimillion dollar cottage industry whose primary activity is to restate the problem of disparities, in essence, endlessly adoring the question of what to do about disproportionate minority contact, but never

reaching an answer." Despite a long-term and substantial investment of government resources, most jurisdictions have seen virtually no reductions in Disproportionate Minority Contact (DMC).

7. What are the basic elements of this effort to end racial disparity in juvenile justice?

There are four:

- First, racial disparity exists in the juvenile justice system with a disproportionate number of African American and other youth of color being incarcerated.
- Second, alternatives exist that work better and are cheaper than incarceration.
- Third, public agencies that pursue practices resulting in sustained racial disparity in the juvenile justice system while being aware of the better alternatives can be successfully sued for exhibiting "deliberate indifference," thus demonstrating intent to discriminate in violation of the equal protection clause.
- Fourth, if a coordinated, overarching strategy similar to successful efforts to dismantle Jim Crow is pursued with this initiative, fundamental changes can be achieved that have the potential to bring real justice and equality, long denied, to the juvenile justice system.

8. If the data are so clear and the racial disparity is so great, why haven't cases been brought to challenge this flaw in the juvenile justice system before?

Until now, injured parties have faced many challenges proving the discriminatory intent behind official policies. And when it comes to a municipality or agency, actual intent to discriminate is virtually impossible to prove even where DMC exists.

9. How does this current initiative to end racial disparity in the juvenile justice system overcome the hurdle of proving discriminatory intent?

By pursuing another route entirely. This initiative contends that failure to use knowledge about effective, validated and cheaper alternatives that reduce or eliminate DMC constitutes "deliberate indifference" and, therefore, gives rise to liability under 42 USC § 1983. When official decision-makers have had formal notice of racial disparities and alternatives that are less costly and more effective, the failure to use these alternatives represents "intentional disregard" of injury to the fundamental constitutional rights of youth in the juvenile justice system.

10. How will this "deliberate indifference" strategy unfold in the real world?

Ultimately through litigation or the threat of litigation. The first step of the strategy is to hold hearings that will put officials on formal notice of the disparity, the injury and then of the alternatives that are more effective. It is an added bonus that these alternatives tend to be substantially less expensive.

After the hearing, officials will have two choices: change their practices voluntarily or change them as a result of successful litigation against them. But the following point bears emphasis: litigation can commence only after juvenile justice officials in the jurisdiction have been put on formal notice of the injury flowing from their present juvenile confinement practices and of the availability of validated and affordable alternatives. After receiving this formal notice, the officials' continuation of their current practices represents an informed and deliberate choice to continue inflicting injury in lieu of available alternatives that are authoritatively regarded are more effective and less costly. In other words, if the responsible officials continue business as usual, there is ample basis for alleging and proving "deliberate indifference" or "intentional disregard." After all, if someone in the private sector continued using a prevailing practice while disregarding knowledge of a more efficacious and cost-effective alternative practice, that person or entity could be liable to a claim of professional malpractice or gross negligence.

11. To be effective, what will the details of this "formal notice" look like?

To establish the requisite "deliberate indifference" in the juvenile justice context, officials must receive formal notice that:

- the present system results in documented Disproportionate Minority Contact (DMC), as defined by the Juvenile Justice Delinquency Prevention Act, that violates the U.S. Constitution if the requisite discriminatory intent or purpose is shown;
- this disparity cannot be accounted for by purely racially neutral factors;
- injuries flow from this disparity, specifically from the disproportionately high detention rate for youth of color; and
- highly effective, replicated and less costly alternatives would substantially reduce DMC and these alternative methods have been made known to official decision-makers and have not been utilized.

12. How will this "formal notice" be delivered?

In a variety of ways, including a series of hearings as outlined in the June 26 Colloquium on Dismantling Structural Racism in Juvenile Justice and Child Welfare. Starting June 30, the Racial Justice Initiative will begin putting officials on formal notice of the injuries resulting from juvenile confinement practices and of the availability of validated and affordable alternatives. Facing a new legal doctrine that establishes "intent to discriminate," officials will have two choices: change their practices voluntarily or change them as a result of successful litigation against them. Any continuation of current practices will represent an

informed and deliberate choice to continue inflicting injury in lieu of better alternatives. As such, there is ample basis for alleging and proving "deliberate indifference" or "intentional disregard." Through the Racial Justice Initiative, there is now a moral, economic and legal force underway to compel judges and other officials to choose from an array of proven practices that help (not harm) America's youth.

13. Isn't there a danger that this entire initiative will undermine public safety? As deleterious as confinement might be for youth, isn't it a necessary evil that protects law-abiding society?

No and no. In fact, quite the opposite. Detention gives the appearance of protecting the public and offers the theoretical promise of rehabilitation for youth. But the reality – and evidence – shows something quite different. Unnecessarily excessive juvenile detention actually *begets* crime. Crowded facilities result in increased violence. Youth detained for long periods of time usually do not have the opportunity to further their education, and treatment programs in detention facilities are not designed to address substance abuse or a history of physical or sexual abuse. Research shows that *detention actually increases recidivism*. Not only does confinement deprive youth of liberty, it heightens the prospect that those youth will inflict more crimes on society when they are released and will create a future drain on society rather than contributing wealth and well-being to society. In fact, there is a growing national consensus, expressly reflected in the Juvenile Justice and Delinquency Prevention Act (JJDPA), that secure detention should be used as "an option of last resort only for serious, violent and chronic offenders, and for those who repeatedly fail to appear for scheduled court dates." Only a small fraction of youth confined in juvenile facilities have histories that warrant confinement.

14. What opportunities exist in the Juvenile Justice Delinquency Prevention Act (JJDPA) to reduce disparate treatment and promote proven alternatives to detention and confinement?

The JJDPA is currently up for reauthorization by Congress and it is our hope that the updated bill will carry stiff penalties for failure to reduce DMC, a private right of action for enforcement, threat of reduced funding and an incentive for local and state government to shift the allocation of its resources away from expensive and fruitless incarceration and into community based alternatives that are more effective and far less expensive.