ABSTRACT

An Offer They Can't Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives that Work

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Juveniles of color are more likely than their white counterparts to be arrested, referred to juvenile court rather than to diversion programs, charged, waived to adult court, detained pre-trial and locked up at disposition. There is ample documentation of Disproportionate Minority Contact (DMC) and a substantial body of knowledge about ways to reduce and even eliminate DMC. Nonetheless DMC persists.

Judicial relief has not been forthcoming because the requirement for injured parties to prove discriminatory intent set forth in *Washington v. Davis*, 426 U.S. 229 (1976) has thwarted efforts to dismantle structural racism stemming from the systematic practices and policies of governmental agencies.

This Article proposes a way to meet the intent requirement, utilizing the test supplied in *City of Canton v Harris*, 489 U.S. 378 (1989) that intent can be inferred when government policymakers decide among alternatives to follow an injurious course of action, demonstrating a "deliberate indifference" to rights protected by the United States Constitution and federal laws.

This Article 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 disparity 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 for youth of color in the juvenile justice system. Once put on formal notice of the racially disparate injury that flows from present practice ***and*** the availability of effective, validated, and less expensive alternatives, the decision to continue present practice with knowledge of the consequences constitutes an intentional choice reflecting "deliberate indifference."

An extensive body of knowledge has emerged over the past twenty years that would save vast amounts of money, reduce DMC, and mitigate its most injurious manifestation: the over use of detention and confinement of minority youth. Officials have an obligation to make use of knowledge where existing practices have a disproportionately injurious impact on youth of color.

This Article summarizes the legal argument and precedent, provides a brief overview about practices that would reduce or eliminate DMC, lays out a pre-litigation, public hearing process designed to confront officials with the explicit choice to use or fail to use effective practices and describes two highly successful alternatives to secure confinement with which the authors have personal knowledge.

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