

**AN OFFER THEY CAN'T REFUSE:
RACIAL DISPARITY IN JUVENILE JUSTICE AND DELIBERATE
INDIFFERENCE MEET ALTERNATIVES THAT WORK***

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INTRODUCTION

While young people of all races commit delinquent acts, some are provided treatment while others are detained and incarcerated. Once incarcerated, these youth begin their slide down a slippery slope; they lack an equal opportunity to gather evidence and prepare their cases. Furthermore, they will be effectively deprived of the opportunity and the resources to develop the educational and employment skills necessary to progress to productive adult lives. It is well documented that juveniles of color are more likely than their white counterparts to be arrested,¹ referred to juvenile court rather than to diversion programs, charged, waived to adult court, detained pre-trial, and locked up at

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¹ We use the term "youth of color" throughout this article primarily to refer to African-American and Latino youth. The Office of Juvenile Justice and Delinquency Prevention ("OJJDP") defines minority populations – youth of color – as African Americans, American Indians, Asians, Pacific Islanders, and Hispanics. OJJDP Substantive Requirements for Grant Programs, 28 C.F.R. § 31.303(j)(6) (2009).

disposition.² What recent studies have shown, however, is that these disparate outcomes are not solely the product of race neutral factors. 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. There is incontrovertible evidence that race bias affects critical decisions leading to detention or confinement. The consequences of this disparate treatment can be devastating to juveniles of color and any community aspiring to make good on the guarantee of equal justice.³

Efforts to address these disparities have thus far produced little more than a “multi-million 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 (“DMC”), but never reaching an answer.”⁴ In 1992 and

² NAT’L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 3 (2007) [hereinafter AND JUSTICE FOR SOME]. From 2002 to 2004, African Americans comprised: 16% of all youth; 28% of juvenile arrests; 30% of referrals to juvenile court; 37% of the detained population; 34% of youth formally processed by the juvenile court; 30% of adjudicated youth; 35% of youth judicially waived to criminal court; 38% of youth in residential placement; and 58% of youth admitted to state adult prison. *Id.* Over the last thirty years, multiple studies have shown that disproportionate minority contact (“DMC”) afflicts nearly every processing point in nearly every juvenile justice system in the country. Perry Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 310 (2008). From the mid-1980s to 1995, the number of white youth in detention decreased while the number of minorities in detention increased until minorities represented the greater part of detained young people. BARRY HOLMAN ET AL., JUSTICE POLICY INST., DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 12 (2006) [hereinafter DANGERS OF DETENTION].

³ Michael J. Leiber, *Disproportionate Minority Confinement of Youth: An Analysis of State and Federal Efforts to Address the Issue*, 48(1) CRIME & DELINQUENCY 11-14, app. d (2002) (noting that 32 of 46 studies conducted by 40 different states reported “race effects,” defined as “the presence of a statistically significant race relationship with a case outcome that remains once controls for legal factors have been considered”); Carl E. Pope et al., *Disproportionate Minority Confinement: A Review of the Research Literature from 1989 Through 2001*, OJJDP BULL. 5, http://ojjdp.ncjrs.org/dmc/pdf/dmc89_01.pdf (noting that 25 of 34 studies reviewed reported “race effects” in the processing of youth). By 1997, in thirty states – representing 83% of the national population – minority youth comprised the majority of youth in detention. DANGERS OF DETENTION, *supra* note 2, at 12. Even in states with minuscule ethnic and racial minority populations, more than 50% of the youth detained were minorities. *Id.* Additionally, a study by the OJJDP found that in 49 states the numbers of detained minority youth exceeded their proportion of the nation’s population. *Id.*

⁴ JAMES BELL ET AL., W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION 15 (2008). The Juvenile

again in 2002, in its reauthorization of the Juvenile Justice & Delinquency Prevention Act (“JJDP” or “the Act”), Congress made clear that it was concerned about DMC and elevated a mandate to address it to a core requirement of the Act. The Office of Juvenile Justice and Delinquency Protection (“OJJDP”) has launched a technical assistance website and database and funneled millions of dollars to states to study and reform their local juvenile justice systems.⁵ There have been numerous conferences, meetings, and studies. States have added DMC specialist staff positions. And yet, despite this long-term and substantial investment of governmental resources, the bottom line is that there has been virtually no reduction in DMC in most jurisdictions.

For decades, despite the persuasive data documenting DMC, the requirement for injured parties to prove discriminatory intent set forth in *Washington v. Davis*⁶ and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁷ then reaffirmed by *McCleskey v. Kemp*,⁸ has thwarted efforts to dismantle structural racism stemming from the systematic practices and policies of governmental agencies. When it comes to a municipality or an agency, intent to discriminate is virtually impossible to prove.⁹ However, in *City of Canton v. Harris*, the Supreme Court provided one explicit

Justice and Delinquency Prevention Act (“JJDP”) originally provided that “DMC” was an acronym for “Disproportionate Minority Confinement,” which occurs when the percentage of minority youth confined in juvenile justice system facilities exceeds their proportion in the general population. 42 U.S.C. § 5633(a)(22) (1988). In 2002, Congress expanded the concept of DMC to include any point of “contact” with the juvenile justice system at which minority youth are overrepresented. *See* 42 U.S.C. § 5633(a)(22) (2006). The acronym “DMC” now commonly refers to “Disproportionate Minority Contact.” *Id.*

⁵ *See* Development Services Group, Inc., <http://www.dsgonline.com/index.html##p> (last visited Mar. 10, 2009) [hereinafter DSG Website].

⁶ *Washington v. Davis*, 426 U.S. 229 (1976).

⁷ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Our decision last Term in *Washington v. Davis* made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.”). Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. *Id.*

⁸ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

⁹ William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the*

test that results in a finding of municipal intent and liability.¹⁰ 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.¹¹

This Article applies the Supreme Court’s “deliberate indifference” test in a new context – enforcement of equal protection rights – to address the problem of disproportionate minority contact in the juvenile justice system.¹² The juvenile justice system continues to subject youth of color to the high risks of injury from decisions regarding detention and confinement that manifest a racial bias.¹³ These decisions demonstrate “deliberate indifference” when decision-makers are on formal notice of preferable, less costly and less injurious alternatives. This pattern of practices, if maintained, violates constitutional rights and gives rise to a valid claim for damages and injunctive relief.¹⁴

Twentieth Century, 100 MICH. L. REV. 2062, 2107 (2002); Serena A. Hoy, *Interpreting Equal Protection: Congress, the Courts and the Civil Rights Acts*, 16 J. L. & POL. 381, 417 (2000); Charles Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987).

¹⁰ *City of Canton v. Harris*, 489 U.S. 378 (1989) (finding that a failure to provide training for police officers in the use of deadly force was reckless or grossly negligent because it could be anticipated – with substantial certainty – that the lack of training would deprive persons’ of their constitutional rights).

¹¹ *Id.*; *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

¹² Although we developed this analysis in the juvenile justice context, our proposed strategy might also be applicable in other contexts, such as child welfare and special education.

¹³ Administration of juvenile justice varies by jurisdiction in regard to the number of players, their respective roles and who bears decision-making authority for such aspects as diversion, charging and detention. These varied players include, among others: police officers, prosecutors, probation departments, court social services departments, youth services departments, and schools. Accordingly, system change strategies must be tailored to reflect the readiness, resources and roles in each particular jurisdiction under review. This article is designed to set in motion the dynamics necessary to effectuate systems change by providing a strategy to overcome the historic “discriminatory intent” barrier to successful litigation.

¹⁴ 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an

This Article also proposes a system change strategy that envisions the use of litigation as the last step and last resort. We urge tactical reliance upon the use of other forums and processes to engage officials and enlist public support for these more efficacious approaches. To establish the requisite “deliberate indifference” in the juvenile justice context, we posit the need for a process to put officials on formal notice that:

- (1) the present system results in documented disproportionate minority contact that violates the United States Constitution if the requisite discriminatory intent or purpose is shown;
- (2) this disparity cannot be accounted for by purely racially neutral factors;¹⁵
- (3) injuries flow from this disparity, specifically from the disproportionately high detention rate for youth of color;¹⁶ and
- (4) highly effective, replicated, and less costly alternatives would substantially reduce disproportionate minority contact and these methods have been made known to official decision-makers and have not been utilized.

When official decision-makers had formal notice of alternatives that are less costly and yield significant, sustained effects that have been replicated or have earned designation as promising or exemplary, the failure to use these alternatives represents “intentional

act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

¹⁵ We make this assertion because youth who are white and commit the same offenses as youths of color are treated differently and alternatives known to officials have been more frequently utilized for white youth. These available alternatives are more effective and less expensive than present practice. These alternatives have been formally recognized and recommended by authoritative sources.

¹⁶ Although DMC manifests at all key milestones of the juvenile process, this article focuses on the decision points that result in confinement. Particularly, detention decisions prior to adjudication because this is pivotal to the eventual outcomes for any juvenile who finds him or herself behind bars. “More than fifteen years of experience suggests that changing practices and procedures to bring greater rationality to the use of juvenile detention could be an important component in efforts to reduce disparity.” CENTER FOR JUVENILE JUSTICE REFORM, UNDERSTANDING RACIAL AND ETHNIC DISPARITY IN CHILD WELFARE AND JUVENILE JUSTICE: A COMPENDIUM, 29 (2009); *see also* Moriearty, *supra* note 2, at 291 (2008).

disregard” of injury to the fundamental constitutional rights for youth of color in the juvenile justice system.¹⁷

Officials have an obligation to make use of knowledge where existing practices have a disproportionately injurious impact on youth of color. Part I of this Article provides a truncated summary of the extent to which DMC pervades the juvenile justice system and violates a youth’s constitutional right to equal protection; it thereby gives dimension to the scale of the injury inflicted. Excessive use of detention may also give rise to a Due Process claim that is equally injurious to all youth – white as well as youth of color.¹⁸ However, the central purpose of this Article is to propose a way to meet the “intent” requirement under the Equal Protection Clause by providing a structured opportunity for officials to choose cost-effective alternatives that would reduce DMC instead of options that are ineffective and racially biased.

Part II analyzes how using “deliberate indifference” as the gravamen of a complaint under 42 U.S.C. § 1983 addresses the intent requirement that has operated as a barrier to relief in the past. Part III describes the extensive body of knowledge which has emerged over the past fifteen years that, if used, would save vast amounts of money, reduce DMC, and mitigate its most injurious manifestation – the use of detention and confinement of minority youth. It also describes two highly successful alternatives to

¹⁷ ROBIN L. DAHLBERG, ACLU RACIAL JUSTICE PROJECT, LOCKING UP OUR CHILDREN: THE SECURE DETENTION OF MASSACHUSETTS YOUTH AFTER ARRAIGNMENT AND BEFORE ADJUDICATION (2008). “In 2006, it cost Massachusetts taxpayers approximately \$15,000 to detain a child for 16 days (the average length of stay) in one of DYS’s facilities. At the same time, it costs less than \$1500 to provide a child who was permitted to remain at home with 6 to 8 weeks of supervision to ensure that he returned to court and didn’t re-offend.” *Id.*

¹⁸ The Supreme Court has severely circumscribed the liberty interest of juveniles. *See Schall v. Martin*, 467 U.S. 253, 263 (1984) (noting that children are assumed to be subject to control of their parents and that if parental control falters, “the juvenile’s liberty interest may be subordinated to the state’s *parens patriae* interest in preserving and promoting welfare of the child”) (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)). Accordingly, we have focused exclusively on the violation of Equal Protection rather than on denial of Due Process.

secure confinement with which the authors have experience that illustrate how readily beneficial and cost effective system change could be initiated.

Part IV discusses how courts deal with public interest litigation designed to effect system change. Instead of limiting the search for proof of intent to past actions and practice, we propose to extend the focus to include present and future actions taken following a proffer of alternatives. Thus, the relevant officials in the juvenile justice system need to be given a prospective choice to use alternatives to detention that have proven to be effective, including initial diversion. If these officials persist in continuing a present practice, they will have manifested the requisite “deliberate indifference.”

I. WHAT COLOR IS JUVENILE JUSTICE?

Since the turn of the last century, a separate system of juvenile justice has developed in the United States that is expressly designed to serve the “best interests of the child” and to rehabilitate any young person who has erred in judgment and conduct.¹⁹ It should not matter what color young people are if they misbehave or commit acts that would be crimes if they were adults. All too often, however, the color of a young person’s skin defines the experience he or she will have in the juvenile justice system. A cascading series of decisions throughout the juvenile justice process can determine

¹⁹ The first separate juvenile court was created by the Illinois Juvenile Court Act of 1899. In response to the Reformist Movement of the late nineteenth century, the Illinois legislature created a rehabilitative system for adjudication of youth under the age of sixteen in order to separate juveniles from the social stigma and procedural formalities associated with the adult criminal process. Robert E. Shepherd, Jr., *The Juvenile Court at 100 Years: A Look Back*, in 4 JUV. JUST. J. 2 (1999), available at <http://www.ncjrs.gov/html/ojjdp/jjjournal1299/2.html>. Because the guiding principle for creation of the first juvenile court was “[a] child should be treated as a child,” it was unacceptable that children under sixteen would be prosecuted and incarcerated in prisons “before they knew what crime was.” Ann Reyes Robbins, *Troubled Children and Children in Trouble: Redefining the Role of the Juvenile Court in the Lives of Children*, 41 U. MICH. J. L. REFORM 243 (2007).

whether resources are spent on rehabilitation, as called for and supported by the JJDP, ²⁰ or whether a single bad act places a youth on a path that will irrevocably delimit his future as a life journey down the “cradle to prison” pipeline. ²¹

A. Equal Justice is the Casualty of Disproportionate Minority Contact

[F]airly viewed, pretrial detention of a juvenile gives rise to injuries comparable to those associated with the imprisonment of an adult. ²²

Removing young people from their communities and dropping them into secure detention halts their development while causing many long-term injurious consequences that amount to anything but rehabilitation. Too often, youth of color get locked up; they are much like the fossilized insect frozen in petrified amber, stuck. Recent brain development research indicates that mature decision-making capacity may not develop until the age of twenty, or even later in some instances. ²³ 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. ²⁴

²⁰ 42 U.S.C. §§ 5601–5784 (2002). The purpose of the JJDP is to support state and local programs to prevent juvenile involvement in delinquent behavior, promote public safety by encouraging juvenile accountability, and to provide technical assistance and information on programs to combat juvenile delinquency. *See id.*

²¹ THE CHILDREN’S DEFENSE FUND, AMERICA’S CRADLE TO PRISON PIPELINE 5 (2007), available at <http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-highres.html>. In 2007, The Children’s Defense Fund launched an initiative, the Cradle to Prison Pipeline Campaign, to address and interrupt this apparent pipeline for young people, particularly low income youth of color. *Id.* The organization’s vision calls for a paradigm shift in the juvenile system’s current focus of punishment and incarceration to one focused on investment, prevention, and intervention in the lives of all young people. *Id.*

²² *Schall*, 467 U.S. at 291 (Marshall J., dissenting).

²³ Elizabeth Cauffman et al., *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 756 (2000).

²⁴ *Id.* at 7 (noting that incarceration interrupts and delays a youth’s normal pattern of discontinuing delinquent behavior as they mature due to its effect on community, education, and employment engagements).

Adolescent antics are a predictable developmental byproduct of youth.²⁵ As teenagers mature they grow less inclined to act out. This is particularly true when youth live in the community with access to support from family or surrogate supervision, wrap-around and enrichment programming, mentors, role models, school, and employers.²⁶ Most youth desist from delinquent behavior once they have achieved educational and employment milestones.²⁷ Detention often arrests a youth's developmental process and propels him in a different direction, as evidenced by recidivism rates of 50% to 80% for youth who have been incarcerated.²⁸ Adolescents are very suggestible, seeking a sense of belonging, confidence, and competency. When incarcerated in close proximity to other delinquent youth, this environment promotes the development of antisocial behavior among teenagers seeking both competency in illicit behavior and acceptance by their peers.²⁹

²⁵ U.S. DEP'T OF HEALTH & HUMAN SERV., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL, ch. 3 (2000), available at <http://www.surgeongeneral.gov/library/youthviolence/>. As many as one-third of youth exhibit delinquent behaviors; however, most will naturally "age out" of such actions as they attain maturity. DANGERS OF DETENTION, *supra* note 2, at 6. "According to Dr. Delbert Elliott, former President of the American Society of Criminology and head of the Center for the Study of the Prevention of Violence, although the rate of delinquent behavior appears high, the rate at which the criminal behavior ceases is also high." *Id.*

²⁶ DANGERS OF DETENTION, *supra* note 2, at 6.

²⁷ *Id.* Studies show that youth able to establish a relationship with a partner or mentor, as well as obtain employment, correlates with the ability of youthful offenders to cease delinquent behavior. *Id.*

²⁸ According to the Annie E. Casey Foundation,

In fact, recidivism studies routinely show that 50 to 80 percent of youth released from juvenile correctional facilities are rearrested within 2 to 3 years – even those who were not serious offenders prior to their commitment. Half or more of all released youth are later re-incarcerated in juvenile or adult correctional facilities. Meanwhile, correctional confinement typically costs \$200 to \$300 per youth per day, far more than even the most intensive home- and community-based treatment models.

ANNIE E. CASEY FOUND., 2008 KIDS COUNT ESSAY: A ROAD MAP FOR JUVENILE JUSTICE REFORM 9 (2008) [hereinafter ROAD MAP FOR JUVENILE JUSTICE].

²⁹ Thomas J. Dishion, et al., *When Interventions Harm: Peer Groups and Problem Behavior*, 54 AM. PSYCHOLOGIST 755-64 (Sept. 1999).

In 2006, the Department of Justice reported that 96,655 juveniles were incarcerated in youth detention centers.³⁰ African American youth constitute 16% of U.S. youth but 38% of the youth in detention.³¹ In many states, the disparity is even greater.³² Minorities are more likely than whites to be formally charged in juvenile court and to be sentenced to out-of-home placement, even when referred for the same offense.³³

Today, Latin, Native, Asian, Pacific Islanders, and African Americans are 35% of the U.S. youth population, yet comprise 65% of all youth who are securely detained pre-adjudication.³⁴ Youth of color are four times more likely to be arrested for a drug trafficking offense,³⁵ even though white teens self-reported experiences of using and selling drugs at rates greater than African American teens.³⁶ 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.³⁷

³⁰ HOWARD N. SNYDER ET AL., NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 211 (2006).

³¹ *Id.* at 2.

³² *Id.* at 213.

³³ AND JUSTICE FOR SOME, *supra* note 2, at 2.

³⁴ Eleanor Hynton Hoytt et al., *Reducing Racial Disparities in Juvenile Detention*, in 8 ANNIE E. CASEY FOUND. PATHWAYS TO JUVENILE DETENTION REFORM 18 (2001).

³⁵ SNYDER, *supra* note 30, at 211. In 2003, 79% of the youth incarcerated for drug trafficking offenses were minorities, compared to 21% for white youth. *Id.* During this period, 73% of adjudicated drug offense cases involved a white youth; white youth comprised 58% of the offenders receiving out-of-home placements and 75% of those receiving formal probation. *Id.* Contrastingly, 25% of adjudicated drug offense cases involved an African American youth; African American youth comprised 40% of the offenders receiving out-of-home placements and 22% of those receiving formal probation. *Id.*

³⁶ Carl McCurley et al., *Co-Occurrence of Substance Use Behaviors in Youth*, OJJDP JUV. JUST. BULL. 4 (Nov. 2008), <http://www.ncjrs.gov/pdffiles1/ojjdp/219239.pdf>. The 1997 Longitudinal Survey of Youth indicates that white and Hispanic youth were “more likely than African American youth to report . . . substance-related behavior (twenty-nine, twenty-six, and nineteen percent, respectively).” *Id.* Additionally, “whites and Hispanics were more likely than African Americans to report drinking alcohol [and] whites were more likely than African Americans to report either marijuana use or selling drugs.” *Id.*

³⁷ Alex R. Piquero, *Disproportionate Minority Contact*, 18 FUTURE OF CHILD. 59, 62 (Fall 2008), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/41/92/3a.pdf.

Additionally, minorities account for more than 58% of youth admitted to state adult prisons.³⁸

The systematic failure of many state and local authorities to collect data by race stymies efforts to fully document, explain, and address disproportionality.³⁹ Nonetheless, the information that does exist strongly suggests that racial bias accounts for disproportionate treatment at each stage of the juvenile justice process and that its consequences are severe in regard to decisions concerning juvenile incarceration.

B. Collateral Consequences of Confinement

Incarcerated youth typically do not receive the education nor the healthcare that would have been available to them had they been sent home under supervision. Correctional systems have been the dumping ground for children with mental health, substance abuse, family-related, and behavioral problems – along with those suffering undiagnosed and untreated developmental disabilities.⁴⁰ Studies estimate that as many as 70% of incarcerated youth have diagnosable mental health problems.⁴¹

The legal collateral consequences that result from juvenile incarceration have been dubbed “invisible punishment” by Jeremy Travis, former director of the National Institute of Justice.⁴² These consequences increasingly and disproportionately harm the

³⁸ *Id.* at 63.

³⁹ DAHLBERG, *supra* note 17, at 5.

⁴⁰ Joseph J. Cocozzo & Kathleen Skowrya, *Youth with Mental Health Disorders: Issues and Emerging Responses*, 7 JUV. JUST. J. 3, 4-5 (April 2000), http://www.ncjrs.gov/html/ojjdp/jjnl_2000_4/youth.html.

⁴¹ James Austin et al., *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, OJJDP JUV. JUST. BULL. 2 (Sept. 2005), <http://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf>. “Between 50 and 70 percent of incarcerated youth have a diagnosable mental illness and up to 19 percent may be suicidal, yet timely treatment is difficult to access in crowded facilities.” *Id.* See also Linda A. Teplin, *Assessing Alcohol, Drug, and Mental Disorders in Juvenile Detainees*, OJJDP FACT SHEET (Jan. 2001), <http://www.ncjrs.gov/pdffiles1/ojjdp/fs200102.pdf>.

⁴² See JEREMY TRAVIS, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer et al. eds. 2002).

life options for youth of color.⁴³ For anyone convicted of a felony drug offense, collateral consequences include lifetime bans on the receipt of federal benefits, such as food stamps and other types of public assistance.⁴⁴ For anyone convicted of a drug related offense or activity, collateral consequences include denial of public housing and student loans.⁴⁵ Disproportionately high rates of conviction and incarceration of juveniles of color for drug related offenses drastically diminish their ability to participate in their communities after they are released.⁴⁶ Confinement in juvenile facilities represents a significant separation from the communities to which these youth return. Substantial obstacles must be overcome upon release from confinement, such as re-entry to public schools, obtaining marketable skills, and finding employment opportunities.⁴⁷

II. DELIBERATE INDIFFERENCE: REFRAMING DISPROPORTIONATE MINORITY CONTACT FOR A § 1983 COMPLAINT

The Juvenile Justice Delinquency Prevention Act (“JJDP A”) is designed to provide the necessary resources, leadership and coordination to develop and conduct effective programs to: prevent delinquency; divert juveniles from the traditional juvenile justice system; and provide critically needed alternatives to the institutionalization of youth.⁴⁸ And, the JJDP A provides states with the funds and expertise they need to meet

⁴³ Marc Mauer, *Invisible Punishment: Block Housing, Education, Voting*, FOCUS MAG., May/June 2003, at 3, 4.

⁴⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 115, 110 Stat. 2180 (1996).

⁴⁵ Quality Housing and Work Responsibility Act of 1998, Pub. L. 105-276, § 576 (1998) (current version at 42 U.S.C. § 13661 (2006)); Higher Education Act, 20 U.S.C. § 1091(r)(1) (2006).

⁴⁶ Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (holding that federal Anti-Drug Abuse Act required lease terms that gave local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engaged in drug-related activity, regardless of whether tenant knew, or should have known, of the drug-related activity); *see also* DANGERS OF DETENTION, *supra* note 2, at 7.

⁴⁷ Tamara A. Steckler, *Litigating Racism: Exposing Injustice In Juvenile Prosecutions*, 60 RUTGERS L. REV. 245, 258 (2007).

⁴⁸ Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5602(b) (2000).

these goals.⁴⁹ Four core protections of the Act are explicit: (1) deinstitutionalizing status offenders; (2) separating juvenile and adult offenders in secure confinement; (3) eliminating the practice of detaining or confining juveniles in adult jails and lockups; and (4) addressing the disproportionately large number of minority youth who come into contact with the juvenile justice system.

Earlier court decisions have found an implicit private right of action in three of these JJDPA protections – not jailing status offenders, separating adult and juvenile offenders and ceasing to confine juveniles in adult jails.⁵⁰ However, the policy mandate to address the disproportionate minority contact (“DMC”) simply means that the states must submit a plan that addresses DMC. The JJDPA does not set numerical standards nor require states to adopt measures known to be effective. Such requirements could be added through amendments or through the regulations governing state plan requirements.⁵¹ To be enforceable, however, an express private right of action likely is necessary in light of two Supreme Court decisions: *Alexander v. Sandoval*⁵² and *Gonzaga University v. Doe*.⁵³ While an action in mandamus might lie to secure effective enforcement, it is not likely to succeed until Congress amends the JJDPA provisions governing core DMC measures in a

⁴⁹ Cruz v. Collazo, No. 77-83084, 1979 U.S. Dist. LEXIS 8941, at *13 (D.P.R. Oct. 26, 1979).

⁵⁰ Hendrickson v. Griggs, 672 F. Supp. 1126, 1134 (N.D. Iowa 1987).

⁵¹ On March 24, 2009, Senator Patrick Leahy introduced the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2009. Press Release, Office of Senator Leahy, Leahy Introduces Juvenile Justice Reauthorization Bill (Mar. 24, 2009), <http://leahy.senate.gov/press/200903/032409b.html>. This Act will strengthen provisions related to the disproportionate minority contact core requirement by providing additional direction for states and localities on how to identify and reduce racial and ethnic disparities among youth who come into contact with the juvenile justice system. *Id.* In addition, state juvenile justice system plans must provide alternatives to detention that include diversion to home-based detention or community-based services for youth in need of treatment for mental health, substance abuse, or co-occurring disorders. *Id.* States must also include plans to: reduce the number of children housed in secure detention facilities who are awaiting placement in residential treatment programs; encourage inclusion of family members in the design and delivery of juvenile delinquency prevention and treatment services – particularly, post-placement; and use community-based services for addressing needs of at-risk youth and those who have come into contact with the juvenile justice system. *Id.*

⁵² *Alexander v. Sandoval*, 532 U.S. 275 (2001).

⁵³ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

manner that makes the requirements, consequences and enforcement processes far more specific. At present, all a state must show is that it is investigating the DMC problem.

This Article proposes that the community of people concerned about juvenile justice and reducing DMC need not and should not wait idly, hoping the next Congressional re-authorization mandates more effective enforcement.⁵⁴ Historically, federal agencies have been extremely reluctant to withhold funds from states even in the face of egregious violations. These agencies regard funding cut-offs as the equivalent of using a nuclear bomb and, in excessive deference to federalism, are often leery of acting. It is possible that this reluctance also is being reinforced by JJDPAs' grantee assertions that federal funding is essential to the viability of both the law enforcement apparatus and the preservation of law and order, such as it is; therefore the grantor cannot risk withholding federal funds to enforce any prohibition against DMC. Being tough on crime has political appeal. Given the state of the economy, those administering the JJDPAs could be held responsible for any increase in crime if they cut back on resources as a penalty for failure to reduce DMC in the juvenile justice system. Despite what is known by many – that waiver of juveniles to adult court ultimately increases the likelihood of recidivism – we have not heard the last of slogans like “adult time for adult crime.”

Failure to address DMC sets the stage for an equal protection action under § 1983. Because of the nature of such a claim, liability will ensue if, and only if, the parties

⁵⁴ FEDERAL ADVISORY COMMITTEE ON JUVENILE JUSTICE, ANNUAL REPORT 2008 xvi-xvii, 20-24 (2008), available at http://www.facjj.org/annualreports/ed_08-FACJJ%20Annual%20Report%202008.pdf. Reasonable people can disagree as to whether fund cut-offs would trigger the needed changes. The Federal Advisory Committee on Juvenile Justice has recommended expansion of the Edward Byrne Memorial Justice Assistance Grant Program, promotion of community wide collaboration, creation of funding incentives to pool funds from multiple federal programs, and interdisciplinary teams to develop cross-training models, legal models, technical assistance and emergency services for children who are in both the juvenile justice and child welfare systems. *Id.*

injured by a state action that produces DMC can prove that the disparity resulted from an intent to discriminate.

A. Intentional Indifference is an Interference with Constitutional Rights: A Different Approach for Remedy Under § 1983

While numerous threshold requirements must be met to initiate a § 1983 action, there are two primary cases that have made it more difficult to prove intent when bringing an action based on disparate impact. In *Washington v Davis*, the Supreme Court held that a mere showing of disparate racial impact of a facially race neutral policy or practice is not sufficient.⁵⁵ The Court later raised the hurdle for plaintiffs in *McCleskey v. Kemp*, where the petitioner presented what continues to be one of the most comprehensive multi-regression studies ever conducted on the impact of race in sentencing.⁵⁶ However, even such a well-documented, statistically significant and discriminatory pattern was insufficient to support an inference that any of the decision-makers in *McCleskey* acted with discriminatory purpose.⁵⁷ *McCleskey* hoped to prove that administration of the death penalty was racially discriminatory and, accordingly, that his death sentence violated the Constitution. The Court reasoned that what other juries had done in sentencing defendants to death did not prove that the jury in *McCleskey*'s case had discriminated against him on the basis of race.⁵⁸ According to the Court, the probability of a discriminatory motive was insufficient to prove actual discrimination by one particular jury. The Court further observed that any number of other factors might have accounted for the *McCleskey* verdict and that the uniqueness of every jury

⁵⁵ *Washington*, 426 U.S. at 245 (holding that the plaintiff must prove that the discriminatory impact was the result of a specific racially discriminatory intent).

⁵⁶ *McCleskey*, 481 U.S. at 286-91.

⁵⁷ *Id.* at 293.

⁵⁸ *Id.* at 295-96.

forestalled inferring motive in a particular instance from a statistical pattern of disparity.⁵⁹

The *McCleskey* defense can be anticipated in response to a cause of action brought by any particular juvenile in detention who alleges racial discrimination in the decision to confine him or her in a secure facility. The circumstances of the juvenile justice process, however, can be distinguished from *McCleskey* due to the repetitive experience and policy influence of the juvenile justice decision-makers..

B. Addressing the Requirement of Intent

Washington and *McCleskey* stand for the governing precedent that a showing of disparate impact alone will not suffice. When it comes to a municipality or an agency, actual intent to discriminate is necessary but virtually impossible to prove – even where DMC exists, some non-discriminatory public purpose justification for the policy or action can usually be found in an individual case. The Supreme Court has, however, provided one explicit test which, if met, results in liability: when “deliberate indifference” has been shown to rights protected by the Constitution and federal laws. Under such circumstances, “execution of the government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the Constitutional injury, that the government, as an entity, is responsible under § 1983.”⁶⁰

⁵⁹ *Id.* at 293-300.

⁶⁰ *Monell v. Dep’t of Soc. Serv.*, 436 U.S. 658, 694 (1978).

In *City of Canton v. Harris*,⁶¹ the Supreme Court determined that a local government could be held liable for the inadequate training of its police officers. Justice White wrote:

We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition . . . that a municipality can be liable under §1983 only where its policies are the “moving force [behind] the constitutional violation.” Only where a municipality’s failure to train its employees in a relevant respect evidences a “deliberate indifference” to the rights of its inhabitants can such a shortcoming be properly thought of as a city “policy or custom” that is actionable under §1983. As Justice Brennan’s opinion in *Pembaur v. Cincinnati*, put it: “[M]unicipal liability under §1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives” by city policymakers. Only where a failure to train reflects a “deliberate” or “conscious” choice by a municipality-a “policy” as defined by our prior cases-can a city be liable for such a failure under §1983.⁶²

This holding’s essence is that liability can be based on constructive intent as inferred from actual knowledge of predictable injury and the subsequent rejection or disregard of known alternatives that would have averted that injury.⁶³ Intent can be inferred when a constitutional injury was substantially certain to result and the decision-maker chose to continue a course of action that perpetuated a pattern tainted by racial bias when alternatives were known and available that would have averted the injury.⁶⁴ Moreover, an

⁶¹ *City of Canton*, 489 U.S. at 388.

⁶² *Id.* (citations omitted).

⁶³ *See, e.g., Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir. 1992). In *Walker*, the Second Circuit articulated three criteria for constructive intent: (1) the policy maker must know “to a moral certainty” that his other employees will confront a particular situation; (2) “the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or . . . there is a history of employees mishandling the situation; and (3) the wrong choice by the employee frequently causes constitutional deprivation. *Id.* *See also* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 6-190 (4th ed. 1997, 2007).

⁶⁴ A similar standard for “deliberate indifference” was invoked in an Eighth Amendment case involving cruel and unusual punishment. *See Farmer v. Brennan*, 511 U.S. 825 (1994). In *Farmer*, Justice Souter,

“objective obviousness” standard is employed to identify the threshold for holding a government entity responsible for deliberate indifference to the constitutional rights committed by its inadequately trained agents.⁶⁵ The *City of Canton* Court’s deliberate indifference inquiry into liability focused on obviousness, or constructive notice, an objective standard for inferring intent.

In the juvenile justice context, we propose to use this same standard to redress violations of the Equal Protection Clause. Our theory is that government policies and practices subject a juvenile of color to the infliction of sanctions that are far greater and more punitive than if the same offense had been committed by a white youth. Sanctions on account of race include: deprivation of liberty; developmental injury; deprived access to special education and other wrap-around services that are available to non-detained youth; an increased likelihood of personal injury; intensification of established risk factors; restricted ability to find witnesses or secure probation; and a predictably higher probability of recidivism.⁶⁶ To prove “deliberate indifference” for purposes of a §1983 claim, the plaintiff must demonstrate: (1) injury to a right protected by the Constitution or federal law; (2) that the injury was relatively certain to occur; and (3) that the

writing for a unanimous court, defined the term deliberate indifference in the context of criminal confinement as “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.* at 980.

⁶⁵ *Collins v. City of Harker Heights*, 503 U.S. 115, 124 (1992).

⁶⁶ Nancy Rodriguez, *A Multilevel Analysis of Juvenile Court Processes: The Importance of Community Characteristics 25* (June 30, 2008) (unpublished manuscript, on file with the National Institute of Justice), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/223465.pdf>.

[J]uveniles who were informally processed were less likely to reoffend post age 17 in urban jurisdictions. Models with the detention outcome as a predictor of recidivism reveal that juveniles who were detained were more likely to recidivate post age 17 in both urban and rural counties . . . [J]uveniles who were removed from the home at disposition were more likely to reoffend post age 17. This effect was significant in both the urban and rural jurisdictions.

Id.

government's course of action was one selected from among various alternatives.⁶⁷ Use of an alternative to detention will eliminate the injury that comes from a racially biased detention decision.

C. *“Deliberate Indifference” Stems from a Duty to Use Knowledge*

The origin of the juvenile justice system fundamentally relies on the intent to provide for the welfare of the youth in its ambit, with rehabilitation being the primary goal. The JJDPa promotes seeking the least restrictive alternative and specifically anticipates detention only for those youth who pose either significant risks of flight and failure to return to court, or risk of endangerment to themselves or to public safety.⁶⁸ Estimates of the number of youth for whom detention is warranted range from five to twenty percent. A combination of procedures has been proven to dramatically reduce the average daily population in secure detention without increased risk to public safety. These include the use of objective risk screening instruments,⁶⁹ diversion from the system altogether, expedited case processing, and rigorously designed alternatives to detention.

⁶⁷ SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 209-247 (Mary Massoron Ross et al. eds., 3rd ed. 2007).

⁶⁸ Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5603(19)(A) (2002); Austin, *supra* note 41, at 1.

⁶⁹ Austin, *supra* note 41, at 6, 8.

The key attributes of objective classification and risk assessment instruments are: [1] They employ an objective scoring process; [2] They use items that can be easily and reliably measured meaning the results are consistent both across staff and over time as they relate to individual staff members; and [3] They are statistically associated with future criminal behavior, so that the system can accurately identify offenders with different risk levels.

. . . .

The factors to be considered in objective detention risk assessments can be separated into four categories: [1] Number and severity of the current charges; [2] Earlier arrest and juvenile court records; [3] History of success or failure while under community supervision . . . ; and [4] Other ‘stability’ factors associated with court appearances and reoffending (e.g., age, school attendance, education level, drug/alcohol use, family structure).

Id.

In fact, several states committed to reducing DMC were able to also reduce juvenile crime and recidivism.⁷⁰ Every state receives funding expressly dedicated to providing access to the knowledge and technical assistance needed to reduce DMC; the strategy outlined in this Article provides a way to ensure that states do reduce DMC.

Every youth, irrespective of race, is entitled to a level of care that honors the purpose of the JJDP by limiting juvenile confinement to only the situations in which it is truly required. Equal protection of the law means that the risk of injury from failure to use knowledge should not be compounded by race-biased decision making. Therefore, the injured parties must serve formal notice on the relevant government officials that the current practices result in a continuing injury. This notice should be coupled with a presentation of effective and cost efficient alternatives to confinement. Refusal to utilize these alternatives would constitute an intentional disregard of foreseeable injury and an infringement of constitutionally protected rights.

The OJJDP, through its partnership with Development Services Group, Inc., has gone to extraordinary lengths to make available knowledge about model programs and DMC reduction.⁷¹ For the past fifteen years, the Annie E. Casey Foundation has implemented its Juvenile Detention Alternatives Initiative (“JDAI”) in nearly one hundred locations throughout twenty-two states and the District of Columbia.⁷² We submit that the requisite proof of available alternatives is provided by the extensive

⁷⁰ The Annie E. Casey Foundation Juvenile Detention Alternatives Initiative, “is one of the most effective, influential, and widespread juvenile justice reform initiatives” “after more than a decade of innovation and replication.” Juvenile Detention Alternatives Initiative, Annie E. Casey Foundation, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx> (last visited Mar. 16, 2009) [hereinafter AECF Detention Alternatives Website]; ELIZABETH DRAKE, WASH. STATE INSTIT. FOR PUB. POLICY, EVIDENCE-BASED JUVENILE OFFENDER PROGRAMS: PROGRAM DESCRIPTION, QUALITY ASSURANCE, AND COST (June 2007), <http://www.wsipp.wa.gov/rptfiles/07-06-1201.pdf>.

⁷¹ DSG Website, *supra* note 5. Both OJJDP’s Model Programs Guide and DMC Reduction Database are easily accessible from the home page.

⁷² AECF Detention Alternatives Website, *supra* note 70.

documentation of model programs by the OJJDP coupled with the extensive research on effective alternatives conducted by the Colorado Blueprints Project, the Washington State Institute for Public Policy, and the nationally respected Annie E. Casey JDAI.⁷³ These resources, developed over the past two decades, demonstrate efforts to create alternatives to confinement that are effective and less costly than the prevailing practice.

The “deliberate indifference” strategy puts officials on formal notice of the impact of current policies and practices and documents effective alternative remedies. After receiving formal notice, the continuance of a current practice represents an informed and deliberate choice to continue inflicting injury in lieu of available alternatives that are authoritatively regarded as more effective and less costly. If the responsible officials conduct business as usual, there is ample basis for alleging and proving “deliberate indifference” or “intentional disregard.” Litigation could commence only after juvenile justice officials in the jurisdiction have been put on notice of the injury flowing from their present juvenile confinement practices and of the availability of validated and affordable alternatives.

In the private sector, continuing to employ a prevailing practice while disregarding knowledge of more efficacious and cost effective alternative interventions would give rise to a claim of professional malpractice or gross negligence.⁷⁴ Admittedly, addressing DMC involves attacking a problem that stems from multiple factors embedded and entrenched in every aspect of life – *e.g.*, economic, social, educational,

⁷³ *Id.*; Center for the Study and Prevention of Violence at the University of Colorado, Blueprints for the Prevention of Violence, <http://www.colorado.edu/cspv/blueprints/index.html> (last visited April 27, 2009); Washington State Institute for Public Policy, <http://www.wsipp.wa.gov/> (last visited April 27, 2009).

⁷⁴ An obligation to keep abreast and make use of knowledge is commonplace in medical malpractice claims, product safety claims (most notably those involving asbestos), and where a fiduciary obligation is involved. *See, e.g.*, *Borel v. Fiberboard Paper Prod. Co.*, 493 F.2d 1076 (5th Cir. 1973); *Feldman v. Lederle Labs*, 479 A.2d 374, 386 (N.J. 1984).

cultural, geographic, and historical.⁷⁵ This is precisely why courts once were likely to shy away from the issue altogether. But after more than twenty years of skirting the issue because of its “complexity,” there is a growing body of knowledge in regard to available, effective, and affordable remedies and this knowledge can no longer be dismissed or ignored. In the context of long-standing injurious disparity, the right to equal protection gives rise to an obligation to use knowledge of what works.

A showing of actual knowledge of injury coupled with rejection of proposed changes to provide a cost effective remedial strategy would be sufficient to defeat a motion to dismiss for failure to state a cause of action.⁷⁶ Doubtless, defendants would reply with a description of the efforts they have been making, the complexity of the problem and the need to come up with a comprehensive solution. Our focus on detention is something that can be implemented right away – and every youth of color kept out of detention represents a reduction in disproportionate minority contact.

In regard to detention, the situation parallels the disparity addressed by the Supreme Court in *Castenada v Partida*.⁷⁷ *Castenada* involved a claim of discrimination based on a grand jury selection process where Spanish names comprised 50% of the list from which the grand jurors were selected. “Three of the five jury commissioners, five of the grand jurors who returned the indictment, seven of the petit jurors, the judge presiding at the trial, and the Sheriff who served notice on the grand jurors to appear had Spanish

⁷⁵ OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL (2006). Specific reference is made to this difficulty in the Introduction. Lesson 2 states, “Many factors contribute to DMC at different juvenile justice system contact points, and a multipronged intervention is necessary to reduce DMC.” *Id.*

⁷⁶ FED. R. CIV. P. 12(b)(6).

⁷⁷ *Castenada v. Partida*, 430 U.S. 482 (1977). The issues then become: what acts constitute a rejection of these alternatives, what constitutes a good faith effort to make use of available knowledge, and what action over what period of time constitutes merely dilatory tactics? Getting beyond the “intent” barrier to those questions would lay the foundation for defining meaningful indicators of progress in reducing DMC. A significant reduction in the numbers of those detained would be a primary measure.

surnames.”⁷⁸ Nonetheless, the Supreme Court held that the plaintiff had established a discrimination claim by presenting evidence that over an eleven-year period, only 39% of persons summoned for grand jury service were Mexican American when the county’s population was 79.1% Mexican American. In short, the Court found that this disparity coupled with a selection procedure susceptible to abuse was sufficient to make a *prima facie* case of intentional discrimination. When the burden of proof shifted, the State failed to rebut this *prima facie* presumption, despite the racially neutral qualifications for grand jurors and despite the fact that Mexican Americans held a “governing majority” in the county’s elected offices.

Similar to *Castenada*, the criteria for a determination of whether to detain a juvenile offender are purportedly neutral on their face but the ultimate decision making process is discretionary and susceptible to abuse. And, there is also a multi-year disproportion in the detention of juveniles of color. The availability of alternatives proven to radically reduce the use of detention through diversion, risk assessment instruments, and community-based wrap-around services supports the assertion that youth of color have been denied Equal Protection if the system elects to continue business as usual.

Abusive use of detention by juvenile justice systems is peculiarly ironic. On one hand, the system was established to safeguard the best interests of the juvenile by imposing a duty on officials to care for the juveniles over whom the system has jurisdiction. On the other hand, these officials default on their duty when they know of efficacious, less costly alternatives and allow infliction of injury by racially biased confinement decisions.

D. Addressing the Requirement of Causation

⁷⁸ *Id.* at 484.

Commentators have noted that without causation, “negligent or even grossly negligent training would not give rise to a §1983 municipal liability claim.”⁷⁹ A successful plaintiff must therefore be able to demonstrate a sufficiently close causal connection between the deliberately indifferent training and the deprivation of the plaintiff’s federally protected right.

Even upon finding “intentional disregard” or interference with fundamental rights, the reasoning of the Supreme Court in *McCleskey v. Kemp* would appear to impose a further requirement: not only must race be a factor in the disparities generated by the system, but race must be shown to have been a causal factor present in each particular case.⁸⁰ Admittedly, some youth ought to be confined securely. However, experts observe that far more young people than can be justified by safety concerns are in secure confinement all across the country. Furthermore, each youth has a right to counsel and the opportunity to demonstrate that detention is not appropriate or necessary in his or her individual case. Therefore, a defendant could contend that there is no causal relationship in any individual case between the injury caused by racially biased decisions to incarcerate and the failure to use knowledge about alternatives.

Professor Perry Moriearty, in a recent law review Article, argued that the refusal of the Court in *McCleskey* to infer the operation of a racial motive in a specific capital case should not apply to the detention of juveniles:

In every critical respect Juvenile Court pretrial detention decisions in many jurisdictions are analogous to the jury *venire* decision at issue in *Castaneda* . . . and are distinguishable from the capital sentencing decision at issue in *McCleskey*. . . .By the *McCleskey* Court’s own reasoning, then, an equal protection challenge to the

⁷⁹ SWORD AND SHIELD, *supra* note 67, at 33-34.

⁸⁰ See Moriearty, *supra* note 2, at 323 (discussing how race falls outside the rationale in *McCleskey v. Kemp*).

discriminatory pretrial detention of youth of color in the juvenile justice system should be analyzed under the *Castenada* three-pronged inquiry: a claimant would create an inference of discriminatory intent if she could demonstrate that she was a member of a historically disadvantaged class that has been overrepresented in the population of juveniles detained by the judge or probation officer in question over a significant amount of time.⁸¹

Unlike a jury verdict, a decision to detain a juvenile is made by professionals who can be required to explain the rational basis underlying their decision. As Professor Moriearty points out, “the nature of juvenile detention decisions, in many jurisdictions, places them squarely within the contours of the type of administrative decisions for which, according to Justice Powell, evidence of disparate impact alone may be sufficient to create an inference of discriminatory intent.”⁸²

In juvenile cases, as distinguished from jury verdicts, the decision-makers are professionally trained, the criteria are ostensibly prescribed by statute, and actors can be called upon to explain the racial disparities produced by their confinement decisions.⁸³ A sufficient causal relation between intentional disregard and the injury flowing from detention can be proven where the disparities are known, where a “race effect” is present, and where a choice has been made to maintain the existing system even after alternatives that would reduce that disparity have been formally presented to and rejected by the relevant juvenile justice administrators.

We suggest, as a tactical matter, that the issue of whether race was a factor in any specific confinement decision is best eliminated by a class action lawsuit that seeks prospective relief from continuation of a practice that fails to make secure confinement

⁸¹ *Id.* at 331-32.

⁸² *Id.* at 329.

⁸³ *Id.* at 291.

the choice of last resort – *i.e.*, a choice made only after all other alternatives have been exhausted.⁸⁴ Such a tactic is imperative given the well-documented absence of effective counsel in a vast number of juvenile cases and the inability of a juvenile respondent to make the case needed to challenge a widespread practice of unnecessary detention.⁸⁵

III. WHAT WE KNOW ABOUT ALTERNATIVES TO DETENTION

First, it should be acknowledged that no alternative to detention can totally eliminate recidivism.⁸⁶ This makes secure confinement appealing to decision-makers. On its face, detention gives the appearance of protection for the public and, in theory, presents an opportunity to provide rehabilitative treatment for the youth. However, this overall sense of public safety belies the evidence now available: unnecessarily excessive juvenile detention begets crime. Crowded facilities result in increased institutional violence.⁸⁷ Youth detained for long periods of time usually do not have the opportunity to further their education, nor are treatment programs in detention facilities designed to address substance abuse or a history of physical or sexual abuse.⁸⁸ Even more

⁸⁴ *Carter v. Doyle*, 95 F. Supp. 2d 851 (N.D Ill. 2000) (finding that the class action did not become moot even though final judgment was entered against the juvenile finding him to be delinquent).

⁸⁵ ROAD MAP FOR JUVENILE JUSTICE, *supra* note 28, at 8-9. “Just 24 percent of youth confined in 2003 were adjudicated for violent felonies, whereas more than 45 percent were guilty only of status offenses; probation violations; misdemeanors; or low-level felonies unrelated to violence, weapons or drug trafficking.” *Id.*

⁸⁶ Austin, *supra* note 41, at 1. The word “detention” refers to two distinct practices: secure pre-adjudication detention and secure confinement post adjudication.

Secure detention refers to the holding of youth, upon arrest, in a juvenile detention facility (*e.g.*, juvenile hall) for two main purposes: to ensure the youth appears for all court hearings and to protect the community from future offending. In contrast, secure confinement refers to youth who have been adjudicated delinquent and are committed to the custody of correctional facilities for periods generally ranging from a few months to several years.

Id.

⁸⁷ MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, 2000 JUVENILE RESIDENTIAL FACILITY CENSUS: SELECTED FINDINGS 1 (2002); Paul Florsheim et al., *An Interpersonal-Developmental Perspective on Juvenile Justice Systems*, 10 J. L. & FAM. STUD. 147 (2007).

⁸⁸ Austin, *supra* note 41, at 2.

disturbingly, consistent research findings indicate that detention actually increases recidivism. These findings show that secure detention makes it more, not less, likely that a youth will commit additional crime – though there may be a delay factor built in.⁸⁹ In other words, confinement exacts more than a temporary deprivation of liberty. It imposes the heightened prospect of future crimes on society when the youth is ultimately released. Moreover, by halting the youth’s development, confinement increases the likelihood that the youth will become a drain on society instead of a producer of wealth and wellbeing.

There is a growing national consensus, expressly reflected in the JJDP, 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.”⁹⁰ Only a small fraction of youth confined in juvenile facilities have histories that warrant confinement.⁹¹ Extensive research coupled with cost-benefit analyses support the need for a policy shift for all youth – regardless of race. This research acquires even greater weight in the context of disproportionate minority contact and supports but one conclusion: Except when truly exceptional circumstances clearly warrant confinement, divert the youth before he or she enters the system by providing alternatives to detention that place the youth in the community with access to services – preferably in his or her own household with access to family.⁹²

⁸⁹ *Id.* at 2-3. Research on traditional confinement in large training schools found recidivism rates ranging from 50 to 70% of previously confined youth who were rearrested within one or two years after release. *See also* ROAD MAP FOR JUVENILE JUSTICE, *supra* note 28, at 9.

⁹⁰ Austin, *supra* note 41, at 1; Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5633(a)(9)(L)(i) (2002).

⁹¹ ROAD MAP FOR JUVENILE JUSTICE, *supra* note 28, at 19. In the 1990s, only 14% of the 50,000 youth detained in 28 states committed a serious violent offense. *Id.* Prior to 2005, only 17% of confined youth in the District of Columbia were serious violent offenders. *Id.*

⁹² DANGERS OF DETENTION, *supra* note 2, at 8. Diversion programs – often restricted to first-time offenders facing charges for non-violent offenses – are designed to divert the youngster from the bowels of the juvenile delinquency system and its attendant path to facilities for incarceration. For example, young

A. The Cost and Effect of Alternatives to Secure Detention and Confinement

This Article does not purport to provide an exhaustive review of the full range of alternatives to detention that have been tested, replicated, and evaluated. It will suffice to provide a brief overview of the extensive work and research undertaken in this field over at least two decades, along with some of the findings that have emerged and the materials that have been produced.

The short survey begins with the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”), which three years ago issued a Juvenile Justice Bulletin (“the Bulletin”) that “promotes reducing the court’s reliance on detention and confinement through administrative reforms and special program initiatives informed by an objective assessment of a youth’s risk level.”⁹³ OJJDP has identified model programmatic responses available for every element of the process that contributes to DMC and offers a web-based directory to assist states in developing initiatives to reduce DMC.⁹⁴ The Bulletin extensively describes several alternatives to detention with an extensive bibliography,⁹⁵ and includes sample “Risk Assessment Instruments” used by several jurisdictions to provide an objective basis for determining whether or not detention is warranted.⁹⁶ It also provides a concise description (with contact information) of a continuum of alternatives coupled with evaluation data for each approach, including:

people placed in San Francisco’s Detention Diversion Advocacy Program have approximately half the recidivism rate of juveniles ordered to detention or funneled elsewhere through the juvenile justice system. This result is indicative of a governmental apparatus intent on meting out punishment rather than pursuing the rehabilitative solutions for which juvenile courts were established.

⁹³ Austin, *supra* note 41, at 1. Detention is confinement or incarceration of a juvenile in a secure facility before an adjudicatory finding of involvement. There is also evidence of disproportionate minority contact in the rate of confinement of juveniles of color in secure facilities after the juvenile has been found to be involved in a delinquent act - akin to the court finding an adult defendant guilty of a crime.

⁹⁴ DSG Website, *supra* note 5 (both OJJDP’s Model Programs Guide and DMC Reduction Database are easily accessible from the website’s home page).

⁹⁵ Austin, *supra* note 41, at 24-29.

⁹⁶ *Id.* at 29.

diversion, supervised release, home detention, electronic monitoring, intensive supervision, day and evening reporting centers, skills training programs, residential programs such as foster homes, and programs for runaway youth.⁹⁷ The Bulletin, along extensive materials provided by the Annie E. Casey Juvenile Detention Alternatives Initiative (“JDAI”) project, attests to the mushrooming body of knowledge about promising strategies to reduce detention and confinement.⁹⁸

The development of objective screening criteria and risk assessment instruments first made it possible to limit the use of detention to high risk cases. Several case processing reforms have expedited case flow so that youth are not unnecessarily held in detention pending initial hearing or arraignment – *e.g.*, new police referral procedures, 24-hour intake, fast tracking hearings, case expeditors, and increased automation. During the past few decades there has also been extensive development, experimentation, refinement, and utilization of alternatives to detention pending an adjudicatory hearing. Finally, due to a major investment in cost-benefit analysis and evaluation, the body of knowledge regarding the cost-effectiveness of various juvenile rehabilitation strategies continues to expand.

B. Private Philanthropy Funded Expansion of Alternatives to Juvenile Incarceration

Much of the knowledge about alternatives to incarceration stems from foundation-funded initiatives that have overtly reduced the use of detention and enjoyed a derivative reduction in DMC. Through participation in the Casey Foundation-funded JDAI, Multnomah County, Oregon became “the first jurisdiction to produce substantial

⁹⁷ *Id.* at 13-20.

⁹⁸ *See, e.g.*, AECF Detention Alternatives Website, *supra* note 70.

reduction in racial disparity within its juvenile justice system.”⁹⁹ The Casey Foundation’s 2008 Report notes that “[w]hen Multnomah began JDAI in the mid 1990s, youth of color were 30% more likely than white youth to be detained following a delinquency arrest.”¹⁰⁰ Because no other viable location existed, Multnomah County law enforcement officials brought almost 1400 youth charged with non-detainable offenses to the detention center.¹⁰¹

In Multnomah County, juvenile justice reform began when the County’s Department of Community Justice and Police, with assistance from a non-profit agency, established a Juvenile Reception Center where caseworkers, rather than the court or probation personnel, reunited the youth with their families and referred them to appropriate services.¹⁰² By 2000, detention reforms and persistent leadership had reduced the odds of detention to 22% for all youth, regardless of race.¹⁰³ The progress was no accident. By reviewing system data, local leaders identified decision points where racial disparities were prominent; when they found that structural bias or exercises of discretion “placed youth of color at a disadvantage, the leaders made [systemic] changes.”¹⁰⁴ As a result, detention was reduced for all youth and, even more relevant to this Article, disproportionate minority contact had effectively been eliminated.

From 1996 to 2006, using the JDAI model, Cook County (Chicago), Illinois reduced the youth committed to confinement by 500 per year and to residential treatment centers by more than 400 – the greatest reductions were among the number of African

⁹⁹ ROAD MAP FOR JUVENILE JUSTICE, *supra* note 28, at 24.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ ROAD MAP FOR JUVENILE JUSTICE, *supra* note 28, at 24.

American youth.¹⁰⁵ A similar trend was documented in Santa Cruz County, California where reforms reduced the average number of Latino youth in detention by more than 50% from 1996 to 2007.¹⁰⁶

C. Assessing Effectiveness

During the past thirty years, a variety of community-based models have emerged. Those designated as “evidence-based” include Multi-Systemic Therapy, Functional Family Therapy and Multidimensional Treatment Foster Care. Although these models remain relatively small-scale pilot projects in otherwise unreformed systems, they nevertheless provide rock-solid evidence of more effective, less expensive, consistently successful alternatives to incarceration.¹⁰⁷

On a larger scale, extensive reviews and evaluations of wrap-around services and intensive case management initiatives have documented positive results in many jurisdictions.¹⁰⁸ Such wrap-around programs are neighborhood-based, customized to each community, make use of lay advocates, and are invariably shaped by individual, family and local contexts. For these reasons, the controlled randomized trials (“CRT”) needed for the designation “evidence-based” have not been conducted.¹⁰⁹ While there is an

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.* at 8.

¹⁰⁷ DSG Website, *supra* note 5. OJJDP’s Model Programs Guide rates the effectiveness of a variety of programs using the following designations: “promising,” “effective,” and “exemplary.” Programs are evaluated according to four factors: conceptual framework of the program; program fidelity; evaluation design; and, empirical evidence demonstrating the prevention or reduction of problem behavior, the reduction of risk factors related to problem behavior, or the enhancement of protective factors related to problem behavior.

¹⁰⁸ OJJDP’s Model Program Guide, http://www.dsgonline.com/mpg2.5/wraparound_prevention.htm (last visited Apr. 29, 2009). The guide documents the success of wraparound case management services and programs.

¹⁰⁹ We propose that juvenile justice administrators should not limit their options for demonstrably effective programs solely to those that bear the “evidenced-based” designation. Youth Courts and other wraparound programs work and they have been shown to have significant and sustained positive outcomes in more than one site. The juvenile justice field needs to promote constant innovation and should promote constant innovation. Community based learning and social entrepreneurship reflects “common sense” responses to

increasing institutional, and even a policy, bias towards formal CRT with control groups and random assignment, other evaluation methodologies proffer significant advances for reliable information and knowledge.¹¹⁰ For more than two decades, these “non-evidence-based” programs have consistently shown major reductions in recidivism. This accomplishment earned them a designation of Model Programs by the OJJDP.

We have personal experience with two effective alternatives to detention: The Time Dollar Youth Court (“T-D Youth Court”) diversion program, authorized by the Superior Court of the District of Columbia, and the Youth Advocate Program (“YAP”), a community-based program of wraparound services. Both programs have proved highly successful in furthering youth development and reducing recidivism. Both efforts incorporate a “co-production” framework,¹¹¹ in which the “consumers” of human service programs and interventions – the youth themselves – are enlisted as co-workers and “co-producers” of the transformation desired.¹¹² These two programs incorporate a set of core principles that we believe offer an even more enduring and transformative approach to

the needs of young people.

¹¹⁰ Michael Quinn Patton, *sup wit eval ext?*, 120 *NEW DIRECTIONS FOR EVALUATION* 101, 114 (2008). Michael Patton, a former president of the American Evaluation Association, supports appropriateness – not CRT – as “the gold standard” of evaluation. *Id.* He describes the need to counter “inflexible institutional biases toward specific methodologies such as experimental designs” and notes that this is the standard affirmed by the American Evaluation Association, the European Evaluation Society, and the Network of Networks on Impact Evaluation. *Id.*

¹¹¹ See EDGAR CAHN, *NO MORE THROW-AWAY PEOPLE: THE CO-PRODUCTION IMPERATIVE* (2d ed. 2004); EDGAR CAHN, *PRICELESS MONEY: BANKING TIME FOR CHANGING TIMES* (2007); NEW ECONOMICS FOUND., *THE NEW WEALTH OF TIME: HOW TIMEBANKING HELPS PEOPLE BUILD BETTER PUBLIC SERVICES* (2007); PHELPS-STOKES FUND, *COMING HOME: AN ASSET-BASED APPROACH TO TRANSFORMING SELF & COMMUNITY - VOL. 1 CO-PRODUCTION AT WORK* (2008).

¹¹² Co-Production is premised on the conviction that efforts to address major social problems prove most effective when they enlist and engage the target population as contributors and co-producers. It is an approach to system change and social welfare that focuses on the idea that the traditional beneficiaries of social programs: clients, recipients, consumers, and at-risk populations can “co-produce” outcomes that address issues as diverse as eldercare, childcare, juvenile justice, education, community development, health, self-sufficiency, and opportunity.

address delinquent conduct than the “evidence-based” programs now enjoying authoritative endorsement.¹¹³

In 2008, T-D Youth Court jurors heard 888 cases for offenses such as simple assault, possession with intent to distribute marijuana, and disorderly conduct. Recidivism rates during the first six months after referral to T-D Youth Court were a mere 6% and twelve months after referral recidivism had risen only to 11%. Both the six-month and one-year recidivism rates are far below the prevailing 33-35% rate for the comparison group. The estimated nationwide cost of Youth Court programs is \$458 per respondent compared to probation costs estimated at \$1,635 per youth and juvenile justice processing cost estimates ranging between \$21,000 and \$84,000 per case.¹¹⁴

For the past thirty years, YAP has operated a community-based wraparound program that now reaches sixteen states and works annually with approximately 10,000 youth who would otherwise have been in secure confinement.¹¹⁵ YAP has been extraordinarily successful with some of the most entrenched and chronic juvenile offenders by hiring and training community members to function as advocates who work

¹¹³ Those core principles are:

- (1) An Asset Perspective: We must build on strengths because one cannot build on weaknesses; every human being has capacities of potential use and value to others;
- (2) Valuing Real Work: We must honor real work: caring labor, civic labor, social justice labor, and lifelong learning – rewards for contribution must enhance one’s quality of life;
- (3) Reciprocity - or Pay It Forward: Giving back empowers the recipient so that receiving help is not regarded as charity and does not create dependency;
- (4) Community: Building a social infrastructure of help, support, companionship, and trust is essential; and,
- (5) Respect: The voices of those who are most disenfranchised need to be amplified and respected.

See also Edgar S. Cahn, *Co-Producing Justice: The New Imperative*, 5 UDC/DCSL L. REV. 105 (2000).

¹¹⁴ SARAH S. PEARSON & SONIA JURICH, AM. YOUTH POLICY FORUM, YOUTH COURT: A COMMUNITY SOLUTION FOR EMBRACING AT-RISK YOUTH 16 (2005).

¹¹⁵ Youth Advocate Programs, Inc. Home Page, <http://www.yapinc.org> (last visited Mar. 10, 2009).

to strengthen the family and build an informal support network for the young person.¹¹⁶

One of YAP's sites, the Tarrant County Advocate Program-North (TCAP) underwent extensive review and earned official characterization as a "successful intensive probation program."¹¹⁷

TCAP uses paid mentors and advocates who link the youth with community-based services. Programs include "counseling, job training, subsidized youth employment, vocational training, anger management classes, tutoring, community service restitution projects, character development courses, and parent education classes."¹¹⁸ In 2002, TCAP served over 500 youth and their families – nearly 400 families completed the entire program.¹¹⁹ OJJDP reported that "[o]f these youth, 96 percent were successfully maintained in the community or were diverted from out-of-home placement or commitment to the Texas Youth Commission."¹²⁰

We cite these programs because they exemplify the growth in knowledge that has mushroomed over the past several decades. Indeed, they embody a new approach to juvenile justice which takes strength-based youth development quite literally. These programs regard juvenile offenders as neighborhood assets who can be enlisted to contribute to rebuilding the sense and quality of life in a community – all the while radically reducing disproportionate minority contact.

¹¹⁶ DSG Website, *supra* note 5. The Model Programs Guide contains many such indications of improvements and accomplishments by programs in multiple jurisdictions.

¹¹⁷ Austin, *supra* note 41, at 19; RONALD B. REA ET AL., FINAL EVALUATION REPORT OF THE HARRIS COUNTY YOUTH ADVOCATE PROGRAM (YAP) (2003). Perhaps the most important finding is that young offenders can be served in their home communities and neighborhoods by members of their communities who are recruited, provided with a limited amount of pre-service training, and supervised by professional staff in providing direct services to the youth and their families. The program model can be operated at about one-half of the cost of residential contract services and achieves a success rate that compares favorably with the more expensive residential service. Based on an analysis of the closed cases, the YAP is realizing successful outcomes for approximately 80% of the clients enrolled in their program.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

D. The Question of Cost-Benefit

Besides effectiveness, cost is the other major factor that public officials bear in mind in when choosing a course of action for youthful offenders. Ongoing studies of the cost of secure detention versus the cost of alternatives to detention consistently show that alternatives to detention are far less expensive than keeping a youth in secure detention.¹²¹ As one commentator writes, “[w]hile states spend millions of dollars on detention centers, the community-based programs are held together by a fair amount of gum, tape, and baling wire.”¹²² For example, “Texas spends \$57,000 a year incarcerating each minor.”¹²³ Other jurisdictions average between \$32,000 and \$65,000 annually per minor, with far higher average costs reflected in the highest cost-of-living regions. By comparison, most community-based, wrap-around programs boast annual costs considerably less than \$20,000 per youth, with many as low as \$13,000.”¹²⁴

The cost-benefit of an investment in community-based alternatives becomes far greater in light of the 50% recidivism rate for young people within two years of release from secure confinement. The Washington State Institute for Public Policy (“WSIPP”), at the direction of its state legislature, conducted extensive research assessing the effectiveness of prevention and early intervention programs to reduce at-risk behaviors for children and youth and identified specific research-proven programs that result in a

¹²¹ COAL. FOR JUVENILE JUSTICE, ANNUAL REPORT 2003: UNLOCKING THE FUTURE 23 (2003). The Coalition provides the following comparative data: New York City, secure confinement at \$358 per day and alternative to detention at \$16-24 per day; Cook County (Chicago), secure detention at \$115 per day and an alternative to detention at \$33 per day; Multnomah County (Portland, OR), secure detention at \$180-200 per day and an alternative to detention at \$30-50 per day; Tarrant County (Dallas/Ft. Worth), secure detention at \$121 per day, an intensive advocacy program at \$30-35 per day, and electronic monitoring at \$3.50-3.75 per day. *Id.*

¹²² David L. Marcus, *Communities Helping Kids*, THE AMERICAN PROSPECT, Aug. 14, 2005, http://www.prospect.org/cs/articles?article=communities_helping_kids.

¹²³ *Id.*

¹²⁴ DANGERS OF DETENTION, *supra* note 2, at 10-11.

positive cost-benefit analysis.¹²⁵ WSIPP developed criteria designed to ensure quality implementation and program fidelity of research-proven programs in the state.¹²⁶ Cost-benefit studies of those programs produced some startling figures, ranging from a benefit of \$31,243 for each dollar spent to a *negative* value of \$12,478 of the Scared Straight program, after subtracting costs.¹²⁷ The legislature also directed WSIPP to develop recommendations for potential state legislation that would encourage local governments to invest in research-proven prevention and early intervention programs by reimbursing a portion of the savings accrued to the state as a result of the local programs.¹²⁸

IV. INSTITUTIONAL CAPACITY: COURTS AND SYSTEM REFORM

Our hope is that, prior to litigation, concerned juvenile justice advocates will employ a “notice forum” to put officials on formal notice of the extent to which youth of color have disproportionate contact their respective juvenile justice systems. By design, a notice forum will demonstrate the injury that flows from both the “race effect” in the juvenile justice process and the resulting unnecessary detention and confinement of youth of color. A notice forum will also provide evidence of the availability of cost-efficient, officially-recommended and demonstrably-effective alternatives to confinement. Successful notice forums will either obviate the need for litigation or provide the record necessary to prove intentional disregard.

¹²⁵ ROBERT BARNOSKY, WASH. STATE INST. FOR PUB. POLICY, EVALUATION OF WASHINGTON'S 1996 JUVENILE COURT PROGRAM (EARLY INTERVENTION PROGRAM) FOR HIGH-RISK, FIRST-TIME OFFENDERS: FINAL REPORT (Apr. 2003), <http://www.wsipp.wa.gov/rptfiles/EIPfinal.pdf>.

¹²⁶ WASH. REV. CODE ANN. § 13.40.530 (LexisNexis 2009).

¹²⁷ ELIZABETH DRAKE, WASH. STATE INST. FOR PUB. POLICY, EVIDENCE-BASED JUVENILE OFFENDER PROGRAMS: PROGRAM DESCRIPTION, QUALITY ASSURANCE, AND COST (June 2007), <http://www.wsipp.wa.gov/rptfiles/07-06-1201.pdf>.

¹²⁸ ROBERT BARNOSKY, WASH. STATE INST. FOR PUB. POLICY, THE COMMUNITY JUVENILE ACCOUNTABILITY ACT: RESEARCH-PROVEN INTERVENTIONS FOR THE JUVENILE COURTS (Jan. 1999), http://www.wsipp.wa.gov/rptfiles/CJAA_Research.pdf. The result of this mandate was the Community Juvenile Accountability Act. WASH. REV. CODE ANN. § 13.40.510 (LexisNexis 2009).

Emerging research demonstrates the savings derived from use of diversion and alternatives to detention. Such a cost-benefit analysis is important because the officials who administer the juvenile justice system are likely to plead “system poverty,” particularly in the current economic environment.¹²⁹ Government officials are obligated to seek the most cost-effective strategies to meet their policy objectives, especially when less costly strategies produce a much higher rate of long and short-term success while preventing a constitutionally prohibited injury. Often, following a formal hearing where notice of effective alternatives is provided, officials choose to resist system change by maintaining business as usual, or they go through the motions of a response by announcing a plan that is clearly inadequate to end racial bias.¹³⁰ There clearly needs to be pressure to reduce the use of detention, not only by offering alternatives to juvenile detention, but also by limiting the number of available secure confinement slots.

It will take strategic litigation planning, akin to Charles Houston’s work in plotting the road to *Brown v Board of Education*,¹³¹ to pick the best litigants within a jurisdiction where there is a clear violation. The OJJDP monitors violations of the JJDP, and there is no shortage of cases.¹³² Given the plethora of research and data filed with the federal government, county level analyses should surface examples where two juveniles of the same socio-economic class committed the same offense, but the youth of color was not diverted, *i.e.*, detained, while white youth was sent home. Once such

¹²⁹ AECF Detention Alternatives Website, *supra* note 70; DRAKE, *supra* note 127.

¹³⁰ Interview with Bart Lubow, Dir. of Programs for High Risk Youth & Their Families, Annie E. Casey Found., in Baltimore, MD (Jan. 22, 2009). Mr. Lubow reported that the Georgia legislature responded by appropriating millions of dollars for programs that would provide 500 slots as alternatives to detention. *Id.* The programs were launched and all the slots filled; however, the numbers of juveniles placed in criminal institutions was not reduced. *Id.*

¹³¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). For an in-depth discussion of Houston’s legal strategy, see RICHARD KLUGER, *SIMPLE JUSTICE* 508-40 (1977).

¹³² Mead Gruver, *Some States Disregard Juvenile Justice Law*, ABC NEWS, Feb. 8, 2009, <http://abcnews.go.com/US/wireStory?id=6831314>.

evidence is obtained, the issue becomes securing a remedy that compels officials to use knowledge of what works. Assuming that liability is established under the theory of deliberate indifference, the next hurdle will be getting judges to oversee system change when it comes to prisons and secure confinement facilities – a problem of ancient vintage.¹³³ This obstacle is not insurmountable; there is now a substantial body of case law dealing with “public law litigation” and ongoing judicial supervision of systemic reform. These cases involve public services provided by schools, hospitals, mental health systems, prisons, police and housing authorities.¹³⁴

Initially, judicial intervention was characterized by what has been called a “command-and-control” orientation. Court orders took the form of comprehensive regimes of “fixed and specific rules that prescribed the inputs and operating procedures of the institutions they regulated.”¹³⁵ Commentators have identified three characteristics that typify this “command and control” approach: (1) “an effort to anticipate and express all the key directives needed to induce compliance in a single, comprehensive, and hard-to-change decree”; (2) “assessment of compliance in terms of the defendant’s conformity to detailed prescriptions of conduct in the decree”; and (3) “a strong directive role for the court or a special master in the formulation of remedial norms.” In short, the “command-and-control” approach mandates certain actions for the defendant and monitors compliance. Substantial concerns emerged regarding the judicial competence to oversee

¹³³ Bernard Shaw, *Preface to SYDNEY WEBB ET AL., ENGLISH PRISONS UNDER LOCAL GOVERNMENT*, at viii (Cass 1963) (1922) (“Judges spend their lives in consigning their fellow creatures to prison; and when some whisper reaches them that prisons are horribly cruel and destructive places, and that no creature fit to live should be sent there, they only remark calmly that prisons are not meant to be comfortable; which is no doubt the consideration that reconciled Pontius Pilate to the practice of crucifixion.”).

¹³⁴ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

¹³⁵ Charles F. Sabel & William H. Simon, *Destablization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1018 (2004).

operation of complex, executive branch institutions when confronted with opposing armies of experts arrayed by plaintiffs and defendants.¹³⁶ Courts initially embraced three guiding principles: (1) the response must be one chosen from professionally approved strategies;¹³⁷ (2) implementation must commit sufficient resources to carry out the chosen strategy effectively and responsibly;¹³⁸ and (3) performance will be judged on the outcome. Implicit in this arrangement is the notion that if the strategy chosen fails to produce the anticipated outcome, then the strategy will have to be changed.¹³⁹

Over several decades, courts learned the limitations of command-and-control orders that freeze the parties' adversarial roles and lack the flexibility or capacity to address new factors, such as unintended consequences or sabotage by front line administrators. As a result, system change methodology has shifted away from the command-and-control approach. More recently, commentators have characterized system change judges as employing a "catalyst" approach,¹⁴⁰ engaging in an "experimentalist"

¹³⁶ In the context of responding to egregious cases of educational failure, courts have articulated various definitions for what is considered a "sound and effective professional practice." *See, e.g.,* Castenada v. Pickard, 648 F.2d 989 (5th Cir. 1981) (sound educational theory or legitimate experimental strategy); U.S. v. Texas, 506 F. Supp. 405, 420 (E.D. Tex. 1981) (defendant's program must be an "equally effective alternative" to that sought by plaintiffs); Martin Luther King Jr. Elementary Sch. Children v. Ann Arbor Sch. Dist. Bd., 473 F. Supp. 1371 (E.D. Mich. 1979) (best available knowledge); Martin Luther King Jr. Elementary Sch. Children v. Mich. Bd. of Educ., 451 F. Supp. 1324 (E.D. Mich. 1978); Nicholson v. Pittenger, 364 F. Supp. 669, 675 (E.D. Pa. 1973) (violation of size, scope and quality requirements where programs were approved without an evaluation to determine their effectiveness).

¹³⁷ Youngberg v. Romeo, 457 U.S. 307 (1982). The Court embraced "deference to the judgment exercised by a qualified professional" noting that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 322-23. *See also* Soc'y for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1248-49 (2d Cir. 1984); Sabel & Simon, *supra* note 135, 1056 (discussing the changing role of professionals in formulating remedies).

¹³⁸ *See Nicholson*, 364 F. Supp at 675 (finding violations of size, scope and quality requirements where programs were approved without an evaluation to determine their effectiveness).

¹³⁹ Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1041 (7th Cir. 1987) ("[j]udicial deference to the school system is unwarranted if over a certain period the system has failed to make substantial progress in correcting the language deficiencies of its students").

¹⁴⁰ Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 856-59 (1990).

approach,¹⁴¹ or creating “destabilization rights” which open the door to stakeholders in an ongoing participatory process.¹⁴² Rather than imposing a static order from above, recent “intervention takes the form of a ‘rolling-rule regime’” where rules are regarded as provisional and subject to a continuous, transparent process of reassessment and revision.¹⁴³ New stakeholders can intervene, negotiations are deliberative, and the goal is to reach consensus. Representation of diverse stakeholders has proven critical in a rolling-rule regime because such cases typically entail political resistance to reforms that respond to the interests of a vulnerable, stigmatized minority.¹⁴⁴ The creation of “destabilization rights” through an ongoing “rolling rule” remedy that permits stakeholders to intervene could reverberate throughout the “web” of juvenile justice authorities;¹⁴⁵ and thereby reduce their insulation from accountability. Our hope is that emergence of a legal obligation to make use of the knowledge available will operate as an

¹⁴¹ See Sabel & Simon, *supra* note 135, at 1055 (“The judge’s role changes from that of directly determining the merits to facilitating a process of deliberation and negotiation among stakeholders.”)

¹⁴² “Destabilization induces the institution to reform itself in a process in which it must respond to previously excluded stakeholders.” Sabel & Simon, *supra* note 135, at 1056.

Destabilization usefully describes both the remedy and the process by which the meaning of the background substantive right is articulated in these cases. In the new public law, the judge does not exercise discretion in each case to choose among an infinite array of potential responses to the particular problem. Rather, having found a violation of some broad norm--the right to an adequate education, the right to access to justice--she imposes the single remedy that the liability phase has shown to be appropriate: institutional destabilization. This remedy has a common structure across fields. Moreover, judicially and publicly accountable standard-setting in the experimentalist liability phase bridges the gulf between the initial affirmation of the substantive right and the eventual remedy.

Id.

¹⁴³ *Id.* at 1068.

¹⁴⁴ *Id.* at 1065. “The minority can be a racial group, as in some versions of the education, housing, and police cases. Or it can be a group that has been socially stigmatized on the basis of conduct or disposition, as with prisoners and mental health patients.” *Id.*

¹⁴⁵ Different entities are responsible for different parts of the juvenile justice system. Police, probation offices, youth services, and courts play key decision-making roles. In addition, other agencies provide critical resources needed for an effective remedy, such as those that administer Medicaid and mental health services and the public school system. The “rolling-rule regime” provides a vehicle for enlisting all relevant parties; the design of a pre-litigation strategy is critical in securing their involvement.

incentive, not a threat, to accrue new knowledge so the “rolling rule” regime also serves as a journey of exploration and learning.

CONCLUSION

We submit that the initial set of demands for reduction of disproportionate minority contact should commence with the query: What response would be accorded a white juvenile who had committed the same offense? There is no excuse for continuing to treat youth of color as “throw-away people.”¹⁴⁶ And this is just the beginning. “Deliberate indifference” can yield an evolving national standard for Equal Protection. In some states, the standard of intervention for white youth may *also* be far below that which is attainable through co-production and strength-based approaches. A new body of knowledge exists in regard to detention alternatives that engage both family and community and produce better outcomes for all – particularly for youth of color. It is time for officials to be obliged to make use of this knowledge.¹⁴⁷

¹⁴⁶ SNYDER, *supra* note 30, at 211. While the majority of delinquency cases are referred to juvenile court by law enforcement, cases may also be referred by parents, schools, or probation officers. *Id.* “[N]early half of all cases referred to juvenile court intake are handled informally.” *Id.* While many informal cases are dismissed, in others “the juvenile voluntarily agrees to abide by specific conditions for a specific time period.” *Id.*

¹⁴⁷ We oppose limiting that obligation to only “evidence-based” programs. Youth Courts and wrap-around programs work. Verification and demonstrable effectiveness ought to be sufficient – and there is still much to be said for common sense. After all, we knew that segregation sent a message of inferiority long before doll tests were utilized to “prove” the stigma. Further delay in utilizing what we know is unacceptable when such a delay perpetuates injustice. *Accord* EDMOND CAHN, CONFRONTING INJUSTICE: THE EDMOND CAHN READER 329 (1966); Edmond N. Cahn, *A Dangerous Myth in the School Segregation Cases*, 30 N.Y.U. L. REV. 150 (1955).