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“PUBLIC NOTICE FORUMS”

Choosing Among Alternatives to Confront the Intent Requirement

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For more on Edgar S. Cahn,
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For decades, plaintiffs challenging racial discrimination or other violations of the Constitution or federal law have borne the onerous burden of proving that officials intended the resulting injury.¹ In 2009 TimeBanks USA launched its Racial Justice Initiative to develop and use a novel legal strategy to take on that burden.² In *City of Canton v. Harris*, the U.S. Supreme Court ruled, intent can be inferred when government policymakers choose an injurious course of action from among alternatives.³ Relying on this analysis, one can thereby demonstrate officials' "deliberate indifference" to rights protected by the U.S. Constitution and federal law.

Here we first articulate a legal strategy to overcome the barrier that the intent requirement creates to remedying racial disparities. We then explain the "public notice forum" strategy for disseminating knowledge about effective alternatives to injurious practices and show how this approach potentially extends beyond juvenile justice (where we begin) to multiple fields wherever purportedly "racially neutral" procedures consistently yield racially disparate outcomes. We then describe how this approach enlists the community as partners and coproducers of systems change. Finally we invite legal aid programs to consider how to use this strategy to meet the needs of indigent, underserved populations.

I. Juvenile Justice: The Initial Context for the Strategy

While the legal theory is applicable to multiple systems where prevailing practice generates racial disparity, we have begun with juvenile justice because of the documented lack of progress in reducing that disparity despite a federal statutory mandate, vast expenditures, and multiple empirically grounded effective and less expensive alternatives.

A. The Legal Theory

The Racial Justice Initiative's core legal theory is straightforward. We propose to meet the intent requirement in a 42 U.S.C. § 1983 case by shifting the focus from past to future. We rely on the *City of Canton v. Harris* holding that intent can be inferred when

¹*Washington v. Davis*, 426 U.S. 229, 245 (1976) (plaintiff must prove that discriminatory impact was result of specific racially discriminatory intent).

²The Racial Justice Initiative began with a focus on two systems that result in disproportionately adverse outcomes for youths of color: juvenile justice and child welfare. However, we believe that the strategy can be used to address plaintiffs' onerous burden of proof in claiming intentional discrimination in cases arising under 42 U.S.C. § 1983 protections.

³*City of Canton v. Harris*, 489 U.S. 378 (1989).

government policymakers choose among alternatives to follow an injurious course of action, demonstrating a “deliberate indifference” to rights protected by the U.S. Constitution and federal laws.⁴ Under the theory, when official decision makers have formal notice of alternatives that are less costly and yield significant, sustained effects which have been replicated or which experts regard as promising or exemplary, the failure to use these alternatives constitutes “deliberate indifference” to injury to the fundamental constitutional rights of youths of color in the juvenile justice system. We believe that this strategy would at least shift the burden of proof from plaintiffs alleging discrimination to the institutional actors denying intent.

In *City of Canton* plaintiff Geraldine Harris was arrested and taken to the police station, where she “slumped to the floor on two occasions” during police questioning; “the police eventually left Mrs. Harris lying on the floor to prevent her from falling again.”⁵ After about an hour Harris was released to her family; relatives called an ambulance to take her to the hospital, where she was diagnosed with several emotional disabilities.⁶ She sued, “seeking to hold the city liable under 42 U.S.C. § 1983 for its violation of Mrs. Harris’ right, under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical attention while in police custody.”⁷ The Court considered evidence that under “a municipal regulation, shift commanders were authorized to determine, in their sole discretion, whether a detainee required medical attention” and that “Canton shift commanders were not provided any special training (beyond first-aid training) to make a determination as to when to summon medical care for an injured detainee.”⁸ The Court de-

termined that a local government could be held liable for the inadequate training of its police officers:

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 § 1983.⁹

In essence the Court held that liability could 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 the in-

⁴*Id.* at 388.

⁵*Id.*

⁶*Id.*

⁷*Id.* at 381.

⁸*Id.* at 380.

⁹*Id.* at 388.

jury.¹⁰ Under our theory, the “deliberate indifference” standard is applied in a new context—enforcement of equal protection rights—to address the problem of disproportionate minority contact with the juvenile justice system.¹¹

B. The Problem—Juvenile Justice

Juveniles of color are more likely than their white counterparts to be arrested, referred to juvenile court rather than to diversion programs, charged, waived to adult court, detained at the pretrial stage, and locked up at disposition—i.e., they are more likely at every stage of the system to be subjected to the more injurious choice.¹² For more than two decades, federal law has explicitly mandated a reduction in disproportionate minority contact.¹³ Vast sums have been appropriated and distributed to states through the Juvenile Justice and Delinquency Prevention Act to reduce disproportionate minority contact, and a substantial body of knowledge exists about ways to reduce and even eliminate it.¹⁴ Nonetheless disproportionate minority contact persists.

Our theory is that government policies and practices subject a juvenile of color to sanctions that are far greater and more punitive than if the same offense had been committed by a white youth. To prove “deliberate indifference” for purposes of a Section 1983 claim, the plaintiff must show that (1) injury to a right protected by the Constitution or federal law occurred; (2) the injury was relatively certain to occur; and (3) the government’s course of action was selected from among various alternatives.¹⁵ 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

- the present system results in documented disproportionate minority contact that violates the U.S. Constitution if the requisite discriminatory intent or purpose is shown;
- racially neutral factors cannot account for this disparity;¹⁶
- injuries flow from this disparity, specifically from the disproportionately high incarceration rate for youths of color;¹⁷ and

¹⁰See, e.g., *Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir. 1992), where the Second Circuit articulated three criteria for constructive intent: (1) the policymaker 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.*).

¹¹The theory can apply in other areas, such as employment discrimination, housing discrimination, and environmental protection.

¹²National Council on Crime and Delinquency, *And Justice for Some: Differential Treatment for Youth of Color in the Justice System* 3 (2007), <http://bit.ly/awQy1C>. From 2002 to 2004 African Americans constituted 16 percent of all youths, 28 percent of juvenile arrests, 30 percent of referrals to juvenile court, 37 percent of the detained populations, 34 percent of youths formally processed by the juvenile court, 30 percent of adjudicated youths, 35 percent of youths judicially waived to criminal court, 38 percent of youths in residential placement, and 58 percent of youths admitted to state prison (*id.*).

¹³James Bell & Laura John Ridolfi, W. Haywood Burns Institute, *Adoration of the Question: Reflections on the Failure to Reduce Racial and Ethnic Disparities in the Juvenile Justice System* 15 (2008), <http://bit.ly/bKkwU>. The Juvenile Justice and Delinquency Prevention Act originally referred to disproportionate minority contact as “disproportionate minority confinement,” which occurs when the percentage of minority youths confined in the 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 to include any point of “contact” with the juvenile justice system at which minority youths are overrepresented (see 42 U.S.C. § 5633(a)(22) (2006)). Hence “disproportionate minority contact” (*id.*).

¹⁴Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5602(b) (2000); see, e.g., Annie E. Casey Foundation, *Juvenile Detention Alternatives Initiative* (n.d.), <http://bit.ly/dyFWh6>; Models for Change, *Background and Principles* (2008), <http://bit.ly/anJ11i>.

¹⁵SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 209–47 (Mary Massoron Ross et al. eds., 3d ed. 2007).

¹⁶We make this assertion because, compared to youths of color who committed the same offenses, white youths are accorded recommended alternative treatments that are more effective and less expensive.

¹⁷Although disproportionate minority contact manifests at all key milestones of the juvenile justice process, detention decisions prior to adjudication are pivotal to the eventual outcomes. Juvenile justice experts explain, “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, *Racial and Ethnic Disparity in Child Welfare and Juvenile Justice: A Compendium* 29 (2009), <http://bit.ly/ciw500>).

- highly effective, replicable, less costly alternatives would substantially reduce disproportionate minority contact; decision makers have been made aware of these methods and have failed to use them.

While the theory is straightforward, moving from theory to a legal mandate to implement programs that are known to be cheaper, be more effective, and have a lower disproportionate minority contact is the challenge. This legal theory would be a case of first impression before the Supreme Court. Judges are unlikely to order sweeping institutional change even when presented with compelling data about disparities and alternatives, especially when confronted by officials who assert that they are enforcing the law and protecting public safety. These barriers to institutional change led us to situate the Section 1983 litigation within a broader systems change strategy that uses the public notice forum strategy to focus first on policy advocacy and uses litigation as a last resort.

II. Structuring a Prelitigation Public Notice Forum

Litigation is not necessarily the best—or the only—way to create awareness of alternatives to prevailing practice, community engagement, support for leaders who seek change, or oversight of its implementation. We seek to advance all of these through a prelitigation process.

A. De Facto Implementation via Public Notice Forums

We propose the use of public notice forums to create awareness of intolerable racial disparities in the juvenile justice system and of options that would reduce

those disparities, advance public safety and rehabilitation, and save the public money.¹⁸ Specifically the forums would give official decision makers formal notice both of the pattern of entrenched racial disparity that results from current practice and of less costly, more effective alternatives.

A variety of bodies or individuals—legislators, foundation officials, academicians, advocacy organizations, community groups—can organize public notice forums. The first step is to highlight for officials clear evidence of more effective, less expensive alternatives that lower disproportionate minority contact.¹⁹ We contend that, once the officials receive this notice, if they continue present practice rather than adopting alternatives, they make an intentional choice that reflects deliberate indifference to the fundamental constitutional rights of youths of color in the juvenile system and to the injuries to their rights.

Our hope is that in many instances public notice forums will obviate the need for litigation by setting in motion a broader array of community actors demanding change. But failing that, the forums can provide the public record necessary to establish “deliberate indifference.”

B. Next Steps—Designing the First Public Notice Forum

The Racial Justice Initiative held its first public notice forums in Pennsylvania in June 2010; the forums highlighted successful alternatives to incarceration.²⁰ We selected Pennsylvania for a number of reasons—long-standing connections to state legislators, Pennsylvania’s reputation as a flagship state in using detention alternatives to lower disproportion-

¹⁸While other methods of giving public decision makers official notice of alternatives, such as written correspondence or reporting, might be complementary, we prefer to incorporate the public notice forum because the approach also promotes community engagement in the systems change process.

¹⁹We are still developing and refining the Racial Justice Initiative strategy. Research is under way to determine the legally sufficient number of government policymakers put on notice to hold a municipality liable under the “deliberate indifference” standard.

²⁰Numerous alternatives to detention programs operate in Pennsylvania. For example, Youth Advocate Program Inc. offers intensive community-based wraparound services in twenty-two Pennsylvania counties and has been extraordinarily successful with chronic juvenile offenders by hiring and training community advocates who work to strengthen the family and build an informal support network for the young person (see <http://bit.ly/9i6j1T>). In 2005 the Office of Juvenile Justice and Delinquency Prevention recognized the Youth Advocate Program in Tarrant County, Texas, as a Best Practice Model for an Alternative to Secure Detention. The program served over 500 youths, of whom 96 percent were diverted from out-of-home placement or commitment to a juvenile detention center (see <http://bit.ly/dd6GTb>).

ate minority contact, and the presence in the state of nationally recognized juvenile justice leaders. We anticipate that, as a result of these public forums, legislators and other decision makers in budgeting will focus more on using alternatives to confinement to lower disproportionate minority contact.

We sought backing from leaders in the state legislature, especially those serving on pertinent committees and caucuses. The first hearing focused on outstanding programs in Pennsylvania and beyond. We hope to develop a prototype for testimony that gives notice of effective, less expensive alternatives, for use by other communities seeking to use this strategy.

Despite its array of effective alternatives to detention programs, Pennsylvania’s juvenile justice system has very high rates of incarceration. Moreover, all three branches of government established a commission to investigate the causes of corruption recently exposed in a widely publicized case from Luzerne County.²¹ The commission held extensive hearings on corruption and institutional practices that resulted in juveniles waiving their right to counsel and being assigned unjustifiably to out-of-home placements.²² The Racial Justice Initiative is working to organize a public notice forum that highlights pertinent recommendations made to the commission, whose final report was published in May 2010.²³ The hearing will be an additional platform for those who have been leading the reform effort. We are aware that valiant though functionally invisible probation officers and other personnel in the juvenile delinquency system who are committed to the ideals

of rehabilitation and youth development rarely get public support or attention. A public hearing is a forum to recognize and encourage these efforts and contributions from those on the front lines.²⁴ Our intent is to showcase exemplary programs in order to have live and video statements by youths and families who are the beneficiaries of and participants in programs that incorporate evidence-based practices. Our hypothesis is that such a hearing, coupled with publicity before and after, will increase receptivity within the jurisdiction to the expanded use of such practices, particularly if they offer clear fiscal benefits.

The first public notice forum will give us information that is essential to moving from theory to practical application. We also believe that such a hearing can establish a standard of excellence by documenting evidence-based practices, within the state and beyond, in a way that can be invoked as precedent in other jurisdictions by judges who wish to adopt the strategy and compel officials to use knowledge about alternatives to overincarceration of youths of color.

III. Extending the Theory to Child Welfare

To illustrate the applicability of the strategy beyond juvenile justice, we have examined disparities in child welfare to see if they are amenable to the same analysis as juvenile justice.

A. Child Welfare System Reforms

Racial disparity is manifest and pervasive in other domains such as warehousing juveniles in the foster care system rather

²¹In February 2009 two juvenile court judges in Luzerne County, Pennsylvania, “pleaded guilty to tax evasion and wire fraud in a scheme that involved sending thousands of juveniles to two private detention centers in exchange for \$2.6 million in kickbacks” (Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, NEW YORK TIMES, March 28, 2009, at A1). Judge Mark A. Ciavarella sentenced a 13-year-old “to a detention center for several days in 2006 for failing to appear at a hearing as a witness to a fight, even though his family had never been notified about the hearing and he had already told school officers that he had not seen anything” (*id.*).

²²For more on the commission, see <http://bit.ly/9tV4Cg>.

²³Interbranch Commission on Juvenile Justice, Report (2010), <http://bit.ly/9KZNVu>.

²⁴The Juvenile Court Judges’ Commission sponsors a program through which probation officers can receive a master’s degree in administration of justice with a concentration in juvenile justice (Juvenile Court Judges’ Commission, Master of Science in Administration of Justice (2010), <http://bit.ly/dvjVQP>). As part of the program, “[s]tudents will conceptualize, implement, and evaluate a program at their agency, or evaluate an existing program that will employ the knowledge gained in their studies in solving problems relevant to the field of juvenile justice” (Juvenile Court Judges’ Commission, Courses in the JCJC Graduate Education Program (2010), <http://bit.ly/bZAXrQ>).

than providing family support.²⁵ Just as youths of color have disproportionate contact with the juvenile delinquency system, youths of color are disproportionately removed from their homes and placed in foster care.²⁶ They receive disparate—and less favorable—treatment once contact with the child welfare system has been made.²⁷ According to research on the disproportion in child welfare, “[a]lthough minority children comprise about 40 percent of all children in the nation, they account for 50 percent of the more than 500,000 children in foster care.”²⁸ Unfortunately youths who have contact with the child welfare system are more likely to have negative social outcomes in the future.²⁹

B. The Impact and Cost Savings of Family Support Alternatives

Michigan, Wisconsin, and New York have reduced both the number of children in placement and cost to the system by relying instead on community-based family support programs. Michigan’s Family Reunification Program, “established in 1992, provides assessment, case management, in-home services, transportation services, 24-hour service availability and flexible funds for families over a four- to eight-month period” at an average cost of

“\$3,830 compared to \$9,113 for children and families served in a more traditional program over an 18-month period.”³⁰ The Wraparound Milwaukee Program, which reduced the overall cost of care per child from \$5,000 to less than \$3,300 per month, recommends that child welfare agencies

[permit] private agencies [to serve] as care coordinators; give care coordinators small case-loads of 8 to 10 families; use flexible funding so that care coordinators can purchase the services that children and families need; focus on results rather than process measures; continually assess family satisfaction; empower families to take charge; and use available community support structures for families.³¹

In New York City community advocacy teams of the Center for Family Representation each comprise an attorney, a social worker, and a parent advocate. Before children are placed in foster care and sometimes even before a court case is filed, the teams work with families to put a continuum of services in place to help the families stay together or reunify quickly.³² Legal advocacy is available if

²⁵See Robert B. Hill, Casey-CSSP Alliance for Racial Equity in the Child Welfare System, Synthesis of Research on Disproportionality in Child Welfare: An Update (2006), <http://bit.ly/dBj7za>.

²⁶“Disproportionality refers to the differences in the percentage of children of a certain racial or ethnic group in a country as compared to children of the same group in the child welfare system” (*id.* at 3); “[f]or example, in 2000 black children made up 15.1 percent of the children in this country, but 36.6 percent of the children in the child welfare system” (*id.*).

²⁷“Disparity means unequal treatment when comparing a racial or ethnic minority to a non-minority. This can be observed in many forms including decision points (e.g., reporting, investigation, substantiation, foster care placement, exit, treatment, services or resources). Research shows that children of color in foster care and their families are treated differently from—and often not as well as—white children and their families in the system. For example, fewer African American children receive mental health services even though the identified need for this type of service may be as great (or greater) for African Americans as for other racial groups” (*id.* at 3). Youths of color are “more likely to be removed from their parents and placed in foster care, they stay in foster care for longer periods of time, and they are less likely to be either returned home or adopted” (CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF POLICIES, PRACTICES AND PROGRAMS 624 (Gerald P. Mallon & Peg McCarthy Hess eds., 2005)).

²⁸Hill, *supra* note 25, at 7.

²⁹A study of over 23,000 youths who were placed in the foster care system in Illinois had “results [that] suggest that children placed in care have two to three times higher arrest, conviction, and imprisonment rates than children who remained at home” (Joseph J. Doyle Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 JOURNAL OF POLITICAL ECONOMY 747, 753, 766 (2008), <http://bit.ly/co8Q5s>).

³⁰Pew Charitable Trusts, Time for Reform: Investing In Prevention: Keeping Children Safe at Home 16 (2007), <http://bit.ly/cpYhh1>.

³¹*Id.*

³²Center for Family Representation, Bringing Innovative Legal Services to Scale—A Brief History of CFR’s Community Advocacy Teams: from Pilot to Promise (n.d.), http://www.cfrny.org/new_legal.asp.

a case goes to court or children are removed, and the community advocacy team continues to work with families after the children return home to ensure that they continue to receive services that enhance the likelihood of successful reunification.³³

To keep a child in foster care costs New York City an average of at least \$18,000 per year. Over the entire life of a case, a community advocacy team costs approximately \$5,900 per family.³⁴ The results are striking: The average length of stay in foster care of a child of a Center for Family Representation client is just under four months, compared to a citywide average of eleven months for children in foster care.³⁵

By using these less expensive, more effective alternatives to placement in the foster care system, outcomes for youths, families, and state budgets are improved.³⁶

IV. Creating a Constituency for Systems Change: Mobilizing the Community

Racial disparities perpetuate stereotypes, fragment families, depopulate communities, and impede racial healing. We are all losers when disparities remain entrenched. Democracy requires public systems to use what we learn and know from individual cases, pilot projects, and successful programs in remote sites.

A. Community Mobilization

A strategic public notice forum can turn an entrenched disparity into a cognizable grievance if the issue is framed as officials’ informed choice among alternatives.³⁷ A key aspect is the potential to enlist community support and participation. Public testimony can turn the forum from a mere prelitigation tactic into a community education and organizing

strategy that also informs communities about the reforms which may be possible and which they can demand. An essential element of preparation is capturing both data and the voices of youths, families, and neighborhoods having benefited from alternatives that reduce racial disparities. This process also enhances the leadership opportunities for youths and families who, hitherto silent, ignored, or muzzled, can become spokespersons advancing justice and systems change. For legislators who embrace reform efforts, a forum can generate support from their constituencies.

A strategy designed to trigger broader public awareness of more effective, less expensive alternatives can lead to systems change on a different scale. If the strategy gives rise to a broader standard of professionalism—one that obligates officials to use knowledge about alternatives that work—it can shift policy and practice. Just the articulation of this strategy provides a rationale for legislators and other civic leaders to exercise an oversight role that enables them to engage directly with officials about the operation and effectiveness of the systems they run.

B. Strategy for Achieving Systems Change

Until now the principal advocacy for systems change has come from leaders of progressive nonprofit entities enlisting progressively inclined public officials, who operate within relatively insulated systems. The requirement to prove intent to discriminate has reinforced this insulation from accountability, especially in the juvenile justice and child welfare systems. And legislators may lack the time, staff, resources or incentives to undertake a major overview of systems except in the context of appropriations.

³³*Id.*

³⁴*Id.*

³⁵*Id.*

³⁶The Racial Justice Initiative strategy is applicable to other systems where both racial disparity and knowledge of more effective, cheaper alternatives that would alleviate the disparity exist—e.g., housing, employment, and education.

³⁷To view a portion of a public notice forum, see YouTube: TimeBanks USA, Racial Justice Initiative, An Offer They Can’t Refuse (n.d.), www.racialjusticeinitiative.org.

This Racial Justice Initiative strategy, by showcasing what works, allows the community, legislators, and officials to ask: “Why aren’t you using alternatives that work, cost less, and do not have a disparate impact on minority youth?” This query can set in motion a political dynamic that promotes innovation, learning, and the use of knowledge. The stories, videos, and personal testimony of youths who have benefited from programs that enlist peers, families, and community organizations as partners in reducing delinquency or offering family support can act as a powerful constituent voice that officials and legislators will heed when they make hard choices about the use of scarce funds. If a public notice hearing exposes these alternatives’ greater effectiveness and lower cost, and if the hearing carries the prospect of possible litigation for failure to make use of the knowledge, the drive for ongoing improvement can be sustained and internalized.

These public systems have been relatively immune to and insulated from public scrutiny. Their lack of success in resolving problems they purport to address has translated into lack of a constituency for them, as well as loss of public confidence in government. The judicial branch has been reluctant to second-guess the discretionary authority vested in officials who administer the programs.

C. When Reforms Are Less than 100 Percent Effective

A public notice forum can be a buffer against fear-generating, antireform attacks that predictably occur if even one youthful offender commits a serious offense when the offender is released or diverted back to the community or when one child is harmed in a reunified family. Nightly news coverage and newspaper headlines dramatize and magnify any violation by a former offender or a failed reunification. Politicians jump on the bandwagon; public anxiety leads posturing politicians to advocate “tough on crime” responses and drastic decisions to sever family ties.

Typically those who operate alternative programs have no mechanism in place

for contacting, mobilizing, or marshaling support from the youths who benefited from the alternatives that helped them choose a different path. In so many programs, for every youth who “recidivates,” fifty to a hundred succeed. If the “success story” youth were to go to city hall, to the media, to the state legislature, to high schools, or to youth rallies to ask “Would you throw away one hundred of us because of one failure?” both the media and elected officials might think twice about reverting to expensive methods that neither help youth nor promote community safety. The public notice hearing offers a vehicle to put bad news in perspective and redirect public attention to proven approaches.

D. The Challenge to Legal Aid Programs

We urge legal aid programs to consider how the Racial Justice Initiative strategy might help them return to their original mission: to amplify the voices of the disenfranchised in ways that empower them to redefine themselves as full citizens, as contributors and assets, and as essential partners in building a more just—or, at least, a less unjust—society. Typically a practitioner who renders services relegates the client to a relatively passive role as a consumer of those services. This public notice hearing strategy proposes to enlist clients as living exemplars of alternatives that work and to transform the clients’ role from consumer to partner in producing desired outcomes.

Systems change is not easy. First, our premise is that an obligation to use knowledge of effective alternatives can set in motion a process that confers negotiating leverage; the process must be ongoing and not simply a static set of changes. Second, enlisting authorities other than officials operating the system (e.g., legislators, ombudsmen, community groups) can secure sustained, transformative change. And, third, systems change requires mobilizing a constituency for ongoing change, not on a onetime basis but with the longevity to monitor progress and have a continuing feedback loop.



The Racial Justice Initiative strategy is part of a larger systems change strategy aimed at tackling public officials' practices that have a racially disparate impact in juvenile justice and child welfare. We are only beginning to learn the best way to proceed. Our experience thus far strongly suggests that the strategy can be a powerful tool in an ever-evolving systems change arsenal and, in turn, can help reduce disproportionality in juvenile justice and child welfare, as well as in other systems.

Charles Hamilton Houston is credited with noting that "[a] lawyer's either a social engineer or ... a parasite on society."³⁸ Legal aid attorneys become social architects when they undertake the design work needed to create public notice forums and enlist the community to participate in those forums to showcase efforts that have given young people, families, and committed community advocates the opportunity to grow, develop, and contribute.

[Editor's Note: Edgar S. Cahn and his late wife Jean Camper Cahn were among the architects of legal services. Their seminal article, *The War on Poverty: A Civilian Perspective*, 73 *YALE LAW JOURNAL* 1317 (1964), is widely regarded as the blueprint for the National Legal Services Program; working with Sargent Shriver and following the model set out in the article, the Cahns helped create that program under the Office of Economic Opportunity. At a time when there was no such thing as "poverty law," their creativity, vision, and passion for justice set the stage for the work all of us do today.

In 1972, through their efforts, Antioch Law School began operation in Washington, D.C., as the nation's first clinical law school; the University of the District of Columbia's David A. Clarke School of Law, where Cahn is a professor, is Antioch's successor. In 1980 Cahn developed a strategy of Time Dollars, a medium of exchange promoted through TimeBanks and based on time spent helping others, building community, or pursuing justice. The Racial Justice Initiative described in this article is a project of TimeBanks. In 2009 the National Legal Aid and Defender Association honored Edgar S. Cahn and the late Jean Camper Cahn with the Charles Dorsey Award, which recognizes individuals who have provided extraordinary and dedicated service to the equal justice community.]

³⁸Genna Rae McNeil, *In Tribute: Charles Hamilton Houston*, 111 *HARVARD LAW REVIEW* 2167, 2169 (1998).



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