

**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,

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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).

waived to adult court, detained pre-trial, and locked up at 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

2 NAT'L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 3 (2007), http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf [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 adult 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-1980's to 1995, the number of white youth in detention decreased, while the detention of minorities increased until they represented a majority 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, (2007) [hereinafter DANGERS OF DETENTION]. In 1985, 43% of juvenile detainees nationwide were youth of color; in 1995, that percentage grew to 56% and 62% in 1999. In 2006, in the most recent national count taken, the percentage of youth of color detainees rose to 69%. RICHARD A. MENDEL, THE ANNE E. CASEY FOUND., TWO DECADES OF JDAI, A PROGRESS REPORT – DRAFT 5, (2009) [hereinafter TWO DECADES OF JDAI]. However, in 2007, African American juveniles accounted for only 16.3% of the population nationwide, Asian-Americans accounted for 4.8% of the population, Native Americans accounted for 1.2%, and self-identified Hispanics accounted for 20.9%. C. PUZZANCHERA, ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, EASY ACCESS TO JUVENILE POPULATIONS: 1990-2007 (2008), <http://www.ojjdp.ncjrs.gov/ojstatbb/ezapop/>.

3 Michael J. Leiber, *Disproportionate Minority Confinement of Youth: An Analysis of State and Federal Efforts to Address the Issue*, 48(1) CRIME & DELINQ. 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 JUV. JUST. 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 fifty percent of the youth detained were minorities. *Id.* Additionally, a study by the Office of Juvenile Justice and Delinquency Programs (“OJJDP”) found that in 49 states the numbers of detained minority youth exceeded their proportion of the nation's population. *Id.*

about disproportionate minority contact (“DMC”), but never reaching an answer.”⁴ In 1992 and again in 2002, in its reauthorization of the Juvenile Justice and Delinquency Prevention Act (“JJDP” or “the Act”), Congress was explicitly concerned about DMC and elevated the mandate to reduce DMC 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 efforts to dismantle structural racism stemming from the systemic policies and practices of government agencies has been thwarted by 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 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 test that results in a finding of municipal intent and liability.¹⁰ Intent can be inferred when government

4 JAMES BELL ET AL., W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTION ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 15 (2008). The Juvenile 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 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 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> (last visited Mar. 10, 2009) [hereinafter DSG Website].

6 *Washington v. Davis*, 426 U.S. 229, 242 (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, 298 (1987).

9 William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the 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, 388 (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

policymakers “where – and only where – a deliberate choice to follow a course of action is made from among various alternatives“ by city policymakers.”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 Those decisions demonstrate “deliberate indifference” when decision-makers are on formal notice of preferable, more effective, less costly, and less injurious alternatives. This pattern of practices, if maintained, violates constitutional rights and gives rise to a valid claim for damages, declaratory, and injunctive relief.¹⁴

This Article also proposes a system change strategy that envisions the use of litigation as the last step and a 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 alternatives. 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;

anticipated – with substantial certainty – that the lack of training would deprive persons’ of their constitutional rights).

11 *City of Canton*, 489 U.S. at 388 (citing *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (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 areas, such as child welfare and special education.

13 The 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 system 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 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.

- (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 have 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 would constitute “intentional 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

15 We make this assertion because youth who are white and commit the same offenses as youth 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 because the detention decision is pivotal to 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.” *CTR. 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. We use the word “detention” to refer 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.

See infra Austin, note 43, at 1.

17 ROBIN L. DAHLBERG, *ACLU RACIAL JUST. 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.

thereby gives dimension to the scale of the injury inflicted.¹⁸ 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.¹⁹ 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 relying on the ineffective and racially disproportionate option of incarceration.

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 few decades and which, if used, would save vast amounts of money, reduce DMC, and mitigate its most injurious manifestation – the disproportionate use of detention and confinement of minority youth. It also describes two highly successful alternatives to secure confinement with which the authors have experience that illustrate how readily beneficial and cost effective system change could be initiated. One involves diversion prior to adjudication; the other offers a highly effective alternative to confinement, used both pre- and post-adjudication, that has proven effective for over thirty years.

Part IV discusses how courts deal with public interest litigation designed to effect system change. Instead of focusing the search for proof of intent on past actions and practice, we propose to shift the focus to include 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 of disproportionate incarceration, 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.²⁰ It should not matter what color young people are if they misbe-

18 See Appendix A: Two Roads Diverge – Parallel Tales. Appendix A provides a typical scenario describing how such disparities manifest in a relatively routine case.

19 The Supreme Court has severely circumscribed the liberty interest of juveniles. See *Schall v. Martin*, 467 U.S. 253 (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.

20 The first separate juvenile court was created by the enactment of 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 the adjudication of youth under the age of sixteen in order to

have 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.²¹ A cascading series of decisions throughout the juvenile justice process can determine whether resources are spent on rehabilitation, as called for and supported by the JJDPa,²² 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."²³

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.²⁴

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; their development is suspended much like the fossilized insect frozen in petrified amber – stuck. Recent brain development research indicates that under ordinary circumstances, mature decision-making capacity may not develop until the age of twenty, or even later in some instances.²⁵ Many young people who have been incarcerated and returned to the community be-

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 *JUV. JUST. J.* 13 (1999), available at <http://www.ncjrs.gov/html/ojdp/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 the age of 16 would be prosecuted and incarcerated in prisons "before they knew what a 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).

21 See Appendix: Two Roads Diverge – Parallel Tales; which mimics real life when tracing the fictional, but typical the fates of two young men. Ian, a Caucasian, and Tyrone, an African-American, both teenagers who commit virtually identical incidents that result in vastly different outcomes.

22 42 U.S.C. §§ 5601–5784 (2002). The purpose of the JJDPa 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.

23 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.pdf>. 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 on punishment and incarceration to one focused on investment, prevention, and intervention in the lives of all young people. *Id.*

24 *Schall*, 467 U.S. at 291 (Marshall J., dissenting). As the juvenile court developed to incorporate more due process protections per *In re Gault*, 387 U.S. 1 (1966), and other cases, the more confrontational process has also resulted in disproportionate outcomes.

25 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).

come unable to break out of behaviors that they might have otherwise outgrown as adults.²⁶

Adolescent antics are a predictable developmental byproduct of youth.²⁷ As teenagers mature they grow less inclined to act out.²⁸ 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.²⁹ Most youth desist from delinquent behavior once they have achieved educational and employment milestones.³⁰ Detention often arrests a youth's developmental process; detention propels a youth in a different direction, as evidenced by recidivism rates of 50% to 80% for youth who have been incarcerated.³¹ Adolescents are very suggestible, seeking a sense of belonging, confidence, and competency. When incarcerated in close proximity to other delinquent youth, their environment promotes the development of antisocial be-

26 *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); *see generally* ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (Harvard Univ. Press 2008).

27 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/> [hereinafter *YOUTH VIOLENCE*]. As many as one-third of youth exhibit delinquent behaviors; however, most will naturally outgrow 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.*

28 *YOUTH VIOLENCE*, *supra* note 27; *DANGERS OF DETENTION*, *supra* note 2, at 6.

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

30 *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.

31 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 reincarcerated 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. Research shows that youth who spend time in custody are less likely to complete high school, less likely to avoid re-arrest, less likely to find employment, and less likely to form stable families. They are also more likely to abuse drugs and alcohol.

ANNIE E. CASEY FOUND., 2008 KIDS COUNT ESSAY: A ROAD MAP FOR JUVENILE JUSTICE REFORM 9 (2008) [hereinafter *ROAD MAP FOR JUVENILE JUSTICE*]. "Youth who are detained are more than three times as likely to be found guilty and incarcerated than similarly situated peers." Two Decades of JDAI, *supra* note 2, at 5. When comparing likelihood of behavior, youth who have been detained or incarcerated have a 49% chance of using alcohol, 42% chance of using any illicit drug, and a 59% chance of dropping out of high school. *Id.* By comparison, youth who have not been detained or incarcerated, have a 34% chance of using alcohol, 21% chance of using any illicit drug, and a 30% chance of dropping out of high school. *Id.*

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havior among teenagers seeking both competency in illicit behavior and acceptance by their peers.³²

In 2006, the Department of Justice reported that 96,655 juveniles were incarcerated in youth detention centers.³³ African American youth constitute 16% of U.S. youth but 38% of the youth in detention.³⁴ In many states, the disparity is even greater.³⁵ 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.³⁶

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.³⁷ Youth of color are four times more likely to be arrested for a drug trafficking offense,³⁸ even though white teens self-reported experiences of using and selling drugs at rates greater than African American teens.³⁹ 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.⁴⁰ Additionally, minorities account for more than 58% of youth admitted to state adult prisons.⁴¹ Although this Article does not address in detail the disproportionate rate of referral to

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

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

34 *Id.* at 2.

35 *Id.* at 213.

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

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

38 SNYDER, *supra* note 33, 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 offenses involved a white youth; white youth comprised 58% of the offenders receiving out-of-home placement and 75% of those receiving formal probation. *Id.* Contrastingly, 25% of the 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.*

39 Carl McCurley et al., *Co-Occurrence of Substance Use Behaviors in Youth*, 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 American youth to report drinking alcohol [and] whites were more likely than African Americans to report either marijuana use or selling drugs." *Id.*

40 ALEX 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.

41 *Id.* at 63.

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adult court, this decision offers one of the most predictably high rates of disparity with some of the most gravely injurious consequences.

The systematic failure of many state and local authorities to collect data by race stymies efforts to fully document, explain, and address disproportionality.⁴² Nonetheless, the information that does exist strongly suggests that racial bias accounts for disproportionate treatment at each stage of the juvenile delinquency process and that its consequences are severe in regard to decisions concerning juvenile incarceration, pre- and post-adjudication.

B. *Collateral Consequences of Confinement*

Incarcerated youth typically do not receive the education or the healthcare which 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.⁴³ Studies estimate that as many as 70% of incarcerated youth have diagnosable mental health problems.⁴⁴

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.⁴⁵ These consequences increasingly and disproportionately harm the life options for youth of color.⁴⁶ 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.⁴⁷ For anyone convicted of a drug related offense or activity, collateral consequences include denial of public housing and student loans.⁴⁸ Disproportionately high rates of conviction and incarceration of juveniles of color for drug related of-

42 DAHLBERG, *supra* note 17, at 5.

43 Joseph J. Cocozzo & Kathleen Skowyra, *Youth with Mental Health Disorders: Issues and Emerging Responses*, 7 JUV. JUST. J., 4-5 (Apr. 2000), http://www.ncmhjj.com/pdfs/publications/Youth_with_Mental_Health_Disorders.pdf.

44 James Austin et al., *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, ODJJP JUV. JUST. BULL. 2 (Sept. 2005), <http://www.ncjrs.gov/pdffiles1/ojdp/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*, ODJJP FACT SHEET (Jan. 2001), <http://www.ncjrs.gov/pdffiles1/ojdp/fs200102.pdf>.

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

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

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

48 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).

fenses drastically diminish their ability to participate in their communities after they are released.⁴⁹ 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.⁵⁰

To illustrate the decision points in the juvenile justice process from which disparate outcomes emerge, the Appendix provides contrasting fictional, but typical, scenarios for two sixteen-year-old males, one Caucasian and the other African American. Both teenagers are involved in a fight at their respective neighborhood high schools where most people are of the same race as the young man in the altercation. By design, the initial incidents are virtually identical but the consequences are as different as black and white.

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

The Juvenile Justice and Delinquency Prevention Act (“JJJPA” or the “Act”) is designed to provide the resources, leadership, and coordination necessary to develop and conduct effective programs that prevent delinquency, divert juveniles from the traditional juvenile justice system, and provide critically needed alternatives to the institutionalization of youth.⁵¹ 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. And, the JJJPA provides states with the funds and expertise they need to meet these goals.⁵²

Earlier court decisions have found an implicit private right of action in three of these JJJPA protections – not jailing status offenders, separating adult and juvenile offenders, and ceasing to confine juveniles in adult jails.⁵³ However, the policy mandate to address disproportionate minority contact (“DMC”) simply means that the states must submit a plan that addresses DMC. The JJJPA does not set numerical standards and does not require states to adopt measures known

49 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). “On a given day, African Americans comprise nearly half of all youth in the United States detained for a drug offense.” DANGERS OF DETENTION, *supra* note 2, at 13.

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

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

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

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

to be effective. Such requirements could be added through amendments or through the regulations governing state plan requirements.⁵⁴ To be enforceable, however, an express private right of action likely is necessary in light of two Supreme Court decisions: *Alexander v. Sandoval*⁵⁵ and *Gonzaga University v. Doe*.⁵⁶ 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 manner that makes the requirements, consequences, and enforcement processes far more specific.⁵⁷ At present, all a state must show is that it is addressing the DMC problem.⁵⁸

This Article proposes that the community of people concerned about juvenile justice reform and reducing DMC need not and should not wait idly, hoping the next Congressional re-authorization mandates more effective enforcement.⁵⁹ 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 deference to federalism, are often leery of acting. It is possible that this reluctance also is being

54 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/200903/023409b.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.*

55 *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that no freestanding private right of action exists to enforce disparate impact Under Title VII of the Civil Rights Act of 1964).

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

57 *See supra* note 53.

58 JAMES BELL ET AL., W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTION ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 13-14 (Dec. 2008) (explaining that the 2002 amendment to the JJDPa “required that States ‘address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system.’”).

59 FED. ADVISORY COMM. ON JUVENILE JUSTICE, ANNUAL REPORT 2008 xvi-xvii, 20-24 (2008). Reasonable people can disagree about whether fund cut-offs would trigger the needed changes. The Federal Advisory Committee on Juvenile Justice has recommended expansion of the Justice Assistance 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.*

reinforced by JJDP A grantee assertions that a withholding of federal funding will compromise the viability of both the law enforcement apparatus and the preservation of law and order. Thus, despite the grantee's failure to reduce DMC, the grantor dares not risk withholding federal funds. Being tough on crime has political appeal for actors at both the state and federal level. Given the state of the economy, those administering the JJDP A could become scapegoats blamed for any juvenile crime if they cut back on resources as a penalty for failure to reduce DMC in the juvenile justice system. We have not heard the last of "adult time for adult crime" despite unequivocal evidence that waiver of juveniles into adult court ultimately increases the likelihood of recidivism.⁶⁰

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

A. *Intentional Indifference Interferes 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 to prove discriminatory intent.⁶¹ The Court later raised the hurdle for plaintiffs in *McCleskey v. Kemp*, where the

60 Diane H. Schetky, *Juveniles Standing Trial: Waiver into Adult Court*, J. OF PSYCHIATRIC PRAC., Nov. 2003, at 3. "Two studies suggest that not only do they [juveniles held in adult correctional facilities] have a higher rate of recidivism, but that recidivism occurs more rapidly than in controls who remain in the juvenile justice system." *Id.* According to The Sentencing Project:

- A Florida study comparing recidivism rates for matched groups of youthful offenders (comparable on the basis of the number and seriousness of past and current offenses as well as socio-demographic characteristics) found that juveniles coming out of the adult system were more likely to reoffend, to reoffend earlier, to commit more subsequent offenses, and to commit more serious offenses than juveniles retained in the juvenile system.
- A study of over 500 youth charged in Pennsylvania found that youths transferred to adult court are more likely to be convicted and incarcerated but their recidivism rates are higher than the rates for those who remain in juvenile court.
- A study comparing 15-16-year olds charged with robbery in New York and New Jersey found that New York juveniles whose cases originated in criminal court were more likely to reoffend and to reoffend sooner than the New Jersey juveniles whose cases were heard in juvenile court.

MALCOLM C. YOUNG & JENNI GAINSBOROUGH, THE SENTENCING PROJECT, PROSECUTING JUVENILES IN ADULT COURT: AN ASSESSMENT OF TRENDS AND CONSEQUENCES 9 (2000) (citations omitted).

61 *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).

petitioner presented what still stands as one of the most comprehensive multi-regression studies ever conducted on the impact of race in sentencing.⁶² However, even such a well-documented, statistically significant discriminatory pattern was insufficient to support an inference that any of the decision-makers in *McCleskey* acted with discriminatory purpose.⁶³ *McCleskey* hoped to prove that administration of the death penalty was racially discriminatory and, accordingly, that his death sentence violated the Constitution.⁶⁴ 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.⁶⁵ According to the Court, the probability of a discriminatory motive was insufficient to prove actual discrimination by one particular jury.⁶⁶ The Court further observed that any number of other factors might have accounted for the *McCleskey* verdict and that the uniqueness of every jury forestalled inferring motive in a particular instance from a statistical pattern of disparity.⁶⁷

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 delinquency process, however, can be distinguished from *McCleskey* due to the repetitive experience, professional expertise, and policy influence of the juvenile justice decision-makers as compared to the *McCleskey* jury of lay community members.⁶⁸

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, since some non-discriminatory public purpose justification for the policy or action can usually be found in each 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

62 *McCleskey*, 481 U.S. at 286-91.

63 *Id.* at 293.

64 *Id.* at 286-91.

65 *Id.* at 295-96.

66 *Id.*

67 *Id.* at 293-300.

68 See generally Moriety, *supra* note 2.

Constitutional injury, that the government, as an entity, is responsible under § 1983.”⁶⁹

In *City of Canton v. Harris*,⁷⁰ 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 §1983.⁷¹

This holding’s essence is that liability can be based on constructive intent as inferred when officials have actual knowledge of predictable injury and yet they reject or disregard known alternatives that would avert that injury.⁷² Intent can be inferred when a constitutional injury is substantially certain to result and the decision-maker chooses to continue a course of action that perpetuates a pattern tainted by racial bias rejecting known and available alternatives that would have averted the injury.⁷³ Moreover, an “objective obviousness” standard is employed to identify the threshold for holding a government entity responsible for deliber-

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

70 *City of Canton*, 489 U.S. at 388.

71 *Id.* (citations omitted).

72 *See, e.g., Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992). In *Walker*, 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.* *See also* SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* 6-190 (4th ed. 1997, 2007).

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

ate indifference to the constitutional rights for acts committed by its inadequately trained agents.⁷⁴ 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 deliberate indifference standard to redress violations of the Equal Protection Clause. Our theory is that government policies and practices consistently subject a juvenile of color to the infliction of sanctions that are predictably far greater and more punitive than if the same offense had been committed by a white youth. Injuries stemming from disproportionate minority contact include: deprivation of liberty; developmental injury; blocked access to special education guaranteed by federal law 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 to contribute to defense preparation, and to secure probation; and, a predictably higher probability of recidivism.⁷⁵ 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 government's course of action was one selected from among various alternatives.⁷⁶ Use of an alternative to detention will eliminate the injury that comes from current patterns of racially disproportionate detention decisions.

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 risk of flight and failure to return to court, or risk of endangerment to themselves or to public safety.⁷⁷ Estimates of the number of youth for whom detention is

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

75 Nancy Rodriguez, A Multilevel Analysis of Juvenile Court Processes: The Importance of Community Characteristics 25 (Jun. 30, 2008) (unpublished manuscript, on file with National Institute for Justice), available at <http://www.ncjrs.gov/pdffiles1/njj/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.

76 SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 209-247 (Mary Massoron Ross et al. eds., 3d ed. 2007) (1971).

77 Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5603(19)(A) (2002); Austin, *supra* note 44, at 1.

warranted range from five to twenty-one percent of those routinely detained.⁷⁸ 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,⁷⁹ diversion from the system altogether, expedited case processing, and rigorously designed alternatives to detention. In fact, several states committed to reducing DMC were able to also reduce juvenile crime and recidivism.⁸⁰ 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 actually do reduce DMC.

Every youth, irrespective of race, is entitled to a level of care that honors the purpose of the JJDPA by limiting juvenile confinement to only the situations in which it is truly required. Guaranteeing equal protection of the law requires government officials to be on notice that current practices result in a continuing injury that disproportionately impacts youth of color. 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 a foreseeable injury and an infringement of constitutionally protected rights.

78 TWO DECADES OF JDAI, *supra* note 2, at 7. “Few kids in detention (21 percent) are charged with serious violent crimes, less than the number of detained youth for status offenses (i.e., noncriminal behaviors like being “unruly” or running away) or rule violations (e.g., missing curfew). As one chief probation officer recently said about his detention population, ‘These are kids we are angry at, not kids we are scared of.’” *Id.*

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79 Austin, *supra* note 44, at 6, 8.

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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.

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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.

80 The Annie E. Casey Foundation’s 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 INST. FOR PUB. POLICY, EVIDENCE-BASED JUVENILE OFFENDER PROGRAMS: PROGRAM DESCRIPTION, QUALITY ASSURANCE, AND COST (Jun. 2007), <http://www.wsipp.wa.gov/rptfiles/07-06-1201.pdf>.

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.⁸¹ For the past twenty 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.⁸² During the same period, the John D. and Catherine T. MacArthur Foundation has invested in parallel efforts through its Model for Change Initiative.⁸³ We submit that the requisite proof of available alternatives is provided by the extensive 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 Foundation’s JDAI.⁸⁴ 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 incarceration practices given the availability of validated and affordable alternatives that would not have caused a disparate impact.

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.⁸⁵ Admittedly, addressing DMC involves attacking a problem that stems from mul-

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

82 AECF Detention Alternative Website, *supra* note 80. *See also* TWO DECADES OF JDAI, *supra* note 2.

83 Models for Change, Background and Principles, <http://www.modelsforchange.net/about/Background-and-principles.html>.

84 AECF Detention Alternative Website, *supra* note 80; 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 Apr. 27, 2009); Washington State Institute for Public Policy, <http://www.wsipp.wa.gov/> (last visited Apr. 27, 2009).

85 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, 470 A.2d 374, 386 (N.J. 1984).

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tiple factors embedded and entrenched in every aspect of life – e.g., economic, social, educational, cultural, and geographic.⁸⁶ This is precisely why courts were once likely to shy away from the issue of DMC altogether. But after more than twenty years of skirting the issue because of its perceived complexity, there is a growing body of knowledge regarding available, effective, and affordable remedies that can no longer be dismissed or ignored. In the context of long-standing injurious disparity, the constitutional right to equal protection gives rise to an obligation to use knowledge of what works.

A showing of actual knowledge of injury coupled with the rejection of proposed cost-effective, efficient alternatives meets or satisfies the intent requirement sufficiently to defeat a motion to dismiss for “failure to state a claim upon which relief can be granted.”⁸⁷ 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 confinement 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 DMC situation parallels the disparity addressed by the Supreme Court in *Castenada v. Partida*.⁸⁸ *Castenada* involved a claim of discrimination based on a grand jury selection process where Spanish surnames 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 surnames.”⁸⁹ 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.⁹⁰ In short, the Court found that this disproportionality coupled with a selection procedure susceptible to abuse was sufficient to make a *prima facie* case of intentional discrimination.⁹¹

86 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.*

87 FED. R. CIV. P. 12(b)(6).

88 *Castenada v. Partida*, 430 U.S. 482 (1977). The issue then becomes: 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 number of youth of color detained would be a primary measure.

89 *Id.* at 484.

90 *Id.* at 496.

91 *Id.* at 497-98.

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.⁹²

Similar to *Castenada*, the criteria for reaching a determination of whether to detain a juvenile offender are purportedly neutral on their face while the ultimate decision-making process is discretionary and susceptible to abuse. And, there is also a multi-year disproportionality in the detention of juveniles of color. The availability of alternatives proven to radically reduce the use of detention at each stage in the process from arrest to post-adjudication 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 refuses to change.

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 to persist.

D. Addressing the Requirement of Causation

Commentators have noted that without causation, “negligent or even grossly negligent training would not give rise to a §1983 municipal liability claim.”⁹³ 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 for Equal Protection claims: 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.⁹⁴ 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 respondent could contend that there is no causal relationship in any individual case between the injury caused by racially

⁹² *Id.*

⁹³ SWORD AND SHIELD, *supra* note 71, at 33-34.

⁹⁴ See Moriearty, *supra* note 2, at 323 (discussing how race falls outside the rationale in *McCleskey v. Kemp*).

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 discriminatory pretrial detention of youth of color in the juvenile justice system should be analyzed under the *Castaneda* 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.⁹⁵

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."⁹⁶

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.⁹⁷ A sufficient causal relationship 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 would be best eliminated by a class action lawsuit. Plaintiffs would seek prospective relief from a continuing practice that fails to make secure confinement the choice of last resort – *i.e.*, a choice made only

95 *Id.* at 331-32.

96 *Id.* at 329.

97 *Id.* at 291.

after all other alternatives have been exhausted.⁹⁸ These claims would best be raised in a class action context. Such a tactic is imperative given the well-documented absence of effective counsel in a vast number of juvenile cases⁹⁹ and the inability of a juvenile respondent to effectively challenge a widespread practice of unnecessary detention.¹⁰⁰

III. WE KNOW A GREAT DEAL ABOUT ALTERNATIVES TO DETENTION

First, it should be acknowledged that no alternative to detention can totally eliminate recidivism.¹⁰¹ This makes secure confinement appealing to decision-makers. On its face, incarceration 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.¹⁰² 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.¹⁰³ Even more disturbingly, consistent research findings indicate that detention actually increases recidivism. These find-

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

99 In 1995, the American Bar Association's Juvenile Justice Center published *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, a national study that revealed major failings in juvenile defense across the nation. Since that time, numerous state-based assessments have documented, in detail, the manner in which these failings result in lifelong, harmful consequences for our nation's children. Common findings among these assessments include a lack of access to competent counsel, inadequate time and resources for defenders to prepare for hearings or trials, a juvenile court culture that encourages respondents to plead guilty, to move cases quickly, a lack of pretrial and dispositional advocacy and an over-reliance on probation. All National Juvenile Defender Center Assessments are available at <http://www.njdc.info/assessments.php>. See NAT'L JUVENILE DEFENDER CTR., & NAT'L LEGAL AID & DEFENDER ASSOC., TEN CORE PRINCIPLES FOR PROVIDING QUALITY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS (Jul. 2008), http://www.njdc.info/pdf/10_Core_Principles_2008.pdf.

100 ROAD MAP FOR JUVENILE JUSTICE, *supra* note 31, 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.* In 2006, only 21% of detained youth were held for violent crimes and 10% for simple assaults and other person offenses whereas the majority of youths were held for property, drugs, "public order and other crimes, 41%; and status offenses, 28%. TWO DECADES OF JDAI, *supra* note 2, at 7.

101 Austin, *supra* note 44, at 1.

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

103 Austin, *supra* note 44, at 2.

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ings 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.¹⁰⁴ In other words, confinement exacts more than a temporary deprivation of liberty. It imposes the heightened prospect that a youth will commit future crime against society once 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 Juvenile Justice and Delinquency Prevention Act (“JJDP A”), 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.”¹⁰⁵ “Just 14% of more than 50,000 youth in 28 states detained in the 1990s had committed a serious violent offense. Prior to 2005 in the District of Columbia, only 17% of confined youth were serious violent offenders.”¹⁰⁶

Only a small fraction of youth confined in juvenile facilities have histories that warrant confinement.¹⁰⁷ Extensive research coupled with cost-benefit analyses support the need for a policy shift for all youth – regardless of race. This research should be accorded even greater weight in the context of disproportionate minority contact and supports but one conclusion: except in those truly exceptional circumstances where confinement is clearly warranted, 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.¹⁰⁸

A. *Alternatives to Secure Detention and Confinement Cost Less and Work Better*

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

104 *Id.* at 2-3. Research on traditional confinement in large training schools found recidivism rates ranging from 50-70% of previously confined youth were rearrested within 1 or 2 years after release. *See also* ROAD MAP FOR JUVENILE JUSTICE, *supra* note 31, at 9.

105 Austin, *supra* note 44, at 1; Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5633(a)(9)(L)(i) (2002).

106 ROAD MAP FOR JUVENILE JUSTICE, *supra* note 31, at 19.

107 *Id.*

108 DANGERS OF DETENTION, *supra* note 2, at 8. Diversion programs – often restricted to the first-time offenders facing charges on a non-violent offense – 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 people 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. Continued confinement of non-violent offenders in the face of substantial success at rehabilitation or preventing recidivism is indicative of a governmental apparatus intent on meting out punishment rather than pursuing the rehabilitative solutions for which juvenile courts were established.

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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 issued a Juvenile Justice Bulletin (“the Bulletin”) in 2002 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.”¹⁰⁹ OJJDP has identified model programmatic responses available for every element and at every stage of the process that contributes to DMC and offers a web-based directory to assist states in developing initiatives to reduce DMC.¹¹⁰ The Bulletin extensively describes several alternatives to detention with an extensive bibliography,¹¹¹ and includes sample “Risk Assessment Instruments” used by several jurisdictions to provide an objective basis for determining whether or not detention is warranted.¹¹² It also provides a concise description (with contact information) of a continuum of alternatives coupled with evaluation data for each approach, including: 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.¹¹³ The Bulletin, along with extensive materials provided by the Annie E. Casey Juvenile Detention Alternatives Initiative project, attest to the mushrooming body of knowledge about promising strategies to reduce detention and confinement of youth.¹¹⁴

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 track 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.

109 Austin, *supra* note 44, at 1. Detention is confinement or incarceration of a juvenile in a secure facility before an adjudicatory finding of involvement. *Id.* There is also evidence of DMC in the rate of confinement of juveniles of color in secure facilities after they have been found involved in a juvenile delinquent act, akin to the court finding an adult defendant guilty of a crime. DANGERS OF DETENTION, *supra* note 2, at 8.

110 DSG Website, *supra* note 5.

111 Austin, *supra* note 44, at 24-29.

112 *Id.* at 29.

113 *Id.* at 13-20.

114 See, *e.g.*, AECF Detention Alternatives Website, *supra* note 80; TWO DECADES OF JDAI, *supra* note 2.

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*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 significantly reduced the use of detention while also generating a derivative reduction in DMC. Two foundation initiatives have been at the forefront of developing alternatives to detention and reducing DMC: the Juvenile Detention Alternatives Initiative of the Anne E. Casey Foundation (“JDAI”) and the Models for Change Initiative of the John D. and Catherine T. MacArthur Foundation. These two philanthropic initiatives have enabled states and counties to develop, utilize, and validate effective and less expensive alternatives to detention.

1. Success of the Casey Foundation’s Juvenile Detention Alternative Initiative
– Local

Through participation in the Casey Foundation-funded JDAI, Multnomah County, Oregon became “the first jurisdiction to produce substantial reduction in racial disparity within its juvenile justice system.”¹¹⁵ 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.”¹¹⁶ Because no other viable location existed, Multnomah County law enforcement officials brought almost 1400 youth charged with non-detainable offenses to the detention center.¹¹⁷

Reform of the system 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.¹¹⁸ About five years later, by 2000, detention reforms and persistent leadership had reduced the odds of detention to 22% for all youth, regardless of race.¹¹⁹ The progress was no accident. By reviewing system data, local leaders identified decision points where racial disparities were prominent. Where structural bias or exercise of discretion was found to have “placed youth of color at a disadvantage, the leaders made [systemic] changes.”¹²⁰ As a result, detention was reduced for all youth and, even more relevant to this Article, disproportionate minority contact had effectively been eliminated.

115 ROAD MAP FOR JUVENILE JUSTICE, *supra* note 31, at 24.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 ROAD MAP FOR JUVENILE JUSTICE, *supra* note 31, at 24.

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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 American youth.¹²¹ 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 2007.¹²²

2. Success of the MacArthur Foundation's Models for Change Initiative – Local

The Model for Change Initiative “supports reform in 16 states and aims to help accelerate a national juvenile justice reform movement to improve the lives of young people in trouble with the law, while enhancing public safety and holding young offenders accountable for their actions.”¹²³ Pennsylvania, a participant in the Models for Change Initiative, has seen a reduction in detention rates in Berks County. “Since 2007, Berks County has reduced its detention population by 45% without compromising public safety.”¹²⁴ The county was able to reduce its detention population because it used “data-driven analysis of key decision points in Berks County” and then created a detention assessment instrument, an evening reporting center, and used alternatives to out of home placements.¹²⁵ Because of the reduction in detention caused by the data-driven, purposeful decision-making, “the County has permanently removed 24 beds from its secure detention program, altering the space to create a shelter for youth who cannot return home for safety reasons”¹²⁶

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 un-reformed systems, they nevertheless provide rock-solid evidence of more effective, less expensive, consistently successful alternatives to incarceration.¹²⁷

121 *Id.* at 3.

122 *Id.* at 8.

123 The John D. and Catherine T. MacArthur Foundation, Juvenile Justice, http://www.macfound.org/site/c.lkLXJ8MQKrH/b.943477/k.9538/Domestic_Grantmaking__Juvenile_Justice.htm.

124 Models for Change, *Reducing the Incarceration of Youth of Color in Berks County* (May 13, 2009), <http://www.modelsforchange.net/reform-progress/14>.

125 *Id.*

126 *Id.*

127 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.” *Id.* Programs are evaluated according to four factors: conceptual framework of the program; program

On a larger scale, extensive reviews and evaluations of wrap-around services and intensive case management initiatives have documented positive results in many jurisdictions.¹²⁸ Because 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, there have not been the controlled randomized trials (CRT) required for a strategy to gain the “evidence-based” designation.¹²⁹

While there is an increasing institutional, and even a policy, bias towards formal CRT, with control groups and random assignment, other evaluation methodologies proffer significant advances in reliable information and knowledge.¹³⁰ Over more than two decades these “non-evidence-based” programs have consistently shown major reductions in recidivism. For that reason, they have earned designation as Model Programs by the OJJDP.¹³¹

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 Programs, Inc. (“YAP”), a community-based program of wrap-around services. Both

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. *Id.*

128 OJJDP’s Model Program Guide, http://www.dsgonline.com/mpg2.5/wrap-around_prevention.htm. The guide documents the successes of wraparound case management services and programs. *Id.*

129 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 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 the needs of young people.

130 Michael Quinn Patton, 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.*

131 *See e.g.* The Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education Act of 2009, H.R. 1064 111th Cong. (2009) (introduced by Rep. Scott) [hereinafter Youth PROMISE Act]. The purpose of the Youth PROMISE Act is to use the “wide range of evidence-based and promising programs, integrated into a youth-oriented community system of care [because it] has been demonstrated to reduce youth violence, delinquency, and crime risks, as well as criminal justice, public assistance, victim assistance, and other cost. H.R. 1064 § 4(2). Furthermore, the specific findings of the Youth PROMISE Act includes the finding that, “many alternatives to incarceration of youth have been proven to be more effective in reducing crime and violence at the National, State, local, and tribal levels, and the failure to provide for such effective alternatives is a pervasive problem that leads to increased youth, and later adult, crime and violence.” H. R. 1064 § 4(17).

programs have proved highly successful in furthering youth development and reducing recidivism. One is particularly effective prior to adjudication; the other has a proven track record as an alternative to institutional confinement following adjudication. Both efforts incorporate a “co-production” framework,¹³² 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.¹³³ These two programs incorporate a set of core principles that we believe offer an even more enduring and transformative approach to address delinquent conduct than the “evidence-based” programs now enjoying authoritative endorsement.¹³⁴

1. Time Dollar Youth Court (“T-D Youth Court”)

“The Time Dollar Youth Court was authorized in 1996 by the Superior Court of the District of Columbia to work with the courts in a ‘partnership for the purpose of jointly developing a diversion program that provides a meaningful alternative to the traditional adjudication format in juvenile cases.’”¹³⁵ For twelve years T-D Youth Court has successfully diverted juvenile, non-violent first time offenders away from the juvenile delinquency system. In 2008, T-D Youth Court jurors heard 912 cases for offenses such as simple assault, possession with intent

132 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).

133 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.

134 Those core principles are:

- (1) An Asset Perspective: We must build on strengths; 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).

135 Time Dollar Youth Court Home Page, <http://www.tdyc.org/>.

to distribute marijuana, and disorderly conduct.¹³⁶ Typically, recidivism rates during the first six months after referral to T-D Youth Court were a mere 5% and twelve months after referral recidivism has risen only to 9%.¹³⁷ Both the six-month and one-year recidivism rates are far below the prevailing 33-35% recidivism rate for the comparison group. The estimated nationwide cost of Youth Court programs is \$458 per respondent compared to: (1) the costs of probation, estimated cost of \$1,635 per youth; and, (2) juvenile justice processing, estimated costs ranging between \$21,000 and \$84,000 per case.¹³⁸

2. Youth Advocate Programs, Inc. (“YAP”)

For the past thirty years, the Youth Advocate Programs, Inc. (“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 at an average annualized cost of \$88,000.¹³⁹ 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 to strengthen the family and build an informal support network for the young person.¹⁴⁰ 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.”¹⁴¹ 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.”¹⁴² In

136 CAROLYN D. DALLAS & RENE M. GORNALL, A FIVE YEAR LOOK AT PARTICIPATION IN THE TIME DOLLAR YOUTH COURT, INC. DIVERSION PROGRAM: PROGRESS REPORT 2004 TO 2009 2 (2009).

137 *Id.*

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

139 Youth Advocate Programs, Inc., 10 Fast Facts about YAP, <http://www.yapinc.org/index.php?pID=57> (last visited Mar. 10, 2009); *see* TWO DECADES OF JDAI *supra* note 2, at 7.

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

141 Austin, *supra* note 44, at 19; RONALD B. REA ET AL., FINAL EVALUATION REPORT OF THE HARRIS COUNTY YOUTH ADVOCATE PROGRAMS (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 less than 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.

142 *Id.*

2002, TCAP served over 500 youth and their families – nearly 400 families completed the entire program.¹⁴³ 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.”¹⁴⁴

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, recidivism, and crime – at a fraction of the cost of incarceration.

D. *Alternatives Beat Incarceration in the Cost-Benefit Analysis*

Besides effectiveness, cost is the other major factor that public officials bear in mind 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.¹⁴⁵ 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.”¹⁴⁶ For example, “Texas spends \$57,000 a year incarcerating each minor.”¹⁴⁷ 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 \$13,000.¹⁴⁸ “States spent about \$5.7 billion in 2007 to imprison 64,558 youth committed to residential facilities.”¹⁴⁹ According

143 *Id.*

144 *Id.*

145 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, IL), secure detention at \$115 per day and alternative at \$33 per day; Multnomah County (Portland, OR), secure detention at \$180-200 per day and alternative to detention at \$30-50 per day; Tarrant County (Dallas/Ft. Worth, TX) at secure detention \$121 per day, an intensive advocacy program at \$30-35 per day, and electronic monitoring at \$3.50-3.75 per day. *Id.*

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

147 *Id.*

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

149 JUSTICE POLICY INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 4 (May 2009), http://www.justicepolicy.org/images/upload/09_05_REP_CostsOfConfinement_JJ_PS.pdf.

to the American Correctional Association, “on average, it costs states \$240.99 per day – around \$88,000 a year – for every youth in a juvenile facility.”¹⁵⁰

The benefit of an investment in community-based alternatives escalates upon consideration 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 positive cost-benefit analysis.¹⁵¹ WSIPP developed criteria designed to ensure quality implementation and program fidelity of research-proven programs in the state.¹⁵² Cost-benefit studies of those programs have produced some startling figures ranging from a benefit of \$31,243 for each dollar spent to *negative* value of \$12,478 of the Scared Straight program, after subtracting costs.¹⁵³ 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 accruing to the state as a result of the local programs.¹⁵⁴

IV. CAN COURTS EFFECT SYSTEM CHANGE? INSTITUTIONAL CAPACITY: COURTS AND SYSTEM REFORM

Our hope is that, prior to litigation, concerned juvenile justice advocates will employ a “public notice forum” to put officials on formal notice of the extent to which youth of color have disproportionate contact within 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.

150 *Id.*

151 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>.

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

153 DRAKE, *supra* note 75.

154 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, since codified in WASH. REV. CODE ANN. § 13.40.510 (LexisNexis 2009).

A notice forum can take many forms: a blue ribbon commission, a caucus of state legislators, a select committee, a judicial convening or more. The first such forum will likely be convened by a group of concerned inner-city legislators whose constituencies are most directly affected by the high concentrations of youth of color historically drawn into the “cradle to prison pipeline.” Such a forum would do more than put officials on notice of effective, less expensive alternatives. It would enfranchise families and neighborhoods, by providing them with a platform to voice injury and to advocate change, information about alternatives, and an opportunity to begin holding the system accountable to produce better outcomes and lower recidivism rates. It would provide legislators with the opportunity to exercise oversight of the federally mandated State Advisory Group charged with making plans and recommending grants to implement the core requirement of the Juvenile Justice and Delinquency Prevention Act. Ideally such forums could provide an opportunity for those youth who have been in detention and others who have benefited from alternatives to detention to inform community leaders about the world that only they know. Finally, the voices of those who have benefitted from system change need to be heard because advocates for reform need youth allies who can share their personal stories and attest to the benefits they have derived from innovative community-based practices. Without such a constituency, progress in breaking the current addiction to detention is all too vulnerable to a fatal setback if even one juvenile who might have been detained does something bad. Those cases are as predictable as they are rare; they will generate exponential backlash if they are not countered by youth who can say: “You get twenty or fifty of us for every one who slips through the cracks. And we are your future family heads, taxpayers, and leaders.”

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.¹⁵⁵ 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. Following a formal hearing where notice of effective alternatives has been provided, officials may choose to resist system change by maintaining business as usual, or to go through the motions of a response by announcing a plan that is clearly inadequate to end racial bias.¹⁵⁶ There clearly needs to be pressure to

155 AECF Detention Alternatives Website, *supra* note 80; DRAKE, *supra* note 75.

156 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 undertook a response by appropriating millions of dollars for programs that would provide 500 slots as alternatives to detention. *Id.* The programs were launched and all slots were filled; however, the numbers of juveniles placed in criminal institutions was not reduced. *Id.*

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*,¹⁵⁷ to identify 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.¹⁵⁸ 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 and system involvement committed the same offense, where (as in our hypothetical comparison in Appendix) the youth of color was not diverted but was instead charged and detained, while the white youth was sent home. Once such evidence is obtained, the issue becomes securing a remedy that compels officials to use knowledge of what works. Assuming that intent 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.¹⁵⁹ 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.¹⁶⁰

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.”¹⁶¹ 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”;¹⁶² (2) “assessment of compliance in terms of the defendant’s conformity to detailed prescriptions of

157 *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).

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

159 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.”).

160 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).

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

162 Sabel, *supra* note 161, at 1021.

conduct in the decree”;¹⁶³ and (3) “a strong directive role for the court or a special master in the formulation of remedial norms.”¹⁶⁴ 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 operation of complex, executive branch institutions when confronted with opposing armies of experts arrayed by plaintiffs and defendants.¹⁶⁵ Courts initially embraced three guiding principles: (1) the response must be one chosen from professionally approved strategies;¹⁶⁶ (2) implementation must commit sufficient resources to carry out the chosen strategy effectively and responsibly;¹⁶⁷ 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.¹⁶⁸

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,¹⁶⁹ engaging in an “experimentalist” approach,¹⁷⁰ or creating “destabilization rights”

163 *Id.* at 1021-22.

164 *Id.* at 1022.

165 In the context of responding to egregious cases of educational failure, courts have articulated varying standards for defining what “sound and effective professional practice” might mean. These include: *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. Texas 1981) (defendant’s program must be an “equally effective alternative” to that sought by plaintiffs); *Martin Luther King Jr. Elementary Sch. Children v. Mich. Bd of Educ.*, 473 F. Supp. 1371 (E.D. Mich. 1979) (best available knowledge); *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 program effectiveness).

166 *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 161, at 1056 (discussing the changing role of professionals in formulating remedies).

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

168 *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”).

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

170 *See Sabel & Simon*, *supra* note 161, at 1055 (“The judge’s role changes from that of directly determining the merits to facilitating a process of deliberation and negotiation among stakeholders.”).

which open the door to stakeholders in an ongoing participatory process.¹⁷¹ 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.¹⁷² 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.¹⁷³ 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;¹⁷⁴ 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 incentive, not a threat, to accrue new knowledge so the “rolling rule” regime also initiates an ongoing 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.”¹⁷⁵ And this is just

171 “Destabilization induces the institution to reform itself in a process in which it must respond to previously excluded stakeholders.” Sabel & Simon, *supra* note 161, 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.

172 *Id.* at 1068.

173 *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.*

174 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, such as the Medicaid agency, the department of mental health and the public school system, provide critical resources needed for an effective remedy. 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.

175 SNYDER, *supra* note 33, 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 of-

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. There is a new body of knowledge respecting alternatives to detention that engage both family and community that produce better outcomes for all, but especially for youth of color. It is time that officials were obliged to make use of that knowledge.¹⁷⁶

ficers. *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.*

176 We oppose limiting that obligation to only those programs that are “evidenced-based.” 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 it 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).

APPENDIX
TWO ROADS DIVERGE—PARALLEL TALES

This short hypothetical scenario presents two fictional, but representative sixteen year olds: Ian, who is Caucasian and Tyrone, who is African American. Each protagonist in the parallel scenarios attends his neighborhood school in a community where most people are of the same race as he.

These parallel tales begin with each protagonist starting a minor altercation at his own school. Each fight results in a few thrown punches and bruised adolescent egos; the only bloodshed is from a minor cut to the young protagonist. By design, the initial virtually identical incidents result in consequences that are as different as black and white.

TWO TAKES DIVERGE—PARALLEL TALES		
DECISION POINT IN THE JUVENILE JUSTICE PROCESS	<i>IAN'S EXPERIENCE</i>	TYRONE'S EXPERIENCE
PRE-ARREST		
ERRANT BEHAVIOR IS THE SAME	<i>Ian and two other young men begin to argue and throw punches. Only Ian has a minor bleeding cut. No one else is injured in any way. Several other students stand around jeering.</i>	Tyrone and two other young men begin to argue and throw punches. Only Tyrone has a minor bleeding cut. No one else is injured in any way. Several other students stand around jeering.
WHAT AUTHORITY COMES TO ADDRESS THE SITUATION?	<i>The School Nurse and College Counselor are the first adults to arrive on the scene. They diffuse the crowd of students and dispatch one to get the Assistant Principal (AP).</i>	The School Policeman ¹ is the first adult to arrive on the scene. He diffuses the crowd of students and radios a report of the incident to the precinct. ¹ This officer parks his marked squad car by the school to deter fighting and other criminal behavior, such as drug deals.
ONCE LAW ENFORCEMENT IS CONTACTED, WHAT IS THE ASSESSMENT?	<i>Ian has stopped bleeding from a minor cut by the time the first adult arrives on the scene.</i>	Tyrone has stopped bleeding from a minor cut by the time the first adult arrives on the scene.

INITIAL CONTACT		
ARE CHARGES BROUGHT?	<p><i>The AP has been briefed by the Counselor that Ian has been out of sorts since his other brother has just left town to go to a drug treatment program.³ The AP asks Ian what happened and says that since there is blood they must call the police. The responding officer prepares paperwork over the phone and offers to issue a citation for diversion which must be picked up by the child and parent within 24 hours.</i></p> <p>³ <i>Ian's older brother was busted for having 40 packets of "powder" cocaine hydrochloride in the basement.</i></p>	<p>The police officer looks at Tyrone and asks, "Don't you run with 'Smoke'?"² The police officer pushes other students out of the way as he handcuffs and guides Tyrone out toward the patrol car. He doesn't let Tyrone speak and he says he knows Tyrone is a troublemaker and he saw the incident himself.</p> <p>² Smoke is an 18 year old. He was just sentenced to prison for 10+ years in a crack-cocaine distribution case for having 40 packets of crack-cocaine.</p>
PRE-PETITION		
HOW ARE FIRST-TIME OFFENDERS TREATED?	<p><i>The AP tries to reach Ian's mother, whose phone is out of service. Ian is then permitted to try to reach another adult relative. He calls his cousin to get his aunt's telephone number. Ian is still permitted to go home. When his mother gets home he tells her that she must to go to retrieve the citation. Later that night Ian's mother goes to the police station to pick up the citation directing Ian to report to Court two weeks later, on a Saturday.</i></p>	<p>Tyrone asks to go to his locker to get his aunt's work number because his mother cannot receive calls at work during her afternoon shift. The officer refuses and orders Tyrone, "to shut up or I'll shut you up," as he pushes Tyrone into the squad car to go down to the station for his first booking.</p> <p>When Tyrone's mother arrives at home after work, Tyrone is not there. Tyrone's friends tell her what happened to Tyrone and she quickly goes to the neighborhood police station to pick him up. Tyrone is not there and no one can tell her where he is being held or when his case might be in court.</p>

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INITIAL HEARING		
<i>IN RE GAULT ENTITLES JUVENILES TO LEGAL REPRESENTATION.</i>	<i>A lawyer calls Ian's home a few days later. Ian and his lawyer meet so the lawyer can ascertain the facts, possible witnesses and develop a defense while the incident is still fresh. The lawyer encourages Ian to mind the release order and to follow all of the rules so that he can persuade the court to order Ian into a diversion program.</i>	Tyrone meets his lawyer for the first time, in open court when he is brought out from the lock-up cell behind the judge's bench. His appointed counsel did not come to meet him before his afternoon court appearance and instead starts whispering some basic questions like, "Is anyone in court for you?"
WHAT HAPPENS WHEN THE YOUTH GOES TO COURT?	<i>Ian arrives at court with his mother and uncle, on a Saturday about two weeks after his arrest. The case gets referred to diversion for first offenders and they do not appear before the judge. They complete paperwork shortly after they arrive at court and are able to leave court less than an hour after they get there.</i>	Tyrone gets to court the day after his arrest. He is alone, sleepless, scared, disheveled, and hungry. He has not talked with his mother, any other family member, or with his lawyer. Tyrone is bought out to the counsel table in handcuffs. The lawyer defers to the court social services and the prosecutor's recommendation for Tyrone to be held in a halfway house or group home because he seems unsupervised and no adult has come forward to speak on his behalf. Tyrone tries, to no avail, to explain that the police did not permit him to call anyone.

<p>WHAT HAPPENS AFTER THE FIRST COURT APPEARANCES?</p>	<p><i>Ian goes home. He continues to act out on occasion, but has been chastened by the diversion agreement that he and his mother signed at the courthouse. The agreement requires Ian to meet all of the conditions, including getting a summer job and staying out of trouble for an entire year. If Ian meets all of the conditions in the diversion agreement, he will not even have an arrest record.</i></p>	<p>All of the community halfway houses are full so Tyrone gets sent to a youth detention facility. He is incarcerated on a ward with about twenty other juvenile detainees where he gets into altercations and disagreements with staff and bunk mates. Tyrone has talked with his mom a couple of times by phone, but she has been unable to visit due to transportation issues.</p> <p>When Tyrone returns to court for his status hearing two weeks later, he has “earned” a number of infractions. Tyrone’s attorney, whom he has not seen since the initial hearing/arraignment, directs him to enter a guilty plea and he does. Tyrone is adjudicated “involved”; the judge commits Tyrone to the Department of Youth Services, which decides to keep him locked up for another month or two, or until a group home slot opens up.</p>
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DURING THE FIRST SIX MONTHS AFTER INITIAL INCIDENT		
WHAT HAPPENS POST-DISPOSITION?	<p><i>Ian finds a part time job at the local pizza shop and tries not to let his temper flare. Although Ian does not get any new contacts during the first six months he is on diversion, he begins to slide about six months later. His volatile temper results in Ian getting fired from his job, which places him out of compliance with the diversion program.</i></p> <p><i>Ian's citation is filed, he gets officially charged, and a notice sent to his home orders him to appear on the following Saturday. Since Ian has not gotten rearrested, when he goes before the judge he enters a guilty plea for the initial fight case and is placed on probation. His only condition is that he complete an afterschool SAT Prep program and report to the probation office six months later with a certificate of completion.</i></p>	<p>Tyrone eventually gets into a group home near the rival high school; he is happy to be back in the community and no longer locked up. Due to overcrowding in the system, particularly in community-based group home, Tyrone is released a mere ten days later and returned home under several conditions of aftercare (the juvenile equivalent of parole). Tyrone must report weekly to his aftercare worker, submit to drug tests, go to a monthly anger management meeting at the probation officer and he is ordered to find a summer job.</p>

<p>WHEN THERE IS SUBSEQUENT BAD CONDUCT, HOW DOES THE SYSTEM RESPOND?</p>	<p><i>Although Ian completes the SAT Prep program he has several additional disciplinary reports at school and gets more and more out of control. His school counselor signs him up for an art therapy program designed to tackle his anger management issues. This begins to make a difference. He also meets a girl in the program who is a good influence on his study habits and overall behavior.</i></p>	<p>During his first month home, Tyrone reports religiously for his aftercare appointments where he submits urine samples and “tests clean” indicating no drug use or exposure. Tyrone tries in vain to find a summer job. It seems like the first question on each application is: Whether he has been arrested and found guilty. After he answers that question, “yes,” he does not get called back. The next two times that Tyrone shows up his aftercare worker is either absent or unavailable. When Tyrone finds out there are no consequences for failing to find a job or for failing to check in with his aftercare worker (although it is her fault), he slackens on attendance at the weekly appointments and falls back into his old patterns and activities. He goes to a party one Saturday night and hangs out in a room where his friends are smoking marijuana. The next week, his aftercare worker calls and orders him to come in or risk getting locked up. Tyrone believes that he will test dirty for drug use so he refuses to go to the appointment. The system records are also unclear from the group home. A bench issues for Tyrone’s arrest. The school officer is notified and the next day Tyrone is arrested coming out of school.</p>
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		<p>Tyrone refuses to submit to a drug test and is held pending an aftercare revocation hearing. When he appears before the judge, Tyrone is told that he will be held in confinement for another six months to teach him a lesson.</p>
EIGHTEEN MONTHS AFTER ADJUDICATION		
<p>WHAT HAS HAPPENED EIGHTEEN MONTHS AFTER ADJUDICATION?</p>	<p><i>Due to his continued bad temper, Ian lost his job at the local pizza parlor and his chance at diversion is taken away. When his case his reinstated, the court places Ian on probation with the sole conditions that he stay out of trouble and complete the after school SAT Prep course. Ian had some technical violations while on probation because he continued to get into disputes and altercations. Ian's probation does not get revoked. He accesses community-based services and participates in an art therapy program that actually helps him cope better. While in the program, he befriends a young lady with whom he enjoys spending afternoons studying and starts managing his time and temper better.</i></p>	<p>During the same eighteen-month period, Tyrone was incarcerated first in detention and then in commitment status pending an opening in a group home. When he eventually got home, he could not find a job, and did not get any other helpful services. Once he realized that the recordkeeping at the aftercare office was lax, he stopped going and began to hang out with the "wrong crowd" again. Although he has no new charges, some technical violations result in Tyrone being locked up again.</p>

These parallel tales depict the many points in the classic juvenile delinquency incident where disparate decisions will result in vastly different outcomes. Although Ian and Tyrone are similarly predisposed to have volatile tempers, the consequences are very different. The system offers alternatives, resources and a measure of grace to permit Ian to overcome his temper problem and to develop coping skills. On the other hand, Tyrone, like so many before him, becomes one more statistical casualty – one swept into the “cradle to prison pipeline.” Disparity with a racial bias element is present in every phase of the juvenile justice system, but the decision at the point of the initial contact regarding whether to divert, prosecute, detain, or employ an alternative to detention is the most critical in the eyes of many scholars.

