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## Juvenile Justice Reform in Georgia: A Collective Decisionmaking Approach to De-Politicize Crime and Punishment

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## **JUVENILE JUSTICE REFORM IN GEORGIA: A COLLECTIVE DECISIONMAKING APPROACH TO DE-POLITICIZE CRIME AND PUNISHMENT**

*The Honorable Steven Teske\**

*Since the creation of the first juvenile court in 1899, juvenile courts have undergone periods of transition in response to legislative enactments prompted by societal events or in response to legal challenges involving due process rights of children. This Article examines politics and the extent in which it played a role in shaping juvenile justice and crime policies and its impact on children and public safety. In this critical review of each period of transition, this Article concludes that the lack of success among juvenile justice agencies, including the courts, is predominately the result of the politicizing of crime and punishment in the United States. This politicization consequently disrupts efforts to employ programs and practices that empirical evidence has shown to prevent and reduce delinquency. Using Georgia's approach to juvenile justice reform as a case study, this Article shows how using a collaborative approach coupled with employing a methodical analytic decisionmaking process de-politicizes the issues, allowing for a discussion of programs and practices that work.*

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## I. CONTEXT AND PURPOSE OF THIS STUDY

A wave of adult and juvenile justice reforms began in 2007 when Texas passed a series of reforms,<sup>1</sup> which have produced astounding outcomes that are difficult to ignore. By 2007, Texas had experienced a dramatic increase in its prison population.<sup>2</sup> Texas desperately needed to build more prisons to accommodate its prison population, but to do so would have cost its taxpayers approximately \$2 billion.<sup>3</sup> Texas simply did not have the fiscal resources to build more prisons.<sup>4</sup> The lack of funds forced legislators to take a closer look at why they were spending so much money yet, with very high recidivist rates, getting very little back in return.<sup>5</sup>

Texas legislators studied the drivers of prison growth and what, if any, community alternatives existed that had proven effective in reducing prison populations while also reducing recidivism among offenders—thus maintaining, if not improving, public safety.<sup>6</sup> The legislative study resulted in a \$241 million justice reinvestment program to support treatment and diversion programs in lieu of incarceration.<sup>7</sup> As a result of the justice reinvestment program, Texas experienced a 29% decline in crime rates, which has influenced conservative politicians to reconsider their get-tough-on-crime position.<sup>8</sup>

Other states, such as Georgia, soon followed Texas' lead by reforming their own criminal and juvenile justice systems. Several states, a majority with Republican leadership, have passed justice reform legislation.<sup>9</sup> Following several years of reforms at the state level, Congress finally stepped in and passed the First Step Act—an

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<sup>1</sup> See, e.g., Michael Haugen, *Ten Years of Criminal Justice Reform in Texas*, RIGHT ON CRIME (Aug. 1, 2017), <http://rightoncrime.com/2017/08/ten-years-of-criminal-justice-reform-in-texas/> (discussing the effects of Texas's prison reforms).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (“Then-House Speaker Tom Craddick’s instructions . . . were simple: ‘Don’t build new prisons, they cost too much.’”).

<sup>4</sup> See *id.* (explaining how the legislative session had an already tight budget).

<sup>5</sup> See *id.* (explaining that “state leaders studied the drivers of prison growth and researched effective approaches to reducing recidivism”).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., PEW CHARITABLE TRS., 35 STATES REFORM CRIMINAL JUSTICE POLICIES THROUGH JUSTICE REINVESTMENT 1 (July 2018), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2018/07/35-states-reform-criminal-justice-policies-through-justice-reinvestment> (“Since 2007, 35 states have reformed their sentencing and corrections policies.”).

effort led by Republican Senator Chuck Grassley with the support of a Republican administration.<sup>10</sup> The significance of conservative leadership in these reforms cannot be overstated, especially given that criminal justice reform is not traditionally a conservative agenda.<sup>11</sup>

Historically, public safety within the context of conservatism is predominately grounded in the deterrence theory (i.e., the belief that the threat of punishment prevents crime).<sup>12</sup> But studies have shown, and the crime reduction outcomes as a result of state reforms have confirmed, that the threat, not severity of, punishment is what reduces crime.<sup>13</sup> In other words, deterrence increases when people perceive a higher certainty of apprehension if they commit a crime. People are less likely to think about what will happen to them when caught if they do not believe they will be apprehended in the first place.<sup>14</sup> Therefore, reliance on the deterrence theory to promote public safety is most effective by placing emphasis on

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<sup>10</sup> See, e.g., *Historic Criminal Justice Reform Legislation Signed into Law*, BRENNAN CTR. FOR JUST. (Dec. 21, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reform-legislation-signed-law> (“One major accomplishment of the FIRST STEP Act is that it includes meaningful sentencing reform provisions.”).

<sup>11</sup> See Mike Lee, *The Conservative Case for Criminal Justice Reform*, FEDERALIST (Oct. 7, 2015), <https://thefederalist.com/2015/10/07/the-conservative-case-for-criminal-justice-reform/> (explaining that “many conservatives . . . think criminal justice reform is a progressive cause, not a conservative one”). Conservatives are especially wary of reforms that include less incarceration. See, e.g., *id.* (advocating for criminal justice reform—including lowering incarceration rates—via conservative principles such as crime reduction).

<sup>12</sup> Among conservatives are those who emphasize the severity of the punishment using the retribution theory of crime and punishment. This theory holds that a person who commits a crime should suffer pain in proportion to the suffering of the victim. It has also been described as the perpetrator getting his “just desserts.” Those who follow this theory are more inclined to reduce judicial discretion in sentencing and favor specific sentences for criminal acts without regard to the individual defendant. For example, a retributionist would favor mandatory minimum sentences for certain crimes notwithstanding any mitigating circumstances unique to the defendant or the case. It may be safe to say, based on the most common reason given by conservative policymakers, that mainstream conservatives rely mostly on the deterrence theory to forward their platforms on crime and punishment. For a critique of conservative reliance on deterrence, see Gary Potter, *Wilson and van den Haag: Conservative Theories of Crime Control*, IMAGINING JUST. (May 12, 2014), <http://imaginingjustice.org/essays/wilson-van-den-haag-conservative-theories-crime-control-3/>.

<sup>13</sup> See Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013) (“[The] evidence in support of the deterrent effect of various measures of the certainty of punishment is far more convincing and consistent than for the severity of punishment.”).

<sup>14</sup> VALERIE WRIGHT, SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 2 (Nov. 2010), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>.

crime-catching strategies as opposed to increasing the severity of punishment.

Despite the research supporting the threat of apprehension over the severity of the punishment, conservative policymakers often structure sentencing laws to emphasize the severity of punishment. This thinking is reflected in an adage most commonly repeated among conservative policymakers, “Do the crime, do the time.”<sup>15</sup> This overreliance on the severity of punishment has resulted in harsh sentencing laws that widen the net to capture nonviolent offenders who present a low risk of committing a serious or violent crime.<sup>16</sup> And to be clear, we are not necessarily incarcerating nonviolent offenders for longer periods of time; we are, however, incarcerating them sooner.<sup>17</sup>

Studies show that over-incarceration, especially of low-risk offenders, increases the risk of recidivism, and worse, the seriousness of the future crime.<sup>18</sup> I refer to this phenomenon as *hyper-recidivism* (i.e., when the punishing authority utilizes harsh punishments that are disproportionate to the crime). Hyper-recidivism works to aggravate the offender’s psyche and, in turn, results in an increase in the offender’s risk of re-offending.<sup>19</sup> We must also acknowledge that the severity of punishment does not prevent many offenders from committing future crimes when they get out of prison and return to our communities, which is especially true for violent offenders.<sup>20</sup>

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<sup>15</sup> *Do the Crime, Do the Time? The Failed Policies of Permanent Punishment*, HUFFINGTON POST (Apr. 7, 2014, 11:35 AM), [https://www.huffpost.com/entry/do-the-crime-do-the-time\\_b\\_5092183](https://www.huffpost.com/entry/do-the-crime-do-the-time_b_5092183).

<sup>16</sup> See Nagin, *supra* note 13, at 201 (concluding that the social and economic costs do not justify prison sentences as deterrents).

<sup>17</sup> See *id.* (noting that a prison sentence does not deter crime more than noncustodial sanctions, such as probation).

<sup>18</sup> See, e.g., Christopher T. Lowenkamp & Edward Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, in NAT’L INST. OF CORR., TOPICS IN COMMUNITY CORRECTIONS 3, 5 (2004), [http://caparc.org/uploads/3/5/2/7/35276822/high\\_low\\_risk\\_article.pdf](http://caparc.org/uploads/3/5/2/7/35276822/high_low_risk_article.pdf).

<sup>19</sup> Judge Steven Teske, *OP-ED: Breaking the Cycle of Hyper-Recidivism*, JUV. JUST. INFO. EXCHANGE (July 17, 2013), <https://jjie.org/2013/07/17/breaking-the-cycle-of-hyper-recidivism/>.

<sup>20</sup> See generally JAMES AUSTIN, VINCENT SCHIRALDI, BRUCE WESTERN & ANAMIKA DWIVEDI, SQUARE ONE PROJECT, RECONSIDERING THE “VIOLENT OFFENDER” (May 2019), [https://thecrimereport.org/wp-content/uploads/2019/05/Reconsidering-the-Violent-Offender\\_DIGITAL.pdf](https://thecrimereport.org/wp-content/uploads/2019/05/Reconsidering-the-Violent-Offender_DIGITAL.pdf); BIANCA E. BERSANI, JOHN H. LAUB & BRUCE WESTERN, EMERGING ADULT JUSTICE LEARNING CMTY., THINKING ABOUT EMERGING ADULTS AND VIOLENT CRIME (May 2019),

How we define a violent crime in our criminal codes can be influenced more by the emotions of policymakers than by the empirical evidence and neuroscience. Neuroscience shows that all but the most exceptional criminals, even violent ones, mature out of lawbreaking before middle age, meaning that long sentences do little to prevent crime.<sup>21</sup> Notwithstanding the politically sensitive nature of mentioning reducing the length of sentences for certain violent crimes, the evidence raises the question—Why are we incarcerating so-called “violent offenders” for periods of time that extend beyond their age of criminality?<sup>22</sup> The flip side of this question is, How much money would we save (that could be directed to education and other early-childhood services) if we decrease the length of sentences for violent offenders?

This overreliance on punishment in the deterrence theory has resulted in unintended consequences which worsen public safety.<sup>23</sup> In other words, the conservative adage that we need to “get tough” on crime presents the appearance of being “tough” (e.g., harsher sentencing, lengthy incarceration, mandatory minimums, life without parole for juveniles) without achieving outcomes that improve public safety. The irony, and why it can be difficult to reform justice systems, is that what does work to improve public safety often looks soft on crime, and politicians do not want to be accused of being soft on crime.

Consider renowned criminologist Alfred Blumstein’s thoughts on why there is such a disparity between criminological knowledge and crime control policy:

It is clear that in the current era, where the political expediency of indulging the public’s intense concern about crime is sufficiently attractive—and the political

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[https://justicelab.columbia.edu/sites/default/files/content/EAJLC\\_YouthViolentCrime\\_final.pdf](https://justicelab.columbia.edu/sites/default/files/content/EAJLC_YouthViolentCrime_final.pdf).

<sup>21</sup> See Dana Goldstein, *Too Old to Commit Crime?*, MARSHALL PROJECT (Mar. 20, 2015, 1:00 PM), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime> (discussing that many older inmates are not at risk of re-offending).

<sup>22</sup> It is important to distinguish between the “violent crime” and any unique characteristics of the person who committed the crime. All people who commit violent crimes have mental health and personality disorders that drive their conduct. These disorders are more difficult to treat, and the offender may not overcome them. Therefore, lengthier prison sentences, the argument goes, are required for the protection of the public. See AUSTIN ET AL., *supra* note 20, at 22; BERSANI ET AL., *supra* note 20, at 1.

<sup>23</sup> See Nagin, *supra* note 13, at 201 (stating that the evidence shows a prison sentence may increase the likelihood of the offender committing future crime).

risk of failing to do so and being labeled “soft on crime” is sufficiently frightening—the role of research findings in the public policy arena does seem largely to have been put aside, though only temporarily one would hope.<sup>24</sup>

While I completely agree with Blumstein’s observation that there is a wide gap between what we know in truth to work in crime prevention and the policies we promulgate to control crime, I am not sure that I agree that it is the public’s intense concern about crime that is driving this disconnect between the truth and what works. Rather, it seems to be the other way around: politicians are driving policy and inflaming the electorate to support their crime policy initiative.

For example, studies show that “public concern about crime follows rather than precedes punitive political initiatives like the war on drugs.”<sup>25</sup> This suggests that politicians “do not seem to be responding to a frightened, victimized, and punitive public,” as they want us to think.<sup>26</sup> Instead, studies suggest that punitive policies start at the top of our political process, beginning with politicians who are driven by their own electoral needs rather than the crime rate or any public display or outcry for get-tough policies.<sup>27</sup>

For example, “the two most commonly cited sources of crime statistics in the U.S. both show a substantial decline in the violent crime rate since it peaked in the early 1990s.”<sup>28</sup> According to the Federal Bureau of Investigation (FBI), violent crime declined by 51% between 1993 and 2018, while the Bureau of Justice Statistics (BJS) reported a 71% decline during the same period.<sup>29</sup> Property crime similarly declined during this span, with the FBI reporting a 54% decline and the BJS reporting a 69% decline.<sup>30</sup> This trend is also reflected in juvenile arrests: the Office of Juvenile Justice and Delinquency Prevention (OJJDP) reported a 74% decline in juvenile

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<sup>24</sup> Alfred Blumstein, *Interaction of Criminological Research and Public Policy*, 12 J. QUANTITATIVE CRIMINOLOGY 349, 359 (1997).

<sup>25</sup> William Lyons & Stuart Scheingold, *The Politics of Crime and Punishment*, in 1 CRIMINAL JUSTICE 2000: THE NATURE OF CRIME: CONTINUITY AND CHANGE 103, 117 (2000).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 116–21.

<sup>28</sup> John Gramlich, *5 Facts About Crime in the U.S.*, PEW RES. CTR. (Oct. 17, 2019), <https://www.pewresearch.org/fact-tank/2019/10/17/facts-about-crime-in-the-u-s/>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*



crime since its peak in 1996.<sup>31</sup> And depending on the state, juvenile crime has returned to levels last seen in the late 1950s and early 1960s.<sup>32</sup>

Despite these sharp declines in crime, the Pew Charitable Trusts (Pew) surveys show that Americans believe the crime rates are worse today than ever before.<sup>33</sup> These Pew surveys are supported by twenty-one Gallup surveys conducted since 1996—the year crime was at its highest peak.<sup>34</sup> The Pew surveys conducted during the early years of criminal justice reform also reveal a strong bipartisan support among the electorate for evidence-based practices and programs.<sup>35</sup> How do we reconcile this paradox among Americans? On one hand Americans believe that crime rates are worse than ever before, but on the other, they favor a public safety system that diverts more offenders from prison, or stated bluntly, looks softer on crime.

The explanation for this paradox brings me to what the title of this Article infers: the over-politicization of criminal justice issues. I assert that politicians, mostly conservatives, have historically employed a tactic called the politics of fear. This tactic occurs when politicians use fear as a driving or motivating factor to influence people to vote a particular way or accept policies that they might otherwise reject had they known the truth.<sup>36</sup>

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<sup>31</sup> *Juvenile Arrest Rate Trends*, OFF. JUV. JUST. & DELINQ. PREVENTION (Oct. 31, 2019), [https://www.ojjdp.gov/ojstatbb/crime/JAR\\_Display.asp?ID=qa05200&selOffenses=1](https://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200&selOffenses=1).

<sup>32</sup> See *But Aren't Youth Committing More Serious Crimes Today?*, YOUTH FACTS, [https://www.youthfacts.org/?page\\_id=840](https://www.youthfacts.org/?page_id=840) (last visited Mar. 28, 2020) (analyzing data from FBI reports that show that “[t]he average youth raised in the 1990s and 2000s is substantially less likely to commit a serious offense than a youth raised in the 1950s and 1960s . . . [and] rates of youthful arrest for serious offenses are much lower today than in past decades”).

<sup>33</sup> See Gramlich, *supra* note 28 (“Public perceptions about crime in the U.S. often don’t align with the data.”).

<sup>34</sup> *Crime*, GALLUP, <https://news.gallup.com/poll/1603/Crime.aspx> (last visited Mar. 29, 2020). For every survey conducted since 1996, the majority answered “yes” when asked, “Is there more crime in the U.S. than there was a year ago, or less?” *Id.*

<sup>35</sup> See PUB. OP. STRATEGIES & MELLMAN GRP., PUBLIC ATTITUDES ON CRIME AND PUNISHMENT IN GEORGIA 1 (Feb. 2012), [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes\\_assets/2012/public\\_attitudes\\_on\\_crime\\_georgia.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2012/public_attitudes_on_crime_georgia.pdf) (“Georgia voters, across party lines, support specific policies that would divert offenders from prison, shorten prison terms, and strengthen community supervision.”). The margin of variance between Republican and Democrat voters was small. *Id.* at 3 (noting the “broad support across [the] political spectrum” for various criminal justice reforms).

<sup>36</sup> See Molly Ball, *Donald Trump and the Politics of Fear*, ATLANTIC (Sept. 2, 2016), <https://www.theatlantic.com/politics/archive/2016/09/donald-trump-and-the-politics-of-fear/498116/> (explaining politicians have always utilized fear as a political force and listing examples of such use throughout history).

Neurologists inform us that emotions have much more power to affect reason than reason does to affect emotions—particularly the emotion of fear.<sup>37</sup> Consider the words of New York University neuroscientist Joseph LeDoux: “Connections from the emotional systems to the cognitive systems are stronger than connections from the cognitive systems to the emotional systems.”<sup>38</sup> Thus, it should be of no wonder how fear can serve politicians well to win campaigns or to influence voters to support policy positions. By presenting an alleged threat to people’s well-being, politicians can elicit a powerful emotional response that can override reason and prevent a critical assessment of policies.

LeDoux’s neuroscientific findings seem to support various studies conducted by William Lyons and Stuart Scheingold that strongly point to why citizens are susceptible to political rhetoric on crime. Lyons and Scheingold explain that:

Politicians are attracted to punishment in part because their constituents are attracted to it. Politicians are, of course, always in search of campaign issues. Valence (largely symbolic and expressive) issues, like anticommunism, for example, are particularly attractive in that they unite sizable majorities. The only challenge with respect to valence issues is to present them in ways that work for you and against your opponent. Certainly in presidential politics, street crime has frequently served as an effective valence issue, especially for conservative Republicans. Not only is there overwhelming agreement that street crime should be reduced, it has the added attraction of arousing strong emotions—something capable of gaining a firm grip on the public imagination.<sup>39</sup>

The politics of fear is the largest obstacle facing any effort to reform the criminal justice system in a conservative state. The misplaced reliance that many conservative politicians place on the

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<sup>37</sup> See JOSEPH LEDOUX, *THE EMOTIONAL BRAIN* 19 (1998) (“While conscious control over emotions is weak, emotions can flood consciousness.”).

<sup>38</sup> *Id.*

<sup>39</sup> Lyons & Scheingold, *supra* note 25, at 127–28.

severity of punishment is likely to result in an immediate rejection of embracing the softer-looking evidence-based practices and programs for fear of losing their constituent support by losing an issue easy to exploit for electoral gains.

This phenomenon of fear showed itself soon after former Georgia Governor Nathan Deal announced his intent to overhaul the justice system and made evident what he likely already anticipated: taking on an issue that is perceived by more Republicans than Democrats as “coddling criminals” will require certain strategies to win over his Republican colleagues in the legislature.<sup>40</sup> For example, in an interview just before leaving office, Governor Deal explained that his conservative constituents often told him, “That’s not a Republican issue.” Deal responded, “No, it might not be. But it ought to be. And it’s the right thing to do.”<sup>41</sup>

Consider, for example, how former Republican Georgia Representative Jay Neal received pushback when he shared his intent to engage in criminal justice reform with his constituency. While attending a 2010 conference on sentencing and corrections sponsored by Pew, Representative Neal learned that Georgia was one of the worst states when it came to harsh sentencing.<sup>42</sup> The data revealing the ineffectiveness of Georgia’s get-tough approach encouraged Representative Neal to engage in justice reform.<sup>43</sup> But when he invited two judges to lunch to share his intentions, one of them said, “I wouldn’t do that if I were you.”<sup>44</sup> Representative Neal asked him why not, and the judge said, “That’s politically risky.”<sup>45</sup>

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<sup>40</sup> While delivering an address at a criminal justice reform summit in 2015, Governor Deal recalled bringing up criminal justice reform during his first state of the state and acknowledged that “[a] lot of people said that’s not a topic that a Republican governor ought to be talking about.” Naomi Shavin, *A Republican Governor Is Leading the Country’s Most Successful Prison Reform*, NEW REPUBLIC (Mar. 31, 2015), <https://newrepublic.com/article/121425/gop-governor-nathan-deal-leading-us-prison-reform>. This may explain why, in the Criminal Justice Reform Council’s first meeting in July 2012, Governor Deal emphasized the importance of using data and identifying programs that work to reduce recidivism as a mechanism to convince hesitant legislators to be supportive.

<sup>41</sup> Bill Rankin, *Nathan Deal’s Criminal Justice Reforms Leave Lasting Legacy*, ATLANTA J. CONST. (Dec. 21, 2018), <https://www.ajc.com/news/local/deal-criminal-justice-reforms-leaves-lasting-legacy/ZMwb2vG7C4LurWoFESw46O/>.

<sup>42</sup> *Criminal Justice Reform Can ‘Make Georgia a Better Place’*, PEW CHARITABLE TR. (Mar. 2, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/03/criminal-justice-reform-can-make-georgia-a-better-place>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Representative Neal ultimately ignored the judge's advice. He served on the Criminal Justice Reform Council and convinced his Republican colleagues to vote "yea" to pass reform legislation.<sup>46</sup> His explanation for rejecting the advice to stay away from justice reform was the same as Governor Deal's—it's the right thing to do.<sup>47</sup>

Notwithstanding the fact that Governor Deal and Representative Neal pursued justice reform because it is the right thing to do, they were not naïve enough to believe that their moral compass alone would win over the conservative Georgia General Assembly. They needed a strategy that would appeal to their conservative friends in a way that would help them understand that criminal justice reform *is* a conservative thing to do.

The purpose of this Article is to examine the effective strategies that were employed to preempt conservative legislators from using fear tactics to reject criminal justice reform. By identifying the core strategies directly relevant to passing massive changes in the justice system, this Article will provide a model for future statewide justice system reforms, particularly for states controlled by conservative leaders who may fear taking on justice reform.

Before delving into the strategies that proved effective, Part II will review the history of juvenile courts and juvenile justice in general as well as the stages of evolution that juvenile justice underwent in Texas and in Georgia just a few years later. For those not familiar with juvenile justice, this Article will provide the proper framework to understand and appreciate how and why the reforms occurred in Georgia,<sup>48</sup> especially regarding the political and ideological metamorphosis that a growing number of conservatives have undergone on the issues of crime and punishment.

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Georgia has undergone major reforms of both its adult and juvenile justice systems. The reforms to the adult system occurred in the 2011 Council on Criminal Justice Reform. REPORT OF THE SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS (Nov. 2011). For purposes of this Article, I focus only on juvenile justice reforms out of brevity concerns and because I have personal knowledge of the juvenile justice reforms due to my role as a juvenile court judge while serving on the Georgia Council of Criminal Justice Reform.

## II. BACKGROUND AND REVIEW OF JUVENILE JUSTICE REFORMS

### A. CREATION OF THE JUVENILE COURTS AND ITS CONSTITUTIONAL SHAPING

The earliest efforts to try children separately from adults occurred in states such as Massachusetts and New York, but these states did not expressly create separate courts for children.<sup>49</sup> The creation of a separate court system for juveniles accused of a crime did not occur until the passage of the 1899 Illinois Juvenile Court Act.<sup>50</sup> The creation of the first juvenile court in Illinois was followed shortly by one in Denver.<sup>51</sup> By 1945, all states had juvenile courts.<sup>52</sup>

Despite some differences among states, the goals and objectives were similar, especially in espousing how juvenile courts should be distinct from the adult criminal justice system.<sup>53</sup> For example, children were considered less mature and not sufficiently developed to be fully aware of the consequences of their actions.<sup>54</sup> This necessitated a different court system altogether that would not hold children accountable in the same manner as adults.<sup>55</sup> The process would be civil, rather than criminal, and the method of accountability would primarily focus on rehabilitation, rather than punishment.<sup>56</sup> Furthermore, children were referred to as delinquents, not criminals.<sup>57</sup> Courts, by and through their intake staff, decided who would be prosecuted, not the prosecutor.<sup>58</sup> The legal standard was “in the best interests of the child,” not “beyond a reasonable doubt,” and hearings were informal, not adversarial like

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<sup>49</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 581 (4th ed. 2019).

<sup>50</sup> This Act created the first juvenile court in Cook County, Illinois. *Juvenile Justice Reform*, ENCYCLOPEDIA CHI., <http://www.encyclopedia.chicagohistory.org/pages/683.html> (last visited June 12, 2020). For the current version of the Act, see ILL. COMP. STAT. 705 / 405 (1987).

<sup>51</sup> Robert G. Caldwell, *Juvenile Court: Its Development and Some Major Problems*, 51 J. CRIM. L. & CRIMINOLOGY 493, 493 n.2 (1961).

<sup>52</sup> Theodore N. Ferdinand, *History Overtakes the Juvenile Justice System*, 37 CRIME & DELINQ. 204, 209–10 (1991).

<sup>53</sup> *Id.*

<sup>54</sup> Caldwell, *supra* note 51, at 494.

<sup>55</sup> Ferdinand, *supra* note 52, at 209.

<sup>56</sup> Robert M. Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 CRIME & DELINQ. 68, 69, 78 (1972).

<sup>57</sup> Ferdinand, *supra* note 52, at 209.

<sup>58</sup> David S. Tanenhaus, *First Things First: Juvenile Justice Reform in Historical Context*, 46 TEX. TECH L. REV. 281, 283 (2013).

adult criminal courts.<sup>59</sup> The rules of evidence were suspended in consideration of the new philosophy that the juvenile court would be friendly and helpful to children.<sup>60</sup> Additionally, due process protections for youthful offenders were eliminated, meaning that notice of hearings and the right to be heard was not required, and the right to counsel was not allowed.<sup>61</sup> Because delinquency was viewed as a social ill, emphasis was placed on social sciences, rather than the law.<sup>62</sup> Prosecutors and defenders were replaced by social workers, probation officers, and psychologists.<sup>63</sup>

Unfortunately, the juvenile courts did not have the resources needed to treat children. In fact, prior to the enactment of reforms in Georgia, the chief complaint among judges was the lack of community resources.<sup>64</sup> This dearth of resources caused juvenile courts to rely on training schools and reformatories, which were notorious for abusing children.<sup>65</sup> In 1950, social historian and journalist Albert Deutsch described the horrors that persisted in juvenile facilities:

The disciplinary or punishment barracks—sometimes these veritable cell blocks were more forbidding than adult prisons—were known officially as “adjustment cottages,” or “lost privilege cottages.” Guards were

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<sup>59</sup> See Christopher A. Mallett, *Disproportionate Minority Contact in Juvenile Justice: Today's, and Yesterdays, Problems*, 31 CRIM. JUST. STUD. 230, 236 (2018) (“In addition, the juvenile courts took on child supervision roles in determining what came to be known as ‘the best interests of the child’s welfare.’”).

<sup>60</sup> See *id.* (“Juvenile courts handled most matters as civil cases, viewing the child as in need of rehabilitation and supervision and treating delinquency as a social problem instead of a crime.”).

<sup>61</sup> Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 695 (1991); see also Richard Lawrence & Craig Hemmens, *History and Development of the Juvenile Court and Justice Process*, in JUVENILE JUSTICE 19, 24 (2008); Mallett, *supra* note 59, at 237 (“[T]he expansion of rules, processes, and supervision within the courts had eliminated constitutional and due process protections for youthful offenders.”).

<sup>62</sup> Lawrence & Hemmens, *supra* note 61, at 24.

<sup>63</sup> See *id.* (“The [juvenile] courts often employed probation officers, social workers, and psychologists to work with the child and family, as well as to guide the juvenile courts decision-making.”).

<sup>64</sup> See REPORT OF THE SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS 11 (Dec. 2012) (“Many areas of the state have limited or no community-based program services, leaving juvenile judges with few dispositional options short of commitment to state facilities.”). Having served several years on the Executive Board of the Council of Juvenile Court Judges, I received and heard complaints about the lack of community-based options from my colleagues across Georgia in response to attempts by the Department of Juvenile Justice to reduce commitments to their agency.

<sup>65</sup> Sanford J. Fox, *The Early History of the Court*, 6 FUTURE CHILD. 29, 31 (1996).

“supervisors.” Employees who were often little more than caretakers and custodians were called “cottage parents.” Whips, paddles, blackjacks[,] and straps were “tools of control.” Isolation cells were “meditation rooms.” . . . Catchwords of the trade—“individualization of treatment,” “rehabilitating the maladjusted”—rolled easily off the tongues of many institutional officials who not only didn’t put these principles into practice but didn’t even understand their meaning.<sup>66</sup>

The policies and practices of the juvenile court went unchallenged for the first sixty years following its origin and development. By the 1960s, probably aligned with the Civil Rights movement and other groups protesting violations of civil liberties, attorneys and parents began to acknowledge and protest the sentencing of children to institutions that resembled adult prisons, which engaged in brutality against children.<sup>67</sup> The first constitutional attack came in 1966 in *Kent v. United States*, which involved a waiver of a juvenile to adult court without a hearing.<sup>68</sup> The U.S. Supreme Court ruled that the waiver without a hearing was invalid.<sup>69</sup> This decision acknowledges that children may share rights similar to adults.<sup>70</sup>

The next attack came a year later in the matter of *In re Gault*.<sup>71</sup> Gerald Gault, a fifteen-year-old, and a friend were accused of making an obscene phone call to a woman.<sup>72</sup> Gerald was arrested, detained, and did not have legal representation, and the victim never appeared to testify.<sup>73</sup> Nonetheless, Gerald was found guilty and committed to a training school until he turned twenty-one.<sup>74</sup> The U.S. Supreme Court found that Gerald’s due process rights were violated and held that hearings that could result in placement

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<sup>66</sup> ALBERT DEUTSCH, OUR REJECTED CHILDREN 15 (1950).

<sup>67</sup> See BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT 43–44, 47–49, 54–68 (2017).

<sup>68</sup> 383 U.S. 541 (1966).

<sup>69</sup> *Id.* at 565.

<sup>70</sup> See *id.* at 545 n.3 (discussing the justifications for the distinction between adult and juvenile rights).

<sup>71</sup> 387 U.S. 1 (1967).

<sup>72</sup> *Id.* at 4.

<sup>73</sup> *Id.* at 6–7.

<sup>74</sup> *Id.* at 7.

to an institution must provide children with the right to notice and counsel, to question witnesses, and to protection against self-incrimination.<sup>75</sup>

Then in 1970, in the matter of *In re Winship*, the U.S. Supreme Court ruled that the standard of evidence for adjudication of delinquency should be “proof beyond reasonable doubt.”<sup>76</sup> A few years later in *Breed v. Jones*,<sup>77</sup> Gary Jones, a seventeen-year-old, was charged with armed robbery and adjudicated delinquent.<sup>78</sup> At his disposition hearing, the judge elected not to treat Gary as a juvenile and waived jurisdiction to adult criminal court.<sup>79</sup> The U.S. Supreme Court ruled that adjudication in juvenile courts is the equivalent to a trial in a criminal court, and therefore double jeopardy attached once evidence was presented.<sup>80</sup> In other words, a waiver hearing must take place before or in lieu of an adjudication hearing.

#### B. THE MASSACHUSETTS EXPERIMENT

While the U.S. Supreme Court was reshaping the constitutional contours of the juvenile courts by expanding rights to children, a psychiatric social worker named Jerome Miller was appointed in 1969 by the Massachusetts governor to lead the state’s youth corrections system.<sup>81</sup> Miller sought to overhaul the system and accomplished something never before done, startling many and scaring other.<sup>82</sup> Ultimately, his Massachusetts experiment has come to show that incarceration for most youths does not work.<sup>83</sup>

When Miller arrived in Massachusetts, several scandals involving abuses in the training schools had occurred.<sup>84</sup> For example, teenagers were stripped naked, held for days in dark concrete cells, forced to drink from toilets, made to kneel for hours

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<sup>75</sup> *Id.* at 41, 49.

<sup>76</sup> 397 U.S. 358, 368 (1970).

<sup>77</sup> 421 U.S. 519 (1975).

<sup>78</sup> *Id.* at 519.

<sup>79</sup> *Id.* at 524.

<sup>80</sup> *Id.* at 541.

<sup>81</sup> RICHARD A. MENDEL, ANNIE E. CASEY FOUND., CLOSING MASSACHUSETTS’ TRAINING SCHOOLS 5–7 (2013), <https://www.aecf.org/resources/closing-massachusetts-training-schools/>.

<sup>82</sup> *Id.* at 5–6.

<sup>83</sup> *Id.* at 18–22.

<sup>84</sup> JEROME G. MILLER, LAST ONE OVER THE WALL: THE MASSACHUSETTS EXPERIMENT IN CLOSING REFORM SCHOOLS 32 (1991).



on a stone floor with pencils under their knees, and had their feet strapped to a bed frame to have their bare soles beaten with wooden paddles or the wooden backs of floor brushes.<sup>85</sup> Miller altered the status quo by closing all training schools and returning juveniles to their homes.<sup>86</sup> He then redirected the costs associated with bedding those juveniles to support programs in their communities.<sup>87</sup> Many believe the first juvenile justice reinvestment occurred in 1995 with the creation of the RECLAIM Ohio initiative,<sup>88</sup> but Miller's experiment in Massachusetts to eliminate all training schools and redirect the money to the communities was revolutionary in the outcomes it produced.

Prior to Miller's death, I had the good fortune to meet him and some of his prison deconstruction team at an invitation-only symposium in Washington D.C. He described how, at first, he attempted to work within the system to change the culture, but that staff repeatedly worked to sabotage his reform efforts, even going so far as to encourage juveniles to escape in hopes that news of the escapes would discredit Miller's administration.<sup>89</sup> He also recalled how he came to the realization that the training schools had to be shuttered while expressing his frustration to a top lieutenant.<sup>90</sup> Miller concluded that people working inside abusive and brutalizing institutions would plan, devise, and strategize to protect themselves

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<sup>85</sup> *Id.* at 29, 95–96.

<sup>86</sup> *See* MENDEL, *supra* note 81, at 8.

<sup>87</sup> *See id.* (describing the new support programs as “regionalized system of community supervision and group home care”).

<sup>88</sup> OHIO REV. CODE ANN. §§ 5139.41, 5139.43 (West 2020).

<sup>89</sup> The reflections Jerome Miller provided at the symposium surrounding his experiences while shuttering the training schools are captured in MENDEL, *supra* note 81, at 23–35.

<sup>90</sup> MILLER, *supra* note 84, at 150. Miller described his frustration when told that a cottage supervisor at the Lyman Training School locked two boys in a caged area of the cellar and went home for the evening with the keys. The staff member informing Miller was concerned he had no means to release the boys if an emergency arose. Because this occurred after creating a more therapeutic environment, removing harsh disciplinary practices, and replacing administrators with humane dispositions toward youth, it struck Miller with “conviction” that the reforms in place “were in jeopardy.”

This event occurred on a Sunday and Miller shared his frustration with Tom Jeffers, one of his lieutenants, the following day. Although not mentioned in his book, Miller was more descriptive at a 2011 symposium to celebrate his work in Massachusetts. I was invited and listened as Miller described that moment to shutter the schools. While Miller and Jeffers were sitting in a pub in Boston's Beacon Hill neighborhood, Miller realized that the training schools could not be reformed and should be shuttered instead: “Why don't we just go for broke and get out of these damned places. We can't change them,” Miller recalled. MENDEL, *supra* note 81, at 25. Miller continued, “We did it over a couple of beers. Within a matter of not that many weeks we set in motion getting out of all of these institutions.” *See id.*

in a way that would perpetuate their destructive behaviors.<sup>91</sup> Therefore, he decided the institutions had to close, and the youth had to be returned home and provided with community services and programs. In 1972, a 100-car caravan drove up to the Lyman Training School, Miller exited the lead car, entered the school, and informed the superintendent that he was removing all the youth and shutting it down. He transported the youth to the University of Massachusetts, where they were housed up to thirty days to return home or find another suitable placement. Miller did the same with the remaining three schools. He also took steps to ensure the training schools could not reopen in the future, having them torn down and the property sold.

By closing the training schools, Miller forced the development of a new approach to serving justice-involved youth. With the old institutions gone, juvenile justice practitioners had to look elsewhere—namely, the communities in which the youth resided. During the 2011 symposium, Miller confessed he did not have the benefit of the evidence-based research that exists today, but he knew that doing anything pro-social with these youth was better than what they had endured in the institutions.<sup>92</sup>

Many people, according to Miller, criticized his audacious decision to empty the training schools, arguing that it would cause a spike in crime rates. That never happened. Studies by Harvard and the National Council on Crime and Delinquency later proved that recidivism decreased and that Massachusetts had the lowest recidivist rate compared to other states.<sup>93</sup> Specifically, more than three-quarters of the youth supervised in the community were subsequently not incarcerated, juvenile arrests declined, and the proportion of adult inmates who had graduated from juvenile institutions decreased.<sup>94</sup>

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<sup>91</sup> MILLER, *supra* note 84, at 118–19; *see also* David C. Anderson, *Let His Children Go*, N.Y. TIMES (Jan. 26, 1992), <https://www.nytimes.com/1992/01/26/books/let-his-children-go.html>.

<sup>92</sup> *See generally* MILLER, *supra* note 84.

<sup>93</sup> Vincent Schiraldi, *45 Years Later, Massachusetts Experiment Still Has Lessons to Teach*, JUV. JUST. INFO. EXCHANGE (Aug. 13, 2015), <https://jjie.org/2015/08/13/45-years-later-massachusetts-experiment-still-has-lessons-to-teach/>.

<sup>94</sup> *See generally* BARRY KRISBERG ET AL., UNLOCKING JUVENILE CORRECTIONS: EVALUATING THE MASSACHUSETTS DEPARTMENT OF YOUTH SERVICES—FINAL REPORT 8–12 (1989); Edward J. Loughran, *The Massachusetts Experience: A Historical Review of Reform in the Department of Youth Services*, 24 SOC. JUST. 170, 177 (1997) (discussing the closing of the Lyman School and the transition led by Miller); *see also* MENDEL, *supra* note 81, at 16.

Miller's decision to close the training schools was the "most dramatic—and successful—juvenile deinstitutionalization effort in the history of American jurisprudence" and also the first reinvestment of taxpayer dollars to support those programs.<sup>95</sup> Notwithstanding the positive outcomes of the Massachusetts experiment, it did not get the traction for replication in other states. This was largely due to a dramatic increase in juvenile crime that heralded in a get-tough era and overshadowed the success of the Massachusetts experiment.

### C. THE GET-TOUGH ERA

Some disagreement exists about when the get-tough era truly began. Some say the 1970s,<sup>96</sup> while others say the 1980s,<sup>97</sup> and others even say the 1990s.<sup>98</sup> I say they are all correct. Those who say the 1980s point to the War on Drugs and the zero tolerance policies that produced mandatory minimum sentencing; those who say the 1990s point to the adultification of youth crimes through automatic transfer laws that skip juvenile court and go straight to adult court;<sup>99</sup> the get-tough policies used in the 1990s were a continuation of the same policies, except with a new target—the youth.

But, in truth, these harsher and more punitive sentencing policies that characterized the get-tough era were born from dialogue on crime and punishment that began with Robert Martinson—a sociologist who had completed a survey of data from hundreds of rehabilitation programs over two decades and found no post-program effect on the recidivism of participants.<sup>100</sup> He

<sup>95</sup> Schiraldi, *supra* note 93.

<sup>96</sup> See, e.g., Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018, 9:00 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/> ("President Richard Nixon called for a war on drugs in 1971, setting in motion a tough-on-crime policy agenda . . .").

<sup>97</sup> See, e.g., Peter Beaumont, *America Loses Taste for 'Zero Tolerance'*, GUARDIAN (Sept. 9, 2001, 6:32 PM), <https://www.theguardian.com/world/2001/sep/09/peterbeaumont.theobserver> (noting that "[a] 20-year trend towards ever tougher sentences is apparently in reverse").

<sup>98</sup> See, e.g., Colleen Shaddox, *Juvenile Justice and the Theater of the Absurd*, PACIFIC STANDARD (Nov. 4, 2008), <https://psmag.com/news/juvenile-justice-and-the-theater-of-the-absurd-4136> ("Though treating juvenile offenders like adult criminal sounds medieval, the practice actually gained popularity in the United States in the 1990s . . .").

<sup>99</sup> FELD, *supra* note 67, at 71–155.

<sup>100</sup> Jerome Miller, *Criminology*, WASH. POST (Apr. 23, 1989), <https://www.washingtonpost.com/archive/opinions/1989/04/23/criminology/3e8fb430-9195-4f07-b7e2-c97a970c96fe/>.

published his findings in an article that fell upon some very eager ears who were opposed to Miller and other prison reform advocates.<sup>101</sup> Various groups who called for stiffer penalties in sentencing reforms relied on Martinson's article.<sup>102</sup> The conservative crime-control advocate James Q. Wilson also relied on Martinson's article, which was dubbed *Nothing Works*, and informed prison reformers to stop focusing on the root causes of crime since rehabilitation did not work.<sup>103</sup> Wilson advocated for punishments grounded in the deterrence model by emphasizing the severity of punishment.<sup>104</sup>

The proliferation of *Nothing Works* among elected leaders and other policy makers created a storm pushing for tougher sentencing. Between 1980 and 1996, the policy changes involved a shift toward determinate sentencing and increasingly greater restrictions on judicial discretion.<sup>105</sup> This led to the expansion of mandatory sentencing policies, which required judges to sentence offenders to fixed terms in prison regardless of individual circumstances.<sup>106</sup> Other laws, dubbed "three strikes and you're out" laws, required a life sentence upon conviction of a specified third felony offense.<sup>107</sup>

Notwithstanding Martinson's assertion that *Nothing Works*, which became the cause célèbre for tougher penalties, it was the rising crime rates, which began in the mid-1960s, that influenced Martinson to question the rehabilitation efforts of the justice system.<sup>108</sup> Politicians were already sensationalizing the crime rates and calling for tougher reforms, and Martinson's claim that

<sup>101</sup> See generally Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 43 NAT'L AFF. 22 (1974).

<sup>102</sup> Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 326–30 (2013).

<sup>103</sup> See generally JAMES Q. WILSON, THINKING ABOUT CRIME (rev. ed. 1983) (looking back on reactions to Martinson's works and other studies).

<sup>104</sup> See *id.* at 121 ("To assert that deterrence doesn't work is tantamount to either denying the plainest facts of everyday life or claiming that would-be criminals are utterly different from the rest of us.").

<sup>105</sup> See, e.g., Matthew Van Meter, *One Judge Makes the Case for Judgment*, ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/> ("[T]he Regan-appointed U.S. District Court judge has rebelled against federal sentencing guidelines ever since they were established in the mid-1980s.").

<sup>106</sup> *Id.*

<sup>107</sup> See *10 Reasons to Oppose "3 Strikes, You're Out,"* ACLU, <https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out> (last visited Mar. 29, 2020) ("[T]his law imposes a mandatory life sentence without parole on offenders convicted of certain crimes.").

<sup>108</sup> See TRAVIS C. PRATT ET AL., KEY IDEAS IN CRIMINOLOGY AND CRIMINAL JUSTICE 75 (2011) (describing the "troublesome crime problem" the nation was experiencing in the years preceding the publication of Martinson's work).

rehabilitation programs were not working exacerbated the ever-increasing crime rate issue.<sup>109</sup>

By the 1970s, the rising crime rates were analogous to an active volcano waiting to erupt, and the *Nothing Works* assertion created a platform for conservative politicians to sensationalize the increasing rates: because *Nothing Works*, it was time to erupt and spew get-tough practices.<sup>110</sup> For example, it was common in the 1980s—during Ronald Reagan’s War on Drugs—for the public to be bombarded by conservative political rhetoric describing criminals as “crack heads” and “crack whores.”<sup>111</sup> And because crack cocaine was predominately an epidemic among the Black community, conservative politicians worked the public to connect crime to Black families dependent on welfare by referring to the “Welfare Queen” driving Cadillacs in “flashy splendor” to project a “stereotypical image of a lazy, larcenous black woman ripping off society’s generosity without remorse.”<sup>112</sup> Conservatives employed a tactic that Ian Haney López calls “Whistle Dog Politics” to convey racial politics without referencing people of color.<sup>113</sup> Unsurprisingly, during this period, the federal sentencing guidelines were modified to get tough on crack cocaine possession, and this change resulted in the mass incarceration of Black men.<sup>114</sup>

During the get-tough era, many conservative politicians pointed to the legal status achieved by Blacks during the 1950s and 1960s (e.g., desegregation and the passage of The Civil Rights Act and the Voting Rights Act) to support their position that the plight of Black Americans was due to personal choice and not influenced by the

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<sup>109</sup> See *id.* at 81 (discussing how Martinson’s work influenced the shift within the criminal justice system from rehabilitation to “retribution and just deserts”).

<sup>110</sup> See *id.* (describing some of these get-tough practices that took place in the years following Martinson’s work, including mandatory minimum sentences, truth-in-sentencing statutes, and three-strikes laws).

<sup>111</sup> See Sofia Martinez, *Maybe You Shouldn’t Say ‘Crackhead’ So Much*, WASH. SQUARE NEWS (Oct. 10, 2019), <https://nyunews.com/opinion/2019/10/10/maybe-you-shouldnt-say-crackhead-so-much> (discussing the use of the term “crackhead” as a racist callback to the crack epidemic of the 1980s and the War on Drugs that came with it).

<sup>112</sup> IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 58 (2014).

<sup>113</sup> *Id.* at 16; see also FELD, *supra* note 67, at 100.

<sup>114</sup> See generally DEBORAH J. VAGINS & JESSELYN MCCURDY, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW* (Oct. 2006) (reviewing the history of harsh penalties for possession of crack cocaine, and the racial disparities in their enforcement). “In the 1980s, crack cocaine . . . had a devastating impact on the inner cities reeling from deindustrialization.” Barry C. Feld, *My Life in Crime: An Intellectual History of the Juvenile Court*, 17 *NEV. L.J.* 299, 320 (2017).

continuing effects of poverty from over 300 years of slavery and Jim Crow laws.<sup>115</sup> For whatever reason—whether political or racial animosity or implicit bias—conservative politicians could not grasp the reality that gaining legal rights does not translate into economic mobility overnight. So long as politicians and policymakers attribute poverty and criminality to individual choices rather than social structural factors, they will overlook how policy development can result in unintended consequences, including an increase in crime rates.<sup>116</sup>

When the get-tough policies bled into the 1990s, political scientist John DiLulio sensationalized the rising crime rates among youths by coining the phrase “superpredator.”<sup>117</sup> DiLulio predicted a wave of violence at the hands of the superpredators, who he described as teenagers who are so impulsive that they kill, rape, and maim without giving it a second thought.<sup>118</sup> The problem was not in the description, it was in the prediction. This prediction created such hysteria that lawmakers responded with harsher penalties for children, such as automatic transfer laws to adult court, reducing the age of criminal liability, zero tolerance policies in schools, and increasing incarceration of juveniles.<sup>119</sup>

By the time the era of get-tough legislation slowed after the passage of the Violent Crime Control and Law Enforcement Act of 1994,<sup>120</sup> the adult inmate population had tripled.<sup>121</sup> But the sad irony is that just 12% of this increase is due to changes in crime;

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<sup>115</sup> See Feld, *supra* note 114, at 320 (describing the progression of criminal justice from the Warren Court through the late-1980s and early-1990s). These progressive measures “legitimated the imposition of punitive sanctions that fell disproportionately heavily on minority offenders.” *Id.* “Conservative politicians manipulated and exploited public fears to wage a succession of Wars on Crime, on Drugs, and subsequently on Youths.” *Id.*

<sup>116</sup> *Id.* (“[Conservative politicians] enacted harsh and punitive changes to juvenile and criminal laws that disproportionately affected black residents of the inner cities already disadvantaged by job loss, segregation, poverty, and social isolation.”).

<sup>117</sup> John DiLulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators>.

<sup>118</sup> See *id.* (describing these “super-predators” as “morally impoverished juveniles” that are “capable of committing the most heinous acts of physical violence for the most trivial reasons”).

<sup>119</sup> See generally JOSH ROVNER, SENTENCING PROJECT, HOW TOUGH ON CRIME BECAME TOUGH ON KIDS: PROSECUTING TEENAGE DRUG CHARGES IN ADULT COURTS (Dec. 2016).

<sup>120</sup> 42 U.S.C. § 136 (2018).

<sup>121</sup> See Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER, RACE & JUST. 61, 71 (2002) (“Between 1980 and 2000, the prison population tripled.”).

88% is due to other factors, mainly sentencing policy.<sup>122</sup> More alarming are the reasons that explain the rise in crime rates that led to the get-tough rhetoric and resulting punitive legislation.

To understand the increase in crime rates, one must look to the economic forces, public policies, and bureaucratic and institutional decisions that exacerbate existing social circumstances. So what was happening in the 1960s that could contribute to an increase in crime? It is difficult to point to one factor because several worked together to create the perfect storm. The civil rights movement brought considerable attention to the Black community.<sup>123</sup> But civil unrest was not limited to the civil rights movement; young people protested the Vietnam War and staged college rallies (e.g., Kent State University)<sup>124</sup> that resulted in violent arrests.<sup>125</sup> Ironically, the progressive effort to fight poverty under the Johnson Administration's war on poverty produced unintended consequences, especially by chasing it with his war on crime, which increased police presence in poor neighborhoods.<sup>126</sup> By natural

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<sup>122</sup> RYAN S. KING ET AL., SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 1, 4 (2005), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Incarceration-and-Crime-A-Complex-Relationship.pdf> (noting that some advocates of incarceration attribute lower crime rates to tougher sentences and restrictive release patterns, but reviewing other material that finds over three-fourths of the lower rates can be attributable to factors other than incarceration).

<sup>123</sup> See Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1539–40 (2003) (noting that “[f]ollowing *Brown v. Board of Education*, civil rights activists responded to the southern strategy of ‘massive resistance’ with ‘direct action’ and civil disobedience,” and “[w]hen southern intransigence forced the civil rights movement to adopt disruptive strategies, however, southern political and law enforcement officials reacted violently to suppress protestors”).

<sup>124</sup> The shootings at Kent State University went beyond the typical protest involving signs and chants against the presence of American troops in Vietnam. The student protesters threw rocks and bottles at police officers and ignited bonfires. See *Kent State Shootings*, OHIO HIST. CENT., [https://ohiohistorycentral.org/w/Kent\\_State\\_Shootings](https://ohiohistorycentral.org/w/Kent_State_Shootings) (last visited Apr. 19, 2020). This escalation of assaultive conduct influenced the mayor to close bars before normal closing time to reduce alcohol consumption. *Id.* This led to “students, other anti-war activists, and common criminals . . . to break windows and loot stores.” *Id.*

<sup>125</sup> See Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 208 n.109 (2007) (“For conservatives, the confluence of rising youth crime rates, civil rights marches and civil disobedience, students’ protests against the war in Viet Nam, and urban and campus turmoil indicated an even deeper moral crisis and breakdown of traditional society.”).

<sup>126</sup> See Jonathan Simon, *Is Mass Incarceration History?*, 95 TEX. L. REV. 1077, 1081–82 (2017) (reviewing ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016)) (narrating the evolution of the “war on poverty” into the “war on crime” and noting the former’s origination in the Kennedy administration and the latter’s implementation through the “law enforcement-oriented Department of Justice, and its foot soldiers, rather than ‘community action workers’”).

order, an increase in police presence produces an increase in arrests.<sup>127</sup>

The get-tough era was followed by a period of landmark U.S. Supreme Court decisions and local and statewide reforms that worked to reverse the harsh punishers of the past era.<sup>128</sup> The irony of these reforms is that they were led in many instances by conservative politicians who had to convince their conservative colleagues to change their thinking about crime and punishment.<sup>129</sup> The current efforts led by conservatives to reverse the punitive practices they promulgated during the get-tough era is a political paradox.<sup>130</sup> Although the practices promulgated today by a growing number of conservatives are diametrically opposite of what conservatives advocated in the past, the ideological framework of conservatism has not changed.<sup>131</sup>

Instead, many conservative politicians are embracing the research and accepting that what may look soft on crime is indeed tougher on crime. But more importantly, conservatives realize that evidence-based community programs fit squarely with the three important and basic conservative ideological constructs: increase public safety, reduce big government, and cut taxpayer costs.<sup>132</sup> By diverting eligible people from expensive prisons to far less expensive community-based solutions (which are more effective at reducing recidivism), public safety will improve at a savings to the taxpayer.<sup>133</sup> Further, government dollars are reduced by

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<sup>127</sup> HINTON, *supra* note 126, at 24. This Article has only brushed the surface of the perpetuation of poverty and crime by the ill-conceived policies of the past. To that end, I recommend Barry C. Feld's 2017 book that presents a comprehensive background enriched with historical facts, empirical data, and studies describing these past policies and the plaguing social conditions that influenced the crime increases of the 1960s through the mid-1990s, and how it oppressed people of color. BARRY FELD, *THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE* (2017).

<sup>128</sup> *See infra* Section III.B (describing Georgia's statewide criminal justice reform in the post get-tough era).

<sup>129</sup> *See Rankin, supra* note 41 (explaining the impact Governor Nathan Deal had on making criminal justice reform a Republican issue).

<sup>130</sup> *Id.* (referring to Georgia and remarking that "[l]awmakers saw a red state embrace reforms that were once only part of a liberal agenda").

<sup>131</sup> *See, e.g., id.* (describing the value Governor Deal's criminal justice reform placed on both public safety and taxpayer funds).

<sup>132</sup> *See id.*

<sup>133</sup> *See id.* ("Prior to the overhaul, the state's prison system was consuming an increasingly large chunk of taxpayer funds. And that was set to balloon as the inmate population continued to skyrocket under the state's tough sentencing laws. In addition to saving taxpayer funds, Deal's reforms have also provided a path for rehabilitation aimed at enhancing public safety.").



eliminating bed space, thereby allowing the government to redirect costs to private providers to deliver community-based programs.<sup>134</sup>

Using the approach taken by Georgia to reform its juvenile justice system as a case study, the next Part discusses how using a collective decisionmaking process that involves a four-factor analytic process played a significant role in influencing the conservative Republican majority of the Georgia General Assembly to refrain from politicizing reform efforts and embrace recommendations traditionally viewed by conservatives as soft on crime. Before delving into the statewide reforms, the Part will first examine a Georgia county's experience, which would later be used as a model for the statewide reforms.

### III. THE GEORGIA EXPERIENCE

#### A. PRE-STATEWIDE LOCAL REFORM: CLAYTON COUNTY, GEORGIA

Soon after I was appointed to the bench, I realized that I was working in a system entrenched in the harsh practices produced by the get-tough era. Few youths were diverted, which resulted in extremely high caseloads that would top 150 probationers. The vast majority of probationers were low-risk misdemeanants, which studies show this group is most likely to age out of their delinquency—but-for our over-zealous, net-widening practices that admitted them into the justice system.<sup>135</sup> As I explained at the beginning of this Article, our system hyper-recidivated these youth, thereby worsening crime.<sup>136</sup>

In the get-tough era, the mindset was so focused on strict punishments that we did not take the time to consider the practical approaches to crime reduction. For example, misdemeanants comprised two-thirds of the probation caseloads, which diluted the effectiveness of supervising the high-risk and more violent youth.<sup>137</sup>

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<sup>134</sup> MILLER, *supra* note 84, at 221–26 (describing positive effects that a diversity of community programs has on the recidivism rate for juvenile offenders).

<sup>135</sup> See, e.g., *From Juvenile Delinquency to Young Adult Offending*, NAT'L INST. JUST. (Mar. 10, 2014), <https://nij.ojp.gov/topics/articles/juvenile-delinquency-young-adult-offending> (“Studies agree that 40 to 60 percent of juvenile delinquents stop offending by early adulthood.”).

<sup>136</sup> See *supra* Part I (discussing the impact of hyper-recidivism).

<sup>137</sup> See MILLER, *supra* note 84, at 192–94 (citing a study of 811 Columbus, Ohio youths that found that of the youths with at least one violent crime on their records, 73% of them had neither threatened nor inflicted significant physical harm during the crime).

We also detained youth at alarming rates. The youth detention facility in Clayton County has a sixty-bed capacity, but our average daily detention population was sixty-two. Sometimes the facility exceeded one hundred youths, requiring mattresses to be delivered for them to sleep on the floors.<sup>138</sup> Our get-tough detention policy was another causal factor which explains the high recidivist rates because studies show that the most significant predictor of recidivism is prior detention.<sup>139</sup> In particular, one study revealed that the odds of reoffending increased 13.5 times for youth with a prior detention.<sup>140</sup>

School systems became a large pipeline of delinquency referrals to the court as a result of the changes that occurred in the get-tough era. Police were regularly placed on school campuses by 1996, and by 2003, the number of school-based referrals increased over 1,200%.<sup>141</sup> Of the total filings from the school system, only 10% were felonies, and the bulk of the misdemeanors consisted of typical adolescent behaviors: disrupting public school, simple assault and simple battery, disorderly conduct, and school fights.<sup>142</sup>

This phenomenon, known as the “school-to-prison pipeline,” was born during the get-tough era.<sup>143</sup> It postulates that arresting students also arrests their educational development, causing them to drop out of school and commit crimes.<sup>144</sup> Although some dispute

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<sup>138</sup> These statistics were secured by the Juvenile Court Automated Tracking System.

<sup>139</sup> See, e.g., BARRY HOLMAN & JASON ZIEDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 4 (Nov. 28, 2006), [http://www.justicepolicy.org/images/upload/06-11\\_REP\\_DangersOfDetention\\_JJ.pdf](http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf) (“Instead of reducing crime, the act of incarcerating high numbers of youth may in fact facilitate increased crime by aggravating the recidivism of youth who are detained.”).

<sup>140</sup> *Id.* (citing B.B. BENDA & C.L. TOLLET, A STUDY OF RECIDIVISM OF SERIOUS AND PERSISTENT OFFENDERS AMONG ADOLESCENTS, 27 J. CRIM. JUST. 111, 111–26 (1999)).

<sup>141</sup> See Donna St. George, *Judge Steve Teske Seeks to Keep Kids with Minor Problems Out of Court*, WASH. POST (Oct. 17, 2011), [https://www.washingtonpost.com/lifestyle/style/judge-steve-teske-seeks-to-keep-kids-with-minor-problems-out-of-court/2011/09/21/gIQA1y8ZsL\\_story.html](https://www.washingtonpost.com/lifestyle/style/judge-steve-teske-seeks-to-keep-kids-with-minor-problems-out-of-court/2011/09/21/gIQA1y8ZsL_story.html) (noting the higher school-based offenses in Clayton County in the 1990s); Steven C. Teske, *Why This Juvenile-Court Judge Worries About School Resource Officers*, EDUC. WEEK (Oct. 10, 2017), <https://www.edweek.org/ew/articles/2017/10/11/why-this-juvenile-court-judge-worries-about-school.html> (“I have seen that this inappropriate use of law enforcement in schools does not improve safety, but actually compromises students’ futures.”).

<sup>142</sup> See, e.g., St. George, *supra* note 141.

<sup>143</sup> See *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> (last visited Mar. 29, 2020) (describing the effects this pipeline has on youths).

<sup>144</sup> *Id.*

this phenomenon,<sup>145</sup> it is difficult to disregard studies that show that arresting a student on campus increases the risk of dropping out of school. One study in particular revealed that “first-time official intervention during high school, particularly court appearance, increases the odds of high school dropout by at least a factor of three.”<sup>146</sup> This would explain the dramatic decrease in graduation rates that occurred in Clayton County at the same time school arrests increased.<sup>147</sup>

In addition to the failed get-tough policies, Georgia was undergoing a demographic shift that contributed to an increase in crime. Many Atlantans were displaced from their homes before and after the 1996 Olympics and transitioned from lower socioeconomic areas of Atlanta to the suburbs, like Clayton County.<sup>148</sup> This transition also brought an increase in crime and a decrease in economic standing characteristic of an increase in poverty.<sup>149</sup>

And because most of those who transitioned from the poorer areas of Atlanta were Black, a “White-Flight” ensued from these suburbia metro counties, including Clayton, just as it did in the 1970s after the passage of the Fair Housing Act of 1968<sup>150</sup> when

<sup>145</sup> See, e.g., Stanton E. Samenow, *Schools Are Not a “Pipeline to Prison,”* PSYCHOL. TODAY (June 18, 2018), <https://www.psychologytoday.com/us/blog/inside-the-criminal-mind/201806/schools-are-not-pipeline-prison>.

<sup>146</sup> Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 463 (2006).

<sup>147</sup> See St. George, *supra* note 141 (noting that “students who get arrested are twice as likely to drop out of school and those who appear in court are four times more likely not to graduate”).

<sup>148</sup> Karen Pooley, *Segregation’s New Geography: The Atlanta Metro Region, Race, and the Declining Prospects for Upward Mobility*, SOUTHERN SPACES (Apr. 15, 2015), <https://southernspaces.org/2015/segregations-new-geography-atlanta-metro-region-race-and-declining-prospects-upward-mobility/> (explaining the “New Great Migration” in the country, and specifically, Georgia).

<sup>149</sup> See John Sullivan, *African Americans Moving South—and to the Suburbs*, 18 AUTUMN AWAKENING 16, 18 (2011) (“Meanwhile, poverty is rapidly expanding in suburban communities and black population rates have grown fastest in lower-income suburbs, according to the Brookings Institute.”).

<sup>150</sup> See 42 U.S.C. §§ 3601–19 (2018). James H. Carr explains:

The significance of the Fair Housing Act cannot be overstated; the community in which a family resides significantly determines the[ir] . . . access . . . to education, employment, health care, credit, food, and recreation services. Housing location also determines the overall safety and stability of the environment in which they live.

James H. Carr, *The 1968 Fair Housing Act; 50 Years of Progress, Still an Uphill Climb to Equality*, FORBES (Apr. 11, 2018, 1:30 PM), <https://www.forbes.com/sites/jameshcarr/2018/04/11/the-1968-fair-housing-act-50-years-of-progress-still-an-uphill-climb-to-equality/#30a14054d328>.

Whites fled Atlanta to the suburbs to escape the new mobility of Blacks.<sup>151</sup> This significant influx of Blacks to the Atlanta suburbs influenced the next wave of “White-Flight,” which was dubbed “exurbanizing.”<sup>152</sup> This wave involved Whites “moving from higher density, inner-ring suburbs to emerging suburbs further from the urban core.”<sup>153</sup> In other words, as more Black families moved into the inner suburbs, such as Clayton and Dekalb counties, Whites moved farther out to the outer-ring counties like Henry, Fayette, Rockdale, Spalding, and Newton.

Because many of the Blacks who relocated were from the razed housing projects in Atlanta, Clayton County became one of the poorest counties in metro Atlanta.<sup>154</sup> But to say that poverty is a contributing factor to crime does not mean that all persons who are poor commit crimes.<sup>155</sup> Juvenile justice systems in poor communities tend to over-criminalize children by overusing detention, failing to divert students, and over-arresting students, thereby increasing poverty and aggravating the circumstances of poor children as a criminogenic factor.<sup>156</sup> It is difficult for the poor to escape poverty, but when the system works to exacerbate the circumstances of the poor, it not only makes it more difficult to escape poverty, but it increases the risk that more will be driven to crime.<sup>157</sup>

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<sup>151</sup> See KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM 236 (2005); see also Pooley, *supra* note 148.

<sup>152</sup> See Pooley, *supra* note 148 (describing the process of exurbanizing in the United States in the 1940s to 1970s).

<sup>153</sup> See *id.*

<sup>154</sup> See Nick James, *Worst Atlanta Suburbs for 2020*, ROAD SNACKS (Dec. 26, 2019), <https://www.roadsnacks.net/these-are-the-10-worst-atlanta-suburbs/> (discussing the high poverty rates throughout metro Atlanta); Mary Claire Kelly, *MAP: Atlanta's Highest- and Lowest-Income Neighborhoods*, WABE (Dec. 29, 2016), <https://www.wabe.org/map-atlantas-highest-and-lowest-income-neighborhoods/>; Kate Sweeney, *Suburban Poverty: Atlanta's Hidden Epidemic*, WABE (Mar. 28, 2016), <https://www.wabe.org/suburban-poverty-atlantas-hidden-epidemic/>.

<sup>155</sup> See generally Magnus Lofstrom & Steven Raphael, *Crime, the Criminal Justice System, and Socioeconomic Inequality*, 30 J. ECON. PERSPS. 103 (2016) (discussing the relatively low crime rate among low socioeconomic groups).

<sup>156</sup> Alan Judd, *Juvenile Justice in Georgia, Part 1*, ATLANTA J. CONST. (Nov. 10, 2019), <https://www.ajc.com/news/crime--law/deadly-consequences/kZuvlFOFT4hiUNxFZ83sKK/> (“Twenty-five years ago, Georgia created the most punitive juvenile justice system in the nation, one in which children as young as 13 can be convicted as adults and sentenced to decades in prison.”).

<sup>157</sup> *Id.* Despite Georgia’s efforts to impose tough laws and harsh sentences on its youth, Georgia has the same proportion of violent crimes as it did 25 years ago. *Id.* Judd attributed this to Georgia’s “system [that] lacks a coordinated effort to confront issues underlying the crimes committed by Georgia teens.” *Id.*

In his book, Peter Edelman describes how justice systems criminalize the poor and specifically cites the Clayton County juvenile justice system as a model for decriminalizing youth: “It is not surprising that Clayton County and Teske are regarded as national models.”<sup>158</sup> Edelman’s description of Clayton County as a “national model” is a segway to what our local reforms produced.<sup>159</sup> Many of the reforms we implemented were replicated at the state level a decade later, so I will not describe them here because I address them later in this Article.<sup>160</sup>

Taken together, these reform practices and programs we implemented in Clayton County produced the following outcomes:

- detention rates have declined by 77%;
- detention rates among Black youth have declined by 63%;
- the average daily detention population was 62 in 2002 and is presently at 14;
- commitments to state custody have declined 71%;
- commitments among Black youth have declined 68%;
- school-based arrests have declined 95%;
- school-based arrests among Black students have declined 91%;
- status offense filings have declined 90%; and
- probation caseloads have declined 83%.<sup>161</sup>

Notwithstanding that the appearance of these outcomes look soft on crime, the total number of delinquency filings have decreased by 82%, and the total number of felony filings have declined by 64%.<sup>162</sup>

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<sup>158</sup> PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 133 (2017).

<sup>159</sup> *Id.*

<sup>160</sup> See *infra* Section III.B (addressing the statewide reforms).

<sup>161</sup> These statistics were secured by the Juvenile Court Automated Tracking System. The Clayton County Juvenile Court recently published its annual report, and in 2019, Clayton County saw a 75% drop in the average daily population in detention, a 41% reduction in the average length of stay in detention, a 70% drop in the rate of commitments to DJJ, and a 69% reduction in the number of juvenile petitions filed in the Clayton County Juvenile Court. See CLAYTON CTY. YOUTH DEV. & JUSTICE CTR., ANNUAL REPORT FY19, at 8 (2019), <https://www.claytoncountygga.gov/home/showdocument?id=154>. For an article that reflects on the positive changes in the criminal justice system in Clayton County, see St. George, *supra* note 141 (noting, for example, that “[s]chool referrals to juvenile court fell more than 70 percent from 2003 to 2010”).

<sup>162</sup> These statistics were secured by the Juvenile Court Automated Tracking System.

By diverting youth away from the system, reducing detention and commitment rates, and keeping more children at home and involved in pro-social programming, juvenile crime fell considerably and graduation rates increased dramatically, which is a protective buffer against delinquency.<sup>163</sup> These outcomes illustrate why Clayton County is a national model and was a model for Georgia when it came time for Governor Deal to convene the Criminal Justice Reform Council (the Council) to address the juvenile justice system.<sup>164</sup>

#### B. STATEWIDE REFORM

When I returned to Georgia from the 2011 Symposium in Washington, D.C., where I met and listened to Jerome Miller describe his experiences implementing the Massachusetts experiment, I was convinced that youth prisons “are bad . . . evil . . . [and] criminogenic”; that most of the children “were not victimizers[,] but rather victims”; and that most children would fare better at home involved in evidence-based programs and other pro-social programming and services.<sup>165</sup> I was also convinced that I would never see, in my lifetime, Georgia turn its back on the get-tough policies and begin to de-institutionalize youth.

I was wrong.

About three months later, the Governor’s staff reached out to me to solicit my opinion on reform legislation titled Model Code ReWrite that was making its way to the Georgia Senate following a unanimous vote in the Georgia House of Representatives. I informed his staff that the delinquency section of the bill was not a

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<sup>163</sup> The graduation rates in Clayton County increased by “more than 20 percentage points in seven years.” See St. George, *supra* note 141. In 2012, the U.S. Department of Education changed the formula for reporting graduation rates from the “overall” formula to the “on-time” formula. U.S. DEP’T OF EDUC., USER’S GUIDE TO COMPUTING HIGH SCHOOL GRADUATION RATES 3 (2006), <https://nces.ed.gov/pubs2006/2006604.pdf>. Since 2012, the graduation rates have continued to increase each year by 21%. See Heather Middleton, *Clayton County Schools Graduation Rates Rise, Still Behind State Numbers*, CLAYTON NEWS DAILY (Sept. 19, 2019), [https://www.news-daily.com/news/clayton-county-schools-graduation-rates-rise-still-behind-state-numbers/article\\_a76418d8-dadd-11e9-b64e-8bec3a8f7205.html](https://www.news-daily.com/news/clayton-county-schools-graduation-rates-rise-still-behind-state-numbers/article_a76418d8-dadd-11e9-b64e-8bec3a8f7205.html) (noting that 72.7% of Clayton County’s class of 2019 graduated, up more than 22% from 2011).

<sup>164</sup> Rhonda Cook, *Clayton Juvenile Program Becomes Model for State Reform*, ATLANTA J. CONST. (Mar. 5, 2013), <https://www.ajc.com/news/clayton-juvenile-program-becomes-model-for-state-reform/i71CvDOETbSD9nHxeh0adJ/> (sharing the Clayton County model as a national and statewide model).

<sup>165</sup> MENDEL, *supra* note 81, at 25.

“model” code and that more work was needed. Shortly thereafter, the bill died in the Rules Committee of the Senate as the Governor expressed concerns.<sup>166</sup> Within a couple months, the Governor re-constituted the Council with the primary objective to recommend reforms to the juvenile justice system.<sup>167</sup> I was appointed to serve on the Council.

The approach taken by Governor Deal to tackle juvenile justice reform was similar in many respects to the local reforms we developed and implemented a decade earlier in Clayton County. Both approaches shared the following stages of decisionmaking: (1) collaboration, (2) framing the problem and issues, (3) generating alternatives, and (4) deciding the course of action.<sup>168</sup> However, unlike local reform, statewide reform efforts are considerably more complicated due, in most part, to a greater number of diverse stakeholders, and, unlike reforms enacted at the local level, statewide reforms require legislative approval.<sup>169</sup>

By adhering to the fidelity of this four-factor decisionmaking process, Governor Deal successfully accomplished a consensus among a large group of politically diverse politicians and several agencies operating with different policies, procedures, and budgets.<sup>170</sup> The process informed the stakeholders as to the best solutions operable in Georgia and, by doing so, de-politicized the problem and issues.<sup>171</sup>

The recommendations of the Council were unanimously approved by the Georgia General Assembly the following year.<sup>172</sup>

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<sup>166</sup> See Jim Walls, *Georgia Juvenile Code Rewrite Suffers Last-Minute Death*, JUV. JUST. INFO. EXCHANGE (Mar. 27, 2012), <https://jjie.org/2012/03/27/georgia-juvenile-code-rewrite-suffers-lastminute-death/> (discussing the failure of House Bill 641).

<sup>167</sup> See MICHAEL P. BOGGS & CAREY A. MILLER, REPORT OF THE GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM 14 (Feb. 2018) (noting the success of House Bill 349 which created the Georgia Council on Criminal Justice Reform for the purpose of promoting public safety through the supervision of adult and juvenile correctional programs).

<sup>168</sup> See Mark A. Wilson, *Collaborative Decision Making: Building Consensus Group Decisions for Project Success*, PROJECT MGMT. INST. (2003), <https://www.pmi.org/learning/library/collaborative-decision-making-group-7667> (explaining the stages of decisionmaking).

<sup>169</sup> See BOGGS & MILLER, *supra* note 167, at 6 (discussing typical considerations when looking to pass a bill).

<sup>170</sup> *Id.* at 4 (quoting Governor Deal who said, “We studied this important issue for a year, met with all the stakeholders, weighed the pros and cons, and delivered a product that passed with support from both sides of the aisle. That’s amazing, particularly on an issue that’s so often at the center of partisan divides”).

<sup>171</sup> *Id.*

<sup>172</sup> H.B. 242, 2013–2014 Gen. Assemb., Reg. Sess. (Ga. 2014).

The recommendations resulted in considerable and significant modifications to the juvenile justice system, including but not limited to

- mandatory objective admission risk assessment,
- a risk and needs assessment instrument,
- mandatory behavioral health evaluations for youth eligible for commitment to state custody,
- limiting judicial discretion on commitments,
- limiting judicial discretion on the amount of time a youth may be placed in secure confinement,
- expanding community-based programs,
- expanding the options for diversion from the court,
- expanding authority to juvenile court judges to require stakeholders at the local level to collaborate to prevent and address delinquency, and
- the creation of a juvenile justice reinvestment program that redirects cost savings resulting from the reforms to the local juvenile courts to support community-based programs.<sup>173</sup>

Without doubt, the reforms reflect a direction in juvenile justice that is less punitive and emphasizes treatment and rehabilitation. It has been six years since the reforms went into effect, and the outcomes to date reflect a decrease in juvenile arrests.<sup>174</sup>

Specifically, by the end of 2018, the number of youths committed to state custody has decreased by over 57%.<sup>175</sup> The reduction in committed youth has resulted in the closure of three detention facilities.<sup>176</sup> When the reforms were enacted, twenty-seven detention centers were needed to accommodate the juvenile

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<sup>173</sup> *Id.*

<sup>174</sup> See CARL VINSON INST. OF GOV'T, GEORGIA JUVENILE JUSTICE INCENTIVE GRANT, FIVE YEAR EVALUATION REPORT: 2013–2018, at 38 (2018), <https://cjcc.georgia.gov/grants/grant-subject-areas/juvenile-justice/juvenile-justice-incentive-grant-program> [hereinafter JJIG REPORT].

<sup>175</sup> See *id.* at 18.

<sup>176</sup> See MICHAEL P. BOGGS & CAREY A. MILLER, REPORT OF THE GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM 8 (Feb. 2017) (“Overall, the shrinking juvenile commitment population has enabled the state to take two detention centers and one Youth Development Campus off-line, representing 269 beds.”). While drafting this Article, another detention facility was closed, making it the third closure. BRIAN P. KEMP, GOVERNOR, THE GOVERNOR’S BUDGET REPORT: AMENDED FISCAL YEAR 2020 & FISCAL YEAR 2021, at 239 (2020).



population committed to the Department of Juvenile Justice (DJJ).<sup>177</sup> The subsequent reduction in commitments removed the need to build new facilities.<sup>178</sup> For example, before the closing of the third detention facility, there were a total of 2,051 beds in the combined regional and statewide secure facilities.<sup>179</sup> Of those beds, 823 beds were not in use.<sup>180</sup> Consequently, these savings realized from the closures and less funding required to house fewer youth resulted in an estimated cost savings of \$85 million.<sup>181</sup> In the first five years of implementing the reinvestment program, which is named the Georgia Juvenile Justice Incentive Grant, served 5,640 youth across fifty-eight Georgia counties through funds distributed to thirty-one grantee courts.<sup>182</sup> Of the total youth served, two-thirds (3,517) successfully completed treatment programs.<sup>183</sup> The reinvestment of the cost savings to local courts has resulted in over \$30 million to support evidence-based programming statewide.<sup>184</sup>

These reductions in detentions and commitments are substantial, and the data shows positive results on juvenile crime after four years. For example, from 2008 to 2018, juvenile arrests have declined by 60%.<sup>185</sup> Whether or not the reforms are responsible

<sup>177</sup> See GA. DEP'T OF JUVENILE JUSTICE, PRISON RAPE ELIMINATION ACT ANNUAL REPORT 5 (2014) (reporting on Georgia's sexual assault cases in DJJ in 2014).

<sup>178</sup> See BOGGS & MILLER, *supra* note 167, at 8–9.

<sup>179</sup> *Juvenile Justice: Hearing on H.B. 440 Before the H. Comm. on Juvenile Justice*, 155th Gen. Assemb., Reg. Sess. (Ga. 2020), <https://livestream.com/accounts/25225474/events/8729747/videos/202036290> [hereinafter *Juvenile Justice Hearing*] (explaining the state of juvenile justice in Georgia while contemplating a bill that raises the age from seventeen to eighteen for juvenile court jurisdiction).

<sup>180</sup> *Id.*

<sup>181</sup> See CRIME & JUSTICE INITIATIVE, IMPLEMENTING JUVENILE JUSTICE SYSTEM IMPROVEMENT IN GEORGIA 2 (Oct. 26, 2017), <https://djj.georgia.gov/blog-post/2017-10-26/cji-report-implementing-juvenile-justice-system-improvement-georgia> (“The policies were expected to save \$85 million over five years . . .”).

<sup>182</sup> See JJIG REPORT, *supra* note 174, at 6 (“In the first five years of implementation, the grant served 5,640 youth across 58 Georgia counties through funds distributed to 31 grantee courts.”).

<sup>183</sup> See *id.* at 33 (“Overall, EBP successful completion rates were fairly consistent throughout the implementation years, with approximately two-thirds (3,517) of all enrollees successfully completing their programs.”).

<sup>184</sup> BOGGS & MILLER, *supra* note 167, at 8 (“Through the Juvenile Justice Incentive Grant Program, more than \$30 million has been used since FY2014 to support various evidence-based programs throughout the state.”).

<sup>185</sup> At the time of writing this Article, the Georgia Bureau of Investigation (GBI) had not released the 2018 data on its website. Thus, this information was obtained from GBI by Josh Rovener who presented it in his testimony before the House Committee on Juvenile Justice on February 18, 2020. See *Juvenile Justice Hearing*, *supra* note 179. For data from preceding years, see generally GA. CRIME INFO. CTR., 2017 SUMMARY REPORT (2017),

for the decline remains unseen, but there is no question that the reforms did not impede the decline in juvenile crime. Notwithstanding the soft-on-crime tactics that many conservative politicians and policymakers fear will increase crime, the opposite occurred. The following discussion describes how these outcomes were accomplished using what I call the *Four-Factor Decisionmaking Approach*.

### 1. Collaboration.

To understand and appreciate the success of Georgia's juvenile justice reforms requires an understanding of the problem. For example, when Governor Deal met with the Council at its first convening, he framed the problem by describing that it costs the state \$91,000 annually to house a youth in a secure facility, but 65% of youths reoffend within three years after their release.<sup>186</sup> Governor Deal and his newly appointed Council emphasized that the state's recidivist rates did not show a good return on taxpayers' investment.<sup>187</sup> Based on how Governor Deal framed the problem, the objective was straightforward: reduce the recidivist rates of our juvenile offenders.<sup>188</sup>

But exactly how to accomplish this objective was more complicated and required an understanding of systems theory as well as collaborative theory. Governor Deal is a former juvenile court judge, which also means he is an attorney.<sup>189</sup> This background indicates that he understood how the juvenile justice system operated—in other words, that the juvenile justice system is or should be a multi-integrated system that comprises multiple

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[https://juveniledata.georgia.gov/sites/default/files/2017\\_crime\\_statistics\\_summary\\_report\\_ucr\\_gbi.pdf](https://juveniledata.georgia.gov/sites/default/files/2017_crime_statistics_summary_report_ucr_gbi.pdf).

<sup>186</sup> Carol Hunstein, Chief Justice, Supreme Court of Ga., 2013 State of the Judiciary Address (Feb. 7, 2013).

<sup>187</sup> See PEW CHARITABLE TRS., GEORGIA'S 2013 JUVENILE JUSTICE REFORM 2 (2013), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs/content-level\\_pages/reports/georgia20201320juvenile20justice20reform20summary20briefjuly2013pdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs/content-level_pages/reports/georgia20201320juvenile20justice20reform20summary20briefjuly2013pdf.pdf) (discussing Governor Deal's commitment to lowering costs and providing "huge savings" to the Georgia community).

<sup>188</sup> See *id.* at 3 (discussing Governor Deal's expanding efforts to reduce reoffending to the juvenile justice system).

<sup>189</sup> See Bill Rankin & Greg Bluestein, *In Filling Another Supreme Court Vacancy Gov. Deal Achieves Milestone*, ATLANTA J. CONST. (Sept. 14, 2018), <https://www.ajc.com/news/crime-law/filling-another-supreme-court-vacancy-gov-deal-achieves-milestone/Ng8oO2pLlEBsppiLV5FW1H/> (noting that Governor Deal, "a former district attorney and juvenile court judge, will have made an indelible imprint on the state's legal system by the time he leaves office at the end of the year").

organizations that work in tandem to resolve the problem. His approach shows that he understood that the analytical framework had to be problem domain-focused as opposed to the more common organization-focused approach. A problem domain-focused analysis drives the evaluator to understanding that each system sometimes works within a larger system with shared boundaries.<sup>190</sup> In an organization-focused analysis, the question is, “How can the DJJ reduce the recidivist rates?” But a problem domain-focused analysis, the question becomes, “Who else shares our problem and has resources to help us?”

For example, police send youths to court, and subsequently the courts commit youths to the state. The data revealed that approximately 40% of youths committed to the state were low-risk youths, which raises the question, “Are police sending the appropriate youths to the courts, and are the courts committing the appropriate youths to the state?”<sup>191</sup> The data answers the latter part of that question with a resounding “no.”<sup>192</sup> But because the DJJ had no control over what type of youths are committed to its control, it was powerless to implement change that would reduce the recidivist rates.<sup>193</sup> The solution, therefore, demanded a collaborative response because the problem involved multiple stakeholders.<sup>194</sup>

While a review of the literature reveals several definitions of collaboration,<sup>195</sup> the following definition best encompasses all

<sup>190</sup> See Donna J. Wood & Barbara Gray, *Collaborative Alliances: Moving from Practice to Theory*, 27 J. APPLIED BEHAV. SCI. 3, 6–8 (1991) (discussing how organizational theories can underplay the interdependencies of complex networks of relationships and how domain-focused theories can better manage these complexities of relationships with collaborative alliances).

<sup>191</sup> LARRY K. GAINES & ROGER LEROY MILLER, *CRIMINAL JUSTICE IN ACTION* 499 (2009) (noting that by the 1960s across the nation many critics of the juvenile justice system observed that there was a “growing number of status offenders—40 percent of all children in the system—who were being punished even though they had not committed a truly delinquent act”).

<sup>192</sup> See *id.*

<sup>193</sup> See Jim Walls, *Georgia’s Troubled Effort to Reduce Juvenile Crime*, CTR. FOR PUB. INTEGRITY (Mar. 25, 2013), <https://publicintegrity.org/education/georgias-troubled-effort-to-reduce-juvenile-crime/> (quoting Georgia State Representative Mary Margaret Oliver, who said that “[t]he DJJ recidivism rates are terrible, and clearly suggest we are doing something wrong – both wasting taxpayers’ money and helping neither the young offender nor protecting the public”).

<sup>194</sup> See PEW CHARITABLE TRS., *supra* note 187, at 2 (discussing how Governor Deal’s 2012 executive order mandated a “detailed analysis of Georgia’s juvenile justice system and solicited input from a wide variety of stakeholders”).

<sup>195</sup> See, e.g., Ted Fellman, *Collaboration and the Beaverhead-Deerlodge Partnership: The Good, the Bad, and the Ugly*, 30 PUB. LAND & RESOURCES L. REV. 79, 83 (2009) (defining

attributes of collective action: “Collaboration occurs when a group of autonomous stakeholders of a problem domain engage in an interactive process, using shared rules, norms, and structures, to act or decide on issues related to that domain.”<sup>196</sup> There is usually an identified leader in a position to initiate the collaborate effort.<sup>197</sup> Leadership typically takes the form of a convening role.<sup>198</sup> A convener’s role is “to identify and bring all the legitimate stakeholders to the table.”<sup>199</sup> The convener, in order to be effective, must possess the following characteristics:

- (1) **Convening Power:** the ability to bring stakeholders to the table;
- (2) **Legitimacy:** the stakeholders perceive the convener to have authority, formal or informal, within the problem domain;
- (3) **Vision:** the convener understands the problem domain and related issues to process stakeholder concerns and needs; and
- (4) **Stakeholder Knowledge:** the convener can identify the stakeholders and possesses knowledge of each stakeholder role in the problem domain.<sup>200</sup>

At the state level, the chief executive (i.e., governor) possesses each of these characteristics. The governor is unquestionably perceived by stakeholders to have authority in matters of juvenile

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“collaboration as ‘a voluntary process through which a broad array of interests, some of which may be in conflict, enter into a civil dialogue to collectively consider possible recommendations and actions’” (citation omitted); Frederick J. Glassman, *A Way to Resolve with Respect: Exploring the Benefits and Opportunities of Collaborative Family Law in California*, ASPATORE, May 2010, at 1, 2010 WL 1976215 (defining collaboration as “the art of working together”); Wood & Gray, *supra* note 190, at 4 (defining collaboration as “a process through which parties who see different aspects of a problem can constructively explore their differences and search for solutions that go beyond their own limited vision of what is possible”).

<sup>196</sup> ALAN FYALL & BRIAN GARROD, *TOURISM MARKETING: A COLLABORATIVE APPROACH* 134 (2005).

<sup>197</sup> See Iteke van Hille et al., *Navigating Tensions in a Cross-Sector Social Partnership: How a Convener Drives Change for Sustainability*, 26 CORP. SOC. RESP. & ENVTL. MGMT. 317, 319 (2019) (discussing how a leader can “establish, legitimize, and guide the collaborative alliance”).

<sup>198</sup> See *id.* (noting that the presence of convener certainly facilitates the formation of an alliance).

<sup>199</sup> BARBARA GRAY, *COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS* 176 (1989).

<sup>200</sup> *Id.*

justice.<sup>201</sup> The commissioner of juvenile justice and corrections is appointed by and therefore accountable to the governor.<sup>202</sup> The governor has the authority to convene by the power to issue executive orders.<sup>203</sup> Specifically, Governor Deal's Executive Order directed the Council to "make recommendations to the Governor's Office on areas of improvement in the criminal justice system."<sup>204</sup> Furthermore, Governor Deal appointed a diverse array of stakeholders that included the Chief Justice of the Supreme Court of Georgia, a juvenile court judge, a superior court judge, a state court judge, legislators from both chambers and from both parties, a prosecutor, a defender, President of the state bar, and members of law enforcement.<sup>205</sup> He also appointed his deputy executive counsel and a judge on the Court of Appeals as the Co-Chairmen of the Council.<sup>206</sup>

Many others were invited to, and did appear at, every meeting of the Council. These other contributors included staff from the following organizations: Prosecuting Attorney's Council, Sheriff's Association, Chiefs of Police Association, Department of Education, Public Defenders Council, Association of County Commissioners, Corrections, DJJ, Department of Behavioral Health, and the Criminal Justice Coordinating Council.<sup>207</sup> In addition to the public agencies that attended, various private and non-profit organizations that specialized in either children's issues or policy development were invited and did attend. They included: Voices for Children, Barton Law Clinic of Emory University Law School, Justice for Children, Georgia Appleseed, and the Georgia Policy Foundation.<sup>208</sup>

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<sup>201</sup> See JEFFREY S. MCLEOD ET AL., NAT'L GOVERNORS ASS'N, A GOVERNOR'S GUIDE TO CRIMINAL JUSTICE 8 (Jan. 2016), <https://www.nga.org/wp-content/uploads/2016/01/A-Governors-Guide-to-Criminal-Justice-Final-PDF.pdf> ("[Governors] oversee the state agencies responsible for implementing those policies and programs, such as corrections, state police, and juvenile justice.").

<sup>202</sup> DEP'T OF JUV. JUST., <https://djj.georgia.gov/> (last visited Mar. 29, 2020).

<sup>203</sup> MCLEOD ET AL., *supra* note 201, at 13–14 (discussing the implications of an executive order and how they are put into place).

<sup>204</sup> Ga. Exec. Order No. 05.24.12.02 (May 24, 2012) (reassembling the Special Council on Criminal Justice Reform).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See *e.g.*, MICHAEL P. BOGGS & W. THOMAS WORTHY, REPORT OF THE GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM 13 (Feb. 2016) (listing the members on the 2016 Georgia Council on Criminal Justice Reform).

<sup>208</sup> See *e.g.*, *JUSTGeorgia: Building Justice and Safety for Children*, GA. APPLESEED CTR. FOR L. & JUST., <https://gaappleseed.org/initiatives/children> (last visited Mar. 29, 2020).

Collaboration is inherently a slow process because it must allow for “open dialogue and a free exchange of ideas.”<sup>209</sup> This explains why Deal limited the membership of the Council to promote structured decisionmaking that would not be unreasonably delayed while simultaneously ensuring the presence of others with expertise to share and inform the decisionmakers.

### *2. Framing the Problem and Issues.*

Once a collaborative team has been created, it is time to frame the problem and issues, which proved to be the most significant step in the decisionmaking process.<sup>210</sup> Framing the problem and issues is essential because how a problem or decision is defined also defines the available alternatives to resolving the problem.<sup>211</sup> Framing the problem describes the global context for the decision.<sup>212</sup> For example, “What is the ultimate objective of the decision? What is the root-cause causes of the issue?”<sup>213</sup> The group must begin with the symptom and keep asking why until the cause is discovered.<sup>214</sup>

This approach is analogous to the model of epidemiology (i.e., the study of disease). This model is the quintessential approach to discovering causes.<sup>215</sup> The premise is grounded in getting to know the targeted population (in our case, juvenile delinquents) and not limiting the question to why youth commit crimes, but also asking why the system is faring poorly to prevent and reduce their delinquency. Looking to epidemiology, the study is driven in part by two basic facts: (1) diseases do not occur by chance—there are always determinants for the disease to occur—and (2) diseases are not distributed at random—distribution is related to risks factors that need to be studied for the population in order to identify

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(noting that Voices for Children, the Barton Center, and Georgia Appleseed formed a coalition that in turn helped guide juvenile criminal justice reform in Georgia).

<sup>209</sup> Wilson, *supra* note 168.

<sup>210</sup> *Id.* (“The single most important step in the Decision Engineering method is establishing a proper frame for the decision.”).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* (“The frame is the overall context for the decision.”).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* (recommending that when framing one should “keep asking the question ‘why?’ until it doesn’t make sense anymore”).

<sup>215</sup> *Principles of Epidemiology in Public Health Practice*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/csels/dsepd/ss1978/lesson1/section1.html> (last visited Mar. 30, 2020) (“Epidemiology is data-driven and relies on a systematic and unbiased approach to the collection, analysis, and interpretation of data.”).

solutions.<sup>216</sup> Delinquent behaviors are not diseases, but they behave like diseases. They too do not occur by chance nor are they randomly distributed, which means they can be studied to identify their root causes.<sup>217</sup> Once the causes are identified, solutions can be better identified.

By framing the problem from an epidemiological context, our perspective shifts away from viewing delinquent behaviors as symptoms that are not treatable. Punishment does not do well to rehabilitate delinquent behaviors because the focus in punishment is on the symptom.<sup>218</sup> Imagine your doctor punishing you for having the flu instead of using diagnostic tools to determine what is causing your headaches, fever, coughing, and other symptoms. You would not return to the doctor and may even file a complaint with the medical licensing board. By questioning why taxpayers are not getting a better return on their investment, the problem is framed to first identify the symptoms (high cost and high recidivism) and go from there until the causes are identified.

Identifying the underlying causes required an analysis of the juvenile population committed to facilities, and to accomplish this analysis, Governor Deal invited the policy and data analysts from Pew in Washington, D.C., to help.<sup>219</sup> They were given access to juvenile data to analyze and found that “53 percent of juveniles in a non-secure residential facility, such as a group home, were adjudicated for a misdemeanor (45 percent) or status offense (8 percent).”<sup>220</sup> Of those offenders, 56% were assessed as low-risk.<sup>221</sup> Among adjudicated youth who are in a Regional Youth Detention Center (RYDC) facility, 20% were adjudicated for a misdemeanor

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<sup>216</sup> See *id.* (summarizing the need to search for determinants and who “the patient” is when studying disease).

<sup>217</sup> MICHAEL SHADER, U.S. DEP’T OF JUST. OFF. OF JUST. PROGRAMS, RISK FACTORS FOR DELINQUENCY: AN OVERVIEW 1–4 (2003), <https://www.ncjrs.gov/pdffiles1/ojjdp/frd030127.pdf> (underscoring the importance and ability of studying risk factors for juvenile delinquency).

<sup>218</sup> See discussion *supra* Part I (discussing the ineffectiveness of punishment focused efforts to change delinquent behaviors).

<sup>219</sup> Kate Brumback, *Georgia Looking at Ways to Reform Juvenile Justice System*, ATHENS BANNER-HERALD (Oct. 5, 2012, 11:22 AM), <https://www.onlineathens.com/article/20121005/NEWS/310059948?template=ampart> (discussing Governor Deal’s data driven reform).

<sup>220</sup> REPORT OF THE SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS 9 (Dec. 2012), <https://dcs.georgia.gov/document/publication/2012-2013-criminal-justice-reform-council-report/download>. Risk percentages are for offenders in 2011 based on the state’s Comprehensive Risk and Needs Assessment tool. *Id.* These percentages may change in future years for a variety of reasons, including revalidating and re-norming the assessment tool. *Id.*

<sup>221</sup> *Id.*

(18%) or status offense (2%), of whom 39% were assessed as low risk.<sup>222</sup>

During the get-tough era, Georgia passed the Designated Felony Act that targets certain felonies for secure confinement in a Youth Development Campus (YDC) for a minimum of one year and a maximum of five years.<sup>223</sup> The analysts found that the percentage of designated felons in YDCs identified as high-risk has stayed essentially flat at approximately 24%, while the percentage of offenders identified as low-risk has increased slightly from 36% in 2004 to 39% in 2011.<sup>224</sup>

By applying the data showing the sizeable number of low-risk youth removed from their homes and placed in group homes or secure facilities to the empirical studies that show how over-treatment of low-risk youth increases recidivism (hyper-recidivism), the cause was identified. Identifying the solutions required generating alternatives and deciding the most appropriate alternative.

### *3. Generating Alternatives.*

Generating alternatives is key to effective decisionmaking because it provides the decisionmaker with an array of choices from which to choose. The more the alternatives, the better the odds of identifying the solution best suited to resolve the problem.<sup>225</sup> Decision theorist Robin Hogarth describes this process as follows:

Imagination and creativity play key roles in judgement and choice. . . . [P]redictive judgement requires the ability to imagine possible outcomes . . . . Similarly, in many choice situations[,] alternatives are not given but must be created. . . . Indeed, it can be said that a person who exhibits neither creativity nor imagination is incapable of expressing 'free' judgement or choice.<sup>226</sup>

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<sup>222</sup> *Id.* at 9–10.

<sup>223</sup> *Id.* at 10 n.13 (codified at O.C.G.A. § 15-11-63 (2014)).

<sup>224</sup> *Id.*

<sup>225</sup> See ROBIN M. HOGARTH, JUDGEMENT AND CHOICE 110 (1980) (explaining the ability to be creative and imaginative in order to produce more potential solutions and ideas).

<sup>226</sup> *Id.*



The key is to generate the alternatives without critique or judgment to ensure all the possible alternatives are offered.<sup>227</sup> The critique phase comes after generating all the possible solutions.<sup>228</sup>

To jumpstart the generating of alternatives, the policy analysts from the Public Safety Performance Project of the Pew Center on the States presented all the alternatives that have been employed in other states.<sup>229</sup> For example, when generating alternatives to reducing which youth will not be eligible for commitment to state custody, an array of options was presented including (1) no commitment on a misdemeanor, (2) no commitment on a misdemeanor unless there is a prior felony, (3) no commitment on a misdemeanor unless there are two or more prior misdemeanors and a prior felony; and (4) no commitment on a misdemeanor unless there are three prior adjudications and one of the priors must be a felony.<sup>230</sup> We discussed variations of these alternatives—and after exhausting the free flow of ideas—we moved to the critique stage, which brings us to the Decision Analysis approach.

#### *4. Deciding a Course of Action.*

It is expected for there to be disagreement among diverse stakeholders working collectively to solve a problem.<sup>231</sup> To minimize disagreement, it is essential to structure and quantify the process of making choices among the alternatives generated, which is called Decision Analysis.<sup>232</sup> It uses probability theory by dissecting issues and breaking them down into component parts that make it easier to compare and contrast each part and make a decision as to which ones are best.<sup>233</sup> Once those decisions are made, they are aggregated into a composite that will create the best macro decision,<sup>234</sup> which in our reform effort is the final report to the governor.

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<sup>227</sup> *Id.* at 167 (“In producing ideas, however, people are best advised not to evaluate them too quickly . . .”).

<sup>228</sup> *Id.*

<sup>229</sup> See *Public Safety Performance Project*, COALITION FOR JUV. JUST., <https://www.juvjustice.org/our-work/public-safety-performance-project> (last visited Mar. 30, 2020) (giving an overview of the Public Safety Performance Project’s state work and research publications).

<sup>230</sup> *Id.*

<sup>231</sup> See HOGARTH, *supra* note 225, at 181 (“In situations where several decision makers are involved, the weights attached to different evaluative dimensions are the primary source of disagreement.”).

<sup>232</sup> *Id.* at 177.

<sup>233</sup> *Id.* at 181–82.

<sup>234</sup> *Id.* at 183 (“[T]he theory of decision analysis strictly applies to a single decision.”).

To guide us in our decisions, we established a few rules based on the law of probability. Because the goal was to reduce the commitment of low risk youth, we established that (1) decisions must be related to reducing the commitment of low risk offenders, (2) decisions must be supported by the data; and (3) decisions must be supported by empirical studies that show what works to resolve the problem. These rules increased the probability of identifying alternatives that would reduce the number of low-risk youths committed to the state.<sup>235</sup>

For example, to reduce the number of low-risk youth in the RYDCs, the Council recommended mandating an objective detention assessment instrument to guide intake workers in making detention decisions that would minimize the risk of detaining low risk offenders.<sup>236</sup> This instrument is referred to as the Detention Assessment Instrument.<sup>237</sup>

To reduce the number of low-risk youth committed to DJJ, the Council recommended mandating a risk and needs assessment tool, commonly referred to as the Pre-Disposition Risk Assessment (PDRA).<sup>238</sup> The Council also recommended that the courts should not commit youth who are low risk unless they make specific findings of fact to justify overriding the PDRA.<sup>239</sup>

The Council recommended dividing the designated felonies in class A and class B categories to remove the less serious felonies from the maximum commitment of five years.<sup>240</sup> The maximum period of confinement for a class B is eighteen months.<sup>241</sup> The Council also recommended eliminating the one year minimum for designated felonies.<sup>242</sup>

To add another layer of restrictions prohibiting the commitment of low-risk youth, the Council recommended that youth cannot be committed on a misdemeanor unless they possess three prior

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<sup>235</sup> See *id.* at 110.

<sup>236</sup> O.C.G.A. § 15-11-505 (2017).

<sup>237</sup> BOGGS & MILLER, *supra* note 167, at 61–62.

<sup>238</sup> *Id.* at 61; see also O.C.G.A. § 15-11-601(a) (2017).

<sup>239</sup> O.C.G.A. § 15-11-602(b) (2014).

<sup>240</sup> See *id.* § 15-11-602 (requiring a court to hold a disposition hearing and write a disposition order); see also *id.* § 15-11-2(12) (defining a “[c]lass A designated felony act”); *id.* § 15-11-2(13) (defining a “[c]lass B designated felony act”).

<sup>241</sup> *Id.* § 15-11-602(d)(1).

<sup>242</sup> See BOGGS & MILLER, *supra* note 167, at 67 (“In 2011 and 2012, the Council recommended statutory authority permitting judges to depart from mandatory minimum sentences for drug trafficking and certain serious violent felonies, under specific circumstances.”).

adjudications of which one has to be a felony.<sup>243</sup> For youths placed in secure confinement for a designated felony, the Council recommended relaxing the restrictions on DJJ that prohibited them from removing a youth from confinement.<sup>244</sup> The Council recommended that after serving one year in confinement, DJJ may move the youth to another setting that is less restrictive and is better suited to meet the needs of the individual youth.<sup>245</sup> To ensure that children with mental health disorders are not committed, the Council recommended that all youths eligible for confinement on a designated felony receive a behavioral health evaluation.<sup>246</sup>

The Council also expanded the judges' authority to bring stakeholders together to create collaborative written protocols to prevent and address delinquency.<sup>247</sup> This permits judges to enter orders referred to as "Community Based Risk Reduction Programs."<sup>248</sup>

All of the above recommendations were unanimously approved by the Republican-controlled legislature.<sup>249</sup> In speaking with Republican legislators during my time at the Capitol to give testimony on the reforms, they informed me how the cost-savings coupled with the documentation of empirical studies to support the alternative program convinced them to support the reform legislation.<sup>250</sup> They also commented that the diversity of the Council gave the recommendation credibility as well.<sup>251</sup> While testifying before Congress a couple years later, U.S. Representative Buddy Carter (R-GA), a former state representative, told his colleagues on the Congressional Committee following my testimony that the Georgia juvenile justice reforms were a life-saver at a time the state was still struggling with their budget, and that the millions of savings realized from the reforms not only improved public safety,

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<sup>243</sup> O.C.G.A. § 15-11-2(12)(K) (2019).

<sup>244</sup> *See id.* § 15-11-602(c)(3).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* § 15-11-477(b).

<sup>247</sup> *Id.* § 15-11-38.

<sup>248</sup> *Id.* § 15-11-38; *id.* § 15-11-39.

<sup>249</sup> *See* BOGGS & MILLER, *supra* note 167, at 4 ("At the request of Governor Deal, many of these policy proposals were included in HB 1176, which passed unanimously in both chambers of the General Assembly and was signed into law by the Governor on May 2, 2012.").

<sup>250</sup> *Id.* (noting the data driven and cost-saving approach resulted in a unanimous approval of the reforms).

<sup>251</sup> I have firsthand knowledge of this information from speaking with Republican legislators during my time at the Capitol.

but gave us money needed in transportation. Those results were the result of a conservative approach to getting tough on crime by being smart on crime: save taxpayer money and spend it wisely on what works to increase public safety.<sup>252</sup>

#### IV. CONCLUSION

The evolution of the juvenile justice system has been one struggling to find its identity. Since its creation in 1899, the purpose was to separate children from adults, and this objective of the juvenile court was well-meaning, but the means to achieve its rehabilitative ends were insufficient and often harmful and abusive. By the time the U.S. Supreme Court stepped in to police the juvenile court by mandating due process for children, the crime rate was climbing and conservative politicians were bemoaning that the juvenile courts made kids worse because they were coddled.<sup>253</sup> This crime rate coupled with Martinson's assertion that rehabilitation does not work led to the get-tough era that deprived the juvenile court of certain authority over some felonious crimes and delivered youth to the adult system, sometimes for life sentences.<sup>254</sup>

Going into the twenty-first century, the juvenile justice field was delivered medical and scientific evidence that the pre-frontal lobe, which translates emotion into logic, is not developed until age twenty-five.<sup>255</sup> In other words, youth are neurologically wired to be prone to risk-taking behaviors that include crimes. Relying on this teen brain research, the U.S. Supreme Court struck down the death penalty and life sentences without the possibility of parole for youth.<sup>256</sup> These rulings coupled with a growing body of evidence-based studies showing that some programs are effective in the community to prevent and treat delinquent behaviors created a

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<sup>252</sup> BOGGS & MILLER, *supra* note 167, at 6–9 (reporting the multiple improvements in Georgia's juvenile justice system, including saved costs, lower confinement rates, and lower crime rates).

<sup>253</sup> See *In re Gault*, 387 U.S. 1, 12 (1967) (granting due process rights to children).

<sup>254</sup> Martinson, *supra* note 101, at 23–27 (reporting unchanged recidivism rates after alternative programs were implanted as opposed to punishment for juveniles); see also BOGGS & MILLER, *supra* note 167, at 3 (noting the effects of the get-tough era on Georgia's criminal justice system and the need to reform it).

<sup>255</sup> See generally *Understanding the Teen Brain*, UNIV. ROCHESTER MED. CTR., <https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=1&ContentID=3051> (last visited Mar. 30, 2020).

<sup>256</sup> See *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

friendlier atmosphere for conservative politicians to re-think their approach to getting tough on crime.

Conservative politicians like Governor Deal reframed the conservative approach to criminal justice by embracing what does work by targeting low-risk offenders for community-based programs that work and at a cost savings to the taxpayer. Although the fear rhetoric remains a threat, Governor Deal constructed an approach to collective decisionmaking that de-politicized the issue of crime and punishment by emphasizing a structured and quantifiable process to making decisions.<sup>257</sup> Consequently, the conservative legislature unanimously approved the reform recommendations, but, more importantly, the outcomes after five years of implementation prove that Governor Deal's approach to criminal justice reform on a statewide scale can be successful.<sup>258</sup>

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<sup>257</sup> See Aaron Gould Sheinin, *Governor to Sign Sweeping Justice Reform Bill*, ATLANTA J. CONST. (May 2, 2012), <https://www.ajc.com/news/state--regional-govt--politics/governor-sign-sweeping-justice-reform-bill/k2hlftKECpVrfX7wM0qs8O/> (interviewing Governor Deal to learn about his tactics and goals behind House Bill 1176).

<sup>258</sup> BOGGS & MILLER, *supra* note 167, at 4 (summarizing the success Georgia has experienced from the reforms).