

RACE AND REFORM: A MISSED OPPORTUNITY FOR MEANINGFUL IMPACT AND POTENTIAL REMEDIES

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INTRODUCTION

The late 1990s witnessed a dramatic change in the perception and policy of juvenile justice in America. Reacting to a sudden increase in juvenile crime, many states took a hard-line approach against the perceived threat of “super-predators.”¹ North Carolina exemplified this shift. In February 1998 Governor Jim Hunt’s Commission on Juvenile Crime and Justice (“Commission”) provided its Final Report to the General Assembly (“Report”).² The Report addressed juvenile crime, which “ha[d] escalated to unacceptable levels,” and predicted that “the growth of juvenile crime could be three times higher than that of adults” if current trends persisted.³ The Report suggested substantial changes to the Juvenile Code, with sixty-one recommendations.⁴ The recommendations “call[ed] for accountability,” noting that “[j]uveniles must be held swiftly and appropriately accountable for delinquent behavior.”⁵ The result of the recommendations was a juvenile code that focused on punishment rather than prevention, accountability rather than adolescent development.

The juvenile crime wave never happened. In fact the exact opposite occurred. Juvenile violent crime in North Carolina only

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1. See generally John J. Dilulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), <http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160> (describing the increase in juvenile crime rates during the 1980s and 1990s).

2. See DEPT OF CRIME CONTROL & PUB. SAFETY, GOVERNOR’S COMM’N ON JUVENILE CRIME & JUSTICE, FINAL REPORT 1 (1998) [hereinafter FINAL REPORT].

3. *Id.*

4. *Id.*

5. *Id.* at 2.

rose 9% between 1996 and 2005,⁶ then dropped 38% between 2005 and 2014.⁷ While there is no clear explanation for the decline in the juvenile violent crime rate, what is certain is that juvenile disproportionality has not improved as a result of the recommendations. In particular, the level of overrepresentation is particularly high for black youth placed in confinement as compared to white youth.⁸

For at least a quarter of a century, the reality of minority overrepresentation at stages of juvenile proceedings⁹ has been apparent and documented. In 1988 Congress required, pursuant to the Juvenile Justice and Delinquency Prevention Act of 1974 (“JJDPA”),¹⁰ that the states address “disproportionate minority confinement” (“DMC”) in their state plans.¹¹ Specifically, if the proportion of minority youth detained or confined in secure facilities exceeded that of such groups in the general population, then states could only receive funds under the Formula Grants Program by addressing efforts to reduce the proportion of the detained or confined minority youth.¹² In 2002 the legislature amended “confinement” to “contact” in the JJDPA,¹³ requiring an examination of possible disproportionate representation of minority youth at all decision points along the juvenile justice system continuum.¹⁴

North Carolina criminal and juvenile justice entities were aware of the issue, at least as early as 1991, as evidenced by the

6. STATE BUREAU OF INVESTIGATION, N.C. DEP'T OF JUSTICE, CRIME IN NORTH CAROLINA - 2005, at 7 (2005), <http://www.ncdoj.gov/getdoc/0904662c-5800-436e-a87d-09632dec7a75/2005-Crime-Statistics.aspx>.

7. STATE BUREAU OF INVESTIGATION, N.C. DEP'T OF JUSTICE, CRIME IN NORTH CAROLINA - 2014, at 7 (2015), <http://crimereporting.ncsbi.gov/public/2014/ASR/2014%20Annual%20Summary.pdf>.

8. *Detention Data 2014*, N.C. DEP'T OF PUB. SAFETY, <http://www.ncdps.gov/Juvenile-Justice/Data-Statistics-Reports/Recent-Data-Statistics/2014/Detention>; *Youth Development Center Data 2014*, N.C. DEP'T OF PUB. SAFETY, <http://www.ncdps.gov/Juvenile-Justice/Data-Statistics-Reports/Recent-Data-Statistics/2014/Youth-Development-Centers>.

9. Stages include arrest, referral to court, deferral and diversion from court, petitions filed in court, adjudication, sentencing resulting in probation, placement or commitment to secure facilities, detention, and waiver to adult court.

10. Pub. L. No. 93-415, 88 Stat. 1119 (codified as amended in scattered sections of 42 U.S.C.).

11. Andrea R. Coleman, *A Disproportionate Minority Contact (DMC) Chronology: 1988 to Date*, U.S. DEP'T OF JUST., OFF. JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/dmc/chronology.html> (last visited July 28, 2016).

12. *Id.*

13. See 42 U.S.C. § 5633(a)(22) (2012). Despite the change in language, this Article uses the abbreviation DMC to refer interchangeably to “disproportionate minority confinement” and “disproportionate minority contact.”

14. Coleman, *supra* note 11.

state's selection as a national pilot to research DMC.¹⁵ Despite the awareness of overrepresentation, the Commission relegated DMC to a side issue, scant on detail or directive.¹⁶ Caught in the grip of a national panic fearing a future overrun with violent juvenile offenders, the Commission declined to consider the DMC evidence available and chose instead to crack down on serious offenders.

Did the "get tough" approach of the Juvenile Code recommendations and subsequent changes contribute to the problem of overrepresentation, especially for black youth confined in juvenile facilities? Part I begins the discussion by describing the emergence of a national panic in the mid-1990s regarding the proliferation of violent juvenile offenders. Part II explores the background of Governor Jim Hunt's mission to address this concern through the formation of the Commission in 1997, while Part III reveals that, prior to the work of the Commission, disproportionality among juveniles was recognized nationally and in North Carolina. Part IV details the Commission's recommended changes to the Juvenile Code, including the new focus on protecting public safety and addressing serious offenses. Part V recognizes that the problem of disproportionality was identified, but marginalized, in the Report.

Part VI explores the absence of the juvenile violent crime wave, while Part VII, in detail, explains that the overrepresentation of black juveniles in detention and youth development centers ("YDC") has maintained and even increased since the 1999 Juvenile Code reform. Part VIII further highlights that while the overall numbers of juveniles in confinement are decreasing, the reduction is not equal for black and white juveniles. Finally, Part IX suggests how to address overrepresentation of black juveniles in confinement through Juvenile Code amendments and other policy recommendations.

I. IN THE MID-1990S THERE EMERGED A NATIONAL PANIC REGARDING THE PROLIFERATION OF VIOLENT JUVENILE OFFENDERS.

Juvenile violent crime increased nationally during the late 1980s and early to mid-1990s.¹⁷ According to one report, the national juvenile violent crime arrest rate increased 64% between

15. Patricia Devine et al., *Disproportionate Minority Confinement: Lessons Learned From Five States*, JUV. JUST. BULL. (U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention), Dec. 1998, at 1, <https://www.ncjrs.gov/94612.pdf>.

16. See FINAL REPORT, *supra* note 2, at 46-47.

17. See Patricia Torbert & Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime: 1996-97 Update*, JUV. JUST. BULL. (U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention), Nov. 1998, at 2, <http://files.eric.ed.gov/fulltext/ED434979.pdf>.

1988 and 1994.¹⁸ As a result, “[e]xtensive media coverage of violent crimes by juveniles . . . fueled perceptions of a juvenile crime epidemic in the early 1990’s.”¹⁹

In 1995 John J. DiIulio Jr., then Professor of Politics and Public Affairs at Princeton University, coined the term “super-predator” in describing the rapid development of youth criminals.²⁰ These youth were described as “kids that have absolutely no respect for human life and no sense of the future. . . . These are stone-cold predators!”²¹ The media and public soon adopted this position as a real and imminent fear.²²

Juvenile violent crime in North Carolina escalated dramatically from the late 1970s to 1996.²³ In a May 1996 report the North Carolina Department of Crime Control and Public Safety noted that juvenile serious violent crime rose 171% from 1981 to 1994.²⁴ According to the Uniform Crime Data Report in 1996, arrests for persons fifteen years and under rose 23% from 1992 to 1996, and violent crime rose 26% during that same period.²⁵

In response to this perceived threat, many state governments reconsidered juvenile justice in a punishment context. While initially proposals were tailored to impact only those small groups of juveniles charged with violent offenses, “[i]n recent years . . . [s]tates have revised policies and procedures that impact the juvenile justice system as a whole and the full range of offenders.”²⁶ North Carolina followed this path with the creation of the Commission.

II. GOVERNOR JIM HUNT SOUGHT TO ADDRESS THIS CONCERN THROUGH THE FORMATION OF THE COMMISSION IN 1997.

In 1996 Governor Hunt sought a second consecutive term in office during his second administration as governor. It was often noted during his campaign that while the overall crime rate was

18. *Id.*

19. *Id.* at 1.

20. JAMES C. HOWELL, PREVENTING AND REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK 4 (2d ed. 2009).

21. *Id.*

22. See ‘Superpredators’ Arrive, NEWSWEEK (Jan. 21, 1996), <http://www.newsweek.com/superpredators-arrive-176848>. See generally Ted Gest & Victoria Pope, *Crime Time Bomb*, U.S. NEWS & WORLD REP., Mar. 26, 1996 (discussing teenagers’ lack of compassion and empathy in connection to the rise of youth crime).

23. FINAL REPORT, *supra* note 2, at 1.

24. Douglas Yearwood, *The Juvenile Justice System in North Carolina: Past, Present, and Projected Trends*, N.C. DEP’T OF PUBLIC SAFETY (1996), https://www.nccrimecontrol.org/div/GCC/ss_sum96.htm.

25. STATE BUREAU OF INVESTIGATION, N.C. DEP’T OF JUSTICE, CRIME IN NORTH CAROLINA - 1996 (1997), <http://www.ncdoj.gov/getdoc/494c7b72-c269-4090-8448-8b77b52b8b90/1996-Crime-Statistics.aspx>.

26. Torbert & Szymanski, *supra* note 17, at 1.

decreasing, the juvenile crime rate was on the rise.²⁷ As early as May 1996 Governor Hunt stated that the General Assembly “must get tougher on juvenile offenders.”²⁸ In September he promised to “[crack] down hard on juvenile crime” by “work[ing] for tougher sentences for the most dangerous delinquents and for more ‘boot camp’ prisons for first-time offenders, in hopes of shocking them back into line.”²⁹ In addition, Hunt’s opponent in the gubernatorial race, Robin Hayes, sought to link Hunt with the recent rise in juvenile violent crime.³⁰

Hunt won reelection in November 1996, and by the following September he had formed his Commission.³¹ The Commission included state representatives, juvenile justice administrations, and representatives from the courts and law enforcement.³² While some stakeholders supported the Commission’s four-part mission, including “developing tougher punishments for first-time juvenile offenders,”³³ others were not convinced of the Commission’s intentions and directions.³⁴

III. PRIOR TO THE COMMISSION’S WORK, DISPROPORTIONALITY AMONG JUVENILES WAS RECOGNIZED NATIONALLY AND IN NORTH CAROLINA.

At the time of the Commission’s formation, DMC was well-known and North Carolina agencies endeavored to address the overrepresentation of minorities in the delinquency system. DMC refers to the percentage of minority youth who come into contact with the juvenile justice system that exceeds the percentage of that

27. James B. Hunt, N.C. Governor, Address to the Commission on Juvenile Crime and Justice (Nov. 7, 1997), in PAPERS OF JAMES BAXTER HUNT JR. 131, 133 (Jan-Michael Poff & William Harris Brown eds., 2010).

28. David A. Hall, *Hunt: Get Tough on Juvenile Offenders*, GREENSBORO NEWS & REC., May 8, 1996, at B2.

29. John Cochran, *Hunt Sets Goals for Possible Fourth Term*, GREENSBORO NEWS & REC., Sept. 4, 1996, at B1.

30. John Cochran, *Hayes Casts Shadow on Hunt Spotlight*, GREENSBORO NEWS & REC., Sept. 26, 1996, at B1.

31. Millicent Rothrock, *Hunt Launches Panel on Crime by Kids*, GREENSBORO NEWS & REC., Sept. 10, 1997, at B2.

32. FINAL REPORT, *supra* note 2, at 2.

33. See Rothrock, *supra* note 31, at B2 (“We are seeing a younger and younger clientele in our jails, [Guilford County Sheriff BJ] Barnes said ‘I think we need to make punishment sure and swift.’”); Torbert & Szymanski, *supra* note 17, at 6.

34. Chris Fitzsimon, *The Politics of Juvenile Justice Reform*, TRIANGLE BUS. J. (Nov. 24, 1997), <http://www.bizjournals.com/triangle/stories/1997/11/24/editorial4.html> (“Children’s advocates are worried that Hunt will push primarily for punitive approaches to the juvenile crime problem.”).

youth in the general population.³⁵ Identification of disproportionality in the juvenile justice system was not a new revelation,³⁶ but the issue took firm hold of the national consciousness in the late 1980s and early 1990s. The Coalition for Juvenile Justice (formerly the National Coalition of State Juvenile Justice Advisory Groups) raised concerns in its 1988 annual report, *A Delicate Balance*, prompting Congress to act.³⁷ In 1988 Congress amended the JJDP to require that the states address DMC in their respective plans.³⁸ Under the Formula Grants Program, each state was mandated to address efforts to reduce the proportion of youth detained or confined in secure detention facilities “who [were] members of minority groups if it exceed[ed] the proportion of such groups in the general population.”³⁹

In 1991 the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) created the Disproportionate Minority Confinement initiative (“DMC Initiative”) to help states comply with the Formula Grants Program’s requirements and examine various approaches for addressing disproportionate confinement.⁴⁰ Through a competitive process, the OJJDP selected five states, including North Carolina, to pilot the DMC Initiative, which was carried out in two eighteen-month phases.⁴¹ During Phase I, each of the five pilot states assessed the extent of disproportionality in its juvenile justice system and reported findings to the OJJDP.⁴² During Phase II, the pilot states designed strategies to address the disproportionate representation problems identified during their Phase I assessments.⁴³

According to the final report:

The major findings of the Phase I research were that minority youth were more likely than Caucasian youth to be arrested and presented to a juvenile intake facility as well as more likely to be committed to training school. While the research demonstrated that minority youth were more likely to be over-represented in the juvenile justice system Statewide

35. *Disproportionate Minority Contact*, OJJDP IN FOCUS (U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention), Nov. 2012, at 1, <http://www.ojjdp.gov/pubs/239457.pdf>.

36. Charles W. Dean et al., *Minorities and Juvenile Case Dispositions*, 18 JUST. SYS. J. 267, 267–68 (1996).

37. Coleman, *supra* note 11.

38. Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scatter sections of 42 U.S.C.); *See also* Coleman, *supra* note 11.

39. Coleman, *supra* note 11.

40. Devine, *supra* note 15, at 1.

41. *Id.*

42. *Id.*

43. CALIBER ASSOC., EVALUATION OF THE DISPROPORTIONATE MINORITY CONFINEMENT (DMC) INITIATIVE: NORTH CAROLINA FINAL REPORT, at iv (1996).

and in a majority of the counties, the DMC initiative focused on 10 counties, which were designated the "Pilot Counties."⁴⁴

Other findings included that in the ten counties selected for more detailed analysis, five counties indicated overrepresentation in their arrest, detention, and commitment rates, while five neighboring counties were shown to have minorities "not over-represented or only slightly over-represented."⁴⁵

As far as next steps, the report opined, "North Carolina's plans for addressing DMC in the future are uncertain and unrefined, primarily because of the limited support being provided by State-level DMC stakeholders."⁴⁶ An unrelated study, also focusing on a discrete number of counties in North Carolina, suggested that race played a role in determining commitment to training school.⁴⁷

IV. THE COMMISSION RECOMMENDED CHANGES TO THE JUVENILE CODE, THE GOVERNING LAW OF DELINQUENCY COURT, PRIMARILY TO PROTECT PUBLIC SAFETY AND FOCUS ON SERIOUS OFFENSES.

The Commission met twice a month from September to December 1997 to discuss issues and develop recommendations.⁴⁸ In January 1998 the Commission reviewed final reports from the four advisory groups, and unanimously supported a total of sixty-one recommendations. The Commission approved the Report in March 1998.⁴⁹

The tenor of the recommendations was clear. While the Report highlighted intervention and prevention, its driving force was safety: "[T]he recommendations call for accountability: Juveniles must be held swiftly and appropriately accountable for delinquent behavior."⁵⁰

A. *The recommendations altered the Juvenile Code's purpose to emphasize public safety.*

Of all the recommendations made, Recommendation No. 21, regarding the purpose of dispositions, had the most far-reaching impact that altered the Juvenile Code's philosophy:

"Protection of the public" should be included in the purpose paragraph of the Disposition Article. The Code should require that the judge use the "most effective" dispositional alternative

44. *Id.* at v.

45. *Id.* at III-5.

46. *Id.* at vi.

47. Dean et al., *supra* note 36, at 267.

48. FINAL REPORT, *supra* note 2, at 2.

49. *Id.*

50. *Id.*

or sanction and the requirement for the judge to use the “least restrictive disposition” or alternative should be eliminated.⁵¹

Under “Rationale for the recommendation,” the Report continues:

The Commission recommends that the system concentrate on holding the offender accountable for his/her behavior and protecting the public. In responses to increases in the rate and seriousness of juvenile crime across the country, both federal and state legislatures have been reconsidering the balancing point between the juvenile justice system’s focus on child protection and treatment and the protection of the public safety. The distinct trend has been toward placing greater weight on the protection of the public safety.⁵²

The amended version of the Juvenile Code based on that recommendation now reads:

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public. The court should develop a disposition in each case that:

- (1) Promotes public safety;
- (2) Emphasizes accountability and responsibility of both the parent, guardian, or custodian and the juvenile for the juvenile’s conduct; and
- (3) Provides the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community.⁵³

Compare the current law with the previous, pre-Commission statute:

In choosing among statutorily permissible dispositions for a delinquent juvenile, the judge shall select the least restrictive disposition both in terms of kind and duration, that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile.⁵⁴

51. *Id.* at 19.

52. *Id.*

53. N.C. GEN. STAT. § 7B-2500 (2015).

54. N.C. GEN. STAT. § 7A-646 (1995) (repealed 1999).

This rationale, based on the concern of the increase in serious and violent offenders, resulted not only in the purpose of disposition being rewritten and reoriented to “placing a greater weight on public safety,”⁵⁵ it reverberated throughout the Juvenile Code. As a result of the Commission’s recommendations, the General Assembly found practically every instance of the “least restrictive disposition” language and replaced it with a variation on “protection of public safety.”⁵⁶ For example, the Purpose section of the Juvenile Code is now tiered in favor of safety:

(1) To protect the public from acts of delinquency.

(2) To deter delinquency and crime, including patterns of repeat offending:

a. By providing swift, effective dispositions that emphasize the juvenile offender’s accountability for the juvenile’s actions; and

b. By providing appropriate rehabilitative services to juveniles and their families.

(3) To provide an effective system of intake services for the screening and evaluation of complaints and, in appropriate cases, where court intervention is not necessary to ensure public safety, to refer juveniles to community-based resources.

(4) To provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders to proceed with all possible speed in making and implementing determinations required by this Subchapter.⁵⁷

Compare this to the pre-Commission language of the Juvenile Code:

(1) To divert juvenile offenders from the juvenile system through the intake services authorized herein so that juveniles may remain in their own homes and may be treated through

55. FINAL REPORT, *supra* note 2, at 19.

56. Janet Mason, 1998 *Legislation: Juvenile Law Reform*, 98/03 ADMIN. JUST. 1, 11 (1998). “In relation to delinquent and undisciplined juveniles, the new Juvenile Code places a stronger emphasis on protection of the public, on deterring juvenile delinquency, on the timeliness of juvenile justice procedures, and on juveniles’ and parents’ accountability.” *Id.*

57. N.C. GEN. STAT. § 7B-1500 (2015).

community-based services when this approach is consistent with the protection of the public safety.⁵⁸

There are other instances of this shift in language and philosophy.⁵⁹ The consistent reliance on public safety as the fundamental concept of the recommendations reflects the Commission's fear of an insurmountable juvenile crime rate. The Governor's mission—suppressing violent juvenile offenders—is now reflected in the changed language in the Juvenile Code's Purpose section.

B. The recommendations further altered the laws regulating secure custody and YDCs (training schools).

There were only a few Commission recommendations that directly addressed secure confinement. Recommendation No. 33 provided intermittent confinement for both Level 1 and Level 2 sanctions (five days in confinement and up to fourteen days, respectively).⁶⁰ Recommendation No. 37 sought to limit the number of secure confinement days to fourteen.⁶¹

Commitment to training schools (now YDCs) received greater attention. It is important to note that another core recommendation was the use of graduated sanctions, described in Recommendations No. 30 through No. 34.⁶² As stated in the Report:

A new graduated sanctions model that provides for accountability of the juvenile, the seriousness of the offense, and the public safety (an offense plus risk based system) requires that categories of offenses be defined. . . .

....

... A system of dispositional categories which increase gradually in restrictiveness, incapacity and intensity provides structure to the process of determining the appropriate disposition according to the seriousness of the offense committed and the risk of further offending. . . . The most restrictive, incapacitating, and intensive disposition is commitment to training school.⁶³

58. N.C. GEN. STAT. § 7A-516 (1995) (repealed 1999).

59. See, e.g., N.C. GEN. STAT. § 7A-577(e) (1995) (repealed 1998) in regards to imposing the "least restrictive interference with the liberty of a juvenile who is released from secure custody" or N.C. GEN. STAT. § 7A-651(e) (1995) (repealed 1998), requiring that alternatives to commitment must be "explored and exhausted."

60. FINAL REPORT, *supra* note 2, at 28.

61. *Id.* at 32.

62. *Id.* at 27-30.

63. *Id.* at 30.

Therefore, commitment to training school would be limited to a Level 3 sanction.⁶⁴ A Level 3 sanction could be achieved by committing a violent offense or violating probation, unless the probation was for a minor offense.⁶⁵

This new system of accountability and graduated sanctions had an influence on the overall reduction of the youth population in confinement.⁶⁶ However, as will be described later, the historic disproportionality between black juveniles confined and white juveniles confined continued to increase.

V. THE PROBLEM OF DISPROPORTIONALITY WAS IDENTIFIED, BUT MARGINALIZED.

As stated earlier, the Report contained sixty-one recommendations. Recommendation Nos. 52 and 53, close to the end of the Report and after consideration of substantive statutory changes, addressed the formerly titled "Over-Representation of Minorities in the Juvenile Justice System."⁶⁷ Specifically, Recommendation No. 52 stated, "The final report of the Governor's Commission on Juvenile Crime and Justice to be presented to the Governor shall include in the historical section of the report an acknowledgement of the over-representation of minorities in the juvenile justice system."⁶⁸ Recommendation No. 53 followed with, "The State of North Carolina should mandate sensitivity training for all law enforcement and juvenile justice professionals regarding minorities."⁶⁹

Following these recommendations were four short, factual paragraphs. It is clear that the Report identified a problem, as it states, "Qualitative and empirical research demonstrates that African American and other minority youth comprise a majority of juveniles involved in the juvenile justice system in North Carolina."⁷⁰ The acknowledgment continues with some data identifying overrepresentation.⁷¹ The Report then admits that "[r]ecognition of the problem needs to be the first step in addressing the issue of over-representation of minority youth in the juvenile

64. *Id.* at 28.

65. *Id.* at 33-34.

66. *See infra* notes 90-91 and accompanying text.

67. FINAL REPORT, *supra* note 2, at 46-47.

68. *Id.* at 46.

69. *Id.*

70. *Id.*

71. Specifically, the report recognized disproportionality in training school commitments (60.6% African American, 36.5% Caucasian), detention admissions (58% African American, 37% Caucasian), and, interestingly, suspensions, although there was no additional language connecting discipline disparities to juvenile justice disparities. *Id.* at 46-47.

justice system.”⁷² The Report continues by suggesting sensitivity training for juvenile justice professionals and law enforcement to help “ensure that the experience of minority youth in the juvenile justice system is equitable and consistent” across the state.⁷³

These sections appear to be the only discussion of overrepresentation. Nowhere else in the Report is the issue identified, considered, or discussed, despite the recognition that the problem impacts youth in custody and at other points in the system.⁷⁴ Other than these brief statements, it is unclear why the Commission did not consider overrepresentation while addressing statutes concerning confinement.

VI. THE JUVENILE VIOLENT CRIME WAVE NEVER HAPPENED.

While there was substantiated concern about the increase in juvenile violent crime in the late 1980s and early 1990s, the crime rate began to decline as early as 1997 and has continued to plummet up to the present day. Considering juvenile arrest rates as reported by the North Carolina Department of Justice, the juvenile arrest rate for violent crimes dramatically increased 125% between 1988 and 1997.⁷⁵ There were 1179 juveniles arrested for violent crimes in 1996, apparently the highest number reported in these documentations.⁷⁶ One expert predicted that based on the trends, the number of juveniles arrested for violent offenses would more than double by 2010.⁷⁷ The expert based this prediction on three simple premises—that the juvenile population would increase, that more teens would be involved in drug transactions, and that the juvenile population would have increased access to weapons.⁷⁸

72. *Id.* at 47.

73. *Id.* It is unclear what resulted from this recommendation, although the state juvenile justice administration did create a position of “DMC Coordinator” to address overrepresentation. *Disproportionate Minority Contact (DMC)*, N.C. DEP’T PUB. SAFETY, <https://www.ncdps.gov/Juvenile-Justice/Juvenile-Court-Services/Disproportionate-Minority-Contact> (last updated Apr. 24, 2015).

74. FINAL REPORT, *supra* note 2, at 46–47 (“Data reported in North Carolina pursuant to federal disproportionate minority confinement legislation revealed that 84 of 100 counties in 1994 reported minority over-representation in the juvenile justice system.”).

75. Violent crime in this report includes murder, rape, robbery, and aggravated assault. STATE BUREAU OF INVESTIGATION, N.C. DEP’T OF JUSTICE, CRIME IN NORTH CAROLINA - 1997 (1998), <http://www.ncdoj.gov/getdoc/d593ccd9-5df6-4e9a-9a98-3ab865cb6029/1997-Crime-Statistics.aspx>.

76. STATE BUREAU OF INVESTIGATION, N.C. DEP’T OF JUSTICE, CRIME IN NORTH CAROLINA - 1998 (1999), <http://www.ncdoj.gov/getdoc/7694ff28-5370-4687-8352-b1439119929a/1998-Crime-Statistics.aspx>.

77. Yearwood, *supra* note 24.

78. *Id.*

While the population did increase close to the rate predicted,⁷⁹ the juvenile crime rate began to fall as early as 1997.⁸⁰ For the first time, juvenile arrests for violent crime fell 2%.⁸¹ A more substantial decline occurred just the next year, with the violent crime rate dropping 20% in 1998.⁸² The crime rate continued to steadily decrease and 2012 saw only 525 juveniles age sixteen and under arrested, the lowest number since 1989.⁸³ In fact, the rate of juveniles arrested for violent crime dropped 38% between 2005 and 2014.⁸⁴ In short, the “time bomb”⁸⁵ for juvenile violent crime never went off.

VII. OVERREPRESENTATION OF BLACK JUVENILES IN DETENTION AND YDCs HAS MAINTAINED AND EVEN INCREASED SINCE THE 1999 JUVENILE CODE REFORM.

Since 2000, within a year of the Juvenile Code changes, and through at least 2014, black juveniles have been overrepresented in juvenile secure facilities. Although the overall populations of both detention centers and YDCs have decreased, the number of black juveniles has increased disproportionately, while the number of white juveniles has decreased.⁸⁶

A. Detention Center Overrepresentation

Juvenile detention centers are either state or county secure facilities that hold juveniles for short periods of time.⁸⁷ Juveniles may be held at these facilities at a number of different points in the juvenile process: pre-adjudication (trial), after adjudication and pending disposition (sentencing), as a dispositional alternative

79. See *id.* (predicting that the population of ten to fifteen year olds would surpass 600,000 by 2000). Compare to the 2000 census numbers, indicating that population of ten to fourteen year olds was 551,367. U.S. CENSUS BUREAU, NORTH CAROLINA: 2000, CENSUS 2000 PROFILE 2 (2002), <https://www.census.gov/prod/2002pubs/c2kprof00-nc.pdf>. For purposes of this analysis, juvenile applies to youth ages sixteen and under.

80. See STATE BUREAU OF INVESTIGATION, N.C. DEP'T OF JUSTICE, *supra* note 75.

81. *Id.*

82. STATE BUREAU OF INVESTIGATION, N.C. DEP'T OF JUSTICE, *supra* note 76.

83. STATE BUREAU OF INVESTIGATION, N.C. DEP'T OF JUSTICE, CRIME IN NORTH CAROLINA-2012, at 6 (2013), <http://www.ncdoj.gov/getdoc/9d422e2e-5ee4-4b6a-a175-90b948e857a0/2012-Annual-Summary.aspx>.

84. STATE BUREAU OF INVESTIGATION, N.C. DEP'T OF JUSTICE, *supra* note 7, at 7.

85. See Gest & Pope, *supra* note 22.

86. See *infra* notes 90–95, 102–107.

87. *Juvenile Detention Centers*, N.C. DEP'T PUB. SAFETY, <https://www.ncdps.gov/Juvenile-Justice/Juvenile-Facility-Operations/Juvenile-Detention-Centers> (last visited July 28, 2016).

(punishment), and after disposition pending placement.⁸⁸ Juveniles who have run away from placement may also be held in detention.⁸⁹

Between 2000 and 2014 the overall number of detained juveniles decreased. In 2000 there were 8563 admissions to detention centers.⁹⁰ In 2014 there were 3238 admissions to detention centers.⁹¹ While an overrepresentation of black juveniles in detention already existed in 2000, the degree of overrepresentation increased over the next fifteen years. During this period of time, the percentage of black juveniles detained increased from 58% of the total detained population in 2000⁹² to 61% of the total detained population in 2014.⁹³ During the same period of time, the percentage of white juveniles detained decreased from 37% of the total detained population in 2000⁹⁴ to 26% of the total detained population in 2014.⁹⁵

B. YDC Overrepresentation

YDCs are state secure facilities that hold juveniles for indefinite and often long periods of time.⁹⁶ Commitment to a YDC is the most severe sanction a juvenile may receive in delinquency court.⁹⁷ Juveniles are placed in these facilities as a result of being adjudicated for a very serious offense, violating probation under certain circumstances, or having amassed a lengthy juvenile record.⁹⁸ Juveniles are committed for an indefinite term of a minimum of six months⁹⁹ and may remain until age eighteen,¹⁰⁰ or in certain circumstances, age twenty-one.¹⁰¹

YDC overrepresentation tells a similar, yet even more disproportionate, story for juveniles confined in detention. Between 2000 and 2014 the overall number of committed juveniles decreased. In 2000 there were 879 commitments to YDCs.¹⁰² In 2014 there

88. See N.C. GEN. STAT. §§ 7B-1903, 7B-2506(12), 7B-2506(20) (2015).

89. N.C. GEN. STAT. § 7B-1903(7).

90. 2000 N.C. DEP'T JUV. JUST. & DELINQ. PREVENTION ANN. REP. 23 (2000), https://www.ncdps.gov/div/JJ/annual_report_2000.pdf [hereinafter 2000 ANNUAL REPORT].

91. *Detention Data 2014*, *supra* note 8.

92. 2000 ANNUAL REPORT, *supra* note 90, at 23.

93. *Detention Data 2014*, *supra* note 8.

94. 2000 ANNUAL REPORT, *supra* note 90, at 23.

95. *Detention Data 2014*, *supra* note 8.

96. *Youth Development Center Data 2014*, *supra* note 8.

97. N.C. GEN. STAT. § 7B-2506(24) (2015).

98. See generally *Id.* § 7B-2508(e) (providing dispositional alternatives for juveniles who have been adjudicated delinquent).

99. *Id.* § 7B-2513(a).

100. *Id.* § 7B-2513(a)(3).

101. *Id.* § 7B-2513(a)(1).

102. 2000 ANNUAL REPORT, *supra* note 90, at 21.

were 202 commitments to YDCs.¹⁰³ The degree of overrepresentation of black juveniles also increased from 2000 to 2014, but to an extent greater than that of detention centers. During this period of time, the percentage of black juveniles detained in YDCs increased from 61% of the total detained population in 2000¹⁰⁴ to 68% of the total detained population in 2014.¹⁰⁵ During the same period of time, the percentage of white juveniles detained in YDCs decreased from 32% of the total detained population in 2000¹⁰⁶ to 20% of the total detained population in 2014.¹⁰⁷

VIII. THE OVERALL NUMBER OF JUVENILES IN CONFINEMENT IS DECREASING, BUT NOT EQUALLY.

As mentioned above, admissions to detention centers and commitments to YDCs both decreased over a fifteen-year period. However, the overall number of black juveniles detained and committed decreased less than the overall number of white juveniles detained and committed. Between 2000 and 2014 the overall number of black juveniles detained decreased by 60%, while the overall number of white juveniles detained decreased by 73%.¹⁰⁸ Similarly, the overall number of black juveniles committed decreased by 74%, while the overall number of white juveniles committed decreased by 86%.¹⁰⁹

IX. IT IS POSSIBLE THAT THESE NEGATIVE CONSEQUENCES OF OVERREPRESENTATION OF JUVENILES PLACED IN CONFINEMENT CAN BE ADDRESSED IF THE JUVENILE CODE IS AMENDED TO FOCUS ON DIVERSION, REHABILITATION, AND INDIVIDUAL, OFFENDER-BASED OPTIONS.

When disproportionality is acknowledged, identifying the root of the cause can be very difficult.¹¹⁰ Federal and state governments have spent decades and billions of dollars balancing racial makeup in confinement with mixed results. The following recommendations,

103. *Youth Development Center Data 2014*, *supra* note 8.

104. 2000 ANNUAL REPORT, *supra* note 90, at 21.

105. *Youth Development Center Data 2014*, *supra* note 8.

106. 2000 ANNUAL REPORT, *supra* note 90, at 21.

107. *Youth Development Center Data 2014*, *supra* note 8.

108. See 2000 ANNUAL REPORT, *supra* note 90, at 21; *Youth Development Center Data 2014*, *supra* note 8.

109. See 2000 ANNUAL REPORT, *supra* note 90, at 21; *Youth Development Center Data 2014*, *supra* note 8.

110. Kimberly Kempf-Leonard, *Minority Youths and Juvenile Justice: Disproportionate Minority Contact After Nearly 20 Years of Reform Efforts*, 5 YOUTH VIOLENCE & JUV. JUST. 71, 71 (2007).

therefore, should be considered as attempts to address racial imbalance, not absolute solutions.

A. *Recommendations for Detention*

As indicated earlier, detention populations have consistently decreased in recent years, while disproportionality of black youth in detention centers has remained constant and even increased. One factor in the decrease of the overall detained population has been the use of the detention screening tool developed by the North Carolina Division of Adult Corrections and Juvenile Justice.¹¹¹ However, it is unknown whether or not the tool was developed considering racial impact, including such factors as the juvenile's family status, location of household, and place of offense.¹¹²

Considering the apparent effectiveness of the detention screening tool, perhaps a similar tool could be developed for in-court use. Since there are several points in the juvenile court procedural process where a juvenile may be placed in detention,¹¹³ the tool could assist the court in making determinations—for example, whether to continue to hold a juvenile in secure custody or whether detention as a dispositional option is appropriate for the juvenile before the court.

In addition, more alternatives to detention may serve to reduce disproportionality. Currently, the Division of Adult Corrections and Juvenile Justice is implementing short-term crisis center beds for juveniles otherwise appropriate for detention.¹¹⁴ Electronic monitoring is an option for both pre-adjudication detention¹¹⁵ and as a dispositional sanction.¹¹⁶

111. PowerPoint Presentation, Dep't of Juvenile Justice and Delinquency Prevention, Detention Screening Tool (on file with author).

112. See generally the *Juvenile Detention Alternatives Initiative* for its consideration of race and decision-making. *Juvenile Detention Alternatives Initiative*, JDAI HELPDESK, <http://www.jdaihelpdesk.org/default.aspx> (last visited July 28, 2016).

113. These points in the North Carolina juvenile court process include: before adjudication in § 7B-1903(b), between adjudication and disposition in § 7B-1903, as a dispositional alternative in § 7B-2506(12), (20), after disposition pending placement in § 7B-1903(c), or after an alleged violation of the conditions of probation or post-release supervision in § 7B-1903(d).

114. "Crisis beds" are defined as "[a]n alternative to detention that allows a youth in crisis to be assessed and determine the best long-term service plan and the most appropriate service for a child moving forward." DIV. OF ADULT CORR. & JUVENILE JUSTICE, N.C. DEP'T PUB. SAFETY, JUVENILE JUSTICE FACILITIES STRATEGIC PLAN 4 (2014).

115. N.C. GEN. STAT. § 7B-1906(f) (2015).

116. *Id.* § 7B-2506(18).

B. Recommendations for YDC Commitment

Commitment to a YDC is the most severe sanction under the Juvenile Code.¹¹⁷ It is the only Level 3 option in the scheme of graduated sanctions.¹¹⁸ A juvenile may be committed to a YDC under several circumstances, including consideration of the seriousness of the offense, the juvenile's prior delinquency history, the juvenile's current dispositional level, and whether or not the juvenile was on probation at the time of the offense.¹¹⁹

If a juvenile is adjudicated for a violent crime (offense Class A–E), any prior delinquency history, other than a single misdemeanor adjudication, results in an automatic commitment to a YDC.¹²⁰ The court may only deviate from this sanction if it finds that the juvenile has “extraordinary needs.”¹²¹ In a recent report from the Division of Juvenile Justice, black juveniles received almost twice as many complaints for a violent offense as white juveniles.¹²² Perhaps the “extraordinary needs” standard could be broadened to provide opportunity for more juveniles who have committed a violent offense. For example, instead of establishing such a high standard for diversion from commitment, the court could create a balancing test, considering factors such as available services in the community, prior attempts to rehabilitate, and level of culpability. Another consideration is to expand the dispositional chart to accept other alternatives with a violent offense, so that one violent offense and a low record would not automatically dictate commitment. Another suggestion is to designate certain, individual offenses as “violent,” so that only the most severe crimes would incur the most severe sanction.

Another element of commitment to consider is the prior delinquency history level. According to the most recent statistics, the vast majority of juveniles (72%) are committed for what are classified as “serious” offenses.¹²³ A juvenile may be committed to a YDC with the combination of an adjudication of a serious offense and a high delinquency history level.¹²⁴ The Juvenile Code allows certain offenses to be diverted from the juvenile court process.¹²⁵ Some offenses are deemed “nondivertible,” including offenses such

117. *Id.* § 7B-2506(24).

118. *Id.* § 7B-2508(e).

119. *See id.* §§ 7B-2507, 7B-2508.

120. *Id.* § 7B-2508(f).

121. *Id.* § 7B-2508(e).

122. 2011 N.C. DIV. OF JUVENILE JUSTICE ANN. REP. 11, https://ncdps.s3.amazonaws.com/s3fs-public/documents/files/annual_report_2011.pdf.

123. *Youth Development Center Data 2014*, *supra* note 8.

124. N.C. GEN. STAT. § 7B-2508(f) (2015).

125. *Id.* § 7B-1706.

as murder, serious sex offenses, and any felony that involves willful serious injury committed with a deadly weapon.¹²⁶ The statute also makes any felony drug offense nondivertible.¹²⁷ Common felony drug charges in delinquency court include possession with intent to sell or deliver marijuana and possession of any amount of cocaine.¹²⁸ Frequently, these charges are reduced to misdemeanors.¹²⁹ If these offenses are made “divertible,” juveniles would be diverted from the formal process, and therefore the number of juveniles eligible for commitment due to having a serious offense in their delinquency history would decrease. In addition, a recent law emphasizes the duty of the intake court counselor to make reasonable efforts to meet with the juvenile and the parental authority if the offense is divertible.¹³⁰ This emphasis may influence intake court counselors to divert other non-violent felonies, such as felony breaking and entering, felony larceny, and felony breaking into a motor vehicle.

Active probation is another catalyst that propels juveniles into YDCs. If a juvenile is placed on probation for a serious offense and at a Level 2 disposition, a violation of that probation can expose the juvenile to YDC commitment.¹³¹ There is no time period recommended for probation, although there is a limit to one year plus an additional year if the court finds the extension necessary.¹³² The one-year probation period is a maximum length.¹³³ It is not uncommon for the court to automatically enter a one-year period of probation, sometimes without considering the need for the length of probation as prescribed by law.¹³⁴ The court could instead consider a period tailored to the juvenile’s needs. The longer the juvenile is on probation, the more exposure the juvenile will have to the possibility of violating probation. There are fourteen “regular” conditions of probation,¹³⁵ with five additional conditions available to either the court or the chief court counselor.¹³⁶ Several of these conditions, such as “remain on good behavior” and “shall not violate any reasonable and lawful rules” of the parental authority, are subjective and may be considered differently by different cultures

126. *Id.* § 7B-1701.

127. *Id.* § 7B-1701(5).

128. *Id.* § 90-95.

129. See LaToya Powell, *Reducing Charges in Juvenile Court*, UNC SCH. GOV'T: ON CIVIL SIDE (May 13, 2015, 5:00 AM), <http://civil.sog.unc.edu/reducing-charges-in-juvenile-court/>.

130. North Carolina Controlled Substance Act, 2015 N.C. Sess. Laws 58.

131. N.C. GEN. STAT. §§ 7B-2508(d), 7B-2510(e) (2015).

132. *Id.* § 7B-2510(c).

133. *Id.*

134. See *id.* § 7B-2500.

135. *Id.* § 7B-2510(a).

136. *Id.* § 7B-2510(b).

and backgrounds.¹³⁷ Others, such as proscriptions against acquaintances or locations, do not take into consideration the availability of adult supervision or transportation.¹³⁸ These conditions tend to create difficult obstacles for juveniles with fewer resources and can steer them toward a path to commitment.

Finally, perhaps a decision matrix tool could assist the court in making an appropriate commitment decision, especially if developed with consideration to racial impact.¹³⁹ As discussed earlier, while the court is given some direction in determining dispositions,¹⁴⁰ the emphasis of the decision is on public safety and accountability. In addition, the current disposition chart, while having some discretion, still only utilizes two facts to determine disposition: the juvenile's current offense and prior delinquency history.¹⁴¹ However, anyone involved in working with any youth, but in particular an at-risk and court-involved youth, understands there is much more to a youth's story than a history of charges. A matrix could be developed that focuses on additional factors, such as family history, community alternatives, and strengths of the juvenile. Family history—including mental health diagnoses, social service involvement, or criminal justice interaction—assists in providing the backdrop of the juvenile's experiences. There should always be strong consideration of community alternatives, which have been shown to positively impact outcomes for court-involved youth.¹⁴² Too often the negative is emphasized in the courtroom. A juvenile's strengths, such as academic achievement, community participation, and artistic or athletic prowess, should assist in determining the impact of incarceration. Consideration of the juvenile as a whole person, rather than as an offender made up of the sum of his offenses, likely will individualize the process and perhaps negate stereotypes and bias.

CONCLUSION

It is difficult to establish a definite causal connection between the concern of a future overrun with violent juvenile offenders, resulting in a new Juvenile Code emphasizing public safety, and the current, increased disproportionality of confined youth. However,

137. *Id.* § 7B-2510(a)(1), (3).

138. *Id.* § 7B-2510(a)(6).

139. One of the stated objectives of the North Carolina Detention Screening Tool is to "reduce racial and ethnic disparities." Detention Screening Tool, *supra* note 111.

140. N.C. GEN. STAT. § 7B-2500 (2015).

141. *Id.* § 7B-2508(f).

142. See generally RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION (2011) (discussing strategies for juvenile justice reform).

the sequence of historical events compels society to consider “what if?” What if the federally funded 1996 DMC report findings were integrated into the Commission’s recommendations and subsequently the statutory reforms? Would the disproportionality have been maintained or even reduced? These questions merely fuel the imagination of what could have been. Hindsight is instructive. Decision makers today should study past trends to better inform policy decisions impacting the future of our community.