LEFT BEHIND: THE PATERNALISTIC TREATMENT OF STATUS OFFENDERS WITHIN THE JUVENILE JUSTICE SYSTEM

INTRODUCTION

In the last half century, the juvenile justice system has changed dramatically. Through changes to legislation,[1] various state and federal court decisions,[2] and attitudinal changes,[3] juvenile offenders are increasingly being afforded rights that were once reserved for adult offenders. Youth offenders are now given procedural due process rights,[4] the right to have their voices heard,[5] and, in some states, the right to a trial by jury.[6] Despite this overall shift in the approach to juvenile justice, there are still some parts of the system that have failed to make the adjustment. Status offenders are a primary example of such a group.[7] Status offenses are a classification of transgressions committed by juveniles "that would not be a crime if committed by an adult."[8] Typical examples of status offenses include: truancy,[9] running away,[10] curfew violations,[11] and ungovernability.[12] The nature of these offenses—that they are not considered criminal—makes it so that status offenders are afforded neither procedural due process rights nor the opportunity to voice their interests.

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1. *See infra* notes 57–60 and accompanying text.
2. *See infra* notes 61–89 and accompanying text.
3. *See infra* notes 90–99 and accompanying text.
4. *See infra* notes 63–85 and accompanying text.
5. *See infra* notes 90–99 and accompanying text.
6. *See infra* notes 86–89 and accompanying text.
7. In addition to status offenders, the juvenile justice system has jurisdiction over delinquents and dependent youth. A "juvenile delinquent, is a youth who has committed an offense deemed illegal regardless of the offender's age." Tiffany Zwicker Eggers, Note, *The "Becca Bill" Would Not Have Saved Becca: Washington State's Treatment of Young Female Offenders*, 16 LAW & INEQ. 219, 227 (1998). A dependent youth (sometimes referred to as an abused or neglected child) "is a juvenile needing protection from an unfit guardian." *Id.* at 227.
8. Cheryl Dalby, Note, *Gender Bias Toward Status Offenders: A Paternalistic Agenda Carried Out Through The JJDPA*, 12 LAW & INEQ. 429, 437 (1994). Different jurisdictions may use different labels for status offenders, including Children in Need of Protection or Services (CHIPS), Children in Need of Supervision (CHINS), Persons in Need of Supervision (PINS), or Unruly Child. *See, e.g.*, ALA. CODE § 12-15-1 (LexisNexis 2005); MINN. STAT. ANN. § 260C.007 (West 2007); N.Y. FAM. CT. ACT § 712 (McKinney 1999); OHIO REV. CODE ANN. § 2151.022 (West 2005).
9. *See infra* notes 37–40 and accompanying text.
10. *See infra* notes 41–43 and accompanying text.
11. *See infra* notes 44–47 and accompanying text.
12. *See infra* notes 48–51 and accompanying text.

Rather, the nature of status offenses allows courts to exercise paternalism[13] and use their discretion in determining the disposition of the child, including whether the child committed an offense and how the child should be treated.[14]

This Note examines the juvenile justice system's paternalistic attitude towards status offenders and observes that while the juvenile justice system as a whole has moved towards greater autonomy and voice for youth offenders, the system's treatment of status offenders has failed to keep up. Part I presents a broad overview of the history of the juvenile justice system, as well as a more detailed description of status offenders. Part II discusses various changes made to the juvenile justice system over the last fifty years and the overall shift towards greater autonomy for youth offenders. It describes changes made through federal legislation, federal and state court decisions, and general attitudinal changes. Part III addresses the ways status offenders have been left behind in the juvenile justice system's movement and how they are continually deprived of the same rights and autonomy as other youth offenders. It traces the history of status offenders within the juvenile justice system and presents a case study of female status offenders to demonstrate the ways in which status offenders are subject to paternalism at the discretion of juvenile court judges. Finally, Part IV offers suggestions to afford status offenders the same autonomy and rights as other youth within the juvenile justice

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13. Paternalism is defined as "[a] government's policy or practice of taking responsibility for the individual affairs of its citizens, esp. by supplying their needs or regulating their conduct in a heavy-handed manner." BLACK'S LAW DICTIONARY 1163 (8th ed. 2004); *see also* Dalby, *supra* note 8, at 430 n.10 (quoting GERDA LERNER, THE CREATION OF PATRIARCHY 239–40 (1986)) (defining paternalism).

> *Paternalism*, or more accurately *Paternalistic Dominance*, describes the relationship of a dominant group, considered superior, to a subordinate group, considered inferior, in which the dominance is mitigated by mutual obligations and reciprocal rights. The dominated exchange submission for protection, unpaid labor for maintenance. In its historical origins, the concept comes from family relations as they developed under patriarchy, in which the father held absolute power over all the members of his household. In exchange, he owed them the obligation of economic support and protection. The same relationship occurs in some systems of slavery; it can occur in economic relations, such as the *padrone* system of southern Italy or the system used on some contemporary Japanese industries. As applied to familial relations, it should be noted that responsibilities and obligations are not equally distributed among those to be protected: the male children's subordination to the father;s [sic] dominance is temporary; it lasts until they themselves become heads of households. Daughters can escape it only if they place themselves as wives under the dominance/protection of another man. The basis of 'paternalism' is an unwritten contract for exchange: economic support and protection given by the male for subordination in all matters, sexual service and unpaid domestic service given by the female.

Id.

14. For purposes of this Note, the term "child" is used synonymously with minor, youth, and juvenile.

system. The Note concludes that status offenders must either be provided greater rights and protections within the current structure or they must be removed as a whole from the jurisdiction of the juvenile justice system.

I. OVERVIEW OF THE JUVENILE JUSTICE SYSTEM

A. Historical Background

In the late eighteenth century in the United States, a single court system handled both adult and child criminal offenders.[15] Children age seven and older were considered competent to stand trial in criminal court and if convicted, subject to various "prison sentences or even the death penalty."[16] In the late nineteenth century, Progressives began pushing for reform in the criminal justice system.[17] In particular, "[a] specific group of Progressives, [referred to as] the 'child savers,'" concentrated on juvenile offenders because of their belief that "juvenile offenders as a group [were] in need of care and guidance, not punishment.[18]" This call for reform prompted the creation of the juvenile court system.[19]

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15. Lauren A. Barnickol, Note, *The Disparate Treatment of Males and Females Within the Juvenile Justice System*, 2 WASH. U. J.L. & POL'Y 429, 431 (2000). The system used the "same trial procedures, sentencing guidelines, and prison facilities" for both adult and youth offenders. *Id*.

16. *Id.* at 431. During this time, the courts exempted children under the age of seven from prosecution because they "were presumed to lack the requisite mens rea to commit a criminal offense." Eric K. Klein, Note, *Dennis The Menace or Billy The Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 375 (1998).

17. Barnickol, *supra* note 15, at 431. Progressives refer to activists during the Progressive era, "a broadly based reform movement" lasting between the 1890s and 1920s. In response to changes brought about by industrialization and urbanization, "[P]rogressives advocated a wide range of political, economic, and social reforms." Encyclopedia.com, Progressivism Facts, Information, Pictures, http://www.encyclopedia.com/topic/progressivism.aspx (last visited Mar. 1, 2010).

18. Klein, *supra* note 16, at 376. The view of the "child savers" was summed up by the Supreme Court in *In re Gault*, 387 U.S. 1 (1967), as follows:

> The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." The child—essentially good, as they saw it—was made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or on trial.

Klein, *supra* note 16, at 376; *see also* Eggers, *supra* note 7, at 226–27 (noting that "[t]he Progressives saw themselves as child-savers and their courts as benign, non-punitive, and therapeutic").

19. For a more detailed description of the history leading up to the establishment of the juvenile court, see Sacha M. Coupet, Comment, *What To Do With The Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1308–13 (2000).

In 1899, Illinois established the first juvenile court in the United States.[20] The court was created with the goal of treating offending youth "in order to prevent future delinquent behavior rather than punish them for breaking the law."[21] The philosophy rested on the assumption that children were less developed than adults and thus should not be held to the same level of accountability.[22] Additionally, it was believed that children were more capable of change and could be treated.[23] Because of this focus on rehabilitation, the original juvenile court system adopted the principle of *parens patriae*.[24] This doctrine gave judges broad discretion to consider each child's needs individually and to determine the appropriate disposition and treatment for each offender.[25] By the late 1920s, almost

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20. Sandra M. Ko, Comment, *Why Do They Continue To Get The Worst Of Both Worlds? The Case For Providing Louisiana's Juveniles With The Right To A Jury In Delinquency Adjudications*, 12 AM. U. J. GENDER SOC. POL'Y & L. 161, 164 (2004). The court was established in Cook County, Illinois, through the Illinois Juvenile Court Act, 1899 Ill. Laws 131 §§ 1–21. Ko, *supra* note 20, at 164 n.17.

21. *Id.* at 164; *see* Coupet, *supra* note 19, at 1312 (noting that the job of the juvenile court judge was to use his discretion to provide assistance to a minor who might otherwise begin a life of crime).

22. Ira M. Schwartz et al., *Myopic Justice? The Juvenile Court and Child Welfare Systems*, 564 ANNALS 126, 128 (1999); *see also* Earl F. Martin & Marsha Kline Pruett, *The Juvenile Sex Offender and the Juvenile Justice System*, 35 AM. CRIM. L. REV. 279, 280 (1998) (stating that "[t]he basic doctrine of this new court was that 'children—even children who broke the criminal law—differed from adults,' and therefore 'required not only separate but different treatment before the law'") (quoting ELLEN RYERSON, THE BEST LAID PLANS 3 (1978)); Martin, *supra* note 22, at 314–15 (stating that juveniles "are less capable than adults of making consistently sound judgments or moral distinctions" and "describing the developmental stages of cognitive functioning with respect to legal reasoning, internalization of social and legal expectations, and ethical decision making."); Coupet, *supra* note 19, at 1312–13 (noting that children entering the juvenile courts were assumed to be relatively innocent).

23. Ko, *supra* note 20, at 164; *see* Schwartz, *supra* note 22, at 128 (stating that juvenile court was founded on the belief that "children are in the midst of developing emotionally, morally, and cognitively, and therefore, are psychologically impressionable and behaviorally malleable").

24. Ko, *supra* note 20, at 164–65. *Parens patriae* is defined as "[t]he state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1144 (8th ed. 2004)*; see also* Coupet, *supra* note 19, at 1308 (noting that *parens patriae* "generally refers to the role of the state as the custodian of persons who suffer from some form of legal disability. It authorizes the state to substitute and enforce its judgment about what it believes to be in the best interests of the persons who presumably are unable to take care of themselves"); Klein, *supra* note 16, at 376 (describing *parens patriae* as the doctrine "whereby the state had an affirmative duty to intervene to care for 'its least fortunate citizens'") (quoting ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 3–4 (1977)); Erin M. Smith, Note, *In A Child's Best Interest: Juvenile Status Offenders Deserve Procedural Due Process*, 10 LAW & INEQ. 253, 257 (1992) (defining *parens patriae* as "the right of the state to take control of children whose parents were unable or unwilling to meet their responsibilities or of children who pose a threat to the community").

25. Ko, *supra* note 20, at 165; *see* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1098 (1991) (quoting an early judge describing his role as "[t]he problem for determination by the judge is not, has this boy or girl committed a specific wrong, but what is he, how has he become what

every state had passed a statute similar to that of Illinois and created its own juvenile court system.[26]

At their inception, the juvenile courts did not have any of the procedural protections of the adult criminal court because the proceedings were technically considered civil and because the advocates of the juvenile court system believed the protections to be unnecessary and undesirable.[27] Juvenile court personnel believed that the court's rehabilitative purpose made the formal protections of due process unnecessary.[28] The juvenile court advocates preferred for the court to be an informal atmosphere where the judge could speak with the child and determine the most appropriate disposition and treatment for the juvenile offender.[29] The process was intended to be "more of an information-gathering and problem-solving session to serve the best interests of the child, [rather] than an adversarial-type of proceeding as seen in a criminal court."[30]

B. Status Offenders

The civil, rehabilitation-focused nature of the juvenile justice system allowed the courts to assert jurisdiction over both criminal and noncriminal behavior. Youth classified as status offenders "fall under the jurisdiction of the juvenile courts because they have committed a non-

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he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.").

26. Ko, *supra* note 20, at 164.

27. *Id.* at 165. The Supreme Court of Pennsylvania stated in *In re Holmes*, 109 A.2d 523 (1954), that "juvenile courts *are not criminal courts*, the constitutional rights granted to persons accused of *crime* are not applicable to children brought before them." *Id.* at 525.

28. Hon. W. Don Reader, *The Laws of Unintended Results*, 29 AKRON L. REV. 477, 479 (1996); *see also* Ainsworth, *supra* note 25, at 1100 (stating that procedural formalities were not wanted in the juvenile court system because informality was thought to encourage rehabilitation).

29. Ko, *supra* note 20, at 165; *see* Smith, *supra* note 24, at 258 (stating "in order to meet the 'best interests' of the child, intervention needed to be informal and individualized").

30. Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1161 (2001); *see* Klein, *supra* note 16, at 377 (discussing use of separate terminology and procedures for juvenile offenders to protect them "from the stigma of adult prosecutions"). The goals of the juvenile courts have also been described as follows:

> The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity will gain immensely in the effectiveness of his work.

Gilbert, *supra* note 30, at 1160 (internal citation omitted).

criminal act that is considered unacceptable solely because of their age."[31] Despite the noncriminal nature of the offenses, juvenile courts have jurisdiction over status offenders because of the state's legitimate interest in protecting its youth, whether through punitive or rehabilitative treatment.[32] Additionally, juvenile courts believed jurisdiction over status offenders was proper based on an escalation theory that "status offenses will lead to more serious forms of delinquency" and "[e]arly intervention [was] needed to help children and prevent future delinquency."[33] Status offenses are often difficult to chronicle and assess as they are matters of state law.[34] There are, however, some common offenses that are likely to lead a court in most states to classify a child as a status offender.[35] These offenses include the specific offenses of truancy, running away, and

31. Tracy J. Simmons, Note, *Mandatory Mediation: A Better Way to Address Status Offenses*, 21 OHIO ST. J. ON DISP. RESOL. 1043, 1046 (2006). In most states, the cut-off age for status offenses is eighteen years of age. Soma R. Kedia, Note, *Creating an Adolescent Criminal Class: Juvenile Court Jurisdiction Over Status Offenders*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 543, 550 (2006).

32. Howard T. Matthews, Jr., Comment, *Status Offenders: Our Children's Constitutional Rights Versus What's Right for Them*, 27 S.U. L. REV. 201, 202 (2000).

33. Simmons, *supra* note 31, at 1044–45; *see* Alecia Humphrey, *The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 HASTINGS WOMEN'S L.J. 165, 184 (describing status offenses as a gateway into the juvenile justice system and noting that the committing of status offenses is a signal that a child needs assistance).

34. Kedia, *supra* note 31, at 544. Depending on the state, the statutes may be part of the state's family code or child welfare law. *Id.* at 545. Every state in the United States has some form of status offense legislation. Matthews, *supra* note 32, at 202.

35. A typical example of a status offender statute provides:

> A status offender is an individual who has been charged with or adjudicated for conduct that would not, pursuant to the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult. An adjudicated status offender who violates the terms of his or her probation or aftercare remains a status offender for purposes of Section 12-15-208, unless the child is contemporaneously adjudicated for having committed a delinquent act that is not a status offense. Status offenses include, but are not limited to, the following:
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> a. Truancy.
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> b. Violations of municipal ordinances applicable only to children.
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> c. Runaway.
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> d. Beyond control.
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> e. Consumption or possession of tobacco products.
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> f. Possession and consumption of alcohol, which is a status offense by federal law, even though considered a delinquent act by state law.
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> g. Driving under the influence pursuant to Section 32-5A-191(b), which is a status offense by federal law, even though considered a delinquent act by state law.

ALA. CODE 1975 § 12-15-1 (LexisNexis 2005). For other examples of status offense statutes, *see, e.g.*, ARIZ. REV. STAT. ANN. § 8-201 (2007); CONN. GEN. STAT. ANN. § 46b-120 (West 2009); GA. CODE ANN. § 15-11-2 (2008); LA. CHILD. CODE ANN. § 730; MASS. GEN. LAWS ANN. ch. 119 § 21 (West 2008); R.I. GEN. LAWS § 14-1-3; TEX. FAM. CODE ANN. § 51.02 (Vernon 2008); VA. CODE ANN. § 16.1-228 (2003).

curfew violations, as well as a more general "catch all" offense for "unruly," "incorrigible," or "disobedient" behavior.[36]

Truancy refers to a youth's unexcused absences from school.[37] The rationale for punishing this behavior as a status offense is that truancy is often seen as a "gateway" to further criminal behavior as truants often skip school to participate in crime of some sort.[38] Additionally, if a student is habitually truant, it is more likely that the student will "drop out of school, which generally results in decreased economic opportunity."[39] Because of these results and the underlying public policies, truancy remains a criterion for adjudication as a status offender.[40]

Another common status offense is running away.[41] The National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children defines a runaway as any one of the following:

> [a] child [who] leaves home without permission and stays away overnight; [a] child 14 years old or younger (or older and mentally incompetent) who is away from home chooses not to come home when expected to and stays away overnight; [or] a child fifteen years old or older who is away from home chooses not to come home and stays away two nights.[42]

Running away is included as a status offense as it will often lead to more serious criminal activity.[43]

Curfew violations are also considered a status offense in many localities.[44] Curfew violations occur when a minor breaks an ordinance that imposes restrictions on the hours during which the youth may be out

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36. *See generally* Kedia, *supra* note 31, at 545–49.

37. NATIONAL CENTER FOR SCHOOL ENGAGEMENT, WHAT IS TRUANCY?, http://www.schoolengagement.org/TruancypreventionRegistry/Admin/Resources/Resources/TruancyFactSheet.pdf (last visited Nov. 11, 2009).

38. Kedia, *supra* note 31, at 547–48. *But see id.* at 554–55 (stating that "unfulfilled educational needs," academic anxiety, such as when "a student may stay home from school in order to avoid stressful situations like oral presentations" or as a result of "an undiagnosed learning disability," or academic climate, such as "problematic relationships with peers or teachers," may contribute to a youth being truant).

39. Kedia, *supra* note 31, at 548.

40. *Id*.

41. *Id*. at 546.

42. *Id.*

43. *Id.* Many commentators, however, criticize punishing running away as a status offense because many times the reason why youth run away is because of abuse—physical, sexual, emotional, or psychological. Running away often serves as a "coping mechanism for dealing with and attempting to end the abuse." *Id.* at 554. *See generally* Humphrey, *supra* note 33, at 175–78 (discussing the presence and effects of abuse in many runaway cases).

44. Kedia, *supra* note 31, at 548.

in public.[45] Many cities enacted these laws "as a way to curb juvenile crime."[46] Research has demonstrated a correlation between active enforcement of these laws and a decrease in juvenile crime.[47]

In addition to these specific offenses, many status offense statutes contain general "catch all" sections, referring to "disobedient," "incorrigible," or "ungovernable" children who are "beyond the control of their parents" (hereinafter "ungovernable").[48] Although varying by state, a typical catch all provision will state that a parent can refer a youth for court supervision if he or she "is an habitual truant or is incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of his parents, guardian or lawful custodian."[49] As demonstrated by the language of the statute, no specific criteria define the behaviors contained within the catch all sections of status offense laws, and, thus, parents can refer children as ungovernable for an assortment of behaviors, including "habitual disobedience of family rules about anything from staying out late to engaging in sexual relations."[50] Because the activities and behaviors constituting ungovernability are ill-defined, parents and judges have broad discretion in referral and enforcement of this status offense.[51]

II. CHANGES IN THE JUVENILE JUSTICE SYSTEM: A MOVE TOWARDS GREATER AUTONOMY

Despite the best intentions of the founders and advocates of the juvenile justice system, by the 1960s there were calls to reform the system on account that it had failed in its goal of rehabilitating youth offenders.[52]

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45. *Id.*

46. *Id*.

47. *Id.* at 549. Despite the success of these ordinances, these laws have been "controversial in terms of their possible infringement on minors' First and Fourteenth Amendment rights." *Id.* at 548; *see also id.* at 548 n.26 (listing sources discussing the conflicts over curfew laws); Matthews, *supra* note 32, at 205–08 (discussing various state and federal court cases on the constitutionality of curfew violations but noting that the Supreme Court has yet to resolve the issue).

48. Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C.R.-C.L. L. REV. 41, 45 (1981) (quoting OHIO REV. CODE ANN. § 2151.002 (1976); S.D. CODIFIED LAWS ANN. § 26-8-7.1 (1977)).

49. N.Y. Fam. Ct. Act § 732(a) (1962).

50. Kedia, *supra* note 31, at 546.

51. Costello, *supra* note 48, at 45; *see* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, OJJDP FACT SHEET, PETITIONED STATUS OFFENSE CASES IN JUVENILE COURTS 2 (2004) (showing that relatives referred youth more for the status offense of ungovernability than for other offenses).

52. *See* Gilbert, *supra* note 30, at 1163 (discussing the report, JUVENILE DELINQUENCY AND YOUTH CRIME by the PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF

Critics "questioned the effectiveness of the system's treatment techniques" and its "rehabilitative capacity."[53] It soon became clear that "the juvenile court, despite its stated rehabilitative goals, punishes children in much the same way as the adult system."[54] Many states recognized this shift and embraced a more punitive approach to adjudicating minors.[55] In response to the increasingly punitive approach of many juvenile courts, youth advocates turned their attention to providing youth offenders with legal rights and protections.[56] Ironically, this switch to a more punitively focused juvenile justice system led to greater autonomy for most youth offenders.

A. Federal Legislation

The recognition of the juvenile justice system's shift towards an increasingly punishment-oriented model is reflected in various federal laws.[57] In 1974, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA) which was aimed at reforming and standardizing state juvenile justice systems.[58] Among the changes required by the JJDPA included the deinstitutionalization of status offenders, the separation and removal of juvenile offenders from adult offenders in jails and other institutional settings, and addressing disproportionate minority confinement.[59] The legislation required the federal government to provide

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JUSTICE, which "raised serious questions about fundamental premises of the juvenile justice system and its effectiveness").

53. Barnickol, *supra* note 15, at 434; *see* Gilbert, *supra* note 30, at 1164 (quoting the Supreme Court's decision in *Kent v. United States*, 383 U.S. 541 (1966), in which the Court expressed concerns over the state of the juvenile justice system in 1967, saying "[t]here is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation").

54. Dalby, *supra* note 8, at 435.

55. *Id*. at 435–36; *see, e.g.*, Barnickol, *supra* note 15, at 435 & nn.39–41 (describing new juvenile-related laws regarding juvenile court jurisdiction, transfer to adult court, and mandatory sentencing—which all reflected the shift to a more punitive approach).

56. Ko, *supra* note 20, at 166; *see* Coupet, *supra* note 19, at 1314 (describing critics' assertions that the juvenile courts "harmed children by denying them necessary constitutional protections and by exposing them to the risk of judicial whim.").

57. *See infra* notes 58–60 and accompanying text.

58. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, § 102, 88 Stat. 1110, 1110–11 (1974). During debates the articulated purposes of the JJDPA were stated as "'develop[ing] effective methods of preventing and reducing juvenile delinquency, diverting juveniles from the juvenile justice system, and providing critically needed alternatives to incarceration.'" Dalby, *supra* note 8, at 440 n.90 (quoting 120 CONG. REC. 25, 162 (1974)).

59. Building Blocks for Youth, Juvenile Justice and Delinquency Prevention Act Fact Sheet, http://www.buildingblocksforyouth.org/issues/jjdpa/factsheet.html (last visited Nov. 11, 2009).

resources to assist the states in achieving these goals.[60] Recognizing the shift to an increasingly punitive approach by the juvenile courts, Congress passed the JJDPA with the goal of providing greater protections to youth offenders.

B. Federal and State Court Cases

Recognizing the shift to a punitive model and the corresponding need for greater legal rights, beginning in 1966 the Supreme Court handed down several rulings that formalized juvenile court procedures.[61] These cases "enumerated the constitutional rights retained by juveniles during adjudication," including many due process procedural protections, and restricted the discretion of juvenile court judges.[62]

The Supreme Court first took notice of the juvenile justice system's shortcomings in the case of *Kent v. United States*.[63] In this case, the Court considered whether a juvenile court's failure to hold a hearing on the waiver of jurisdiction violated sixteen-year-old Morris Kent's due process rights.[64] The Court held that Kent had been denied his due process rights when the trial judge failed to hold a hearing prior to transferring him to adult court.[65] In deciding this case, the Court warned the states not to view the doctrine of *parens patriae* as "an invitation to procedural arbitrariness."[66] Additionally, the Court indicated its concerns regarding the then-current state of the juvenile court system when it noted, "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[67]

The year following *Kent v. United States*, the Court decided the landmark juvenile rights case *In re Gault*.[68] A juvenile court sentenced fifteen-year-old Gerald Gault to an institution "for the period of his

60. Barnickol, *supra* note 15, at 447. In providing resources to assist with the deinstitutionalization of status offenders, the JJDPA required states to develop community-based alternatives for youth offenders. *Id*. at 448.

61. *See id.* at 434 n.35 (listing Supreme Court cases that "increased the due process rights of juvenile offenders, in effect making juvenile court processes more similar to those used in [adult] criminal court"); *see also infra* notes 63–85 and accompanying text.

62. Ko, *supra* note 20, at 167; *see* Coupet, *supra* note 19, at 1314–16 (analyzing the evolution of Supreme Court jurisprudence on the constitutional rights of juvenile offenders).

63. 383 U.S. 541 (1966).

64. *Id.* at 552.

65. *Id.* at 552–54.

66. *Id.* at 555.

67. *Id.* at 556.

68. 387 U.S. 1 (1967).

minority" for making lewd phone calls to a neighbor.[69] On appeal, Gault alleged that the juvenile court denied him of numerous constitutional rights at his adjudication hearing.[70] In its analysis of the case, the Supreme Court reviewed and rejected several of the historical rationales for the lack of protections and rights for juvenile offenders.[71] The Court recognized that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[72] In response to these concerns, the Court held that many rights afforded to adult criminal defendants under the Due Process Clause of the Fourteenth Amendment should extend to juvenile offenders.[73] These rights include the right to notification of the charge,[74] the right to representation by counsel,[75] the right to confront and cross-examine witnesses,[76] and protection against self-incrimination.[77] The Court emphasized the importance of due process to all proceedings—whether for adults or juveniles—stating that due process is "the primary and indispensable foundation of individual freedom."[78] Furthermore, the Court noted that "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."[79]

Following *Gault*, the Court continued to make decisions extending various rights and protections to juveniles. In the case of *In re Winship*,[80] the Court held that a state must meet the stricter "proof beyond a reasonable doubt" standard, rather than the preponderance of evidence standard, in order to adjudicate a minor as delinquent for committing a criminal act.[81] Despite the idea that juvenile proceedings were civil in nature, the Court held that "the Due Process Clause protects the accused

69. *Id.* at 7–8. The same offense, if committed by an adult, would be a misdemeanor that carried a fine of $5 to $50 or imprisonment for a maximum of two months. *Id* at 8–9.

70. *Id.* at 10 (claiming that the court denied him the right to notice of the charges, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, the right to a transcript of the proceedings, and the right to appellate review of the case).

71. *Id.* at 14–27.

72. *Id.* at 17–18.

73. *Id*. at 30–59.

74. *Id.* at 31–34.

75. *Id.* at 34–42.

76. *Id.* at 42–57.

77. *Id*.

78. *Id*. at 20.

79. *Id*. at 27–28.

80. 397 U.S. 358 (1980).

81. *Id*. at 367.

against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[82] Additionally, in *Breed v. Jones*,[83] the Supreme Court held that the Double Jeopardy Clause prevented the reprosecution of a youth in adult criminal court after the youth had already been tried in juvenile court.[84] Echoing its observations from *Kent* and *Gault*, the Court noted that "it is clear under our cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew 'the 'civil' label-of-convenience which has been attached to juvenile proceedings,' and that 'the juvenile process . . . be candidly appraised.'"[85] Therefore, the Court determined that youth offenders needed to be afforded the same or similar rights and protections as adult criminal offenders.

In addition to these constitutional mandates from the Supreme Court to extend certain rights to juveniles, some state courts have taken a role in granting even more rights to juvenile offenders. For example, in June 2008 the Kansas Supreme Court granted juveniles the right to a jury trial in *In the Matter of L.M.*[86] Involving a sixteen-year-old charged with aggravated sexual battery, the court held that changes to the Kansas Juvenile Justice Code eroded the differences between the juvenile and adult criminal systems such "that juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments."[87] Additionally, the court stated that the proceedings under the Kansas Juvenile Justice Code established juveniles' right to a jury trial under the Kansas Constitution.[88] Although the Supreme Court first rejected the right to a jury trial for juvenile offenders in the 1971 case of *McKeiver v. Pennsylvania*,[89] this contrary holding of the Kansas Supreme Court points to a potential shift in thinking, which could result in a different outcome should a case regarding the issue again reach the Supreme Court.

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82. *Id* at 364.
83. 421 U.S. 519 (1975).
84. *Id.* at 541.
85. *Id*. at 529 (quoting *Gault*, 387 U.S. at 21, 50) (citation omitted).
86. 186 P.3d 164 (Kan. 2008).
87. *Id*. at 170.
88. *Id.* at 172.
89. 403 U.S. 528 (1971).

C. Attitudinal Changes: Best Interests v. Stated Interests

In addition to being afforded procedural due process rights, in the last half century youth offenders have been given a greater voice within their adjudications.[90] Attorneys for juveniles have long debated the best way to represent children.[91] The two most common approaches attorneys take to juvenile representation are (1) to advocate based on the best interests of the child (hereinafter "best-interests approach")[92] or (2) to advocate based on the expressed interests of the child (hereinafter "expressed-interests approach").[93] The best-interests approach advocates based on a third party's opinion and conclusions as to what is best for the child, derived from the third party's observations.[94] Proponents of the best-interests approach rest their belief on the theory that minors lack the capacity to make reasoned decisions.[95] By contrast, the expressed-interests approach advocates for the minor to voice his or her opinion and preferences with regard to the adjudication.[96] Proponents of the expressed-interests approach actively seek and respect the juvenile's input and perspective.[97] The expressed-interests approach empowers juvenile offenders and provides them with greater decision-making power in their adjudication.[98] Despite these differing approaches, there appears to be agreement among juvenile defenders that the expressed-interests approach is the proper way to advocate for the juvenile offenders.[99] Modern studies indicate that minors possess strong preferences and understanding of their own personal

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90. *See infra* notes 91–99 and accompanying text.

91. Aditi D. Kothekar, Note, *Refocusing the Lens of Child Advocacy Reform on the Child*, 86 WASH. U. L. REV. 481, 484 (2008).

92. *Id.* at 482.

93. ROBIN WELKER STERLING ET AL., NATIONAL JUVENILE DEFENDER CENTER, ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 10 (2009), *available at* http://www.njdc.info/pdf/role_of_juvenile_defense_counsel.pdf.

94. Kothekar, *supra* note 91, at 493.

95. *Id.*; *see also* Francis Gall Hill, *Clinical Education and the "Best Interest" Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering Pedagogy*, 73 IND. L.J. 605, 623 (1998) (stating that "[b]est interest representation is consistent with society's notion that children have not attained the full measure of cognitive skills, maturity, and judgment necessary for autonomous decisionmaking.").

96. STERLING, *supra* note 93, at 7.

97. *Id.* at 8.

98. *Id*. at 9.

99. *Id*. at 7; *see also* Barbara Bennett Woodhouse, *Talking About Children's Rights In Judicial Custody and Visitation Decision-Making*, 36 FAM. L.Q. 105, 123 (2002) (stating that "[i]n recent years, a number of commentators have called for judicial recognition of a much larger role for children's preferences, perhaps at least in part influenced by greater acceptance of general autonomy for children . . ."); Kothekar, *supra* note 91, at 484–86 (discussing the move towards a client-directed model of child advocacy in dependency proceedings).

needs.[100] The shift from a best-interests approach to an expressed-interests approach represents another way in which the juvenile justice system is moving towards greater autonomy for youth offenders.

The federal statutes, Supreme Court decisions, and attitudinal changes of juvenile-court personnel were important changes to the juvenile justice system.[101] As youth offenders were being adjudicated in the same manner as adult offenders with a focus on punishment as opposed to rehabilitation, additional legal rights were necessary. The changes to the juvenile justice system in the last half century finally recognized the need for youth offenders to be provided with various procedural rights and protections and a certain degree of autonomy in their adjudications.

III. STATUS OFFENDERS LEFT BEHIND

Since the 1960s, the state of the juvenile justice system has shifted to provide youth offenders with greater procedural protections and a louder voice in their adjudications. Juvenile courts must now provide juvenile offenders with the right to notification of the charge, the right to representation by counsel, as well as numerous other procedural due process rights.[102] Additionally, during adjudication, juvenile defenders are encouraged to advocate using the expressed-interests approach, rather than the best-interests approach.[103] These changes in the juvenile justice system signal a shift towards affording more rights and greater autonomy to youth offenders. These changes, however, have not been extended to all classes of juvenile offenders. Status offenders are denied procedural due process rights and continue to be "subject[ed] to more flexible and informal procedures under the *parens patriae* notion."[104] Thus, once a status

100. The consensus among several scholars "is that adolescents in the mid-teenage years between fourteen and sixteen, have the understanding and decisional capacity of young adults." Randy Frances Kandel & Dr. Anne Griffiths, *Reconfiguring Personhood: From Ungovernability To Parent Adolescent Autonomy Conflict Actions*, 53 SYRACUSE L. REV. 995, 1044 (2003). Additionally, "a substantial body of psychological research specifically focused on adolescent decisional capacity regarding legal matters . . . indicates that people in their mid teenage years understand, analyze, and decide like young adults and differently from younger subjects." *Id.* at 1045–46.

101. *See supra* notes 57–99 and accompanying text.

102. *See supra* notes 63–85 and accompanying text.

103. *See supra* notes 90–99 and accompanying text.

104. Simmons, *supra* note 31, at 1048; *see* Smith, *supra* note 24, at 258 (noting that "*Gault* expressly limited its holding to the adjudicatory hearing for a child determined to be delinquent."). The view that status offenders should be treated according to the rehabilitative approach results from the fact that status offenders do not actually commit crimes. This reasoning, however, is flawed because "[a]lthough courts attempt to justify the denial of procedural protections by stating that these children receive less punitive dispositions, the courts' treatment of status offenders is not solely rehabilitative since committing noncriminal behavior twice can ultimately provide the basis for incarceration."

offender is referred to the juvenile justice system, he or she is denied the right against self-incrimination, the right to counsel, and the proof beyond a reasonable doubt standard.[105] The denial of these and other rights is especially troubling because the legal criteria for certain status offenses are very vague.[106] The lack of clarity in these statutes allows for a great deal of discretion for juvenile court judges.[107] It is because of this large degree of discretion that status offenders are particularly susceptible, and in fact often fall victim to, paternalistic practices.[108] Despite this susceptibility to paternalism, the juvenile court system continues to deny status offenders various legal rights and a voice in their adjudications.

A. History of Status Offenders Within the Juvenile Justice System

At various times throughout the history of the juvenile justice system there have been attempts to provide status offenders with greater legal rights and protections. The states are largely inconsistent in dealing with status offenders.[109] In most cases, however, state courts have denied status offenders additional rights and protections and continued to differentiate between delinquents and status offenders.[110]

The case of *In re Spalding*[111] illustrates a court's denial of rights to status offenders. Cindy Spalding was charged with the status offense of being ungovernable and beyond the control of her parents for allegedly engaging "in acts of sexual intercourse and sexual perversion with an unknown number of male and female adults for a period of more than one year."[112] Spalding attempted to assert her right against self-incrimination, but the court denied her from asserting this right stating that "since [Spalding] was not charged with an act which, in the circumstances of this case, would constitute a crime if committed by an adult, the privilege of

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Smith, *supra* note 24, at 260; *see infra* notes 126–30 and accompanying text (discussing the Valid Court Order Amendment).

105. Kedia, *supra* note 31, at 559. In some states, status offenders may also be denied access to a guardian ad litem. *Id.* at 559 n.116.

106. *Id.* at 558. In particular, the catch all sections of status offender statutes are very vague and unclear. *See supra* notes 50–51 and *infra* notes 133–44 and accompanying text.

107. Kedia, *supra* note 31, at 559.

108. *See infra* notes 133–44 and accompanying text.

109. Smith, *supra* note 24, at 259–60.

110. Humphrey, *supra* note 33, at 168.

111. 332 A.2d 246 (Md. 1975).

112. *Id*. at 248 n.2. Cindy Spalding was thirteen when her parents brought her to the hospital for drug overdoes and rape. An adult male would give Spalding and her friends a pill before his parties, where all would engage in sexual intercourse. The adult male threatened to kill the girls if they told anyone about the parties. *Id*. at 248.

self-incrimination is not applicable to these proceedings."[113] The *Spalding* court believed that the category of status offenses should be insulated "from the consequences of an adjudication of delinquency" and that "the creation of the category of [status offenses] . . . insures that treatment of children guilty of misconduct peculiarly reflecting the propensities and susceptibilities of youth, will acquire none of the institutional, quasi-penal features of treatment . . . ."[114] Accordingly, "providing Fifth Amendment rights would establish a penal atmosphere," in contrast to the purported goal of rehabilitation of status offenders.[115] Ultimately, Spalding was adjudicated in need of supervision as a status offender and committed to an institution for treatment.[116] This case clearly illustrates the ways in which status offenders are disadvantaged through the denial of the procedural due process rights which are provided to delinquent juveniles and adult offenders.[117]

Recognizing that status offenders were treated differently from delinquents and denied access to certain legal rights, in 1974 Congress passed the JJDPA.[118] Among its requirements, the JJDPA federally mandated the deinstitutionalization of status offenders.[119] In accordance with the mandate, courts began to process status offenders differently from other delinquents.[120] Despite positive initial results, judges gradually became frustrated with their inability to punish status offenders under the JJDPA.[121] A common scenario was one in which judges ordered runaways

113. *Id.* at 257. The Supreme Court, in *In re Gault*, 387 U.S. 1 (1967), laid out a two-prong test to determine whether constitutional rights applied to juveniles. First, the proceeding must be to adjudicate delinquency. Second, the delinquency must be such that it could result in commitment to a state institution. The Maryland court found Spalding ineligible for the right against self-incrimination despite the *Gault* Court's statement that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children." Gault, 387 U.S. at 49. The *Spalding* court responded that the Supreme Court's holding that the constitutional privilege against self-incrimination was applicable to juveniles "was referring to a proceeding to determine 'delinquency' . . . ." *In re* Spalding, 332 A.2d at 253.

114. *Id.* at 252.

115. Smith, *supra* note 24, at 262.

116. *In re* Spalding, 332 A.2d at 249. Because this case was decided before the enactment of the JJDPA, Spalding was sent to an institution for treatment. *See supra* notes 57–60 and 119–30 (the JJDPA mandated the deinstitutionalization of status offenders). *But see infra* notes 123–30 (discussing the techniques many juvenile-court personnel used to get around the JJDPA as well as the Valid Court Order Amendment).

117. Dalby, *supra* note 8, at 440.

118. *See supra* note 58 and accompanying text.

119. *See supra* note 59 and accompanying text.

120. Schwartz, *supra* note 22, at 136.

121. Humphrey, *supra* note 33, at 169–70. Early on, the JJDPA appeared to have positive effects for status offenders. By 1988, status offender detentions had decreased by ninety-five percent. *Id.*

to stay in unlocked facilities, only to have the youth run away again.[122] Because of their frustrations with these types of situations, judges began to use a practice known as "bootstrapping" in which they placed a status offender in secure detention when the child was found in contempt of a court order.[123] Alternatively, another method of bootstrapping was called "relabeling" in which the state charged a status offender with a low-level criminal offense, instead of a status offense, so that he or she could be detained.[124] Despite the fact that institutionalizing status offenders was technically against the law, many judges took it upon themselves to find ways to place these young offenders in secure detention based on what they believed was best for the youth.[125]

In 1980 juvenile court judges lobbied Congress for an amendment to the JJDPA that would create an exception to the "no secure detention" provision for status offenders and which would essentially legalize the bootstrapping and relabeling actions that were already being employed to place status offenders in secure detention.[126] In response to the judges' efforts, Congress enacted a new provision known as the Valid Court Order Amendment.[127] This amendment allows judges to place status offenders in

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122. *Id.* at 170.

123. Joyce London Alexander, *Aligning the Goals Of Juvenile Justice With The Needs Of Young Women Offenders: A Proposed Praxis For Transformational Justice*, 32 SUFFOLK U. L. REV. 555, 564 (1999); *see also* Barnickol, *supra* note 15, at 450 (describing the practice of bootstrapping in greater detail).

124. Alexander, *supra* note 123, at 564; *see also* Barnickol, *supra* note 15, at 451 (discussing how juvenile courts used relabeling to detain status offenders); David J. Steinhart, *Status Offenses*, THE JUVENILE COURT, Winter 1996, at 91, *available at* http://www.futureofchildren.org/usr_doc/vol7no3ART7.pdf (stating that studies indicate that in reaction to deinstitutionalization laws, children are being relabeled as delinquents so they can be housed in secure detention facilities, or are being "involuntarily and inappropriately committed to in-patient treatment facilities and psychiatric hospitals"). In addition to bootstrapping and relabeling, states circumvented the JJDPA's mandate of deinstitutionalization in other ways:

> "Although status offenders were removed from secure facilities, their numbers were offset by the incarceration of more young people for minor and petty delinquent acts. Moreover, there is evidence that many status offenders, as well as other troubled children were propelled into private impatient psychiatric and substance abuse facilities where they were essentially confined against their will with virtually no legal protections."

Simmons, *supra* note 31, at 1048–49 (quoting Wanda Mohr et al., *Shackled in the Land of Liberty: No Rights for Children*, 564 ANNALS 37, 40 (1999)).

125. Humphrey, *supra* note 33, at 170 (noting that judges participated in bootstrapping because of their belief that status offenders needed to be in secure confinement).

126. *Id.* at 171.

127. Pub. L. No. 96-509, 94 Stat. 2750 (1980). Representative John Ashbrook proposed the Valid Court Order Amendment. The amendment passed by a vote of 239 to 123. Judges played an instrumental role in getting the Valid Court Order Amendment through Congress. In hearings in front of the House of Representatives, Judge John Milligan, speaking on behalf of the National Council of Juvenile and Family Court Judges, emphasized the need for the amendment to protect youth from

detention if they violate a valid order of the juvenile court.[128] The practical result of the 1980 Valid Court Order Amendment is that "a judge can issue an order requiring a status offender to stay at home, live in foster care, attend counseling, or any of several other dispositions . . . ." Additionally, the Amendment "allows the juvenile court to [legally] place the child in a secure detention or correctional facility" if the juvenile violates a court order.[129] Despite this change to the JJDPA, which punishes status offenders in basically the same way as juvenile delinquents, status offenders continue to be denied the due process rights provided to those facing delinquency charges.[130]

While the initial enactment of the JJDPA in 1974 seemed to recognize the different position of status offenders and attempted to carve out a separate sphere for these youth by mandating deinstitutionalization, the 1980 Valid Court Order Amendment effectively prevented the mandate from being realized.[131] Status offenders were left in a position similar to delinquents—in that they could be incarcerated—but without the same rights or voice in their adjudications.[132] The juvenile justice system has refused to extend the same legal rights or voice to status offenders as they

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society. "Judge Milligan's comments reflect the paternalistic view that guides many juvenile court judges." Dalby, *supra* note 8, at 443. For more information on the debate and vote on the Ashbrook amendment, see 126 CONG. REC. 30, 214–38 (1980).

128. Pub. L. No. 96-509. The 1980 amendment provided, in part that "[j]uveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult or offenses *which do not constitute violations of valid court orders* . . . shall not be placed in secure detention facilities or secure correctional facilities." (emphasis added). 42 U.S.C. § 5633 (a)(12)(A) (1988); *see* Smith, *supra* note 24, at 275–81 (discussing cases addressing secure confinement in detention facilities for violation of court ordered dispositions resulting from status offenses). The Valid Court Order Amendment and the ability of judges to incarcerate status offenders are especially troubling because of the indeterminate nature of juvenile sentencing. Because juvenile sentencing laws are extremely vague, judges are given a great deal of discretion and a juvenile who violates a court order can be incarcerated for years at a time. Dalby, *supra* note 8, at 442.

129. Dalby, *supra* note 8, at 441–42. On July 31, 2008, the U.S. Senate Committee on the Judiciary marked-up and passed, by voice vote, S. 3155, the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2008, bipartisan legislation to reauthorize the JJDPA. As part of the JJDPA Reauthorization Act, Congress confirmed the use of the Valid Court Order Amendment but instituted a phase-out plan for the use of the valid court order over a three-year period, with a one- to two-year hardship extension for those states that need additional time to make needed changes. Juvenile Justice and Delinquency Prevention Reauthorization Act, S. 3155, 110th Cong. (2008).

130. Kedia, *supra* note 31, at 559.

131. *See supra* notes 58–60 and 127–29 and accompanying text; *see also* Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. FOR SOC. JUST. 555, 560 (2009) (noting that "the use of the [valid court order] exception has, over time, substantially undermined the act's original goal of eliminating the use of confinement to address status-offender behavior").

132. *See supra* notes 127–30 and accompanying text.

do to juvenile delinquents, and instead has allowed the courts broad discretion to look upon these youth with an eye towards paternalism.

B. Case Study: The Role of Paternalism and Female Status Offenders

While the adjudication of each of the types of status offenses allows for a certain degree of discretion by juvenile court judges, the catch all sections regarding ungovernable behavior are especially susceptible to broad judicial discretion and paternalism.[133] In particular, female status offenders falling under the catch all section of status offense statutes represent perhaps the strongest example of the paternalistic treatment of status offenders that results from the denial of procedural due process rights and the right to be heard.[134]

The language of catch all statutes is extremely vague and allows juvenile court judges broad discretion in the adjudication of youth based on this particular offense.[135] Courts can find juveniles ungovernable for an assortment of behaviors, including "having sex, . . . disobeying parents, 'trashing' one's room, or staying out late with one's friends."[136] As described by one scholar, "[t]he vague standard, causes cases to turn on the personal values . . . and the culturally embedded mores and expectations of particular communities about how youths should behave."[137] For young females, the lack of clarity in the catch all statutes allows the courts to take a protective approach to their disposition.[138]

As stated by Professor Poulin, "[t]he state, like many parents, tend[s] to supervise daughters more closely . . . and to demand greater social

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133. *See supra* notes 48–51 and *infra* notes 134–44 and accompanying text.

134. *See* Kedia, *supra* note 31, at 552 (noting that "courts have traditionally taken a 'protective stance' toward teenage females and declared them ungovernable for sexual activity. Male judges . . . punish females for behavior—sexual behavior in particular—that would not be considered extreme or deviant in males"); *see also* Humphrey, *supra* note 33, at 173 (finding that juvenile court judges often made "moral- and sexuality-based judgments" about girls but noting that "without procedural protections or lawyers, these types of discretion and gender bias have gone unchecked and are involved in some form every step along the way"); Dalby, *supra* note 8, at 555 (stating that "it appears that officials with biased judgment continue to perceive a need for intervention in girls' lives either to save or to punish through the authority of the juvenile court . . .").

135. Humphrey, *supra* note 33, at 167.

136. Kandel, *supra* note 100, at 997.

137. *Id.*

138. Anne Bowen Poulin, *Female Delinquents: Defining Their Place in the Justice System*, 1996 WIS. L. REV. 541, 544–45 (1996) ("[T]he [juvenile] court often exercised jurisdiction over girls labeled 'incorrigible,' 'immoral,' or 'wayward' . . . The state undertook their supervision in order to correct lifestyle different from that which mainstream society defined as appropriate for a young woman.").

conformity from girls . . . ."[139] Studies indicate that judges continue to have sexist, paternalistic attitudes toward young girls.[140] Courts believe that girls must be "protected" from the evils of the outside world.[141] A story told by one judge recounted "his salvation of a female status offender . . . [and the great] satisfaction [he derived] from the belief that he had rescued an adolescent girl from a squalid existence and set her on the path to life as an educated member of the middle class."[142] Because of this view, judges continue to perceive a need to intervene in girls' lives to save the young females through the authority of the juvenile justice system.[143] Moreover, as status offenders are not afforded procedural due process rights, they have no protections against the paternalistic attitudes of juvenile court judges. Thus, despite the juvenile justice system's general move towards providing youth offenders with greater procedural due process rights and a chance to express their stated interests in the process of their adjudications, the treatment of status offenders, and female status offenders in particular, demonstrates the ways in which paternalism continues to exist in the juvenile justice system.[144]

IV. SUGGESTED CHANGES TO THE TREATMENT OF STATUS OFFENDERS

As part of the constituency served by the juvenile justice system, status offenders should be provided with the same protections, rights, and autonomy given to juvenile delinquents. Status offenders should be afforded due process rights and the right to have their stated interests heard, rather than have their fates be subject to the broad discretion of judges. Several alternatives to the current state of affairs exist which may help to bring the treatment of status offenders in line with the general shift

139. *Id.* at 544; *see also* Barnickol, *supra* note 15, at 443 (stating that "[f]emales have occupied a subordinate role within society for many years, and as a result, society expects greater conformity to societal norms by young females"); Eggers, *supra* note 7, at 237–38 (noting that according to stereotypes, "girls are expected to conform to traditional standards of passivity, chastity and obedience").

140. Dalby, *supra* note 8, at 446; *see id.* at 446 n.127 (discussing findings of the Minnesota Supreme Court Task Force for Gender Fairness in the Courts of sexist and discriminatory remarks made by juvenile court judges regarding young females).

141. Poulin, *supra* note 138, at 544; *see also* Humphrey, *supra* note 33, at 173 (discussing the various ways in which juvenile-court personnel believed they were saving young girls); Barnickol, *supra* note 15, at 438–39 (same); Dalby, *supra* note 8, at 431–34 (same); Eggers, *supra* note 7, at 239 (same).

142. Poulin, *supra* note 138, at 542; *see also* Humphrey, *supra* note 33, at 173 (noting that judges felt it was their responsibility to act to protect female offenders).

143. Poulin, *supra* note 138, at 542.

144. *See supra* notes 133–43 and accompanying text.

of the juvenile justice system in the last fifty years. These alternatives range from changes within the current existing structure of the juvenile courts[145] to removing status offenders from the jurisdiction of the juvenile justice system completely.[146]

A. Changes Within the Current System

If status offenders are to remain within the jurisdiction of the juvenile justice system, the judicial discretion and paternalism of juvenile court judges must be curbed. This result may be achieved through numerous methods. First, to ensure that status offenders' adjudications and dispositions are appropriate, the juvenile justice system should formalize the adjudication and disposition processes for status offenders.[147] The courts should provide status offenders with the same procedural due process rights and protections it provides to juvenile delinquents.[148] Providing "due process rights decrease[s] judicial discretion, making it more likely that [status offenders will be] treated equally and fairly."[149] An important procedural right that is currently denied to status offenders is the right to counsel.[150] As recognized by the Supreme Court, access to legal representation is possibly the most important procedural right because other constitutional rights are more likely to be protected if the juvenile has effective counsel.[151] Moreover, the presence of an attorney increases

145. *See infra* notes 147–58 and accompanying text.

146. *See infra* notes 159–71 and accompanying text.

147. Barnickol, *supra* note 15, at 455.

148. Dalby, *supra* note 8, at 454.

149. *Id.* at 455.

150. *Id.* "Children usually do not have the resources available to obtain counsel on their own," and, thus, "the responsibility for providing counsel falls on the juvenile's parents. Because status offenders are referred to the court by their parents, the parents do not often retain counsel for them." *Id*. at 448–49. "Recent studies of representation in juvenile courts report that although some states may extend the right to counsel to status offenders, these children are represented by attorneys less often than those accused of delinquent acts." Smith, *supra* note 24, at 266; *see* Humphrey, *supra* note 33, at 171–72 (citing one study which found that only twenty-eight percent of status offenders were represented by counsel). Some states, however, have succeeded in providing the right to counsel to status offenders. *See* Humphrey, *supra* note 33, at 181–82 (noting that Massachusetts appoints counsel to a child in need of services if he or she does not have the ability to retain counsel him or herself); Smith, *supra* note 24, at 265–66 (citing Wagstaff v. Superior Court, 535 P.2d 1220 (Alaska 1975)) (the Alaska Supreme Court held that because they faced the possibility of detention, status offenders must be afforded the due process protection of the right to an attorney).

151. The Supreme Court discussed the need for counsel in *In re Gault*, 387 U.S. 1 (1967):

> [N]o single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine

the likelihood that a youth's expressed interests will be heard. As in an adult attorney-client relationship, the youth's attorney would seek the minor's input, work to empower the minor to make informed decisions, and ultimately represent those interests and decisions.[152] In addition to providing a greater voice to the status offender, the presence of counsel could curb judicial discretion and paternalism through the attorney's knowledge of applicable statutory and case law.[153] Formalizing court procedures for status offenders will help to ensure more equitable case adjudications and dispositions and avoid situations in which a judge abuses his or her discretion.

Alternatively, the discretion of juvenile court judges can be minimized by refining the statutory definitions of the criteria for status offenses. The vague statutory definitions of some status offense violations provide juvenile court judges with the opportunity to interpret the offense and to adjudicate the youth offenders as they see best.[154] There have been numerous attempts to attack the constitutionality of these status offender statutes as void for vagueness; however, these attempts have been met with little success.[155] As noted by one scholar, "the breadth and ambiguity of the [status offender] statutes' terms have been regarded as necessary, even desirable, devices for identifying and treating children in need of care."[156] While this notion may have been true at the inception of the

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> witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively.

Id. at 38 n.65 (quoting REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86–87 (1967)); *see* Dalby, *supra* note 8, at 455 n.181 (stating that "'[t]he granting of procedural rights can hardly become a reality for children without lawyers to assert them on their behalf'") (quoting Sanford Fox, *Juvenile Justice Reform: A Historical Perspective*, 22 STAN. L. REV. 1187, 1236 (1970)).

152. STERLING, *supra* note 93, at 8.

153. For a more detailed discussion of the importance of counsel for status offenders, see PATRICIA PURITZ ET AL., THE AMERICAN BAR ASSOCIATION JUVENILE JUSTICE CENTER ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (reprinted 2002), *available at* http://www.njdc.info/pdf/cfjfull.pdf.

154. *See* Eggers, *supra* note 7, at 241 n.173 (asking, "[w]ho can determine with specificity which child is 'ungovernable,' which one is 'growing up in idleness and vice,' or which juvenile is 'habitually beyond the control of his or her parents?'") (quoting Orman W. Ketcham, *Why Jurisdiction Over Status Offenders Should Be Eliminated From Juvenile Courts*, 57 B.U. L. REV. 645, 657 (1977)) (internal citation omitted).

155. Eggers, *supra* note 7, at 241. For a more detailed discussion on void for vagueness and other constitutional challenges to status offense statutes and why they have not been successful, see Costello, *supra* note 48, at 46–50.

156. Costello, *supra* note 48, at 48.

juvenile justice system, it is no longer true today. The juvenile justice system has shifted from a system focused on rehabilitation to one focused on punishment—courts are no long treating children, but rather punishing them for their wrongdoings.[157] As a result of this shift, the reasons for upholding the vague statutes are no longer valid. Legislators and courts must respond to this change and revise status offense statutes to include greater detail and specificity regarding what constitutes a particular offense.[158]

B. Removing Status Offenders From the Jurisdiction of the Juvenile Courts

The last, and most extreme, alternative is to remove status offenses from the jurisdiction of the juvenile courts completely.[159] As one commentator noted, "no study has shown that status offenders are better off because of court supervision. It is possible that the 'gateway' to harder crime predicted by the commitment of status offenses may be caused by court intervention rather than prevented by it."[160] As an alternative to the juvenile justice system, status offenders should be directed towards community-based programs and social services.[161]

Community-based programs and services are better able than the juvenile court system to address the specific "psychological, emotional,

157. *See supra* notes 52–56 and accompanying text.

158. In particular, this suggestion applies to the status offense of ungovernability.

159. Many commentators recognize the desirability of handling status offenders outside the formal juvenile justice system. *See* Robert W. Sweet, *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389, 411 (1991); Barnickol, *supra* note 15, at 455; Dalby, *supra* note 8, at 451; Smith, *supra* note 24, at 283.

160. Kedia, *supra* note 31, at 562. Being brought under the jurisdiction of the juvenile justice system may actually increase the chance of status offenders becoming juvenile delinquents. Status offenders are more likely to learn criminal behavior because they are placed in the same institutions as juvenile delinquents. *Id.* at 561.

161. JESSICA R. KENDALL, AMERICAN BAR ASSOCIATION, FAMILIES IN NEED OF CRITICAL ASSISTANCE: LEGISLATION AND POLICY AIDING YOUTH WHO ENGAGE IN NON-CRIMINAL BEHAVIOR (2007). The American Bar Association (ABA) has made the following recommendations for establishing community-based alternatives: (1) Identify a single gatekeeper agency to respond to status offense referrals. Some state statues require law enforcement officers to contact the agency that provides services to status offenders immediately after taking a youth into custody. This provides an important and immediate first link between the youth and service provider. (2) Require that pre-court diversion services be provided and design a procedure for offering them. (3) Identify a minimum level of service the designated agency must provide either directly or through referrals. And (4) require monitoring and evaluation of the pre-court services offered to status offenders. Frequent assessments ensure that statutory goals are met and available pre-court services respond adequately to youth and families at risk of entering the status offense system. *Id.* at 15–18.

and educational needs of status offenders. . . ."[162] Additionally, these programs are effective because they integrate the family, and sometimes the school, into the rehabilitation of the youth.[163] For example, one program that involves the family in the rehabilitation of the status offender is family group conferencing (FGC).[164] FGCs are "family-focused, strengths-oriented, and community-based processes where parents, older children, extended family members, social service professionals and others gather and act collectively to work on problems and make decisions for and with families."[165] The programs typically involve the use of mediation and negotiation.[166] By involving multiple parties, FGCs shift the focus away from the youth and the particular status offense to the family or community and the underlying reason why the minor committed the offense in the first place.[167]

Additionally, community-based programs are beneficial because they provide a louder voice to status offenders. For example, mediation allows the child to communicate his or her opinions in the hopes of coming to a mutually agreeable rehabilitation plan, rather than being told by a parent or judge of his disposition.[168] Other community-based programs require the status offender to sign a contract stating agreement with his or her rehabilitation plan.[169] By signing this contract, the status offender acknowledges the offense and commits him or herself to certain actions, such as attending counseling or other related programs. The practice of having status offenders sign a rehabilitation-related contract gives offenders a sense of ownership over their progress.[170] Although the suggestion of taking status offenders out from under the jurisdiction of the juvenile court system seems extreme, if successful, community-based alternatives offer many benefits including decreased court petitions and out-of-home placement, lower costs by keeping more youth at home

162. Kedia, *supra* note 31, at 562.

163. *Id.* at 562–64.

164. Kelly Browe Olson, *The Importance of Using Alternative Dispute Resolution Techniques and Processes in the Ethical and Informed Representation of Children*, 6 NEV. L.J. 1333, 1334 (2006).

165. *Id.*

166. Kedia, *supra* note 31, at 563. For a detailed discussion on the use of mediation to address status offenders, see Simmons, *supra* note 31.

167. *See* Kedia, *supra* note 31, at 562; *see supra* note 43 and accompanying text (noting that youth may commit the status offense of running away because of mental, physical, or emotional abuse occurring at the home).

168. Simmons, *supra* note 31, at 1054.

169. KENDALL, *supra* note 161, at 19.

170. *Id*.

instead of costlier out-of-home placement or detainment, and reduced recidivism rates.[171]

CONCLUSION

The juvenile justice system in the United States has gone through many changes in its history. From an initial goal of rehabilitation, to a realization of the punitive nature of the juvenile courts, the juvenile justice system has granted youth offenders greater autonomy by providing procedural due process rights and protections and a voice in their adjudications. These rights, however, have not been extended to status offenders. The denial of rights and the lack of a voice in their adjudications has left status offenders vulnerable to the discretion and paternalism of juvenile court judges. Because there are no procedural safeguards in place, many judges impose their own views in the adjudication and disposition of status offenders which, in turn, leads to unequal and unpredictable results for many status offenders. To curb the broad discretion and paternalism demonstrated by some juvenile court judges, it is important that the rights and protections offered to juvenile delinquents be extended to status offenders, or alternatively, that status offenders be removed from the jurisdiction of the juvenile justice system.

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171. Simmons, *supra* note 31, at 1058–59, 1066–67.

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