

## **Status Offenses and Dejudicialization: Establishing a Right to Counsel in Informal Diversion Proceedings**

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## I. Introduction

In comparison to the historical development of the law concerning juvenile delinquency and child welfare, the development of the underlying purposes and the practical mechanics of the law regarding juvenile status offenses has been muddled and, at times, conflicted. Status offenses — offenses created by statute that are not criminal if committed by an adult, such as running away from home, truancy, and curfew violations — have been included in the Juvenile Court’s jurisdiction since its inception.<sup>1</sup> However, the Court’s wide discretion in adjudicating status offenses, the ambiguity of the social ills targeted by these statutes, and the lack of appropriate resources available to youth engaging in noncriminal misbehavior, all contribute to a confused judicial and policy landscape in this area.<sup>2</sup> A juvenile status offender could, depending on the state and political climate in which his or her behavior takes place, find him or herself involved in a system that aims either to assist their development or to ensure that they receive the strictest punishment; or in one that, paradoxically, intends to do both. Accordingly, this fluctuation between restorative and retributive purposes has produced tension between the need for an effective rehabilitative system and the need for the protection of children’s liberty interests.

Recent developments in state law have only complicated these issues. Government interest in preventing unnecessary youth interaction with the judicial and correctional systems, along with the development of mandatory pre-court diversion procedures, has led to a decision-making process that increasingly takes place in informal, non-judicial settings.<sup>3</sup> Public agencies are given

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<sup>1</sup> David J. Steinhart, *Status Offenses: Future of Child.*, 6 JUV. CT. 86, 90 (1996).

<sup>2</sup> *Id.* at 87.

<sup>3</sup> JESSICA R. KENDALL, FAMILIES IN NEED OF CRITICAL ASSISTANCE: LEGISLATION AND POLICY AIDING YOUTH WHO ENGAGE IN NONCRIMINAL MISBEHAVIOR 61-76 (2007); *see also* Claire Shubik & Jessica Kendall,

widespread discretion regarding the juvenile's development and wellbeing in these settings, and often overlook both the level of due process required and the role of attorneys. Despite the benefits of securing the voluntary participation of troubled youth and families through this type of diversion,<sup>4</sup> the history of intrusive government intervention on the part of the court and these participating agencies makes the lack of due process in these settings particularly troubling.<sup>5</sup> Further, there is a high risk of power imbalances, reputational harm, and prejudicial legal effects when asking troubled youth to "voluntarily" participate in an open discussion with their parents and with governmental officials about behavioral issues and family conflict. These proceedings, in their current form, fail to demonstrate an interest in protecting youths' voices and rights. Hence, these proceedings bypass a unique opportunity to develop youths' efficacy to remedy their situation, build their trust in social institutions, and foster their sense of pro-social autonomy.

Thus, it is imperative that jurisdictions appoint attorneys prior to these proceedings so that they may play an active role in the informal handling of status offenses. This level of procedural protection is necessary, given the risk of rights violations created by the ambiguity of these processes, the potential for the courts to assist in youths' development, and the historical evolution of juvenile due process rights. Attorneys can contribute to these quasi-rehabilitative settings in a number of ways: as a protector

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*Rethinking Juvenile Status Offense Laws: Considerations for Congressional Review of the Juvenile Justice and Delinquency Prevention Act*, 45 FAM. CT. REV. 384, 385-387 (2007) (providing examples of jurisdictions pursuing informal response systems for status offenders).

<sup>4</sup> KENDALL, *supra* note 3, at 23-25; STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR 15 (Inst. of Judicial Admin. & Am. Bar Ass'n, Tentative Draft 1976) [hereinafter STANDARDS]; Orman W. Ketcham, *Why Jurisdiction over Status Offenders Should Be Eliminated from Juvenile Courts*, 57 B.U. L. REV. 645, 661-62 (1977).

<sup>5</sup> Lee Teitelbaum, *Status Offenses and Status Offenders*, in A CENTURY OF JUVENILE JUSTICE 158, 173 (Margaret K. Rosenheim et al. eds., 2002).

and educator of youths' rights, an advocate for youths' voices, a dedicated problem-solver in the various systems with which the child comes in contact, a negotiator between troubled children and family members with whom they are in conflict, and an ambassador for civil society. To these ends, I propose a model in which skilled and knowledgeable attorneys assist youth in the navigation of these systems and in the development of pro-social autonomy through client-directed holistic representation.

This article is divided into three parts. Part II discusses the evolution of the history of status offense jurisdiction in order to illuminate the underlying intents and existing philosophical tensions in this area of law. Part III analyzes the legal and social risks and missed opportunities inherent in informal pre-court diversion proceedings. Finally, Part IV proposes that attorneys should be appointed as client-directed, holistic advocates prior to informal proceedings in order to address these shortcomings and to further the rehabilitative and diversionary purposes of the Juvenile Court's role in handling status offense cases.

## **II. History of Status Offense Jurisdiction, Social Science, and Due Process**

### *A. The Origins of Status Offenses and the Juvenile Court*

Although the concept of asserting authority over children for noncriminal misbehavior has ancient roots,<sup>6</sup> the earliest instance of the codification of status offenses in the United States dates back to the early ordinances of the Puritans of Massachusetts.<sup>7</sup> Believing the heads of household to be the ultimate agents of social and religious control over the sacred family unit, the Puritans and other colonists enacted laws in the

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<sup>6</sup> Teitelbaum, *supra* note 5, at 160.

<sup>7</sup> Lee E. Teitelbaum & Leslie J. Harris, *Some Historical Perspectives on Governmental Regulation of Children and Parents*, in *BEYOND CONTROL: STATUS OFFENDERS IN JUVENILE COURT* 1, 8-14 (Lee E. Teitelbaum & Aidan R. Gough eds., 1977).

1640s that prescribed capital punishment for children that cursed, struck, or otherwise disobeyed their parents.<sup>8</sup> These provisions, despite there being no formal record of a family utilizing them, emphasized not only the total authority of parents over their households, but also the extent to which the American legal system was willing to forcibly limit child autonomy in order to ensure that children were subject to a certain level of molding and social control.<sup>9</sup> Essentially, the colonial government was willing to supplement parental authority to keep children reliant on their parents' instruction in order to ensure that children grew up to be socially acceptable citizens.<sup>10</sup>

Conversely, these colonial governments also enacted laws that allowed appointed men to monitor all of the families in their town to ensure that parents were not succumbing to the idleness of failing to educate their children.<sup>11</sup> If families were found to be failing in their societal duty, the appointed men could assess fines and even place children in other homes or apprenticeships.<sup>12</sup> Operating on the assumption that idleness implied wickedness, many routinely assumed that the poor were unable to rear their own children and that the involuntary placement of poor children in other homes was best for the child and society.<sup>13</sup> In this way, it is apparent that even the earliest conceptions of child noncriminal misbehavior, however misguided, illuminated the competing contributions of child depravity and parental incapacity to a child's failure to adhere to societal standards.

As the nation progressed through the eighteenth and nineteenth centuries, Enlightenment theories and changing demographics began to heavily influence conceptions of family

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<sup>8</sup> *Id.* at 9-10.

<sup>9</sup> *Id.* at 10.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.* at 12.

<sup>13</sup> *Id.*

and child dysfunction.<sup>14</sup> Operating on the notion that “children, to become enlightened, [must] be reared in an enlightened manner,” Western governments began to believe that many families were unable to meet this standard and were thus “incapable of rearing their children adequately.”<sup>15</sup> Further, with the arrival of Scotch-Irish and German immigrants, who were “not only different, but poor” and uneducated, many in the United States worried about the ability of the new families to provide the proper enlightened environment in which children were thought to become free and productive citizens.<sup>16</sup> Further, as these families brought with them different values and goals, many worried that they and their children would contribute to a less stable and idler society.<sup>17</sup>

These concerns about environmental impact on youth development and societal instability led to the formation of schools to educate poor children and, ultimately, to the enactment of compulsory school attendance laws.<sup>18</sup> Aided by Enlightenment theory, state governments considered manipulating children’s environments by substituting enlightened educators for parental influence in the event that families were incapable of educating their children or sending them to academies.<sup>19</sup> This form of social engineering was codified in Boston and New York in the early nineteenth century with the formation of truancy laws that allowed the government to permanently remove children from their families and to send them to institutions if they failed to attend school or if their parents failed to compel them to attend school.<sup>20</sup>

As this “child-saving” era came into fruition in the mid to late-nineteenth century, many activists and practitioners began to advocate that children in conflict with adult criminal laws be

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<sup>14</sup> *Id.* at 15-16.

<sup>15</sup> *Id.* at 15.

<sup>16</sup> *Id.* at 16.

<sup>17</sup> *Id.* at 17.

<sup>18</sup> *Id.* at 18-20.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*



afforded a form of environmental treatment as an alternative to adult prosecution — a notion that led to the creation of the first juvenile court in 1899.<sup>21</sup> With the passage of a law entitled “An Act for the Treatment and Control of Dependent, Neglected, and Delinquent Children,” the Illinois General Assembly established the Cook County Juvenile Court, in which “[a] sympathetic judge could now use his discretion to apply individualized treatments to rehabilitate children, instead of punishing them.”<sup>22</sup> By 1925, every state except for Maine and Wyoming had juvenile court laws and all American cities with more than one hundred thousand people had fully operational courts.<sup>23</sup> These nearly universal statutory changes constituted a clear expression of Americans’ belief that “the various kinds of conducts evidencing a risk of maldevelopment” in children were matters of state concern and matters requiring the unique discretion found in a paternal, non-punitive system.<sup>24</sup>

Status offenses were explicitly contained within the kinds of conduct with which the original juvenile court was concerned, as the 1907 Illinois Juvenile Court Act defined a delinquent child under the court’s jurisdiction as anyone under the age of seventeen who violates a state criminal law or:

is incorrigible, or knowingly associates with thieves, vicious, or immoral persons; or who without just cause and without the consent of its parents . . . absents itself from its home or place of abode, or is growing up in idleness or crime; or knowingly frequents a house of ill-repute; or knowingly frequents any policy shop or dram shop where intoxicating liquors are sold; or patronizes or

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<sup>21</sup> Steinhart, *supra* note 1, at 89-90.

<sup>22</sup> David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in A CENTURY OF JUVENILE JUSTICE, *supra* note 2, at 42.

<sup>23</sup> *Id.* at 45.

<sup>24</sup> Teitelbaum, *supra* note 5, at 161.

visits any public pool room or bucket shop; or wanders about the streets in the night time without being on any lawful business or lawful occupation; or habitually wanders about any railroad yards or jumps or attempts to jump on [any] moving train; or enters any car or engine without lawful authority; or uses vile, obscene, vulgar, profane or indecent language in [any] public place or about any school house; or is guilty of indecent or lascivious conduct.<sup>25</sup>

Other early courts grouped criminal and noncriminal acts together under the term of delinquency in a similar manner, viewing both as indicators of deviance and future antisocial behavior that could benefit from therapeutic intervention.<sup>26</sup>

Because of broad definitions of early status offenses like “growing up in idleness,” the jurisdiction of the court was invoked more often and more powerfully in situations that reflected the biases of well-meaning “child-savers.”<sup>27</sup> Status offense jurisdiction of the court was seen as a solution to the perceived threat of crime presented by poor and sometimes homeless immigrant youth in whom many saw “the prospect of a permanently and embittered lower class that might rise to destroy the social fabric.”<sup>28</sup> Interestingly, most status offenders — almost two-thirds — were young women.<sup>29</sup> In addition to the fact that numerous statutes subjected young women to status offense jurisdiction until an older age than males, many parents, police officers, and judges were more prone to disapprove of female sexuality and to were more

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 162.

<sup>27</sup> *Id.* at 163-164.

<sup>28</sup> *Id.* at 161.

<sup>29</sup> *Id.* at 163.

willing to invoke status offense charges in an attempt to protect young women from behaviors that led to sex or pregnancy.<sup>30</sup>

According to juvenile justice scholar Franklin E. Zimring, this well-meaning but problematic motivation for intervention or “child saving” was only one of two foundational justifications for the formation of status offenses and juvenile courts.<sup>31</sup> Zimring reasons that the early court was also intended to allow children to have a period of semi-autonomy in which natural deviance could be handled without formal and intrusive system involvement like that experienced in adult jurisdictions.<sup>32</sup> The former intention of “child saving,” in which the court utilizes intrusive but potentially beneficial programs to improve child development, Zimring calls the “interventionist” justification.<sup>33</sup> The latter intention, in which the court considers the formality of adult criminal courts to be “an outrage against childhood” and seeks to provide less intrusive guidance, Zimring calls the “diversionary” justification.<sup>34</sup> Status offense jurisdiction, he argues, contains elements of both intentions, given that it aims to exert broad levels of discretionary social control and to handle youth development in a setting with few consequences rather than in a developmentally inappropriate punitive setting.<sup>35</sup>

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<sup>30</sup> Alan Sussman, *Sex-Based Discrimination and PINS Jurisdiction*, in BEYOND CONTROL: STATUS OFFENDERS IN JUVENILE COURT, *supra* note 7, at 179.

<sup>31</sup> Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts*, in A CENTURY OF JUVENILE JUSTICE, *supra* note 5, at 142, 144-147.

<sup>32</sup> *Id.* at 143, 146-147; *see also* FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982) (arguing that juvenile courts should divert children from system involvement in order to allow a period of semi-autonomous development with few consequences).

<sup>33</sup> Zimring, *supra* note 31, at 145-146.

<sup>34</sup> *Id.* at 145 (quoting Ben B. Lindsey, *Colorado's Contribution to the Juvenile Court*, in THE CHILD, THE CLINIC, AND THE COURT 274 (Jane Addams ed., 1924)).

<sup>35</sup> *Id.* at 148.

Thus, with the creation of juvenile courts, many advocates in the first half of the 20<sup>th</sup> century considered the balance among the conflicting elements of parental authority, enlightened social engineering and harm from system involvement inherent in status offense cases to be finally made harmonious.<sup>36</sup> By combining wide-sweeping and well-meaning interventions with informal proceedings that contrasted the harsh adult criminal system, these advocates were optimistic that a proper venue for engineering youth development finally existed. However, as the coming decades would show, this optimism overlooked various underlying conflicts between the juvenile court's two driving values and placed too much faith in the ability of the court's interventions to produce positive change.<sup>37</sup>

*B. The 1960s and 1970s: The Legalization of Delinquency Proceedings and the (Failed) Decriminalization of Status Offenses*

As many began to critique, in a larger sense, the validity and effectiveness of public authority as a means of rehabilitation in the 1960s and 1970s, a number of critics began to question the underlying philosophies and assumptions of the juvenile court.<sup>38</sup> Specifically, both judges and advocates doubted “the virtues of the procedural informality characteristic of juvenile proceedings, the claims that juvenile court intervention was benign rather than punitive, and the effectiveness of the court's remedial strategies.”<sup>39</sup> Others criticized state governments for “excessive incarceration of disobedient or runaway children, for punishing children when others in the family were also to blame for the behavior, and for abandoning a focus on treatment.”<sup>40</sup>

The first major wave of reform came from three Supreme Court cases that prescribed limited but significant due process

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<sup>36</sup> *Id.* at 145-146.

<sup>37</sup> *Id.*

<sup>38</sup> Teitelbaum, *supra* note 5, at 164.

<sup>39</sup> *Id.*

<sup>40</sup> Steinhart, *supra* note 1, at 90.

requirements for juvenile court proceedings.<sup>41</sup> In these cases, the Court argued that the informal proceedings utilized by most juvenile courts failed to offer enough protection against potential infringement upon juvenile offenders' liberties, recognizing that juvenile court intervention and institutionalization could result in serious consequences.<sup>42</sup> Accordingly, the Court required that juvenile proceedings add the right to counsel in transfer hearings to adult court and in delinquency hearings in which incarceration is a potential outcome, written notice of charges, confrontation and cross-examination of witnesses, privilege against self-incrimination, and a requirement that delinquency be established by proof of its constituent facts beyond a reasonable doubt as procedural protections.<sup>43</sup> Though the Court in each of these cases explicitly stated that it was not addressing status offense proceedings, many advocates and state policymakers agreed with the Court's recognition of potential harm and abuse of liberty, and believed that exposing children who had committed no criminal act to this risk was unjust.<sup>44</sup> Many states responded to these concerns by extending the same due process standards to status offenders and by rewriting or eliminating the various categories of status offense jurisdiction, like "growing up in idleness," that had run the risk of defying constitutional requirements of statutory definiteness.<sup>45</sup>

These concerns of harm arising out of juvenile court intervention also resulted in state and federal initiatives to abandon the notion of defining and treating juvenile criminal behaviors and status offenses similarly.<sup>46</sup> In 1967, the President's Commission on Law Enforcement and Criminal Justice recommended that states

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<sup>41</sup> *Id.*; *Kent v. United States*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970).

<sup>42</sup> *Gault*, 387 U.S. at 17-19.

<sup>43</sup> Steinhart, *supra* note 1, at 90; Zimring, *supra* note 30, at 148-150.

<sup>44</sup> Teitelbaum, *supra* note 5, at 165; Steinhart, *supra* note 1, at 90.

<sup>45</sup> Steinhart, *supra* note 1, at 90.

<sup>46</sup> Teitelbaum, *supra* note 5, at 165.

follow the example of New York and Illinois, whose governments had removed the criminal stigma from these offenses and differentiated status offenders from delinquents.<sup>47</sup> These changes relied on a popular social theory of deviance called “labeling theory,”<sup>48</sup> which argues that public identification as a deviant leads to negative community response and negative identity formation. Recommended terms such as “Minor in Need of Supervision” and “Person in Need of Supervision,” were intended to refocus courts and communities on the rehabilitative and preventative intent of the establishment of these offenses and away from the notion that status offenders were criminals.<sup>49</sup> Nearly a decade later, Congress furthered the notion of differential treatment between status offenders and delinquents with the enactment of the federal Juvenile Justice and Delinquency Prevention Act (JJDP) in 1974, which conditioned federal grant money on state efforts to cease the secure detention of youth offenders who had committed no criminal act.<sup>50</sup>

The last and most dramatic proposal for reform arose out of the Institute for Judicial Administration-American Bar Association Juvenile Justice Standards Project (hereinafter referred to as the IJA-ABA Standards) in 1976, which proposed in its *Standards Relating to Non-Criminal Misbehavior* that juvenile court jurisdiction over status offenses be eliminated in favor of voluntary family participation in community-based services.<sup>51</sup> Under this

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<sup>47</sup> THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE* 84 (1967); Shubik & Kendall, *supra* note 3, at 385; Teitelbaum, *supra* note 5, at 165-166.

<sup>48</sup> John H. Laub, *A Century of Delinquency Research and Delinquency Theory*, in *A CENTURY OF JUVENILE JUSTICE*, *supra* note 5, at 179, 193-194.

<sup>49</sup> Teitelbaum, *supra* note 5, at 165-166.

<sup>50</sup> *Id.* at 166; Shubik & Kendall, *supra* note 3, at 385; Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 42 U.S.C. §§ 5601-5792a (2014)).

<sup>51</sup> STANDARDS, *supra* note 4, at 52-53; Teitelbaum, *supra* note 5, at 166.

system, juvenile court authority would be limited to instances where runaway status presents safety issues, where families seek substitute custody arrangements, and when emergency medical services are required.<sup>52</sup> The IJA-ABA justified this revolutionary approach by arguing that, despite state attempts to create rehabilitation-centered terms for status offenders, “the treatment has not followed the label, and status offenders are generally subjected to the same modes of disposition as are juveniles who violate the criminal law.”<sup>53</sup> Further, the report makes the case that juvenile courts are inept tools to deal with the complex problems of status offense cases, arguing that:

[t]he juvenile court's jurisdiction over unruly children is bottomed on assumptions — most often implicit — that parents are reasonable persons seeking proper ends, that youthful independence is malign, that the social good requires judicial power to backstop parental command, that the juvenile justice system can identify noncriminal misbehavior that is predictive of future criminality, and that its coercive intervention will effectively remedy family-based problems and deter further offense . . . . On the available evidence, these assumptions and pretensions do not prove out.<sup>54</sup>

Although many juvenile courts shared these frustrations and considered these cases to be an unnecessary burden on court resources,<sup>55</sup> the American Bar Association has never adopted these standards, and only a handful of states undertook approaches similar to the one advocated by the report.<sup>56</sup>

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<sup>52</sup> STANDARDS, *supra* note 4, at 53.

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.*

<sup>55</sup> Ketcham, *supra* note 4, at 647.

<sup>56</sup> Teitelbaum, *supra* note 5, at 166.

*C. The 1980s and 1990s: The Age of the “Super-predator”*

After two active decades of reform, policymakers and practitioners were left with a varied and somewhat ambiguous landscape in terms of how to best handle noncriminal child misbehavior. As child welfare became federalized and delinquency proceedings began to closely mirror tough-on-crime adult criminal procedures, status offense jurisdiction began to be, in a sense, defined simply by what it was not — it was not a way to acquire institutional services and not a way to punish youth misconduct. Moreover, as Commissioner Justine Wise Polier predicted in his “Dissenting View” in the IJA-ABA Standards report, states “failed to confront the essential problem of who is to be responsible for the development of alternative services [for status offenders], for their funding, for setting standards, for monitoring, and for protecting the rights of children who are either excluded or denied appropriate services.”<sup>57</sup> With only a handful of exceptions, states tried only to ensure minimal and gradual compliance with the JJDPa deinstitutionalization mandate by reducing detention populations and neglecting to allocate funds toward more appropriate community-based interventions.<sup>58</sup>

Due to growing awareness of the unmet needs of this population, many states encountered an increasing number of complaints from community members and policymakers that the progressive, “soft” approach to status offenders was not working.<sup>59</sup> As juvenile crime rates rose in the 1980s and 1990s, public fear about violent youth behavior led many concerned citizens to call for tougher, more authoritative forms of control over “troubled” teens exhibiting allegedly proto-criminal behaviors such as truancy, incorrigibility, curfew violations, and running away.<sup>60</sup> Fearing the development of these types of youth into the “tens of

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<sup>57</sup> STANDARDS, *supra* note 4, at 67; Steinhart, *supra* note 1, at 91.

<sup>58</sup> Steinhart, *supra* note 1, at 91.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*



thousands of severely morally impoverished juvenile super-predators” as had been predicted by political scientist John J. Dilulio, Jr., citizens and policymakers thought that harsher measures would teach developing criminals to understand the consequences of what Dilulio considered to be the youths’ “moral poverty”—a total inability to understand right and wrong that Dilulio believed was rampant among the young people who grew up in poor and instable families.<sup>61</sup> This backlash, for many states, resulted in a decades-long stall in the development of noncriminal and non-judicial procedures for status offenses, an amendment to the JJDPa allowing secure detention of status offenders who violate court orders,<sup>62</sup> and state initiatives to allow for detention of runaways in limited circumstances.<sup>63</sup>

#### *D. The Current State of Status Offenses & Recent Developments*

As the political climate has shifted away from a period of tough-on-crime measures and as recession-era advocates have begun to emphasize the staggering cost of detaining and intensely supervising juvenile status offenders, more states have begun to enact progressive approaches similar to those advocated for in the 1960s and 1970s.<sup>64</sup> Many states have implemented optional procedures for diverting cases away from the juvenile court process.<sup>65</sup> Others have incorporated status offenses under the more rehabilitation-focused dependency jurisdiction that serves abused and neglected children, and a handful have followed the IJA-ABA Standards and implemented mandatory pre-court diversion prior to court involvement.<sup>66</sup> Those who have implemented the latter report

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<sup>61</sup> John J. Dilulio, *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23, 26.

<sup>62</sup> Juvenile Justice and Delinquency Prevention Act of 1980, Pub. L. No. 96-509; 28 C.F.R. § 31.303(f)(3) (2014).

<sup>63</sup> S.S.S.B. 5439, 54th Leg., Reg. Sess. (Wash. 1995); Steinhart, *supra* note 1, at 91-92.

<sup>64</sup> KENDALL, *supra* note 3, at 23-25.

<sup>65</sup> *Id.* at 61-76.

<sup>66</sup> *Id.*

faster and more appropriate service provision, fewer petitions and out-of-home placements, lower costs, and lower recidivism rates.<sup>67</sup> Others report that increased reliance on mandatory pre-court diversion enables systems to refocus on systemic family issues rather than youth behavior, and forces social service agencies, schools and families to develop more effective and creative internal processes for resolving noncriminal youth misbehavior.<sup>68</sup>

However, data also suggests that many status offenders are still placed in secure detention and that many courts process these youth in a way that is similar to processes utilized for delinquents and adult criminals.<sup>69</sup> Thus, although some juvenile courts have shifted toward a progressive, non-judicial process for status offenders,<sup>70</sup> many states and local jurisdictions appear to retain philosophies that motivated the intrusive interventions of early juvenile courts and the tough-on-crime courts of the 1980s and 1990s. Moreover, disparities in application of status offender laws and dispositions still appear to exist along racial, gender, and socioeconomic lines.<sup>71</sup>

As a renewed movement toward informalizing and decriminalizing the process through which society deals with status offenders begins amidst pervasive policy confusion, several questions must be raised in light of the trends seen in the jurisdiction's history.<sup>72</sup> Firstly, will the courts and agencies follow

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<sup>67</sup> KENDALL, *supra* note 3, at 23-25; SARA MOGULESCU & GASPER CARO, MAKING COURT THE LAST RESORT: A NEW FOCUS FOR SUPPORTING FAMILIES IN CRISIS (2008); James Austin et al., *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, JUV. JUST. BULL., Sept. 2005, at 1.

<sup>68</sup> BARRY C. FELD, *Social Control and Noncriminal Status Offenders: Triage and Privatization*, in BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 166, 170-171 (1999); Howard A. Davidson, *Family Mediation in Parent-Child Disputes: A Legal Justification*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 483, 487-488 (1982).

<sup>69</sup> KENDALL, *supra* note 3, at 5-7; Steinhart, *supra* note 1, at 91-92.

<sup>70</sup> MOGULESCU & CARO, *supra* note 67, at 2.

<sup>71</sup> FELD, *supra* note 68, at 172.

<sup>72</sup> Teitelbaum, *supra* note 4, at 172-173.

a well-meaning but intrusive interventionist justification or will they establish a diversionary system that seeks to prevent undue system involvement for children during normal phases of acting out? Secondly, how will children and families who fall under these less formal jurisdictions ensure that services are funded and provided that meet their needs? Thirdly, how will youth protect themselves against being improperly brought before agencies and courts based on unfair circumstances like poverty, parental unreasonableness, or infringement of rights by law enforcement? Lastly, will agencies and courts that provide services to these families “recreate the problems associated with juvenile court intervention in a child’s liberty without any of the process associated with even traditional juvenile court practice?”<sup>73</sup>

### **III. The Risks and Benefits of Dejudicialization and Mandatory Pre-Court Diversion**

To explore the mechanics and implications of these informal processes, this Part will analyze status offense statutes in states with mandatory pre-court diversion, and attorney appointment statutes in states both with pre-court diversion and without pre-court diversion. It will use examples from New York and Florida, as well as from child attorney appointment statutes contained within Georgia’s recently revised juvenile code.<sup>74</sup> This Part will then expand on the implications and effects of a coercive service delivery system through which children proceed without unbiased advocates. By analyzing the potential gains and pitfalls of these informal systems as they play out in practice, this Part seeks to highlight the potential harms that can affect youth involved in these proceedings and to illuminate the opportunity for balanced intervention and liberty preservation that pre-court diversion could provide if further procedural safeguards were put in place.

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<sup>73</sup> *Id.* at 173.

<sup>74</sup> N.Y. FAM. CT. ACT §§ 711-784 (McKinney 2014); FLA. STAT. §§ 984.01-984.24 (2014); GA. CODE ANN. § 15-11-262 (2014).

*A. State Procedures for Pre-Court Diversion*

In New York, a “Person in Need of Supervision” (PINS) is defined to mean “a person less than eighteen years of age who does not attend school... or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority, or who [commits the offenses of Possession of Marijuana or Prostitution], or who appears to be a sexually exploited child.”<sup>75</sup> Each county designates a “lead agency,” either the local social services or probation department, to provide services to alleged PINS youth and their families designed to “provide an immediate response to families in crisis, to identify and utilize appropriate alternatives to detention and to divert youth from being the subject of a petition in family court.”<sup>76</sup> Anyone interested in initiating court proceedings must attach to their petition a notice from the lead agency that states: (1) that “there is no bar to the filing of the petition as the potential petitioner consented to and actively participated in diversion services,” and (2) that the agency has terminated diversion services because it has determined that “there is no substantial likelihood that the youth and his or her family will benefit from further attempts.”<sup>77</sup>

Thus, parents and other petitioners must first contact a lead agency and initiate the diversion process. The process begins with a conference between the lead agency, the child, the child's family, the potential petitioner, and other interested persons in which the parties “determine the factual circumstances and determine whether the youth and his or her family should receive diversion services.”<sup>78</sup> If diversion is pursued, the parties then discuss or convene another conference to discuss “alternatives to filing a

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<sup>75</sup> N.Y. FAM. CT. ACT § 712 (McKinney 2014).

<sup>76</sup> *Id.* § 735(a).

<sup>77</sup> *Id.* § 735(g)(ii).

<sup>78</sup> *Id.* § 735(c).

petition and services that are available”<sup>79</sup> with the possibility of diversion efforts extending indefinitely.<sup>80</sup> The lead agency must record “clearly documented diligent attempts to provide appropriate services to the youth and his or her family” before determining that a child or family will not benefit from further efforts, and a petition may be dismissed if these attempts are insufficient or if the agency simply includes conclusory statements that these requirements were attempted.<sup>81</sup> Interestingly, diversion services can be ordered by the court after the filing of a petition as well, in order to resolve the need for further litigation and to prevent the need for the child to enter into foster care due to family conflict or other safety risks.<sup>82</sup> If a petition proceeds through formal proceedings, the court holds a fact-finding hearing and a subsequent disposition hearing, after which it can order probation, placement into foster care, or dismissal.<sup>83</sup> Although the statements made by a child during diversion services cannot be admitted as evidence prior to a fact-finding hearing or criminal conviction, the potentially incriminating information may be used as evidence during disposition and sentencing hearings.<sup>84</sup>

Florida’s status offenders system utilizes an approach similar to New York’s PINS system, but contains a few key differences. First, rather than utilizing a “lead agency” approach, Florida’s “Families In Need of Services” (FINS) diversion approach is entirely managed by the Department of Juvenile Justice (DJJ), which contracts with a statewide private non-profit, Florida Network of Youth and Family Services, Inc., to provide “non-residential intervention and outreach services, as well as respite shelters at most locations. The full continuum of residential and non-residential services is available 24 hours a day, seven days

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<sup>79</sup> *Id.* § 735(d).

<sup>80</sup> *Id.* § 735(f).

<sup>81</sup> *Id.* § 735(d), 742; *In re Nicholas R.Y.*, 937 N.Y.S.2d 654 (2012).

<sup>82</sup> N.Y. FAM. CT. ACT § 735(f) (McKinney 2014).

<sup>83</sup> *Id.* § 746.

<sup>84</sup> *Id.* § 735(h).

a week.”<sup>85</sup> The youth and their families receive immediate assessments and service referrals.<sup>86</sup> If these services are insufficient, they must attend a subsequent conference with providers, school staff, a DJJ representative, and other family advocates to determine whether to alter or extend the current plan, close the case without further involvement, or refer the case to the court as a more formal “Child in Need of Services” (CINS) case.<sup>87</sup> If a parent requests this conference, it must occur within seven days.<sup>88</sup> A member of the committee can also request a conference if considered to be in the best interests of the child.<sup>89</sup> Within 7 days of the conference, the Florida Network representative must present the family with a detailed written report containing statements of family need, a summary of case objectives, a description of services to be provided, and a list of timeframes for achievement of case objectives.<sup>90</sup>

A Florida CINS petition, if filed by the Department of Juvenile Justice, must assert either that “the family and child have in good faith, but unsuccessfully,” undergone the diversion process, or that “the family or child have refused all services... after reasonable efforts by the department to involve the family and child in services and treatment.”<sup>91</sup> It is worth noting that a “reasonable efforts” standard for department action is presumably weaker than the more specific and more stringent “diligent efforts” standard required by the New York PINS system. However, the parent may also file a CINS petition if “the department waives the requirement for a case staffing committee,” if “the department fails to convene a meeting of the case staffing committee within 7 days... after receiving a written request for such a meeting from

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<sup>85</sup> MOGULESCU & CARO, *supra* note 67, at 4.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*; FLA. STAT. § 984.12 (2014).

<sup>88</sup> FLA. STAT. § 984.12(7) (2014).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* § 984.12(3).

<sup>91</sup> *Id.* § 984.15(2)(a).

the child's parent, guardian, or legal custodian,” if “the parent, guardian, or legal custodian does not agree with the plan for services offered by the case staffing committee,” or if “the department fails to provide a written report within 7 days after the case staffing committee meets.”<sup>92</sup>

Through the implementation of these similar but unique statutory schemes, New York and Florida have established systems that appropriately avoid formal proceedings unless compelled by family circumstances or party interests. The resulting process contains several procedural protections for parents and agencies that guarantee the process is fair and efficient. Unfortunately, however, both systems lack a critical protection for youth—the right to appointed counsel.

*B. The Lack of Due Process and Right to Counsel in Pre-Court Diversion Proceedings for Status Offenders*

Although neither New York nor Florida prohibit attorneys from being present at informal pre-court diversion proceedings, neither of the two states explicitly gives youth a right to appointed counsel in these conferences. Further, both sets of statutes give wide independence to the diversion-implementing agencies, and have no formal mechanisms in place by which the court would be notified that a child is engaged in pre-court diversion in the first place. Thus, a court may not know enough about an individual case to appoint an attorney under current court notification requirements until the cessation of diversion services or the subsequent filing of a formal status offense petition. The reservation of a right to counsel until formal proceedings are initiated is present in both New York and Florida's appointment statutes for status offenders. New York requires appointment of a client-directed attorney at the first proceeding, while Florida permits courts to appoint a guardian

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<sup>92</sup> *Id.* § 984.15(3)(a).

*ad litem* at the time the petition is filed and requires courts to appoint an attorney prior to an adjudication hearing.<sup>93</sup>

Given this timeline of appointment, attorneys are left with few options by which they can protect their clients' interests. If a client wishes to avoid formal proceedings and if the agency responsible for diversion services or the petitioner has not satisfied the efforts or documentation requirements, an attorney for the child will likely succeed in the filing of a motion to dismiss the petition—although the dismissal will likely be without prejudice.<sup>94</sup> In New York, an attorney can also make the case that the court should order additional informal services to avoid further litigation and more intrusive final disposition orders.<sup>95</sup> Lastly, the attorney can suppress prejudicial evidence from diversion proceedings during adjudicatory or fact-finding stages.<sup>96</sup>

While it seems inevitable that court-appointed attorneys can only be appointed after the court becomes officially involved, other instances of child attorney appointment utilize more proactive mechanisms. For example, in New York's child protective proceedings, an attorney can be appointed for a child when the court is first notified by an agency that it has removed or plans to remove a child from the home—before the filing of a petition and potentially days before the first hearing.<sup>97</sup> Another statute requires the agency to provide this notification as soon as possible.<sup>98</sup> Another more progressive example of child attorney appointment is located in the dependency section of Georgia's newly revised juvenile code, in which an appointment of counsel for a child must be made "as soon as practicable to ensure adequate representation of such child and, in any event, before the first court

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<sup>93</sup> N.Y. FAM. CT. ACT §§ 249, 741 (McKinney 2014); FLA. STAT. § 984.17 (2014).

<sup>94</sup> N.Y. FAM. CT. ACT § 735 (McKinney 2014); FLA. STAT. § 984.15 (2014).

<sup>95</sup> N.Y. FAM. CT. ACT § 735(f) (McKinney 2014).

<sup>96</sup> *Id.* § 735(h).

<sup>97</sup> *Id.* § 1016.

<sup>98</sup> *Id.* § 1024.



hearing that may substantially affect the interests of such child.”<sup>99</sup> Unlike in New York and Florida’s mandatory pre-court systems for status offenders, attorneys in these appointment situations are given the opportunity to meet with clients, discuss agency decisions with agency personnel, and ensure that any infringement of rights does not take place prior to formal court involvement.

### C. Risks of Prejudicial Effects and Missed Opportunities

The harm to youth’s interests that can result from navigating these “voluntary” channels without a committed advocate is alarming. First and foremost, relying on a child to protect his or her own interests presents many legal risks. A child and her parents may be unaware of what constitutes a rights violation when committed by well-meaning or not-so-well-meaning agencies, and they may lack the knowledge or confidence to contest unfair or overzealous surveillance, excessive requirements to prevent child removal, or ungrounded threats of agency coercion.<sup>100</sup> Further, a family, lacking the knowledge of an experienced practitioner, may never learn of a particularly necessary service that could prevent future intrusive action if an agency does not want to offer or fund it.<sup>101</sup> Information divulged in informal conferences may lead to previously unknown charges for the child, their parents, or even uninvolved siblings.<sup>102</sup> The agency’s ability to divulge informal conference information for purposes of disposition and sentencing, however, likely constitutes the most troubling risk to youth legal interests. Without advisement about this possible future consequence, children are likely to divulge information unknowingly that will shed a negative light on

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<sup>99</sup> GA. CODE ANN. § 15-11-262 (2014).

<sup>100</sup> Lindsay A. Arthur, *Should Status Offenders Go to Court?*, in BEYOND CONTROL: STATUS OFFENDERS IN JUVENILE COURT, *supra* note 7, at 235, 238-239.

<sup>101</sup> *Id.* at 239.

<sup>102</sup> FELD, *supra* note 68, at 174 (quoting JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELIQUENCY IN THE UNITED STATES 206 (1988)).

their ability to rehabilitate without intensive supervision or without removal from their preferred living arrangement. Moreover, due to youth's decreased likeliness to be able to think about the future, a child may agree to a voluntary services plan that they will be unable to realistically complete, which in turn may make them appear less compliant in disposition and violation hearings.<sup>103</sup> When a child speaks to a group of friendly adults, including her parents, she is simply not likely to have the foresight or legal knowledge that she is more or less speaking on the record to a judge that she has yet to meet. Further, upon seeing professionals testify against her in court after claims of confidentiality and concern for the youth, she is likely to have a bias against trusting authority figures and other potentially helpful community members in the future.<sup>104</sup>

Aside from the direct legal effects of lack of counsel in these situations, the fact that youth are entirely responsible for articulating and emphasizing their perspectives on family and behavior issues is also deeply problematic. Placing such a burden on the youth ignores both the inherent power imbalances among parents, government officials, and children, and also ignores the complexity of family dynamics in situations of conflict. Parents, who often feel exposed by the misbehavior of their child in public forums like neighborhoods and schools, are likely to voice their innocence in these situations due to embarrassment—and they are usually more capable and willing to argue for their innocence than are their children.<sup>105</sup> Such willingness of a petitioning family member to expose family issues to strangers may signal a desire to place distance between themselves and the offending member, and may be an intentional or unintentional threat to disown or

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<sup>103</sup> Claire Shubik, *What Social Science Tells Us about Youth Who Commit Status Offenses: Practical Advice for Attorneys*, in REPRESENTING JUVENILE STATUS OFFENDERS 15, 19-21 (Jessica R. Kendall & Lisa Pilnik eds., 2010).

<sup>104</sup> *Id.* at 16.

<sup>105</sup> Anne R. Mahoney, *PINS and Parents*, in BEYOND CONTROL: STATUS OFFENDERS IN JUVENILE COURT, *supra* note 7, at 161, 163.

physically remove the child.<sup>106</sup> Children, recognizing the danger of being cast out of the family or, alternatively, being hurt by the lack of solidarity, may be hesitant to voice their opinions for fear of worsening the division.<sup>107</sup> Children engaging in conflict with parents or other authority figures may feel as if no one in the adult world is empathizing with them and may not trust biased providers and government workers to listen to their input.<sup>108</sup> Further, the child may not understand that the professionals want his input, since, absent an unbiased explanation of the purpose of the proceedings, the child will likely assume that everyone intends to punish him.<sup>109</sup> Without an advocate who will explain the proceedings, voice a child's argument, and act as a buffer between angry parents and frightened children, children are likely to be silenced by the underlying dynamics that make this "voluntary" process involuntary for the child. Consequently, these youth may go through these processes without an opportunity to develop a sense of efficacy and autonomy in the same way that they might if they were able to see how their own input and actions could make a positive change in their life circumstances.<sup>110</sup>

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

<sup>107</sup> *Id.*

<sup>108</sup> Shubik, *supra* note 103, at 24.

<sup>109</sup> Sandra Wixted, *The Children's Hearings Project: A Mediation Program for Children and Families*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION, *supra* note 68, at 511, 522.

<sup>110</sup> See Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 63 (2009) ("How children are treated in the juvenile justice system might be particularly important . . . because, for this particular group of children, there may be few if any other opportunities for them to gain experience participating meaningfully in a serious deliberative process with adults in authority, or to cultivate a sense of self and relationship with society and government consistent with our liberal democratic ideals.").

*D. Ideological and Practical Barriers to the Provision of  
Competent and Zealous Counsel for Youth Engaged in Pre-Court  
Diversion Processes*

Although the provision of an advocate throughout this process would mitigate many of the aforementioned risks, several barriers exist that discourage the inclusion of attorneys in pre-court diversion proceedings. The most powerful barrier is historical and ideological in nature and concerns practitioners' self-conception of youth- and family-serving systems. In some sense, advocates for "voluntary" pre-court diversion systems have adopted many of the justifications held by the "child-savers" of the early 1900s, and assert that increased procedural safeguards would make it more difficult to implement well-meaning interventions quickly and easily.<sup>111</sup> Interpreting the court's mission as one in which elements of coercive social control are used solely for the good of society and individuals, those who hold to what Zimring calls the "interventionist" stance<sup>112</sup> see increased legalization as an unnecessary introduction of adversarial relationships into an inherently benevolent process.<sup>113</sup> Zimring summarizes this anti-due process position in the following way:

[t]he usual law-day speech tells us that erroneous acquittals are less socially harmful than erroneous convictions: "It is better that ten guilty men go free than one innocent man gets convicted!" But if the juvenile court is there to help delinquents, what is

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<sup>111</sup> FELD, *supra* note 68, at 175.

<sup>112</sup> As mentioned in Part II, Zimring asserts that the founders of the juvenile court intended for the juvenile court to serve both an "interventionist" and a "diversionary" function. In employing the former, the court assists the development of disadvantaged youth through invasive but presumably beneficial programs. The latter focuses more on the creation of a period of protected semi-autonomy during adolescence in which youth can make mistakes without the imposition of a harsh and intrusive system akin to the adult criminal courts. See Zimring, *supra* note 31.

<sup>113</sup> *Id.* at 149.

the sense in saying, “It is better that ten kids who need help do not get help than that one kid who does not need help is erroneously assisted!”<sup>114</sup>

However, much like the well-meaning court of the early 1900s, informal non-judicial processes can introduce forceful means of coercion into the lives of children and families, and run the same risks of abuse of discretion and failure to protect youth from undue intrusion. The due process and procedural protection afforded by attorneys enables the court to more effectively accomplish its overall mission by engaging children in learning from developmentally normal periods of misbehavior without fearing an intrusive and punitive government response similar to adult criminal courts.<sup>115</sup> Hence, overcoming the presumption that legalization will only frustrate the intent of status offender legislation requires jurisdictions to grapple with the potential risk of harm that can result from the use of overly forceful government action in children’s lives and the ways in which this harm undercuts the overall mission of the juvenile court’s jurisdiction. This, in turn, requires agencies and courts to undertake honest assessments of the effectiveness of their programs and of the probability that their programs can be seen as harmful and invasive forms of social control.

Other, more practical objections are likely to be raised in opposition to the inclusion of attorneys during these proceedings. First, many courts are going to question the availability of resources to pay for attorneys in every case and the overall cost-benefit analysis of whether such a use of funds would be necessary, given that it could be argued that significant rights abuses, like secure confinement, are not directly at issue in these cases.<sup>116</sup> Similarly, legal service agencies responsible for providing

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<sup>114</sup> *Id.* at 149-150.

<sup>115</sup> *Id.* at 150; *see also* ZIMRING, *supra* note 32.

<sup>116</sup> This position is supported, in part, by the Court’s reasoning in *Gault*, in which the Court’s weighing of 14<sup>th</sup> Amendment Due Process interests only

representation for youth will likely raise concerns about adding to already-high caseloads.<sup>117</sup> Further, others will argue that appointing attorneys only for children will make the proceedings unbalanced in a different way by giving the child a powerful voice that could intimidate or manipulate unrepresented parents and professionals.<sup>118</sup> Lastly, some may argue that giving disobedient children an attorney in all cases will embolden youth to consider their anti-social behavior to be defensible or that doing so will simply further fracture an already-fragile family dynamic.

Much of the cost associated with appointing an attorney to represent a child will be saved by keeping the majority of these cases out of the courtroom. Compared to the cost and time demands of due process in formal hearings—multiple attorneys, hours spent writing and reading documents, notice requirements, provision of deputies, training, facilities, etc.—the cost of hiring one attorney and the time spent preparing for and attending a few meetings to ensure basic protections is relatively minimal. Moreover, when assessed in light of the aforementioned societal benefits of autonomy development and youth efficacy, this minimal cost is well worth the benefit of furthering society's interest in assisting youth in becoming healthy and autonomous citizens.

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required counsel for children in hearings in which loss of liberty through incarceration is a possibility.

<sup>117</sup> See LYNN LANGTON & DONALD J. FAROLE, JR., U.S. DEP'T OF JUSTICE, PUBLIC DEFENDER OFFICES, 2007 – STATISTICAL TABLES (2009), available at <http://www.bjs.gov/content/pub/pdf/pdo07st.pdf> (reporting, according to nationwide data collected in 2007, a caseload of between 82 and 100 felony cases and between 146 and 217 misdemeanor cases per attorney providing indigent defense).

<sup>118</sup> *But cf.* Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L. J. 805, 829-834 (2006) (arguing that the appointment of children's attorneys, who often agree with and advocate for well-meaning state actions that deprive child clients of liberty, should be desired by the state because of the resulting illusion of rights protection and legitimacy).

#### **IV. Promoting Youth Voice and Protecting Youth Rights: Options for the Representation of Youth in Informal Status Offense Proceedings**

In light of the substantial risks to youth interests inherent in informal pre-court diversion proceedings for status offenders, it is imperative that jurisdictions require appointment of attorneys for children prior to any significant agency involvement with youth and their families. This is best accomplished by statute, but can also be established by agreements between legal service agencies, the courts, and the agencies responsible for diversion services. The expansion of child advocacy work into more transactional, informal settings can create a number of innovative roles for children's attorneys. Ultimately, to best serve in these roles, attorneys will need to undertake client-directed and holistic representation models of their youth clients.

##### *A. Incorporating a Right to Counsel in Pre-Court Diversion Proceedings: Mechanisms for Ensuring Child Representation in Informal Conferences*

Guaranteeing the ability of attorneys to participate in decision-making processes and to properly interview and advise their child clients requires amending state statutes governing the appointment of attorneys for children in status offense proceedings. These statutes must be amended in a manner that ensures that attorneys are appointed early enough to participate in and prevent harm to child interests in informal meetings and interviews that precede formal court involvement. This requires both an explicit statement that children have a right to appointed or independently chosen counsel during the period in which diversion services are provided,<sup>119</sup> and the creation of a requirement that the

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<sup>119</sup> This would require the inclusion of a statement within a state's status offender laws similar to that utilized in GA. CODE ANN. § 15-11-262 (2014): "A child alleged to have committed a status offense shall have the right to an attorney at all stages of the proceedings under this article, including the period in

agencies responsible for diversion notify courts upon initial contact with the youth and family.<sup>120</sup> Without such a notice, courts would not be aware of the need to appoint counsel until after a petition is filed. Also, the agency must be required to advise the child of the right to counsel at the initial contact, and must affirmatively ask the child whether they — not the parent — have waived that right.<sup>121</sup> This mechanism still permits agencies to continue providing emergency and crisis intervention services immediately, but ensures that a limited level of due process governs future agency involvement.

On a local level, jurisdictions can ensure attorney involvement by entering into formal agreements or memoranda of understanding that provide for procedures similar to those

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which pre-petition diversion services are provided. The court shall, on its own motion, appoint an attorney for the child if independent legal representation is not available to the child and if the child does not waive his or her right to an attorney. The appointment shall be made as soon as practicable to ensure adequate representation of such child and, in any event, before any decisions, meetings, or staffings that may substantially affect the interests of such child.”

<sup>120</sup> This procedure would be similar to that utilized in N.Y. FAM. CT. ACT §§ 1016 and 1024 (McKinney 2014), in which child protection agencies notify the court of emergency removals or plans to remove. Thus, a statement would be added to a state’s diversion statute resembling the following: “[the agency responsible for providing diversion services] shall immediately, upon its first contact with a person seeking to file a [status offense] petition, the youth who may be a potential respondent, or his or her family, notify the court in writing of the commencement of provision of diversion services to the child and family.” Another, more dramatic alternative to this notification system would be to reestablish the responsibility for intake duties as resting with court personnel.

<sup>121</sup> N.Y. FAM. CT. ACT § 735(d) (McKinney 2014), for example, could be amended to read as follows: “Diversion services shall include documented diligent attempts to engage the youth and his or her family in appropriately targeted community-based services, but shall not be limited to. . . advising the youth, at first contact, of his or her right to be represented by an attorney. Agency staff shall notify the court of the need for counsel to be appointed for the child unless the child waives his or her right to be represented by an attorney. Neither agency staff nor a child’s parents may waive a child’s right to be represented by an attorney.”



discussed above. The agencies responsible for providing diversion services, local courts, and legal service agencies could establish terms and timelines that facilitate timely notification of the initiation of diversion cases, the appointment of an attorney by the court, and clear roles for advocates involved in informal proceedings. This avenue is pursuable as either an alternative to or a supplement to statutory amendments.

The next step to guaranteeing that attorneys are present during and prior to informal conferences is to prevent agency personnel from foreclosing attorney participation. As mentioned earlier, because agency workers may feel intimidated or frustrated at the presence of an advocate for the child, there must be an explicit requirement to include attorneys for children in family conferences or other relevant agency meetings. There are several ways to guarantee the right of attorneys to be present at these gatherings through statute. For instance, the efforts requirements for the agencies responsible for diversion can be amended to reflect that any conference must be held with the child, the child's family, and an attorney for the child present.<sup>122</sup> Alternatively, courts can require petitioners, including both agencies and parents, to certify in their petition that an attorney for the child has been appointed and that diligent efforts to include the attorney in diversion decisions have been made.<sup>123</sup>

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<sup>122</sup> Thus, statutes like N.Y. FAM. CT. ACT § 735(d) (McKinney 2014) could be amended to read: "Diversion services shall include documented diligent attempts to engage the youth and his or her family in appropriately targeted community-based services, but shall not be limited to. . . scheduling and holding at least one conference with the youth, his or her family, the person or representatives of the entity seeking to file a petition under this article, *and an attorney for the child* concerning alternatives to filing a petition and services that are available. No petition shall be filed without documentation of efforts to include all parties mentioned in this subsection in the required diversion conference."

<sup>123</sup> N.Y. FAM. CT. ACT § 735(g)(ii) (McKinney 2014) could be amended to read: "The clerk of the court shall accept a petition for filing only if it has attached thereto. . . a certification by the petitioner that an attorney for the child

By amending relevant statutes and facilitating local initiatives, states can ensure that the rights and collaborative mechanisms necessary for the adequate protection of youth's interests are in place. Moreover, the codification of these requirements will reinforce for practitioners the importance of the liberty interests at stake in these proceedings. Lastly, by guaranteeing that local jurisdictions have the procedures and resources in place to facilitate this process, state governments can be sure that practitioners can appropriately and creatively contribute to the proceedings in which they participate.

*B. Potential Contributions of Attorneys in Informal Proceedings*

*Attorneys as Protectors*

Attorneys representing children in these proceedings have the opportunity to play multiple roles for their child clients. On one hand, attorneys in these situations can play a role similar to that which they play in more litigation-focused settings — that of a child's protector. An attorney in this sense is responsible for ensuring that a child's rights are not violated or neglected. In litigation settings, this role manifests itself in the form activities like ensuring notice of hearings and case updates, reducing delays, and avoiding unfair agency and court practices. Here, in informal proceedings, the attorney will protect the youth's interests by ensuring that that youth understand the implications of their statements and actions, they do not agree to service plans that will be overly invasive or potentially prejudicial in the future, and that diversion services do not extend indefinitely as a form of intrusive surveillance.

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has been appointed and that diligent efforts to include the attorney in meetings, decisions, and compilation of reports related to the provision of diversion services.”

*Attorneys as Advocates*

Similarly, attorneys in these informal settings are uniquely qualified to act as an advocate for the child's wishes and needs. Although the whole process exists to help fix the problems that children face, the services in which children and families are coerced to participate also intend to mold the participant's behaviors in the way that professionals see fit; often against the will of those who "agree" to agencies' service goals. By providing an avenue to call attention to children's wishes in a convincing and meaningful way, attorneys can ensure that children have some sense of ownership in the process and that the process is made more effective by being more truly voluntary. By portraying the child's needs from the child's perspective and providing an avenue for children to comfortably speak of their circumstances and of factors that otherwise go unnoticed by professionals and family members, attorneys can guarantee that the system's view of the youth, and the plan for services that arises from this view, is not tainted by biases resulting from agency policies and potentially unreasonable parental opinions.

*Attorneys as Problem Solvers*

The children's attorney in these informal conferences has a unique opportunity to act as a dedicated problem solver for their child clients in the extra-judicial areas of education, mental health, health care, and housing. Unlike attorneys for court-involved children, whose efforts are often focused on developing and defending positions for specific hearings, attorneys involved in informal conferences related to diversion services will be required to devote much of their attention to the internal agency factors that affect the child's ability to convert systematic opportunities into positive outcomes. By advocating for children and their families by helping them navigate the internal processes of schools, healthcare provider systems, and government agencies, lawyers can "insulate [children] from [further involvement with] the juvenile court, re-

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establish [them] in school, and help to stabilize a family in crisis.<sup>124</sup>

### *Attorneys as Negotiators*

Attorneys can also, particularly in informal settings like pre-court diversion conferences, act as a negotiator between the child and the adults involved in the collaborative process. For example, by assisting families in conflict to diffuse fragile tensions and to come to mutually satisfying understandings that acknowledge the perspectives of each family member, attorneys may help child clients in the long-term, as the experience will potentially provide the child and their family with tools to avoid similar conflicts and further system involvement in the future. Attorneys utilizing this collaborative role will also quell fears or frustrations that, as mentioned earlier, agency officials may hold about the power imbalances and adversarial relationships inherent in a more legalized process in which attorneys participate. Additionally, by providing youth perspective in a cooperative way, the attorney can help establish youth ownership of the resulting agreement, prevent a failure of the relevant parties to come to a voluntary and universally acceptable agreement, and teach youth the effectiveness of non-hostile communications with authority figures.

### *Attorneys as Educators*

Attorneys in these transactional settings will also act like attorneys involved in litigation in the way that they seek to educate or counsel their child clients. In accomplishing this task, it is the attorney's job to ensure that clients understand the nature of what is happening and what is likely to happen. Children may need the voluntary nature of the process and the rationales behind different services explained to them in order to achieve their confident

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<sup>124</sup> Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 878 (2010).

participation. Further, when making decisions affecting a child's future, a youth may need the attorneys to explain the consequences of various courses of action and of certain statements made by the child in the presence of the adult professionals. Attorneys can also ensure that children utilize this specific interaction with the justice system as a learning opportunity in a larger sense, rather than simply as an externally enforced mechanism for behavior modification. In this sense, attorneys can attempt to create an experience that "afford[s] children an opportunity to develop an understanding of their rights and gain proficiency in their exercise."<sup>125</sup> By teaching children about their rights in everyday interactions with government officials, professionals, and caring adults, attorneys can help children form healthy conceptions of authority and pro-social interaction that are vital to their overall development as autonomous citizens.<sup>126</sup>

#### *Attorneys as Ambassadors*

In many instances, attorneys for children in these situations can act as an ambassador to the child for both the adult world and the world of civil society. For many children and families involved in these sorts of proceedings, senses of exclusion from mainstream society are pervasive and can cause anti-social behavior and lack of trust in societal institutions like law enforcement, court systems, and government agencies.<sup>127</sup> By explaining the rationales of status offender laws, agency services, and procedural protections in a child-friendly and culturally competent way, attorneys can translate the society's intentions for the child in a way that the child may not otherwise understand. In some situations, their translation can give socially excluded children a much more positive interaction with a formal system that previously seemed foreign and impersonal, in the hopes of encouraging further pro-social participation as the child transitions into adulthood.

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<sup>125</sup> Buss, *supra* note 110, at 55.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 64.

*C. Client-Directed Holistic Representation of Alleged Status Offenders During Informal Proceedings*

To best fulfill the roles discussed, attorneys must provide children with traditional client-directed representation rather than the more paternalistic representation of a child's best interests. While a "best interests"-directed attorney or guardian *ad litem* must advocate against the wishes and opinions of their clients when the client's desires are contrary to the attorney's own opinions of the client's wellbeing, a client-directed attorney can act as a spokesperson for the client — even in situations where professionals disagree with the youth's views or desired course of action. This loyalty to a client's wishes allows the attorney to ensure that the child's voice is heard in the proceedings and unlocks the potential of these conferences to be a formative experience for the child. Such an experience enables the child to feel responsible for creating his or her own solutions to their problems that they can learn to engage with authority figures in a productive way. An attorney acting as a neutral mediator would be insufficient for the same reasons, and would be less capable of advocating for the client and their families outside of the conferences in the role of problem solver.

While the adherence to client wishes can be deemed a "traditional" attorney role, practitioners who seek to fulfill the additional roles mentioned in the previous subsection will also have to adopt an expansive and holistic model of representation with their clients.<sup>128</sup> These attorneys must utilize advanced interviewing techniques, conceptualize their clients' individual needs in the context of their developmental capacity and environmental circumstances, and potentially enlist the help of additional "team members" to engage in comprehensive

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<sup>128</sup> See *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592 (2006) (recommending a comprehensive set of holistic standards for attorneys representing children).

multidisciplinary practice.<sup>129</sup> To effectively assist their clients in this uniquely holistic transactional setting, these attorneys must have a holistic understanding of their client's needs that incorporates the implications of matters unrelated to the narrow legal issue presented by the proceedings. Such matters may include social work and criminal justice issues, various other substantive legal areas that may influence a child's life, and a number of other aspects that impact a child's mind, behavior, and cultural identity.<sup>130</sup>

## V. Conclusion

As the systems that work with status offenders and their families move away from the punitive and intrusive forms of "tough love" advocated for in past decades, and as the courts begin to delegate social control to private and public agencies, it is important that states do not fail to address the due process rights of youth. Using Zimring's terminology, a movement toward a wholly "interventionist" stance for status offenders neglects the other equally important notion of allowing children to make mistakes without fear of undue system involvement. Doing so does a disservice to the rights of children involved in these informal processes and sacrifices an opportunity to equip them to take ownership of the rehabilitative process and to develop into healthy, autonomous members of society.

By retaining the preference for the sorts of informal and voluntary pre-court diversion processes advocated for by reformers in the 1960s and 1970s, while simultaneously guaranteeing that dedicated and competent advocates protect children's interests, jurisdictions can further both the interventionist and diversionary purposes of the juvenile court. While the informal network of services will effectively "fix" the root problems behind the child's misbehavior, the rights-educational process will aid youth in

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<sup>129</sup> *Id.* at 593-599.

<sup>130</sup> *Id.* at 599-605.

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learning to exercise healthy autonomy. The efforts required in establishing statutory or local procedures for ensuring that an all-in-one protector, advocate, educator, negotiator, ambassador, and problem solver accompanies children through these proceedings are, in this sense, well worth the investment.