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Madison C. Jaros
Notre Dame Law School

THE DOUBLE-EDGED SWORD OF *PARENS PATRIAE*: STATUS OFFENDERS AND THE PUNITIVE REACH OF THE JUVENILE JUSTICE SYSTEM

*Madison C. Jaros**

[T]here 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.[1]

Introduction

To many, ditching school, feuding with parents, and staying out late are hallmarks of adolescence. In 2014, however, these acts and other similar ones formed the basis of one out of every eleven juvenile court cases in America.[2] Adolescents convicted in these cases are known as status offenders—juveniles who have committed "a noncriminal act that is considered a law violation only because of [the] youth's status as a minor."[3] Although the particular offenses designated as status offenses vary by state, the most commonly adjudicated status offenses include truancy, ungovernability, and curfew violations, as well as running away from home and underage alcohol

* Candidate for Juris Doctor, Notre Dame Law School, 2020; Bachelor of Business Administration in Marketing and Political Science, University of Notre Dame, 2017. I would like to thank Professor Jimmy Gurulé, for his valuable insight and guidance as I attempted to craft my many thoughts on this topic into a coherent argument. I would like to thank the members of the *Notre Dame Law Review* for their dedication to editing this Note. Finally, I would like to thank my friends and family for their constant support in all things law school. Thank you especially to my parents, Steven and Elaine Jaros—I owe every success to the two of you.

1 Kent v. United States, 383 U.S. 541, 556 (1966).

2 Mahsa Jafarian & Vidhya Ananthakrishnan, Vera Inst. of Justice, Just Kids: When Misbehaving Is a Crime (2017), https://www.vera.org/when-misbehaving-is-a-crime#introduction. Because of the significant procedural differences in status offense adjudication between and within states, it is likely that this figure is an underestimate. *Id.*

3 Office of Juvenile Justice & Delinquency Prevention, Status Offenders 1 (2015), https://www.ojjdp.gov/mpg/litreviews/Status_Offenders.pdf.

consumption.[4] Since status offenses are not technically criminal acts, those who commit these offenses are not classified as juvenile delinquents[5] by the juvenile justice system. As a result, states are not required to guarantee due process protections to status offenders during their initial disposition hearings—and many do not.[6] An adolescent accused of being a status offender will likely enter her disposition hearing without an attorney;[7] she will likely be adjudicated a status offender by a preponderance of the evidence rather than by beyond a reasonable doubt;[8] and the court that adjudicates her will likely prevent her from asserting due process rights like the right against self-incrimination.[9]

States often justify their refusal to guarantee status offenders due process by invoking the principle of *parens patriae*, which embodies the idea that, in the juvenile justice system, the state should look to rehabilitate juveniles rather than punish them.[10] Under *parens patriae*, the court is meant to be a guiding, almost parental, force rather than a punitive one. Despite this rationale, status offenders can still be subject to sanction by the court,[11] and therefore are often just as vulnerable to the punitive reach of the juvenile justice system as their delinquent counterparts. Indeed, status offenders are often subject to some of the *same* sanctions that juvenile delinquents receive: fines; probation; GPS monitoring; and, in some situations, incarceration, are all punishments that may follow disposition as a status offender.[12] As a result, status offenders often have little protection against punishment that may outstrip the severity of their actions.

This Note will argue that, despite the fact that adjudication as a status offender has the potential to lead to punitive outcomes, the rehabilitative rationale of *parens patriae* that lies behind the status offender designation ensures that juveniles charged under this category are not afforded the procedural protections that they are due under the Constitution's Due Process Clause. This conundrum—that the rehabilitative rationale meant to protect

4 CHARLES PUZZANCHERA & SARAH HOCKENBERRY, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2010, at 66 (2013), https://www.ncjrs.gov/pdffiles1/ojjdp/grants/244080.pdf.

5 Juvenile delinquency is defined as a "violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult." *"Juvenile" Defined*, U.S. DEP'T OF JUST., https://www.justice.gov/jm/criminal-resource-manual-38-juvenile-defined (last visited Feb. 25, 2019).

6 *See infra* Section II.B.

7 Ashley Goins, *Justice for Juveniles: The Importance of Immediately Appointing Counsel to Cases Involving Status Offenses and Engaging in Holistic Representation of Juveniles in All Cases*, 2 FORUM 22, 23 (2015) ("Most courts . . . refuse to appoint an attorney to a status offense case unless the case develops into a contempt case in which the child could face incarceration.").

8 *See infra* note 52.

9 *See, e.g.*, *In re* Spalding, 332 A.2d 246 (Md. 1975).

10 *See infra* Section I.A.

11 *See* Goins, *supra* note 7, at 33.

12 *See infra* Section II.B.

juveniles actually leaves them more vulnerable to punishment—is not confined to the status offender context. Instead, the juvenile system as a whole suffers from the failures that result from promises of rehabilitation made by a largely punitive system. And despite Supreme Court rulings that have provided due process to juvenile delinquents, the juvenile system's treatment of status offenders illustrates that any promise of rehabilitation from the juvenile justice system is functionally a dead letter. As a result, status offenders should not simply be afforded due process protections, but instead should be removed completely from a system that claims not to punish them and cannot successfully rehabilitate them.

Part I of this Note will provide a brief history of the juvenile justice system, its initial rehabilitative goals, and how these rehabilitative goals have survived despite legal and social shifts. Part II will discuss the tenuous position that status offenders occupy in the juvenile system and the punitive implications that result from this position. Part III will discuss the due process issues that stem from the juvenile system's treatment of status offenders. Finally, Part IV will discuss how the juvenile system's treatment of status offenders typifies the problems created by the juvenile system's adoption of the *parens patriae* rationale and why this requires that status offenders be removed from the juvenile system altogether. Part IV will then discuss what is likely to be the most successful replacement for juvenile justice system jurisdiction: the use of preexisting community resources that are better equipped to accomplish rehabilitative goals.

I. *Parens Patriae* and the Juvenile Justice System

A. Inception: Why the Juvenile Justice System Was Different

In the United States, adjudicating juveniles and adults as separate classes is a relatively recent phenomenon; the majority of states did not develop distinct juvenile justice systems until the early twentieth century.[13] At that time, societal beliefs about adolescence and the culpability of juveniles were changing, and certain groups began championing the idea that adolescents were fundamentally different from adults—"vulnerable, malleable, and in need of adult guidance."[14] These beliefs about adolescence ultimately formed the base rationale for the juvenile system: adolescents were less morally culpable than adults, and therefore required rehabilitation rather than punishment, in response to their wrongful acts.[15] The juvenile justice system was meant to provide this rehabilitation and guidance under the philosophy of *parens patriae*, literally "parent of the country."[16] Initially a chancery court principle

13 *See, e.g.*, Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083, 1096 (1991).

14 *Id.* at 1095.

15 *Id.* at 1097.

16 Emily L. Barth, Comment, *Blurring the Lines: When the "Best Interests of the Child" Fall to the Wayside. An Analysis of Ohio's Serious Youthful Offender Statute*, 79 U. Cin. L. Rev. 323, 326 (2010).

that justified state authority over parentless children, *parens patriae* encompassed the idea that the government itself was meant to act as a parent to wayward youth.[17] *Parens patriae* oriented the juvenile justice system toward a primary goal of rehabilitation rather than retribution, with the ultimate objective of "mold[ing] wayward youths into good citizens."[18] Perhaps one of the best expressions of what the proponents of a separate juvenile system hoped to achieve comes from the Pennsylvania Supreme Court in *Commonwealth v. Fisher*:

> It is to save, not to punish; it is to rescue, not to imprison; it is to subject to wise care, treatment and control rather than to incarcerate in penitentiaries and jails; it is to strengthen the better instincts and to check the tendencies which are evil; it aims, in the absence of proper parental care, or guardianship, to throw around a child, just starting in an evil course, the strong arm of the parens patriae.[19]

Because the juvenile system was founded on the fundamental idea that adolescents were a distinct class with distinct needs, it was designed to deal with adolescents in a way that was completely different from the way that the justice system at large dealt with adults. The rationale of *parens patriae* permeated every aspect of the juvenile system, informing the crimes with which juveniles could be charged, the structure of juvenile court proceedings, and the rights that juveniles were afforded in these proceedings. For example, because the state considered juvenile courts to be tasked with protecting rather than punishing adolescents, "juvenile court had a mandate to assume liberal jurisdiction over the wayward young, much as it might over other helpless and needy members of society."[20] This meant that juvenile court was not limited to pursuing crimes committed by juveniles; instead, adolescents could find themselves in a juvenile court proceeding for "[b]ehavior such as smoking, sexual activity, stubbornness, running away from home, swearing, and truancy."[21] The structure of juvenile proceedings differed from adult proceedings as well; juvenile proceedings were more casual than adult proceedings, and were often closed to the public.[22] Finally, juveniles were not provided with the due process protections afforded to adults in criminal trials.[23] In the minds of those who created and supported a distinct justice system for adolescents, there was simply no need for these protections.[24] The judge in a juvenile proceeding was not meant to be an agent of the state, wielding the power to take away a child's liberty. Instead, he was meant to be

17 *See* Ainsworth, *supra* note 13, at 1098.

18 *Id.* at 1098–99.

19 Commonwealth v. Fisher, 27 Pa. Super. 175, 182 (Pa. Super. Ct. 1904).

20 *See* Ainsworth, *supra* note 13, at 1098.

21 *Id.*

22 Alicia N. Harden, *Rethinking the Shame: The Intersection of Shaming Punishments and American Juvenile Justice*, 16 U.C. DAVIS J. JUV. L. & POL'Y 93, 102 (2012).

23 *See* Barth, *supra* note 16, at 326.

24 *See* Ainsworth, *supra* note 13, at 1100.

similar to a father figure or a social worker—an advocate.[25] For this reason, an adolescent in juvenile court was not seen as needing due process protections; because the aim of the juvenile system was to guide rather than punish her, there was nothing she needed protection from.

B. Development: The "Superpredator" and Due Process Protection for Delinquents

The early twentieth-century idea that juveniles were less morally culpable than adults and therefore required rehabilitation rather than punishment was only widely accepted for a little over fifty years. By the 1960s, *parens patriae* had fallen out of favor,[26] and the focus of the juvenile system had gradually shifted "from assessing the social needs of the offender to assessing the social harm that the offender caused."[27] Like in the early twentieth century, societal notions about adolescence—and societal notions about the type of adolescents who committed crimes—had shifted. Rather than viewing juvenile delinquents simply as "wayward" and in need of guidance, the juvenile system was increasingly concerned with the punishment of juveniles and the protection of the community. These social developments, however, were coupled with a complete lack of development in juvenile court proceedings. Although the focus of the juvenile justice system had arguably shifted from rehabilitation to retribution, juvenile proceedings were still largely informal. Juvenile delinquents faced the possibility of life sentences, but they were generally denied basic due process rights in these proceedings.[28] As a result, juvenile delinquents began to challenge the constitutionality of juvenile court proceedings; the judiciary responded in turn. Beginning in 1967 with *In re Gault*, the Supreme Court extended a number of due process protections to juvenile delinquents. Stating that "the condition of being a boy does not justify a kangaroo court,"[29] the *In re Gault* Court held that juvenile delinquents were entitled to notice of the charges against them,[30] to counsel,[31] to confrontation and cross-examination,[32] and to the Fifth Amendment privilege against self-incrimination.[33] In 1970, the Supreme Court further held that, in order to adjudicate an adolescent delinquent, juvenile courts were required to prove the adolescent's guilt beyond a reasonable doubt, rather than by a preponderance of the evidence.[34]

As time passed, societal opinions about juvenile offenders grew increasingly negative. The issue was especially salient in the 1990s with the rise of

25 *See* Harden, *supra* note 22, at 102.
26 *See* Barth, *supra* note 16, at 326.
27 *See* Ainsworth, *supra* note 13, at 1105.
28 *See* Barth, *supra* note 16, at 327.
29 *In re* Gault, 387 U.S. 1, 28 (1967).
30 *Id.* at 34.
31 *Id.* at 41.
32 *Id.* at 55.
33 *Id.* at 57.
34 *See In re* Winship, 397 U.S. 358, 368 (1970).

anxiety surrounding juvenile "superpredators."[35] Largely the creation of Professor John J. DiIulio Jr. in the 1990s, the theory of the juvenile "superpredator" warned of "radically impulsive, brutally remorseless youngsters . . . who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders."[36] And although DiIulio has now denounced the "superpredator" theory,[37] this view of juvenile delinquents as hardened criminals had a lasting effect on their treatment within the juvenile justice system. For example, in response to "superpredator" fervor, hundreds of juveniles were given life sentences, and many states made it easier for juveniles who were as young as thirteen or fourteen years old to be tried in adult court.[38]

C. The Survival of Parens Patriae*: The Current State of the Juvenile System*

In some ways, the Supreme Court's decisions in *In re Gault* and related cases fundamentally altered the juvenile justice system—beyond simply the provision of due process rights to juvenile delinquents. As a result of *In re Gault* and other cases affirming the right of juvenile delinquents to due process, states began transferring more serious juvenile cases to adult court, paring down confidentiality protections provided to juveniles at trial, and enumerating rationales for the juvenile justice system beyond *parens patriae*.[39] States' juvenile court proceedings began to look less like an informal discussion between parent and child—the early twentieth-century ideal—and more like the adult proceedings that early proponents of the juvenile justice system had rejected.

However, while some aspects of the juvenile justice system fundamentally changed after *In re Gault*, others have stayed the same. Juvenile proceedings were not transformed into adult criminal proceedings by *In re Gault*. Indeed, the notion of *parens patriae* is still a fundamental rationale underlying the juvenile justice system. States have continued to cite *parens patriae* as one of the rationales for their juvenile justice systems, and "[i]n some jurisdictions, there has been a reluctance among court personnel to introduce elements of the adversarial system into juvenile court."[40]

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35 Daniel J. Gibbs, Note, *Status Offenses and Dejudicialization: Establishing a Right to Counsel in Informal Diversion Proceedings*, 19 U.C. DAVIS J. JUV. L. & POL'Y 126, 138 (2015).

36 Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html. This fear of "superpredators" was one that crossed party lines. *See* C-SPAN, *1996: Hillary Clinton on "Superpredators" (C-SPAN)*, YOUTUBE (Feb. 25, 2016), https://www.youtube.com/watch?v=J0uCrA7ePno.

37 *See* Becker, *supra* note 36.

38 Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html.

39 *See* Harden, *supra* note 22, at 110.

40 Chris E. Marshall et al., *The Implementation of Formal Procedures in Juvenile Court Processing of Status Offenders*, 11 J. CRIM. JUST. 195, 197 (1983).

In addition, despite its comments about "kangaroo court[s],"[41] the Supreme Court has never questioned the position of *parens patriae* as the foundation for the juvenile justice system. *In re Gault* and its progeny did not reject *parens patriae*. Instead, the Court in *In re Gault* upheld the idea that children and adults are distinct and require distinct justice systems, declining "to hold that juvenile delinquency adjudications are the equivalent of criminal prosecutions."[42] The Court further reinforced the fundamental position of *parens patriae* in *McKeiver v. Pennsylvania*, where it held that adolescents were not entitled to jury trials in juvenile court.[43] The *McKeiver* Court emphasized that a jury trial was not only unnecessary in juvenile court but also undesirable; if juvenile delinquents had a right to a jury, the Court argued, the unique nature of juvenile court proceedings would be at risk.[44]

McKeiver is not the only case that has reinforced the idea that adolescents are fundamentally different than adults. Indeed, the idea that the state has greater power to restrict the liberty interests of youths than it does to restrict the liberty interests of adults is found in a number of Supreme Court cases—even those that do not deal directly with the procedures of the juvenile system.[45] These cases often employ similar rationales to those employed by early proponents of the juvenile justice system: children are vulnerable, they lack the judgment of adults and are therefore less culpable, and limiting youth liberty under the law encourages family unity.[46]

The staying power of these *parens patriae* rationales, despite legal and social shifts, continues to have a significant effect on the treatment of juveniles under the law. In some cases, these rationales have protected adolescents from harm.[47] However, as evidenced in *McKeiver*, these rationales have also led to a denial of basic constitutional rights. Even more troubling, the rationale of *parens patriae* is not uniformly invoked in cases regarding juveniles. For example, in *Fare v. Michael C.*, the Supreme Court struck down the California Supreme Court's holding that an individual's status as a juvenile requires a more deferential understanding of when the right against self-incrimination is invoked.[48] In essence, the perceived vulnerability of juvenile offenders allows the state to hold greater control over them, but it does not

41 *In re* Gault, 387 U.S. 1, 28 (1967).

42 *See* Ainsworth, *supra* note 13, at 1114.

43 McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion).

44 *Id.* at 540.

45 *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("The well-being of its children is of course a subject within the State's constitutional power to regulate . . . ."); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) ("[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ."). *See generally* Lee E. Teitelbaum & James W. Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153 (1978) (detailing cases in which the Supreme Court has emphasized that the state has a unique interest in and power over juveniles).

46 *See* Teitelbaum & Ellis, *supra* note 45, at 160–63.

47 *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012) (citing children's education, health, and well-being as concerns underlying child labor laws).

48 Fare v. Michael C., 442 U.S. 707 (1979).

necessarily allow them to receive greater accommodations from the court, even if those accommodations would go to compensating for perceived vulnerabilities.

The clash between *parens patriae* and the changes that states made in the wake of *In re Gault* makes for a juvenile justice system with a confused sense of purpose. An apt illustration of the internal conflict that plagues most states' juvenile justice systems comes from the language that states use to describe what these systems should accomplish. Many states stress numerous purposes for their juvenile systems, some of which are seemingly in disagreement. For example, a state may cite both the purposes of rehabilitation and punishment, or juvenile guidance and community protection.[49] Although these purposes may not wholly conflict, they are indicative of competing and often-irreconcilable views regarding juvenile offenders and how they should be dealt with.

II. Status Offenders and Their Place in the Juvenile System

A. *The Danger of Occupying the Middle Ground*

Most juvenile justice systems adjudicate cases involving three major classes of juveniles: abused and neglected children, status offenders, and juvenile delinquents.[50] Although adolescents can be classified in more than one of these classes, each class is distinct with its own set of proceedings.[51] Within the juvenile justice system, status offenders exist in the tenuous middle ground between the other two groups. Unlike abused and neglected children, status offenders enter the juvenile system as wrongdoers rather than victims of wrongdoing.[52] However, since status offenses are not classified as criminal acts, those who commit status offenses also cannot be classified as delinquents. As a result, status offenders are not protected by the Supreme Court rulings that extended due process protections to juvenile delinquents, such as *In re Gault*.[53]

Indeed, since status offenders are not classified as having committed crimes, the rationale of *parens patriae* is more prominent in discussions of their treatment than the treatment of juvenile delinquents. For example,

49 Nat'l Ctr. for Juvenile Justice, Juvenile Offenders and Victims: 2014 National Report 86–88 (Melissa Sickmund & Charles Puzzanchera eds., 2014) (illustrating the multiple sources that states often pull from when crafting the purpose clauses of their juvenile justice system legislation, and the varied approaches states take to juvenile justice).

50 Kathleen Michon, *Juvenile Court: An Overview*, NOLO, https://www.nolo.com/legal-encyclopedia/juvenile-court-overview-32222.html (last visited Nov. 11, 2018).

51 *Id.*

52 Some argue, however, that adolescents commit status offenses in response to underlying trauma or abuse. *See* Jafarian & Ananthakrishnan, *supra* note 2. This information may imply that status offenders have more in common with abused and neglected children than with juvenile delinquents, although they are subject to punitive sanctions that abused and neglected children are never subject to.

53 387 U.S. 1, 44 (1967) (emphasizing that holding requiring protections for juveniles applied only to delinquency proceedings).

many states do not classify status offenders as "offenders" at all, but rather as "Persons in Need of Supervision," "Children in Need of Care," or the like, hearkening back to the early twentieth-century idea that wayward youths required guidance by the state.[54] The *parens patriae* rationale can also be found in state legislation creating the status offender designation.[55] In addition, in rulings upholding status offender statutes or designating youths as status offenders, state courts often cite to the rehabilitative rationale underlying status offenses.[56] As a result, *parens patriae* not only acts as the foundation for the establishment of status offenses but also acts as the rationale that insulates these proceedings from challenges—due process or otherwise—by juveniles.

B. The Status Offender's Path Through the Juvenile Justice System

The unique position of status offenders presents a problem regarding this class's treatment in the juvenile system. Namely, although status offenders are *considered* to be different than juvenile delinquents, the juvenile justice system is selective in how it treats status offenders differently. Despite the rehabilitative rationale behind status offenses, once an individual is declared to be a status offender, they are often subject to a number of punitive sanctions. This concept is best illustrated by detailing a status offender's experience in the juvenile system, from his or her initial hearing to the long-term effects that can follow from his or her adjudication.

Status offense disposition hearings are largely informal. As previously mentioned, because status offenses are not considered crimes, adolescents who are charged with these offenses are often not guaranteed the due pro-

54 *Status Offense Issues*, JUV. JUST. GEOGRAPHY POL'Y PRAC. & STAT., http://www.jjgps.org/status-offense-issues (last visited May 16, 2019).

55 *See, e.g.*, ALASKA STAT. § 47.10.005(1) (2018) (stating, in a statutory chapter directed toward status offenders, that the purpose of the chapter was to "achieve the end that a child coming within the jurisdiction of the court under this chapter may receive the care, guidance, treatment, and control that will promote the child's welfare"); KY. REV. STAT. ANN. § 630.010 (West 2018) (referencing the purposes enumerated in KY. REV. STAT. ANN. § 600.010 (West 2018)—which include "making the child a productive citizen . . . by advancing the principles of personal responsibility, accountability, and reformation"—and reiterating that these purposes applied to status offenders).

56 *See, e.g.*, K.A.C. v. Commonwealth, No. 2005-CA-002202, 2006 WL 2034300, at *5 (Ky. Ct. App. July 21, 2006) ("[A] further dispositional hearing was undertaken [by the trial court] not for the purpose of punishing K.A.C., but, rather, to consider the appropriate continuing disposition to effect the rehabilitation of K.A.C."); *In re* E.D., 127 S.W.3d 860, 865 (Tex. App. 2004) (quoting, in reference to the trial court's modification of a status offender's probation, the trial court's statement that "the Court doesn't really want to find [appellant] dead on the side of the street one day; and frankly that's the direction I am afraid I see her going . . . . There is no way this Court could put her back on the street" (alterations in original) (internal quotation marks omitted)); State *ex rel.* Harris v. Calendine, 233 S.E.2d 318, 326 (W. Va. 1977) ("[S]tatus offenders must be treated in a fashion consistent with the *parens patriae* power, namely, they must be helped and not punished . . . .").

cess protections they would receive if they were being charged with a crime as a juvenile delinquent.[57] Additionally, in many states, the standard of proof for status offense dispositional hearings is a preponderance of the evidence.[58] This standard is less stringent than the beyond a reasonable doubt standard usually used in juvenile delinquency proceedings, and therefore more likely to result in a guilty disposition.

Once a guilty disposition is laid down, the court often has the discretion to impose a number of different sanctions, including "fines, involuntary community service, recursive court involvement, loss of driving privileges, imposition of curfews, specification of conditions of probation that require students to meet unrealistic school performance standards, unwarranted disclosures of personal information, [and] investigations of family dependency and neglect."[59] In some states, once a juvenile is declared a status offender, she can also be subject to GPS monitoring.[60] And although the status offender designation applies by definition only to juveniles, the punitive outcomes that accompany adjudication as a status offender can follow an individual past that period. For example, the Federal Rules of Evidence do not prohibit a party from impeaching an individual with evidence of a past adjudication as a status offender—even a decade after that adjudication occurred.[61]

In addition, if a status offender lives in one of the thirty states that allows it, the court can order that she be put on probation.[62] The length of this probation varies widely depending on the state—in Arizona, South Carolina, and Texas, probation can last until the status offender's eighteenth birthday; in California, it can last for up to six months; in Idaho, it can last for up to

57 Erin M. Smith, Note, *In a Child's Best Interest: Juvenile Status Offenders Deserve Procedural Due Process*, 10 L. & INEQ. 253, 259 (1992) ("Left to their discretion, most state courts have refused to grant status offenders the same procedural protections guaranteed delinquents by the Supreme Court.").

58 *See, e.g.*, HAW. REV. STAT. ANN. § 571-41 (West 2018) (Hawaii); N.Y. FAM. CT. ACT § 350.3 (McKinney 2018) (New York); TENN. R. JUV. P. 211(e) (Tennessee); VT. STAT. ANN. tit. 33, § 5315 (2018) (Vermont); *In re* D.M.C., 503 A.2d 1280, 1282 (D.C. 1986) (District of Columbia); *In re* C.B., 865 N.E.2d 1068, 1073 (Ind. Ct. App. 2007) (Indiana); State *ex rel.* D.M.G., 579 So. 2d 525, 528 (La. Ct. App. 1991) (Louisiana); *In re* Carter, 318 A.2d 269, 283 (Md. Ct. Spec. App. 1974) (Maryland); *In re* Jennifer G., 695 N.Y.S.2d 871, 878 (1999) (New York); *In re* K., 554 P.2d 180, 183 (Or. Ct. App. 1976) (Oregon).

59 Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [to] Education*, 3 DUKE F. FOR L. & SOC. CHANGE 139, 141 (2011) (footnote omitted).

60 *See, e.g.*, *In re* A.M., 163 Cal. Rptr. 3d 793, 797 (Ct. App. 2013) (holding that juveniles adjudicated to be status offenders in California could be subject to GPS monitoring). Arkansas also allows courts to order that a status offender be subject to GPS monitoring. COAL. FOR JUVENILE JUSTICE, STATUS OFFENSES: A NATIONAL SURVEY 11 (2015), http://www.juvjustice.org/sites/default/files/resource-files/Status%20Offenses%20-%20A%20National%20Survey%20-FINAL%20-%20WEB.pdf.

61 FED. R. EVID. 609(d) (describing the circumstances under which a juvenile adjudication may be used for impeachment purposes).

62 Linda A. Szymanski, *Probation as a Disposition for Status Offenders*, NAT'L CTR. FOR JUV. JUST. SNAPSHOT, Apr. 2006, http://www.ncjj.org/pdf/Snapshots/2006/vol11_no4_probationasdisposition.pdf.

three years.[63] Probation often carries with it a number of requirements that the status offender must meet over the course of her probation, such as a mandate that the status offender "regularly attend school[,] obey a court-imposed curfew," or earn a GED.[64] In some states, if the status offender fails to meet these requirements, she is at risk of incarceration in a juvenile facility.[65]

Historically, status offenders were often subject to incarceration—sometimes for longer periods than their delinquent counterparts.[66] In 1974, however, Congress's Juvenile Justice and Delinquency Prevention Act (JJDPA) looked to prevent the incarceration of status offenders by requiring that states receiving JJDPA funds work toward the deinstitutionalization of this group.[67] Since then, states have generally complied with the letter of the JJDPA.[68] In practice, however, states have been able to circumvent the requirement that status offenders not be institutionalized in multiple ways.[69]

The most commonly used method allowing status offender incarceration is a clause of the JJDPA known as the Valid Court Order (VCO) exception.[70] Under the VCO exception, a state can subject a status offender to incarceration if she fails to meet the requirements of her probation.[71] Although half of all states have either banned use of the VCO exception or regularly report no use of it, it is still used regularly in a number of states to detain status offenders.[72] In 2013, there were sixteen states where the VCO exception was used at least 100 times, and, overall, the VCO exception was used in over 7000 cases to detain youths.[73] Under the VCO exception, a status offender who is accused of violating the conditions of his or her probation is entitled to a hearing before the government can incarcerate him or her.[74] At this

63 *Id.*

64 *Id.*

65 *See* 34 U.S.C. § 11133(a)(11)(A)(ii) (2012).

66 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, 48 (1981).

67 *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 3, at 2.

68 *See* Costello & Worthington, *supra* note 66, at 58.

69 *See id.* at 42. These methods include utilizing the contempt powers of the court, committing status offenders to secure mental institutions, charging an adolescent with a crime when the underlying actions solely constitute a status offense, and detaining status offenders in semisecure facilities. *See id.* at 58–80.

70 *See* D'lorah L. Hughes, *An Overview of the Juvenile Justice and Delinquency Prevention Act and the Valid Court Order Exception*, 642 ARK. L. NOTES 29, 35 (2011).

71 *Id.* at 32.

72 John Kelly, *Two Big Takeaways from Latest Failure to Pass Juvenile Justice Bill*, CHRON. SOC. CHANGE (Feb. 13, 2016), https://chronicleofsocialchange.org/juvenile-justice-2/legal-exception-on-detaining-juvenile-status-offenders-holds-up-jjdpa-bill.

73 *Id.*

74 CAL. BD. OF STATE & CMTY. CORR., VALID COURT ORDER (VCO) EXCEPTION CHECKLIST GENERAL INFORMATION (2014), http://www.bscc.ca.gov/downloads/2014_VCO_General_Information.pdf.

hearing, a status offender is finally entitled to the full panoply of due process protections that are given to juvenile delinquents.[75]

By that point, however, most of the damage has already been done—the status offender has already been punished and subjected to probation. Now the only thing separating her from incarceration is one hearing, where, if the court finds that she violated the terms of her probation, it can legally detain her in a juvenile detention center.[76] Initially brought to court because of an act that was not a crime, the status offender is then subject to the same treatment as a juvenile delinquent convicted of violating the law—she is housed in the same facility and subject to the same rules, dangers, and deprivations of liberty. As a result, there is an increased probability that the juvenile, once simply a status offender, will commit more serious crimes in the future.[77]

III. Due Process Issues Raised by the Treatment of Status Offenders

A. Legal Framework

The Fifth and Fourteenth Amendments to the Constitution both guarantee that no American citizen can be deprived "of life, liberty, or property, without due process of law."[78] The Supreme Court has held that due process has two major prongs: procedural and substantive.[79] Procedural due process, which is the focus of this Note, "concerns whether the government has followed adequate procedures in taking away a person's life, liberty or property."[80] A denial of procedural due process exists, therefore, when the government has deprived an individual of one of these three protected interests without adequate procedures.[81]

The Supreme Court uses a bifurcated test to evaluate procedural due process claims. Under this test, "[t]he question is . . . whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment. Once it is determined that due process applies, the question remains what process is due."[82] In other words, if a status offender choses to challenge the current state of status offender proceedings as a violation of her procedural due process rights, she would have to prove (1) that state action (in this case, the punitive measures taken by the state as a result of her adjudication as a status offender) resulted in depriva-

75 *See id.*

76 *Id.*

77 *See* Soma R. Kedia, *Creating an Adolescent Criminal Class: Juvenile Court Jurisdiction over Status Offenders*, 5 Cardozo Pub. L. Pol'y & Ethics J. 543, 543 (2007) ("[E]ven though status offenders are not delinquents when they enter the court system, they often are when they leave it.").

78 U.S. Const. amend. V; *id.* amend. XIV, § 1.

79 Erwin Chemerinsky, *Procedural Due Process Claims*, 16 Touro L. Rev. 871, 871 (2000).

80 *Id.*

81 *Id.*

82 Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (citation omitted). For further description of this test, see Perry v. Sindermann, 408 U.S. 593 (1972); Bd. of Regents v. Roth, 408 U.S. 564 (1972).

tion of a liberty or property interest, and (2) that the state deprived her of this protected interest without providing her with the process due in that context.

B. State Punishment of Status Offenders Constitutes a Deprivation of Liberty and Property

The first prong of the Court's procedural due process test is itself often divided into two main parts. First, there must be a life, liberty, or property interest at issue. Second, state action must have deprived the plaintiff of that life, liberty, or property interest.[83]

1. Liberty

Here, it is clear that there is a liberty interest at issue. The Supreme Court has long defined liberty interests broadly, as including more than simply one's interest in not being confined. In the 1923 case *Meyer v. Nebraska*, for example, the Court stated that:

> [The liberty interest] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[84]

Common status offender punishments like probation and mandatory community service clearly invoke a liberty interest: not only can these punishments interfere with a status offender's "freedom from bodily restraint," they also may prevent a status offender from "engaging in any of the common occupations of life," since they force status offenders to comply with certain guidelines and restrictions specified by the court. The fact that status offenses are not technically crimes also likely creates an expectation, grounded in state law, that liberty will be retained.[85] This expectation of liberty, although not dispositive, may create a liberty interest—especially since status offenders are generally unsophisticated parties that are likely to take the designation's seeming innocuity at face value. Indeed, the threat of incarceration under the VCO exception following noncompliance with one's probation further increases the likelihood that probation itself embodies a threat to a liberty interest. Even though a status offender is guaranteed full due process rights during a VCO hearing, a disposition of probation means that the threat of incarceration, and therefore serious deprivation of liberty, is always lurking in the background.

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83 *See* Teitelbaum & Ellis, *supra* note 45, at 156.

84 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

85 *See* Chemerinsky, *supra* note 79, at 882 ("You have to look [to] the Constitution, federal statutes, state constitutions, and state laws to determine whether there is a reasonable expectation.").

Status offenders' classification as juveniles does not alter this analysis, as the Court has maintained that "children have the same liberty interests as adults."[86] Where difficulties may arise, however, is in the Court's treatment of *Meyer* in the 2015 case *Kerry v. Din*, where a plurality of the Court seemed to reject the *Meyer* view, stating that "this Court is not bound by dicta."[87] It is unlikely, though, that these comments sounded the death knell for *Meyer*. Indeed, that same year, a majority of the Court cited *Meyer* favorably in *Obergefell v. Hodges* to support its argument that the Due Process Clause protects the right to marry, as well as the right to "childrearing, procreation, and education."[88] It may be true that the Court is not necessarily bound by dicta, but it is also true that it is not necessarily bound by plurality opinions like that in *Kerry*. In addition, although the plurality in *Kerry* reads as though it is a rejection of the *Meyer* view of what constitutes a liberty interest, it is likely that the discrepancy between *Kerry* and *Obergefell* came from differences in the two cases, rather than the *Kerry* plurality's total rejection of *Meyer*'s expansive view of the liberty interest.[89]

2. Property

In addition to liberty interests, status offenders may be able to argue that the sanctions they face invoke a property interest. Under *Board of Regents of State Colleges v. Roth*, a property interest exists when there is "a reasonable expectation [by the plaintiff] to continued receipt of a benefit."[90] The "benefit" that implicates a property interest is usually defined less expansively than the definition of the liberty interest under *Meyer*,[91] but it is likely to cover certain sanctions often faced by status offenders. For example, there are two common punishments that status offenders receive that could likely be classified as deprivations of property: fines and suspension of one's driver's license. Both of these punishments represent reversals of a reasonable expectation created by the government: the exaction of a fine overturns a reasonable expectation in the use of one's government-issued money, and the suspension of one's driver's license overturns a reasonable expectation in the government's continued approval of one's freedom to drive.

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86 Teitelbaum & Ellis, *supra* note 45, at 158.

87 Kerry v. Din, 135 S. Ct. 2128, 2134 (2015) (plurality opinion).

88 Obergefell v. Hodges, 135 S. Ct. 2584, 2598, 2600 (2015).

89 Namely, while *Obergefell* focused on the right to the actual legal union of marriage, *Kerry* involved the right to enjoy the benefits of marriage—specifically, the right to live in the same country as one's spouse. *See generally Obergefell*, 135 S. Ct. 2584; *Kerry*, 135 S. Ct. 2128.

90 *See* Chemerinsky, *supra* note 79, at 881 (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

91 *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976) (holding that the plaintiff did not have a property interest in employment).

3. Deprivation

Establishing deprivation under the first prong of this test requires that the plaintiff show that state action led to the loss of her liberty or property. When juveniles bring a due process claim, however, the question of deprivation becomes a difficult one because courts include an additional factor when deciding whether the state's action constitutes a deprivation in cases involving juveniles: namely, "whether there is some reason for not according a child the full freedom an adult would enjoy."[92]

This does not mean that deprivation cannot be established in juvenile cases. On the contrary, deprivation of liberty was the due process basis for the Court's decision in *In re Gault*.[93] However, status offenders are not in the same position as the plaintiff in *In re Gault*; unlike a juvenile delinquent, a status offender is not initially subject to incarceration as a result of his or her adjudication. In order to incarcerate a status offender, a court must comply with all VCO requirements, including the requirement that a status offender receive the full panoply of due process rights afforded to juvenile delinquents at any hearing that discusses the potential for incarceration.[94] In addition, no state defines status offenses as crimes in and of themselves; instead, status offenses are crimes solely because the individual who committed them is a juvenile. This fundamental difference often forms the basis for the argument that state action does not deprive status offenders of a liberty interest: any punishment that results from being adjudicated a status offender is not a deprivation by the state because it does not result in a "sentence of confinement."[95] Under this argument, there *is* a reason for not according a child the same freedoms as an adult: namely, the child is not charged with a crime.

Even under a broader view of the power of the state to deprive juveniles of their liberty and property, however, it is likely that status offenders would be able to successfully assert that a number of the sanctions they face constitute deprivations. Although status offenders have technically not committed a crime, the fact that they are subject to many of the same sanctions as those faced by juvenile delinquents renders this technical distinction arbitrary and meaningless.[96] This reasoning is in line with that of *In re Gault*, which held that a juvenile's status as a juvenile did not "justify a kangaroo court"[97]—in

92 *See* Teitelbaum & Ellis, *supra* note 45, at 160.

93 387 U.S. 1, 27, 36, 49 (1967).

94 *See supra* notes 73–74 and accompanying text.

95 Dean Hill Rivkin & Brenda McGee, *Truancy Lawyering in Status Offense Cases: An Access to Justice Challenge*, A.B.A. (Oct. 28, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/truancy-lawyering-status-offense-cases-access-to-justice-challenge/.

96 *See id.* ("[S]tatus offenders are often saddled with intrusive sanctions and conditions that, for all practical purposes, are as severe as those faced by juveniles in delinquency cases . . . .").

97 *In re* Gault, 387 U.S. at 28.

essence, the actual treatment of a juvenile plaintiff overrides technical distinctions.

C. Most States Do Not Provide Status Offenders the Process They Are Due

The second prong of the Supreme Court's procedural due process test is essentially a balancing test. Under this prong, a court first balances "the importance of the [life, liberty, or property] interest to the individual."[98] As the importance of the life, liberty, or property interest increases, so too does the procedural protection owed to the plaintiff.[99] The court then balances "the ability of additional procedures to increase the accuracy of the fact finding."[100] The court will order that the plaintiff be provided with those protections that are required to increase the accuracy of her adjudication.[101] Finally, the court balances "the government's interest in administrative efficiency."[102] This cuts against providing additional due process protections; the more expensive providing those protections is, the less likely the court will require that the state provide them.

Here, it is clear that the liberty and property interests at issue are highly important to status offenders. Not only does a deprivation of these interests lead to restrictions on mobility, freedom, or funds, it also could ultimately lead to incarceration. Second, it is likely that affording status offenders due process rights will greatly increase the accuracy of their disposition. The description of the actions that lead to one's adjudication as a status offender can be incredibly vague; for example, a finding that a juvenile is "ungovernable" is commonly enough for the court to declare that a juvenile is a status offender, but what "ungovernable" means is often unclear.[103] Without due process protection, the discretion of the judge in many status offender cases is likely paramount. Finally, although the government's interest in efficiency may cut slightly against the expansion of due process protection to status offenders, it is clear from decisions like *In re Gault* that the Court does not shy away from requiring that states take on additional burdens if due process is at issue, as it is here.

IV. WHY STATUS OFFENDERS SHOULD BE REMOVED FROM THE JUVENILE JUSTICE SYSTEM: STATUS OFFENDERS AS AN ILLUSTRATION OF *PARENS PATRIAE* FAILURE

In many ways, the current treatment of status offenders directly mirrors the treatment of juvenile delinquents before *In re Gault* and other similar cases. Like juvenile delinquents before *In re Gault*, status offenders are sub-

98 *See* Chemerinsky, *supra* note 79, at 888 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

99 *Id.* at 888–89.

100 *Id.* at 889.

101 *Id.*

102 *Id.*

103 *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 3, at 4.

ject to punitive sanctions despite a lack of due process protections in court. Like early juvenile delinquency proceedings, status offender proceedings are informal, and this informality is justified by the rehabilitative rationale of *parens patriae*. And also akin to juvenile delinquents before *In re Gault*, status offenders are harmed by the very system that purports to want to rehabilitate them.

The similarities between the modern treatment of status offenders and that of juvenile delinquents before *In re Gault* would seem to suggest that the solution to the problems discussed in this Note is simply *In re Gault: Status Offender Edition*. In other words, the federal government, through either legislation or the courts, should require that states guarantee status offenders the panoply of due process protections that juvenile delinquents are currently guaranteed. This response, however, ignores the fact that status offenders are not an anomaly within the juvenile justice system. Although status offenders are arguably those most harmed by it, the rationale of *parens patriae* sits at the very foundation of the juvenile justice system, and its failings permeate any proceeding it holds that results in a punitive outcome. In particular, there are three major ways in which the juvenile justice system's adoption of *parens patriae* fails adolescents. First, it inevitably clashes with the need to satisfy due process requirements. Second, it is costly—both to juveniles and to the taxpayer. Finally, its aspirational nature gives it a staying power that, at times, leads to other failures. Although the failure of *parens patriae* runs through the juvenile system, these three issues are particularly salient in the status offender context.

A. The Choice Between Rehabilitation and Due Process

The juvenile justice system's current treatment of status offenders, and its treatment of juvenile delinquents before *In re Gault*, illustrates that due process issues will inevitably develop as long as the juvenile justice system has dual goals of rehabilitation under *parens patriae* and either retribution or deterrence. This is a result of the fact that a justice system that has retribution or deterrence as one of its goals will result in outcomes that are primarily punitive—rehabilitative outcomes will simply not be considered adequate. A system whose outcomes are primarily punitive—as in, one that primarily awards punitive rather than rehabilitative outcomes—will therefore require due process, since these punitive outcomes are likely to result in deprivations of life, liberty, or property. However, rehabilitation under *parens patriae* rejects due process, under the theory that these protections are not needed because rehabilitation is the primary goal, not deterrence or retribution.[104] This creates a major problem that is clearly illustrated in the status offender context: the juvenile justice system's goal of rehabilitation, meant to protect status offenders, leaves this group unprotected from the harms of what many refuse to believe is a punitive system.

104 *See* Smith, *supra* note 57, at 259 (citing a "misguided belief that status offenders are being reformed and thus can be denied procedural protections").

Of course, *In re Gault* ushered in a number of due process protections for juvenile delinquents, seemingly bridging the gap between the juvenile justice system's punitive and rehabilitative goals. However, the concept of *parens patriae* has ensured that even juvenile delinquents do not receive full due process protections.[105] As long as *parens patriae* is the foundation for the juvenile system, there cannot be full due process for juvenile offenders—whether status offenders or juvenile delinquents.

B. The Cost of Ineffective Rehabilitation

Many states' treatment of status offenders is indicative of how incredibly costly the faulty belief in *parens patriae* can be. First, this belief is monetarily costly. Although data on how much money states specifically spend to adjudicate status offenders is not available, one can surmise that such adjudications cost states a great deal since they comprise almost ten percent of the cases petitioned by juvenile courts.[106] State detainment of status offenders under the VCO exception adds an additional cost. On any given day, approximately 2000 juveniles across the country are incarcerated as a result of a court's use of the VCO exception. Although this is only two percent of the total number of juveniles incarcerated in the United States,[107] this practice still proves to be incredibly costly. One estimate predicts that states may spend up to $14.5 million a month incarcerating status offenders under the VCO exception.[108]

The belief that the court system can rehabilitate juveniles is not only costly but also inaccurate. Status offenders are often not rehabilitated by their encounters with the juvenile justice system; instead, they are often worse off. For example, status offense proceedings for ungovernability or running away from home, where the status offender is often in court because her parents brought her there, may "make the dynamic between parent and child worse and more adversarial."[109] As a result, the juvenile justice system is not only costly to the taxpayer but also "costly" to the juveniles that it purports to rehabilitate.

C. The Fascination with Parens Patriae

The current state of the juvenile justice system requires that any response to the due process issues faced by status offenders must require

105 *See supra* Section I.C.

106 In 2013, U.S. juvenile courts petitioned a total of 1,058,500 delinquency cases and a total of 109,000 status offender cases. PUZZANCHERA & HOCKENBERRY, *supra* note 4, at 6, 66.

107 More than 90,000 juveniles are incarcerated per day in the United States. JUSTICE POLICY INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 2 (2009), http://www.justicepolicy.org/images/upload/09_05_rep_costsofconfinement_jj_ps.pdf.

108 *Id.* at 3.

109 COAL. FOR JUVENILE JUSTTICE, NATIONAL STANDARDS FOR THE CARE OF YOUTH CHARGED WITH STATUS OFFENSES 52 (2013), http://www.juvjustice.org/sites/default/files/ckfinder/files/National%20Standards%20for%20the%20Care%20of%20Youth%20Charged%20with%20Status%20Offenses%20FINAL(1).pdf.

either the removal of status offenders from the juvenile justice system or a radical change to the system as a whole. However, it is clear from the way that states have clung to the concept of *parens patriae*, even when it is not effective or even popularly accepted, that any radical change to the juvenile system is either far off or an impossibility.

This loyalty to *parens patriae*, and the results of that loyalty, are most obvious in the context of status offenses. As mentioned above, the Supreme Court has never mentioned status offenders in its opinions guaranteeing due process rights to juvenile delinquents.[110] In addition, legislators' preference for the status quo when it comes to status offenses has made it difficult to advocate for even the most basic steps forward. For example, there is considerable support for phasing out the VCO exception in order to ensure that adolescents are never subject to incarceration merely for being adjudged a status offender.[111] However, staunch supporters of the VCO exception have stalled legislation that would allow this, ensuring that it stays on the books.[112]

This commitment to the status offender status quo illustrates the general state commitment to the *parens patriae* ideal, even when it seems as if most of society has rejected it. Despite the 1990s fear of "superpredators," for example, when common thought was that juvenile offenders were dangerous and deserved harsh punishment, the rationale of *parens patriae* was still being used to deny status offenders full due process protections. This ensures that the juvenile justice system is untouched by societal or even procedural shifts. Although society may believe juvenile offenders are dangerous delinquents, and the group may be punished as if they are "superpredators," the juvenile justice system and its procedures remain largely frozen in time.

Widespread state loyalty to *parens patriae* provides an additional reason for why status offenders should be removed entirely from the juvenile justice system rather than simply given due process rights. In short, a shift to full due process for status offenders is not feasible. This change would either have to come from state legislatures or the courts, and neither has historically been particularly open to affording status offenders adequate due process because of their commitment to *parens patriae*.

D. How Should States Respond to Status Offenses?

If states decide to remove status offenders from the juvenile justice system, what should they do with them instead? It is important to note that removing status offenders from the juvenile system should not be the end of state involvement with this group. Status offenders are a particularly vulnerable category of juveniles—"poverty, abuse, [and] family breakdown . . . are correlated with status offense behavior"—and rehabilitation of status offenders is a worthwhile and important goal that states should continue to pur-

110 *See generally In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).

111 *See* Kelly, *supra* note 72.

112 *Id.* Because of congressional support for the VCO exception, the JJDPA has not been reauthorized since 2002. *Id.*

sue.[113] It is the avenue that states have chosen, not the cause, that is the problem. So, how should states deal with status offenders? The most natural, and likely the most effective, route for rehabilitation is the use of preexisting community resources to address the root issues that cause juveniles to commit status offenses in the first place. Community-based programs targeted toward at-risk youth have been effective in states that have adopted them—both in assisting these adolescents and in saving the state money. For example, Florida adopted legislation in 1980 that created a network of community service providers that at-risk youths and their families could access without the need for court involvement.[114] This network saved Florida approximately $160 million and reduced at-risk youths' involvement in crime.[115] In Louisiana, the creation of a Multi-Agency Resource Center decreased the wait time between seeking help and receiving it from fifty days or more to only about two hours.[116]

Despite the success of community-based alternatives, many jurisdictions support the status offender designation and have concerns that classifying status offenses as crimes would lead to greater harm. Many that support juvenile court jurisdiction over status offenders argue that court involvement is necessary because the court is the only institution equipped to aid this class of juveniles; other institutions are either nonexistent or ineffective.[117] This argument, as Judge David Bazelon argued in his essay *Beyond Control of the Juvenile Court*, "is truly ironic":

> The argument for retaining beyond control and truancy jurisdiction is that juvenile courts have to act in such cases because "if we don't act, no one else will." I submit that precisely opposite is the case: because you act, no one else does. Schools and public agencies refer their problem cases to you because you have jurisdiction, because you exercise it, and because you hold out promises that you can provide solutions.[118]

The irony of the argument only increases when one considers that the time and money that states spend adjudicating status offenses is being used ineffectively.[119] Establishing community-based alternatives or strengthening

113 David J. Steinhart, *Status Offenses*, 6 FUTURE CHILD. 86, 96 (1996); *see also* ACT 4 JUVENILE JUSTICE, JUVENILE STATUS OFFENSES FACT SHEET 1, http://act4jj.org/sites/default/files/ckfinder/files/factsheet_17.pdf ("[R]esearch indicates that risk factors for potential truancy include domestic violence, academic problems, substance abuse, lack of parental involvement in education, and chronic health problems. Research also indicates that that many youth who run away were physically or sexually abused at home in the year prior to their runaway episode." (footnote omitted)).

114 VERA INST. OF JUSTICE, KEEPING KIDS OUT OF COURT: RETHINKING OUR RESPONSE TO STATUS OFFENSES (2014), http://www.modelsforchange.net/publications/648.

115 *Id.* For example, ninety-one percent of the adolescents served by this program in 2011–12 stayed "crime-free" for at least six months after they received services. *Id.*

116 *Id.*

117 *See* Kelly, *supra* note 72.

118 David L. Bazelon, *Beyond Control of the Juvenile Court*, 21 JUV. & FAM. CT. J. 42, 44 (1970) (emphasis omitted).

119 *See supra* Section IV.B.

those that already exist may be necessary for many states in the face of status offenders' removal from juvenile court; however, states are already spending excessive funds to ineffectively accomplish what community-based alternatives have been shown to effectively accomplish. Some states are spending money on community-based programs in this context already: numerous states offer some kind of diversionary resources for status offenders.[120]

Community responses to status offenses could take many forms. However, these responses will likely be most effective if they involve institutions that interact with at-risk juveniles on a day-to-day basis. Responses to truancy, for example, should likely involve schools. Research by the National Center for Mental Health Promotion and Youth Violence Prevention found that the most successful programs targeting truancy partnered schools with community service providers and aimed at increasing the safety of the school environment or altering the teacher response to learning disabilities rather than punishing truants.[121] Responses to status offenses that primarily involve the family, such as ungovernability and running away from home, would best be handled by a state's family services department. And underage liquor laws, the status offense that most resembles an actual crime, should likely either be absorbed into the juvenile delinquency designation or handled by substance abuse programs.

Conclusion

Although the Supreme Court has never rejected *parens patriae*, in its 1966 case *Kent v. United States*, the Supreme Court seemed to express reservations about the *parens patriae* rationale. In dicta, it stated its concern that children in the juvenile justice system received "the worst of both worlds."[122] This statement was incredibly apt in 1966, before *In re Gault*, and it continues to be applicable today—especially when it comes to the treatment of status offenders. In many cases, status offenders are typical adolescents, simply pushing the boundaries of what they can get away with. In many others, status offenders are victims of poverty, abuse, or neglect. Because of the vulnerability of many status offenders, rehabilitation of this group is a worthy goal that states *should* pursue. The problem, however, is that states are pursuing the right goal through the wrong channels. The juvenile justice system was unlikely to be successful in its goal of offering rehabilitation to adolescents when it was created in the early twentieth century, and it is even less likely to be successful now. This is especially true when one considers that, today, behind the rhetoric of *parens patriae* often stands a fear of the "juvenile superpredator"[123]—a belief that adolescents who misbehave are not doing so

120 *See* Coal. for Juvenile Justice, *supra* note 60, at 9–50. The states that offer diversionary resources for status offenders include the following: Arkansas, Arizona, Colorado, Connecticut, the District of Columbia, Kentucky, Idaho, Maryland, Minnesota, Nebraska, New York, North Carolina, Ohio, Oklahoma, South Dakota, and Texas. *Id.*

121 *See* Coal. for Juvenile Justice, *supra* note 109, at 62, 74.

122 Kent v. United States, 383 U.S. 541, 556 (1966).

123 *See supra* Section I.B.

because they are troubled, or because they are typical adolescents, but instead because they are dangerous threats to the community. The fact that this belief runs deeply through the juvenile justice system is most apparent in the status offender context. Under the letter of the law, a status offender's actions are not crimes, but that status offender is treated as a criminal by the juvenile justice system the second that a court finds her guilty. And it is incredibly easy for a guilty disposition to come down when the federal government does not require that states afford status offenders the due process rights that the Constitution promises them. Without these protections, it is no wonder that courts find juveniles guilty of committing status offenses at higher rates than they find them guilty of delinquency.[124]

In many cases, however, it is not only status offenders who receive the worst of both worlds. The juvenile justice system was built on the foundation of *parens patriae*, and the effects of this rationale are found throughout the system. Considering the system's treatment of status offenders simply throws these failures into stark relief because it exemplifies the larger failures of *parens patriae*. These larger failures counsel status offenders' removal from the juvenile justice system, but they also demonstrate that more fundamental changes must be made to the system as a whole in order to protect juvenile offenders—a vulnerable class that requires rehabilitation, but not from the courts.

124 *See* PUZZANCHERA & HOCKENBERRY, *supra* note 4, at 44.