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## Justice for Juveniles: The Importance of Immediately Appointing Counsel to Cases Involving Status Offenses and Engaging in Holistic Representation of Juveniles in All Cases

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JUSTICE FOR JUVENILES: THE IMPORTANCE OF IMMEDIATELY APPOINTING COUNSEL TO CASES INVOLVING STATUS OFFENSES AND ENGAGING IN HOLISTIC REPRESENTATION OF JUVENILES IN ALL CASES

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I. TWO SERIOUS PROBLEMS WITH THE “RIGHT TO COUNSEL,” OR LACK THEREOF, ARE PLAGUING THE JUVENILE JUSTICE SYSTEM

Through observing and researching the role of defense counsel in juvenile cases, I have identified two key problems in the juvenile justice system: lack of attorney representation in status offenses and failure to holistically represent clients.<sup>1</sup>

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<sup>1</sup> Usually, counsel is not immediately appointed to cases involving status offenses. When children do have counsel representing them (whether counsel was appointed to a status offense case, a dependency and neglect case, or a delinquency case), these attorneys are rarely providing holistic representation to their clients. The first part of this paper will explain what status offenses are, the law regarding a child’s right to counsel, why it is important to immediately appoint counsel to children who have been petitioned into court on a status offense, and why holistic representation in *all cases* involving juveniles is essential. The remainder will propose and defend solutions to the two problems identified: that counsel is not being appointed immediately (and in many cases not at all)

First, juvenile defenders are not being appointed to cases involving status offenses.<sup>2</sup> Juveniles should have a defense attorney appointed to represent them immediately upon entering the court system, regardless of the alleged offense.<sup>3</sup> Although indigent juveniles are constitutionally entitled to have appointed counsel represent them on delinquency charges, there is no federal constitutional right to counsel for juveniles accused of committing status offenses.<sup>4</sup> Some states, such as Maryland and Pennsylvania, have extended the right to counsel to juveniles accused of status offenses through state law.<sup>5</sup> Most courts, however, 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.<sup>6</sup> The vast majority of juveniles charged with status offenses across the country, therefore, remain unrepresented by counsel. Without counsel, juveniles accused of status offenses receive minimum due process, often have nobody to guide them out of the system and toward a successful future, and frequently get

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to represent juveniles petitioned to court on status offenses and that juvenile defenders are rarely providing holistic representation to their clients.

<sup>2</sup> The term “juvenile defender” refers to defense attorneys (as opposed to best interest lawyers) and encompasses both public defenders and court appointed private attorneys.

<sup>3</sup> A juvenile should be appointed counsel immediately upon entering the court system, regardless of whether the juvenile is entering the court system because he or she was accused of a status offense, charged with a delinquent act, or is at risk of being removed from his or her home due to allegations of dependency and neglect.

<sup>4</sup> *In re Gault*, 387 U.S. 1, 41 (1967) (holding that “the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child”). This case, however, involved a child’s rights in a delinquency proceeding and did not address the question of whether a child is entitled to counsel in cases involving a status offense.

<sup>5</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20(a); MD. R. JUV. CAUSES 11-106 (youth in juvenile court have the right to counsel at *every* stage of *any* juvenile proceeding except at a peace order proceeding) (emphasis added); Susan Ferriss, JUVENILE INJUSTICE: TRUANTS FACE COURTS, JAILING WITHOUT LEGAL COUNSEL TO AID THEM, The Center For Public Integrity (updated May 22, 2014, 3:47 PM), <http://www.publicintegrity.org/2014/05/09/14699/juvenile-injustice-truants-face-courts-jailing-without-legal-counsel-aid-them> (in Pennsylvania, counsel is automatically appointed to truancy cases and can only be waived after several steps are taken to ensure that the child understands what he or she is doing by waiving this right).

<sup>6</sup> See Matt Lakin, *End to practice of locking up truants sought*, KNOXVILLE NEWS SENTINEL Oct. 7, 2012, <http://www.knoxnews.com/news/local-news/end-to-practice-of-locking-up-truants-sought> (“Underage defendants accused of truancy have no right to a lawyer in Tennessee”); LORI DARNEL, COLORADO DEPARTMENT OF EDUCATION, OFFICE OF DROPOUT PREVENTION AND STUDENT ENGAGEMENT, NEEDS ASSESSMENT OF TRUANCY COURTS (2011) (Denver Juvenile Court appoints attorneys at the initial stages of truancy proceedings “unlike all the other counties. . .”).

<sup>7</sup> For example, valid court orders are often entered against unrepresented juveniles. Should a juvenile later violate a valid court order, he or she can be incarcerated. See U.S. Const. Amend. V.

themselves in situations that later jeopardize their liberty.<sup>7</sup> For these reasons, it is important to appoint counsel early in status offense cases.

Second, juvenile defenders frequently fail to engage in holistic representation of their clients.<sup>8</sup> Children accused of status offenses often have underlying issues that led them to engage in the behavior that brought them into court. An attorney should not only identify these underlying issues in order to develop a defense to the allegations contained in the petition, but should also address and dispose of these underlying issues in a way helpful to the client. Without an attorney's assistance in solving the underlying issues in the child's life, it is likely that the child's court involvement will continue into the future. As part of this holistic representation, it is important that the defense attorney respect and represent the child's expressed interests, rather than unilaterally determining what is in the child's "best interests" and pursuing that course of action.<sup>9</sup>

Most juvenile clients, however, are not receiving holistic representation because juvenile defenders are usually overburdened and underfunded.<sup>10</sup> Due to high caseloads, lack of funding, and caps on billing for private attorneys who are appointed to cases, juvenile defenders often limit their representation of their clients to just the offense or charge identified in the petition.<sup>11</sup>

The failure to appoint counsel to cases involving status offenses and the lack of holistic representation does an injustice to court-involved children and a disservice to our society. For these reasons, it is critical that solutions to these two problems with the juvenile justice system be developed and implemented.

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<sup>8</sup> "Cases" in this sentence refers to status offense cases, delinquency cases, and dependency and neglect cases.

<sup>9</sup> Interview with Christina Klieser, Knox County Juvenile Public Defender, Knox County Public Defender's Office (November 20, 2014).

<sup>10</sup> Interview with Hannah McElhinny, Juvenile Defender at the Public Defender Service for the District of Columbia (PDS), (November 24, 2014) (acknowledging that most public defender organizations receive less funding and have a higher caseload per defender than PDS does).

<sup>11</sup> *See, e.g.*, TENN. SUP. CT. R. 13.

II. IMMEDIATE APPOINTMENT OF DEFENSE COUNSEL IS CRUCIAL TO ENSURE THAT JUVENILES ARE PLACED ON THE PATH TO SUCCESS AND THAT JUSTICE IS DONE

1. *What are status offenses?*

Before delving into why juveniles accused of status offenses should be entitled to counsel, it is important to understand the distinction between status offense cases and delinquency cases. The Office of Juvenile Justice and Delinquency Prevention defines a delinquent act as:

An act committed by a juvenile for which an adult could be prosecuted in a criminal court, but when committed by a juvenile is within the jurisdiction of the juvenile court. Delinquent acts include crimes against persons, crimes against property, drug offenses, and crimes against public order, when juveniles commit such acts.<sup>12</sup>

Examples of delinquent acts, therefore, range from offenses such as theft, vandalism, and arson to offenses like assault, rape, and homicide.

Status offenses, on the other hand, are “noncriminal behaviors” that “would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult.”<sup>13</sup> Examples of status offenses vary from jurisdiction to jurisdiction. The most common examples include: “truancy, running away, being ungovernable or incorrigible, violating curfew laws, or possessing alcohol or tobacco.”<sup>14</sup>

Each year, thousands of children are petitioned into court on status offense cases.<sup>15</sup> Despite the enactment of the 2002 Juvenile Justice and Delinquency Prevention Act (JJDP), dragging children into court for status offenses is still all too common.<sup>16</sup> In 2010, 137,000 status offense petitions were filed nationally.<sup>17</sup> Truancy, the prevailing cause of juvenile

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<sup>12</sup> *Glossary*, THE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <http://www.ojjdp.gov/ojstatbb/glossary.html>. (last visited Dec. 1, 2014).

<sup>13</sup> *Juvenile Status Offenses Fact Sheet*, Center for Children and the Law, AMERICAN BAR ASSOCIATION, (last visited Nov. 24, 2014). [http://act4jj.org/sites/default/files/ckfinder/files/factsheet\\_17.pdf](http://act4jj.org/sites/default/files/ckfinder/files/factsheet_17.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> The latest available data is from 2010, but status offense cases are still being dealt with in courts throughout the nation.

<sup>16</sup> See Annie Salsich & Jennifer Trone, *From Courts to Communities: The Right Response to Truancy, Running Away, and Other Status Offenses*, THE VERA INSTITUTE OF JUSTICE’S STATUS OFFENSE REFORM CENTER (December 2013) (Between 2002 and 2010 the number of status offenses handled by courts nationwide decreased by 33%).

<sup>17</sup> Charles Puzzanhera & Sarah Hockenberry, NATIONAL CENTER FOR JUVENILE JUSTICE, *Juvenile Court Statistics 2010* (June 2013).

status offenses, constituted 36%, or 49,300, of these petitions.<sup>18</sup> Underage consumption of liquor (22%), ungovernability (12%), running away (11%), violating curfew (10%), and miscellaneous (9%) accounted for the remainder of the petitions that were filed in 2010.<sup>19</sup> Of these 137,000 status offense cases that reached a courtroom, 10,400 cases involved a juvenile being held in secure detention.<sup>20</sup> From these numbers, it is clear that the handling of status offense cases is still a valid national concern.

## 2. *Juvenile Justice and Delinquency Prevention Act*

JJDPA, originally enacted by Congress in 1974, sets forth four core mandates: 1) deinstitutionalization of status offenders, 2) separation of juvenile and adult offenders, 3) removal of juveniles from adult jails, and 4) reduction of disproportionate minority contact.<sup>21</sup> States that adopt the JJDPA and comply with the four mandates receive federal grants.<sup>22</sup>

For the purposes of this paper, I will focus on the first mandate—the deinstitutionalization of status offenders (DSO) requirement.<sup>23</sup> The DSO requirement “prohibit[s] the locked placement of youth charged with status offenses. . . .”<sup>24</sup> In other words, “states are required to remove status offenders from detention facilities and instead offer prevention, diversion, and treatment alternatives in the community.”<sup>25</sup> Wyoming is the only state that has not adopted the JJDPA, and, thus, it frequently detains status offenders and does not receive federal funding.<sup>26</sup>

Other states have lost, or are in jeopardy of losing, funding for

<sup>18</sup> Dean Rivkin & Brenda McGee, *Truancy Lawyering in Status Offense Cases: An Access to Justice Challenge*, AMERICAN BAR ASSOCIATION, (Oct. 28, 2014), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/fall2014-1014-truancy-lawyering-status-offense-cases-access-to-justice.html>.

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

<sup>20</sup> See Puzzenchera & Hockenberry, *supra* note 17.

<sup>21</sup> Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. FOR SOC. JUS. 555, 559 (2009) (citing Juv. Just. Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1122).

<sup>22</sup> *Id.*

<sup>23</sup> For the purposes of this paper, “status offender” is used to describe children who have been found by the court to have committed a status offense. Some states, such as Tennessee, refer to a child who has been deemed by the court to have committed a status offense as an “unruly offender” or an “unruly child.” Other states, such as Washington, refer to children who have been found to have committed a status offense as an “at-risk youth” or a “child in need of supervision.” If an adjudication has not yet occurred, this paper will refer to the children who have been petitioned into court on status offense allegations as “alleged status offenders.”

<sup>24</sup> Coal. for Juvenile Justice, *National Standards for the Care of Youth Charged with Status Offenses*, 11 Copyright Coal. for Juvenile Justice (2013).

<sup>25</sup> Arthur & Waugh, *supra* note 21.

<sup>26</sup> TeamChild, *DSO v. VCO Presentation* (Oct. 7, 2013), <http://www.ccyj.org/uploads/Fact%20sheet/DSO%20v%20VCO10.07.13.3pm.pdf>.

failure to comply with the mandates set forth in the JJDP. For example, “Washington has lost millions of dollars for non-compliance because of failure to meet DSO standards.”<sup>27</sup> Recently, Tennessee has also faced the potential loss of federal funds. In February 2014, Robert Listenbee, the administrator of the Office of Juvenile Justice, called for an investigation regarding non-compliance with the DSO requirement in Tennessee (with a focus on Knox County).<sup>28</sup> The complaint that spurred the investigation alleges that status offenders have been locked up in violation of the JJDP, as well as Tennessee state law, and that status offenders were not appointed counsel before they were detained.<sup>29</sup>

There is, however, an exception to the JJDP’s DSO requirement, of which states can avail themselves without jeopardizing federal funding. In 1980, the JJDP was amended to “allow states to incarcerate status offenders for violations of a valid court order (VCO) . . . without [losing] federal funding.”<sup>30</sup> Some have referred to the VCO amendment as “[t]he exception that swallowed the rule,” as several states use the VCO exception to put status offenders in locked facilities.<sup>31</sup>

VCOs are commonly issued after a child is adjudicated as a status offender. Adjudication occurs one of two ways. Either the child pleads “true” to a status offense or the judge makes findings of fact that support adjudication as a status offender. Remember, juveniles accused of status offenses have no federal constitutional right to the assistance of counsel, and several states fail to appoint counsel to cases involving status offenses.

Once the label “status offender” has been attached to a juvenile, the court can issue a VCO that sets forth specific conditions the status offender must follow. Oftentimes, VCOs require that the status offender attend school daily with no disciplinary problems, not possess alcohol, and comply with curfew.<sup>32</sup> Essentially, these VCO conditions prohibit the status offender from committing a future status offense (e.g., truancy, underage consumption of alcohol, and violation of curfew). If the status offender violates one of these conditions of the VCO, he or she can be found guilty of contempt and sentenced to secured detention for a number of days allowable by state law.<sup>33</sup> A child is entitled to defense counsel once he or she has been accused of violating a VCO, but not until then.<sup>34</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> Ferriss, *supra* note 5; *Juvenile Injustice: Truants Face Courts, Jailing without Legal Counsel to Aid Them*, The Center for Public Integrity (May 9, 2014), <http://www.publicintegrity.org/2014/05/09/14699/juvenile-injustice-truants-face-courts-jailing-without-legal-counsel-aid-them>.

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

<sup>30</sup> Arthur & Waugh, *supra* note 21.

<sup>31</sup> *Id.*

<sup>32</sup> See Appendix A (on file with the journal; available on request –Ed.) for a copy of a VCO that was issued in Knox County, Tennessee in 2009.

<sup>33</sup> 28 C.F.R. § 31.303(f)(3)(iv) (2015).

<sup>34</sup> 28 C.F.R. § 31.303(f)(3)(v)(D) (2015).

Allowing states to incarcerate juveniles for a violation of a VCO condition, when violation of that condition could be classified as a status offense regardless of the existence of a VCO, is a loophole around the general rule that states cannot lock up status offenders. For example, a child cannot be locked up for truancy, but a court can incarcerate a child for his or her failure to attend school as long as there is a VCO that says the child must go to school. Essentially, the VCO exception allows for children to be incarcerated for status offenses, which frustrates the initial purpose of the DSO requirement set forth in the JJDPA. Critics of this exception (there are many) are lobbying for an amendment to the JJDPA that would eliminate the VCO exception. Their argument is that the VCO exception has “significantly undermined the DSO requirement.”<sup>35</sup> What makes the VCO exception more unfair and controversial is the fact that children are not constitutionally entitled to appointed counsel, and are therefore usually unrepresented prior to the VCO being issued.

3. *When are juveniles entitled to a court appointed defense attorney?*

The Sixth Amendment of the United States Constitution states:

*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.*<sup>36</sup>

It is important to note that the rights set forth in the Sixth Amendment apply to “criminal prosecutions.”<sup>37</sup> Although juveniles may be charged with the same offenses that would constitute “crimes” if committed by adults, such acts are labeled as “delinquent acts” when committed by juveniles.<sup>38</sup>

Courts and legislatures deliberately created the distinction between

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<sup>35</sup> See American Civil Liberties Union, *National Sign-On Letter Supporting Elimination of the Valid Court Order (VCO) Exception to the JJDPA* (July 14, 2008), [https://www.aclu.org/racial-justice/prisoners-rights\\_drug-law-reform\\_immigrants-rights/national-sign-letter-supporting-el](https://www.aclu.org/racial-justice/prisoners-rights_drug-law-reform_immigrants-rights/national-sign-letter-supporting-el).

<sup>36</sup> U.S. CONST. amend. VI (emphasis added).

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

<sup>38</sup> The Office of Juvenile Justice and Delinquency Prevention, *Glossary* (Dec. 1, 2014), <http://www.ojjdp.gov/ojstatbb/glossary.html>.



crimes and delinquent acts.<sup>39</sup> For a time, this distinction removed delinquent acts from the realm of “criminal prosecutions” and categorized them as “civil (noncriminal) actions.”<sup>40</sup> Early juvenile courts “emphasized an informal, non-adversarial, and flexible approach to” these civil cases.<sup>41</sup> Along with this informal approach came “few procedural rules that the courts were required to follow.”<sup>42</sup> By classifying delinquent acts as civil actions rather than criminal cases, early juvenile courts could avoid applying the “Bill of Rights safeguards,” including the Sixth Amendment right to counsel, to juvenile cases.<sup>43</sup>

In 1967 the United States Supreme Court extended some of the Bill of Rights safeguards, including the right to counsel guaranteed by the Sixth Amendment, to delinquency cases.<sup>44</sup> The Court’s decision in *In re Gault* refers to the “civil” label that has been attached to delinquency cases as a “label-of-convenience.”<sup>45</sup> The Court looked past this label to the substance of delinquency cases and found that a juvenile’s freedom is at risk in these types of cases.<sup>46</sup> Specifically, a determination of delinquency could carry with it the “awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.”<sup>47</sup> This potential loss of freedom exists despite the fact that the purpose of juvenile courts is to rehabilitate and not to punish.

In *In re Gault*, the Court reasoned that this potential loss of liberty in delinquency cases entitled juveniles to some Constitutional safeguards, including the right to counsel. The Court held that:

[T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.<sup>48</sup>

This holding, however, has limited application. While the Court extended

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<sup>39</sup> See The American Bar Association, Division of Public Education, *The History of Juvenile Justice*, (Nov. 24, 2014), <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf>.

<sup>40</sup> *Id.* at 5.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *In re Gault*, 387 U.S. at 17; *Id.* at 59–60 (Black, J., concurring).

<sup>44</sup> *Id.* at 41.

<sup>45</sup> *Id.* at 50.

<sup>46</sup> *Id.* at 36–37.

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

<sup>48</sup> *Id.* at 41.

the right to counsel in delinquency cases, this holding has not yet been applied to status offense cases.

While the Court has never extended the right to counsel guaranteed by the Sixth Amendment to status offenses cases, there is a situation that can arise *after* a juvenile has been adjudicated as a status offender that entitles him or her to counsel under federal law.<sup>49</sup> After a juvenile is adjudicated as a status offender, a court has the power to issue a VCO setting forth certain mandatory conditions that the juvenile must meet.<sup>50</sup> If a juvenile violates a condition in a VCO, a court may, in compliance with federal law, detain the juvenile in a secured facility. In order for the detention to be deemed “lawful,” the juvenile accused of violating a VCO must have received “full due process rights guaranteed by the Constitution of the United States.”<sup>51</sup> These full due process rights include the right to appointed counsel.<sup>52</sup> Again, it is important to note that this constitutional right to counsel does not attach until after an adjudicated status offender is accused of violating a VCO, as it, technically, is not until this point that a status offender’s liberty is placed in jeopardy.<sup>53</sup>

Some states have broadened the right to counsel for juveniles through state law. Pennsylvania and Maryland have enacted laws that require courts to immediately appoint counsel to status offense cases.<sup>54</sup> In Tennessee, children are entitled to defense counsel in “proceedings alleging unruly conduct that place the child in jeopardy of being removed from the home.”<sup>55</sup> The definition of “unruly child” in Tennessee includes “a child in need of treatment and rehabilitation who commits an offense that is applicable only to a child.”<sup>56</sup> Both Tennessee Code Annotated § 37-1-126(a)(1) and Tennessee Supreme Court Rule 13 specify that a child who is in danger of being removed from his or her home should have a defense attorney appointed, specifically, a defense attorney from the public defender’s office.<sup>57</sup> While Tennessee does provide counsel for unruly

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<sup>49</sup> 28 C.F.R. § 31.303(f)(3)(v)(D)(2015).

<sup>50</sup> Arthur & Waugh, *supra* note 21.

<sup>51</sup> 28 C.F.R. § 31.303(f)(3)(i) (“For the purpose of determining whether a valid court order exists and a juvenile has been found to be in violation of that valid order all of the following conditions must be present prior to secure incarceration: The juvenile must . . . have received the full due process rights guaranteed by the Constitution of the United States.”).

<sup>52</sup> 28 C.F.R. § 31.303(f)(3)(v)(D)(2015).

<sup>53</sup> This assertion assumes that the law is being followed. There have been cases where juveniles accused of status offenses have been illegally incarcerated. *See e.g.*, Ferriss, *supra* note 5.

<sup>54</sup> MD. CODE ANN., Cts. & Jud. Proc. § 3-8A-20(a); Md. R. Juv. Causes 11-106; Ferriss, *supra* note 5.

<sup>55</sup> TENN. CODE ANN. § 37-1-126(a)(1)(2014).

<sup>56</sup> TENN. CODE ANN. § 37-1-102(b)(23)(2014).

<sup>57</sup> Klieser, *supra* note 9 (The court often looks at the requirement that the public defender’s office be appointed to unruly cases in which the child is at risk of being removed from his or her home. Rather than appointing defense counsel, who are “expressed-interest”

children who are at risk of being removed from their homes, it fails to immediately appoint defense counsel to status offense cases. Tennessee is not alone in its decision not to extend the right to counsel to status offense cases. In fact, the vast majority of states have refused to provide appointed counsel to status offense cases. Furthermore, in some jurisdictions courts have gone beyond simply refusing to appoint lawyers to status offense cases and have begun to engage in behavior that discourages children from requesting attorneys.<sup>58</sup> There also have been shocking accounts of judges who have acted in ways that have discouraged attorneys from taking status offense cases “pro bono.”<sup>59</sup>

Due to this national negative attitude toward appointing counsel to status offense cases, juveniles who are accused of status offenses, but have not yet been adjudicated, often have to navigate juvenile court without any legal guidance. This lack of counsel can lead to VCOs being unfairly entered against them, along with a host of other problems that will be discussed in the next section of this paper.<sup>60</sup>

#### 4. *Why Defense Counsel is Necessary in Status Offense Cases*

The United States Supreme Court in *In re Gault* articulated justifications for providing counsel to juveniles who are accused of delinquent acts:

The juvenile needs the assistance of counsel to cope with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain, whether he has a defense and to prepare and submit it. The child “requires the guiding hand of counsel at every step in the proceedings against him.”<sup>61</sup>

The justifications for appointing counsel to delinquency cases are equally applicable in the context of status offense cases.<sup>62</sup> Children accused of status offenses are just as in need of the “guiding hand of counsel” to lead

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attorneys, to these cases, the court usually appoints Guardians Ad Litem, who are “best-interest” attorneys. This is a problem in itself, but discussion of it will be left for another day.)

<sup>58</sup> See Russel K. et al., CJJC, *Representation of Minority Youth: An Exploratory Study*, 8, (accessed Nov. 29, 2014), <http://www.justice.utah.gov/Documents/Research/Race/MinorityRepresentation.pdf>.

<sup>59</sup> See Ferriss, *supra* note 5 (Judge Irwin, the elected juvenile court judge in Knox County, “has refused to allow volunteer lawyers to set up a project at the courthouse to offer free counsel to accused truants as they arrive with their parents for hearings . . .”).

<sup>60</sup> Coal. for Juvenile Justice, *Use of the Valid Court Order: State-by-State Comparisons*, [http://www.bscc.ca.gov/downloads/State\\_VCO.pdf](http://www.bscc.ca.gov/downloads/State_VCO.pdf).

<sup>61</sup> *In re Gault*, 387 U.S. at 36.

<sup>62</sup> See Rivkin & McGee, *supra* note 18.

them through the complexities of juvenile court and onto the path toward becoming a productive citizen.<sup>63</sup>

Those people who oppose extending the holding in *In re Gault* to status offense cases attempt to differentiate the effects of being adjudicated a “delinquent” child versus the effects of being adjudicated a “status offender.” In differentiating between delinquents and status offenders, these opponents often discount the plight of status offenders. According to Dean Rivkin, an Education Law professor at the University of Tennessee College of Law, the distinction drawn between delinquents and status offenders can amount to a “cruel hoax.”<sup>64</sup>

Several justifications exist for extending the right to counsel to juveniles accused of status offenses. The following two sub-paragraphs will focus on specific reasons why alleged status offenders should be entitled to appointed counsel immediately upon being petitioned into juvenile court. The main two reasons being that status offenders, like delinquents, are often victims of underlying problems and are subjected to harsh collateral consequences—the harshest of which is incarceration.

- A. *Defense attorneys can prevent their juvenile clients from having to endure negative collateral consequences by aiding the juvenile justice system in identifying underlying issues that their clients are facing, wielding those issues as valid defenses, and then helping their clients to address those issues effectively.*

One argument frequently made by those opposed to a broader reading of *In re Gault* is that status offenders do not need representation because they face less serious collateral consequences than children who are adjudicated “delinquent.”<sup>65</sup> For example, if a child commits theft and is then adjudicated delinquent, that child may or may not have a more difficult time finding employment than a status offender who was caught violating curfew once when he was 16 years old.<sup>66</sup> Just because adjudication might not follow a status offender throughout his or her whole life, however, does not mean that adjudication cannot have a serious impact on the child’s life.

Status offenders “are often saddled with intrusive sanctions and conditions that, for all practical purposes, are as severe as those faced by

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<sup>63</sup> *In re Gault*, 387 U.S. at 36.

<sup>64</sup> Rivkin & McGee, *supra* note 18.

<sup>65</sup> Klieser, *supra* note 9 (while the collateral consequences associated with adjudication as a status offender are not always terribly serious in terms of the adjudication haunting the “offender” throughout his or her adult life, court involvement does have a lasting impact on youth).

<sup>66</sup> *But see* Ferriss, *supra* note 5 (Status offenders found out years later that they had been given delinquency records, which “are comparable to a youth having committed a crime, and that can taint job and other types of applications if a court does not agree to expunge them.”).

juveniles in delinquency cases, where there is a right to counsel.”<sup>67</sup> Direct and collateral consequences that stem from adjudication as a status offender include: “incarceration,<sup>68</sup> 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 . . . .”<sup>69</sup> All of these consequences can lead to other hardships. For example, perhaps the “status offender” who loses her license is a teenage mother. Loss of her license could hinder her ability to get to a job that helps her support herself and her child. It could also mean that she loses her ability to freely transport her child to daycare, doctor appointments, etc.

Recursive court involvement also creates hardships for (alleged and adjudicated) status offenders and their families (if they have familial support), as it might require involved parties to miss work and to make transportation arrangements (or risk getting in more trouble for failure to appear). Additionally, continued court involvement can significantly affect a child psychologically and emotionally.<sup>70</sup> Not only can court appearances cause stress and anxiety, but studies have shown that “[i]nvolvement in the court system for a status offense can lead to deeper justice system involvement . . . the longer youth are court-involved the greater the likelihood that they may enter and become embroiled in the justice system.”<sup>71</sup> Many blame this fact on the “self-fulfilling prophecy” phenomenon.<sup>72</sup> In other words, the child realizes that he or she is being labeled a certain way, as a “status offender” or “pre-delinquent” in this context, and then conforms his or her behavior to that label.<sup>73</sup> This type of collateral consequence not only impacts the lives of status offenders but also society. Funneling children into the juvenile, and eventually criminal, court systems, costs the taxpayers money and does little to address the underlying issues present in the individual’s life. Status offenders would be better helped by programs outside of the court system that can address the issues these children are facing and help them to become productive members of society.

Many of these negative consequences can be avoided if defense counsel is immediately appointed to status offense cases. Some might ask

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<sup>67</sup> Rivkin & McGee, *supra* note 18.

<sup>68</sup> See the below discussion regarding VCOs and illegal incarceration of status offenders.

<sup>69</sup> Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [to] Education*, Duke Forum for Law & Social Change 139, 141 (2011).

<sup>70</sup> See Samantha Buckingham, *A Tale of Two Systems: How Schools and Juvenile Courts are Failing Students*, Loyola Law School Los Angeles, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS (2013).

<sup>71</sup> Coal. for Juvenile Justice, *supra* note 24.

<sup>72</sup> See Buckingham, *supra* note 70.

<sup>73</sup> Jessica R. Kendall, *Juvenile Status Offenses: Treatment and Early Intervention*, American Bar Association, Division for Public Education (Catherine Hawke ed., 2007).

why these consequences need to be avoided—after all the child chose to get into trouble, right? Maybe punishing these children will change their behavior? Wrong. Status offenders, as well as delinquents, often have underlying issues that contribute to, or directly cause, the unfavorable behavior. Unless these issues are addressed in constructive ways, rather than overlooked, status offenders (alleged and adjudicated) are unlikely to change their behavior.

“Adolescents who engage in status offense behaviors often come from broken homes, have suffered childhood trauma, and have unmet mental health and/or education needs.”<sup>74</sup> Statistics show that “46% of runaway and homeless youth reported being physically abused, 38% reported being emotionally abused, and 17% reported being forced into unwanted sexual activity by a family or household member.”<sup>75</sup> Furthermore, several runaways suffer from substance abuse and suicidal tendencies.<sup>76</sup>

Like runaway youth, children who are truant from school, are often victims of underlying problems. Truancy, the most common status offense, is frequently the result of inadequate identification of special education needs, bullying, an unsafe school environment, domestic violence, teen pregnancy or parenthood, unmet mental health needs, alcohol and drug abuse, or a combination of these factors.<sup>77</sup>

If a child can show that their alleged status offense behavior stems from one of these underlying problems, most courts are likely to view the underlying problem as a valid defense to the status offense petition. Some state statutes are explicit in stating that a child cannot be adjudicated as a status offender if their behavior is “justified.” For example, in order for a child to be found truant in Tennessee, the court must find that the child is habitually missing school “without justification.”<sup>78</sup> The list of underlying issues above will usually qualify in the court’s eyes as “justified reasons” for missing school in Tennessee.

The problem is that, without an attorney, a child is unlikely to recognize that he or she has a valid defense. In fact, studies have shown that most children accused of status offenses plead “true” to the allegations because they do not realize they have other options.<sup>79</sup> In cases where children proceed unrepresented but do not plead “true” to the allegations, courts usually make a finding that the child committed a status offense and adjudicate the child as a status offender because the child is unable to present a defense. Once adjudicated, status offenders are likely to be

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<sup>74</sup> Arthur & Waugh, *supra* note 21, at 555.

<sup>75</sup> Coal. for Juvenile Justice, *Girls, Status Offenses and the Need for a Less Punitive and More Empowering Approach*, (2013).

<sup>76</sup> Kendall, *supra* note 73.

<sup>77</sup> *Id.*

<sup>78</sup> TENN. CODE ANN. § 37-1-102(b)(23)(A)(2014).

<sup>79</sup> Rivkin, *supra* note 69, at 141.

subjected to the negative collateral consequences that were previously identified.

A defense attorney can prevent adjudication by presenting a valid defense to the court. By informing the court of any underlying issues that a particular child is facing, explaining how these issues are causing the child to commit status offenses, and arguing that these issues are best dealt with outside of the court, an attorney might be able to keep the court from adjudicating a child as a status offender, thus, protecting the child from enduring collateral consequences.

Even if the attorney fails in keeping the child from being adjudicated as a status offender, the attorney can persuade the court as to the appropriate disposition. For example, the attorney can oppose unfair VCO conditions, explain why certain orders might do more harm than good to a particular child, lobby for services that the client wants to utilize, and appeal illegal incarcerations and other excessive punishments.

In addition to preventing children from enduring negative collateral consequences, appointment of defense counsel to status offense cases can help further the goal of juvenile courts, which is to rehabilitate and not to punish status offenders, in two ways. First, the appointment of counsel to a status offense case makes it more likely that the root of that child's behavior is uncovered and addressed. Children who are accused of status offenses and hauled into court might believe that adults are just out to get them. Maybe their needs are not being met at home or at school, which and this breeds distrust of adults in positions of authority. A child who suffers at the hands of an abuser, has a drug or alcohol problem, or struggles academically might not want to share this information with the court. Maybe the child is embarrassed, protecting someone, or scared that the court might use this information against the child later. To avoid embarrassment, further abuse at home, or self-incrimination (on a more serious issue), the child might say what he or she thinks the judge wants to hear and plead "true" to the allegations contained in the status offense petition. Or perhaps, the child is comfortable sharing information with the court, but the judge does not get to know the child well enough to ask the right questions that would uncover underlying issues. If information pertaining to underlying problems in the child's life are not brought to light, the court cannot get to the root of the child's problems, which makes it more likely that the child will remain involved in juvenile court proceedings.

If, however, an attorney is appointed to a child's status offense case, the attorney can explain that he or she is bound by the rules of professional responsibility and is there to represent only the child's expressed interests. A child might be more willing to share sensitive information with his or her attorney—once a relationship of trust is built—than with the court. The attorney is in a better position to ask the child questions and to identify key issues. If the attorney learns that the child is

dealing with underlying issues, the attorney can explain the benefits of disclosing certain facts to the court. With the client's permission, the attorney can pursue the best course of action.

Immediate appointment of defense counsel is ideal, because it allows attorneys to discover any underlying issues early on in the representation and makes it possible to act preemptively. For example, if the attorney discovers that the child is a victim of bullying and that is why he or she has not been going to school, then the attorney can meet with the school board and get a safety plan in place. This type of action addresses the issue outside of the court system and keeps the child from being labeled a "status offender" and from having to make multiple trips to juvenile court. The child is happy because he or she feels protected by the safety plan and the court is happy because the child is going to school.

Further, defense attorneys can aid the juvenile court in accomplishing its purpose by offering meaningful counseling to (alleged and adjudicated) status offenders. According to the Coalition for Juvenile Justice, "[e]mpowering youth early to understand the status offense process and its repercussions can also serve as an important tool to encourage shared responsibility in resolving problems and limiting court involvement."<sup>80</sup> By explaining the court process and a child's options, an attorney can both alleviate stress and anxiety and can also give the child a meaningful opportunity to evaluate his or her choices. The child, after hearing the pros and cons of available options, might be willing to voluntarily participate in services or plans that will help alleviate his or her underlying problems. A child who takes control of his or her situation and decides to get help with underlying problems is less likely to re-enter the court system.

Finally, if a child chooses to plead guilty to alleged status offenses or is adjudicated as a status offender, an attorney needs to explain any conditions of probation or conditions of VCOS. If a child understands these conditions, he or she is less likely to inadvertently violate them and, thus, less likely to wind up back in court—or incarcerated.

*B. Incarceration of juveniles for violations of status offenses and Valid Court Orders is "harmful and counterproductive"<sup>81</sup> and could be prevented in many cases by immediately appointing defense counsel to status offense cases.*

Another argument that is frequently made by those who oppose extending the holding of *In re Gault* to status offenses is that, unlike delinquent children, status offenders are not at risk of being incarcerated. Status offenders, therefore, do not need the full due process protections,

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<sup>80</sup> Coal. for Juvenile Justice, *supra* note 24.

<sup>81</sup> Arthur & Waugh, *supra* note 21, at 557.



such as the right to counsel.<sup>82</sup> This argument, however, is without merit. Not only do adjudicated status offenders get locked up under the VCO exception, but some states incarcerate status offenders before they are found to have violated a VCO condition—and in some cases, before they are found to have committed a status offense.

The prevalence of the VCO exception, known as the “exception that swallowed the rule” against incarcerating status offenders, has made locking up “status offenders” both possible and common.<sup>83</sup> In 2013, twenty seven of fifty five U.S. states and territories that participate in the JJDPa reported using the VCO exception.<sup>84</sup> In these twenty seven jurisdictions, “approximately 9,850 VCO-related detention orders are issued annually.”<sup>85</sup>

Essentially, the VCO exception is a loophole that allows for children to be incarcerated for status offenses, which frustrates the initial purpose of the DSO requirement set forth in the JJDPa. For example, a child can be incarcerated for violating curfew or missing school, both of which are status offenses, if a VCO that prohibits these behaviors has been entered against the child.

Before a child can be incarcerated for violating a VCO, the child is entitled to be represented by defense counsel at a hearing.<sup>86</sup> At this hearing, a judge will decide whether the child did or did not violate the VCO. Hearings on violations of VCOs are similar to revocation of probation hearings in criminal courts. Revocation of probation hearings involve an allegation that the defendant violated his or her probation. If a court finds that the defendant did violate his or her probation, the court may impose a suspended sentence of incarceration.<sup>87</sup>

In *Alabama v. Shelton*, the United States Supreme Court held that “a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged.”<sup>88</sup> In *Shelton*, an amicus brief was filed, in which *Amicus* asserted that if a defendant is given counsel at the revocation of probation hearing, it should not matter whether the defendant was represented at trial (at which the suspended sentence was ordered). The Court disagreed with *Amicus*: “We think it plain that a hearing to timed and structured cannot compensate for

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<sup>82</sup> *But see* Rivkin & McGee, *supra* note 18 (“Other courts, recognizing the flawed justifications for punishing status offenders, have called for a heightened standard of due process.”).

<sup>83</sup> Arthur & Waugh, *supra* note 21, at 560.

<sup>84</sup> Coal. for Juv. Just., *supra* note 60.

<sup>85</sup> Jodi Martin, TeamChild, Presentation to Becca Conference: DSO v. VCO, (October 7, 2013).

<sup>86</sup> 28 C.F.R. § 31.303(f)(3)(v)(D)(1996).

<sup>87</sup> *See* *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (“A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense.”).

<sup>88</sup> *Id.* at 658 (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)).

the absence of trial counsel, for it does not even address the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration.”<sup>89</sup>

In cases involving status offenders and alleged violations of VCOs, courts should apply a rule similar to the one articulated in *Shelton*. Just as a suspended jail sentence cannot be imposed on a defendant who was unrepresented at trial, a child should not be jailed for violating a condition set forth in a VCO if that child was not represented by counsel at the time the VCO was entered. While a jail sentence stemming from a violation of a VCO is not a “suspended sentence,” the *Shelton* Court’s logic still holds true. Just as *Shelton*, who was unrepresented at trial, did not have the opportunity to meaningfully attack the underlying adjudication that later led to him having to serve a jail sentence, status offenders who are unrepresented by counsel on status offense petitions never have the opportunity to meaningfully attack underlying adjudications that lead to the entry of VCOs (violations of which can lead to incarceration). In *Shelton*’s case, the Court reasoned that, without the representation of counsel, it could not be fairly determined whether the suspended sentence was warranted. Similarly, in cases where status offenders are not represented by counsel at the initial proceeding, it cannot be fairly determined whether the entry of a VCO was warranted. Perhaps the child is a victim of underlying problems that would have excused his or her status offense behavior.

The VCO exception is, unfortunately, not the only way that status offenders wind up in detention. Some jurisdictions incarcerate status offenders (both alleged and adjudicated), despite the existence of the JJDPA and, in some cases, despite the existence of state laws that prohibit the incarceration of status offenders.<sup>90</sup>

A.G. is a prime example of a child who was incarcerated in violation of both Tennessee and federal law.<sup>91</sup> A.G. was not even 15 years old when she was petitioned into Knox County Juvenile Court on a truancy petition. After pleading guilty to truancy without legal representation, A.G. was sent straight to detention. According to A.G., who was a victim of bullying at school, she was never offered an attorney.<sup>92</sup>

Elizabeth Diaz, a Texas teen, is another example of a child who was jailed in violation of federal law. Elizabeth was assessed \$1,600 in fines after being adjudicated on a truancy petition. These fines were assessed against her in a proceeding in which she had no counsel. Because

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<sup>89</sup> *Id.* at 667.

<sup>90</sup> See Martin, *supra* note 85; Ferriss *supra* note 5 (“In Tennessee, as in many states, statutes theoretically limit juvenile courts to initially responding to truants [and other “status offenders”] . . . by issuing them monetary fines, ordering them to perform community service and putting them on probation, with instructions to follow, and initiating the valid court order process.”).

<sup>91</sup> Ferriss, *supra* note 5.

<sup>92</sup> *Id.*

of her failure, which stemmed from her inability, to pay these fines, Elizabeth was jailed for 18 days in an adult county jail.<sup>93</sup> A federal court later ruled that her “detention for failing to pay fines she could not afford was an unconstitutional violation of due process.”<sup>94</sup>

Given the existence of the VCO exception, as well as the stories of A.G. and Elizabeth, it is clear that status offenders are in fact being incarcerated. The effects of incarceration should not be marginalized, as they are severe and long-lasting.<sup>95</sup> For example, “research has . . . shown that the minute a youth sets foot in detention or lock-up, he or she has a 50 percent chance of entering the criminal justice system as an adult.”<sup>96</sup> Studies have shown that status offenders are often exposed to seriously delinquent youth while in detention. This exposure often puts status offenders “in jeopardy of developing the more deviant attitudes and behaviors of higher-risk youth, such as anti-social perspectives and gang affiliation.”<sup>97</sup>

Additionally, “placing non-delinquent youth in detention facilities also exposes them to . . . a risk [of] physical and sexual assault from staff and other incarcerated youth.”<sup>98</sup> But the harm does not end there. Many children who are incarcerated suffer psychological damage. A.G., for example, “who was already in counseling, was so shattered by her shackling and detention that [she] . . . had become suicidal, and she spent the next week in a psychiatric hospital.”<sup>99</sup>

Incarceration of status offenders is happening and it is having devastating effects on our nation’s youth. Early appointment of defense counsel could strongly reduce the number of status offenders who are incarcerated, and thus damaged by incarceration, by: 1) giving the child, through his or her attorney, the opportunity to assert a defense to the allegations contained in the petition, thus making it less likely that the child will be adjudicated a status offender (which would prevent the imposition of a VCO); 2) in situations where entry of a VCO cannot be prevented, counsel can advocate for unrealistic or unfair conditions to be removed, making it more likely that the child will be able to comply with the conditions and less likely that the child will be incarcerated for a violation;

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<sup>93</sup> Susan Ferriss, JUVENILE INJUSTICE: TRUANTS FACE COURTS, JAILING WITHOUT LEGAL COUNSEL TO AID THEM, The Center For Public Integrity (updated May 22, 2014, 3:47 PM), <http://www.publicintegrity.org/2014/05/09/14699/juvenile-injustice-truants-face-courts-jailing-without-legal-counsel-aid-them>.

<sup>94</sup> *Id.*

<sup>95</sup> Coal. for Juvenile Justice, *supra* note 24, at 82 (discussing the “damaging effects” that detention can have on children).

<sup>96</sup> *Id.*

<sup>97</sup> Marc Levin & Dereck Cohen, Texas Public Policy Foundation, *Kids Doing Time for What’s Not a Crime: The Over-Incarceration of Status Offenders* (March 2014).

<sup>98</sup> Coal. for Juvenile Justice, Fact Sheet: Deinstitutionalization of Status Offenses Core Protection (2014).

<sup>99</sup> Ferriss, *supra* note 5.

and 3) should the judge try to put the child in detention in violation of state or federal law, the child will have an attorney there to point out the illegality of the incarceration and to strongly oppose it. Should the attorney fail in his or her opposition, he or she can appeal the judge's illegal incarceration of the child.

### III. THE IMPORTANCE OF HOLISTIC REPRESENTATION IN JUVENILE CASES

Given the serious collateral consequences that can stem from adjudication as a status offender, juveniles should be appointed counsel as soon as a status offense petition is filed. The question then becomes, "what type of representation should the alleged status offender receive?" First and foremost, the child should have a *defense* attorney appointed to his or her case,<sup>100</sup> as opposed to a Guardian Ad Litem, or "best interests" lawyer.<sup>101</sup> Appointment of *defense* attorneys to status offense cases ensures that the child's voice is being heard, as opposed to one more adult standing up in court and expressing what he or she thinks the child needs. Allowing the child to have a say in his or her own life makes it more likely that the child will take control of the situation and work with the court toward a favorable solution. If the child feels as though all of the adults, including the child's own "attorney," are making decisions for him or her, the child might be more resistant to proposed plans and solutions.

Additionally, an attorney who explains that he or she can represent only the child's expressed interests is more likely to gain the child's trust than an adult who tells the child that they will decide what is best for the child and will recommend that course of action to the court, regardless of what the child wants. By earning the client's trust, defense attorneys might be more likely to gain important information as to the inner workings of the child's life. Without this information, it is difficult to determine whether the client has any underlying issues and what options are available to help the child.

Finally, a child's defense attorney might be the only adult in the room who has an interest in ensuring that the child's rights are not violated.<sup>102</sup> While parents, judges, and Guardians Ad Litem usually have

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<sup>100</sup> Coal. for Juvenile Justice, *supra* note 24, at 73–74 (asserting that youth charged with status offenses should be represented by *defense* counsel, and that defense counsel should represent only the child's expressed interests).

<sup>101</sup> Best interest lawyers are the "eyes and ears" of the court. A "best interest" lawyer could consider all of the information disclosed to them by the child and then advocate for a disposition contrary to what the child wants. Courts are usually partial to the opinions of best interest lawyers, because they are supposed to be objected. Hypothetically, a best interest lawyer could advocate for incarceration of a child. For example, maybe the attorney thinks incarceration will keep a runaway safer (despite overwhelming evidence of the damaging effect of detention on children) than living in his or her car. The attorney can advocate for detention, and the court just might go along with it.

<sup>102</sup> See Coal. for Juvenile Justice, *supra* note 24, at 73–74.

the child's best interests at heart, the "remedy" these adults propose are not always fair and often times do more harm than good. Defense attorneys can advocate for fair dispositions (including dismissal if appropriate) and alternative solutions that do not involve court involvement.

Once a defense attorney is appointed to a juvenile case (status offense and delinquent cases alike), he or she should provide "holistic representation" to the child client. While some juvenile advocates attempt to engage in holistic representation, there are many defense attorneys who refrain from addressing all of the child's issues and, instead, represent the child only on the matter to which he or she has been appointed (or hired to handle).<sup>103</sup> In fact, traditional public defender offices are not based on a holistic representation model.<sup>104</sup> This type of single-issue representation is unacceptable, especially in the context of juvenile cases. If underlying issues are not addressed, the child's behavior probably will not change, and the child will likely remain court-involved. This result is detrimental to the individual client and to society.

In order to see why "holistic representation" is beneficial, one needs to understand what it entails. While there is no single definition, "holistic representation" is best described as a "best practices model of juvenile representation, incorporating social workers and education advocates as a part of the juvenile defense team."<sup>105</sup>

The Public Defender Service ("PDS") for the District of Columbia is the model for holistic representation of juveniles. In addition to social workers and education advocates, PDS also employs civil attorneys to help with housing and other social issues.<sup>106</sup> At PDS, defense attorneys are expected to thoroughly investigate a child's case and identify any underlying issues, such as unmet educational needs, mental health concerns, and abuse in the home.<sup>107</sup> Upon identifying an issue, the defense attorney is expected to address it, but must address it in a way that does not conflict with the child's expressed interests. For example, if a child is in need of drug treatment, the attorney is expected to help the child find treatment if the child is not opposed to obtaining such help.<sup>108</sup>

If a child's needs are more complicated and involve more than one or two underlying issues, the PDS defense attorney, after consulting with the client, has the option of referring the child to a social worker, education

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<sup>103</sup>Klieser, *supra* note 9 (The Knox County Public Defender is striving to provide more holistic representation to juvenile clients. For example, the office contracts with an education advocate who participates as part of the defense team. The office also employs a social worker as part of the defense team).

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

<sup>105</sup>Buckingham, *supra* note 70.

<sup>106</sup>McElhinny, *supra* note 10.

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

<sup>108</sup>*Id.*

advocate, or civil attorney, all of whom are part of the defense team.<sup>109</sup> The child always has the right to accept or reject any service.<sup>110</sup> Hannah McElhinny, a Juvenile Defender with the Public Defender Service of the District of Columbia, however, stated that, in her experience, it is uncommon for a child to reject help that is being offered through members of the defense team because they know that the information they provide will remain confidential.<sup>111</sup> If the social workers, education advocates, or civil attorneys are overwhelmed with high caseloads, the responsibility to address the client's issues goes to the defense attorney so that no issue falls through the cracks.

For those who engage in holistic representation of their clients, there is no doubt that the holistic model is the best model. Christina Klieser, Knox County Juvenile Public Defender, stated that "there might not be empirical evidence to show that holistic practice is the best practice, but you know it everyday."<sup>112</sup> Ms. McElhinny echoed this opinion. She claims that in her fifteen years as a juvenile defender engaging in holistic representation of clients, she has seen more successes than failures.<sup>113</sup>

Holistic representation is absolutely critical. There is little a criminal defense attorney can do to change the trajectory of a kid's life. You can help them not fall off a cliff, but [without holistic representation] what brought them in won't change. Getting them connected to services, however, can change the trajectory [of the kid's life].<sup>114</sup>

J.H., a former client of the Education Law Practicum at the University of Tennessee College of Law, is a prime example of a child who has been helped by holistic representation. J.H., a single teenage mother and a victim of school-based bullying, was referred to the practicum. The school system was threatening to file a truancy petition if J.H. continued to miss school. After an initial interview with J.H., it became clear that her failure to attend school was due to, in large part, the bullying she was suffering at school. Additionally, she had picked up a delinquency charge while out with the father of her child and some school "friends."

Ultimately, the Practicum succeeded in placing J.H., at her request, in an alternative school where she would not come into contact with the school bully, would not be around the "friends" with whom she got into

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<sup>109</sup> McElhinny, *supra* note 10 (Ms. McElhinny believes that social workers and civil attorneys become members of the defense team through employment contracts.).

<sup>110</sup> Giving the child the option to accept or reject services is in line with expressed interest lawyering.

<sup>111</sup> This is not necessarily the case with "help" offered from court-employed social workers.

<sup>112</sup> Klieser, *supra* note 9.

<sup>113</sup> McElhinny, *supra* note 10.

<sup>114</sup> *Id.*

trouble, and could take classes on a schedule that was better suited for a single mom who relied on others for transportation. Additionally, the practicum helped J.H. obtain an order of protection against the bully, who was stalking J.H. Once J.H. was protected by an order of protection and content with a new school placement, J.H. ceased to be court involved. Currently, she has no cases pending in juvenile court, is catching up in her classes, and is working a job and saving money for college.

IV. HOW DO WE MOVE IN THE DIRECTION OF CORRECTING THESE TWO FUNDAMENTAL FLAWS—THE FAILURE OF COURTS TO APPOINT DEFENSE ATTORNEYS TO REPRESENT STATUS OFFENDERS AT ALL STAGES OF THE CHILD’S CASE AND THE FAILURE OF DEFENSE ATTORNEYS TO ENGAGE IN HOLISTIC REPRESENTATION OF CHILD CLIENTS—WITH THE JUVENILE JUSTICE SYSTEM?

It has been established that, for various reasons, status offenders should be entitled to defense counsel immediately upon becoming court-involved. It has also been established that “holistic representation” of juveniles is key to keeping them out of the court system.<sup>115</sup> If the goals are 1) to ensure that defense counsel is appointed to every status offense case, and 2) that defense counsel provides holistic representation to every child client, then the question becomes, how do we achieve those goals?

First, to achieve the first goal—ensuring that defense counsel is appointed to every status offense case—a federal law, either promulgated through the enactment of a statute or through a Constitutional decision, that mandates the appointment of defense counsel to all children accused of status offenses would be ideal. In the alternative, laws to the same effect enacted in all U.S. jurisdictions would suffice.

A United States Supreme Court decision holding that status offenders have a Constitutional right to appointed counsel is not likely to occur, at least not anytime soon, because status offenders are not usually represented by counsel. Without legal representation, status offenders might be unaware of their ability to appeal the juvenile court’s decision on constitutional grounds or, where applicable, to file a writ of habeas corpus on the grounds that the child, who was deprived of due process, is being held in detention illegally.<sup>116</sup> This situation is a catch-22. The only way to become constitutionally guaranteed counsel is to be represented by counsel.

Not only must an appeal or a writ of habeas get filed somehow, but

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<sup>115</sup> Keeping status offenses out of court altogether and forcing other systems, such as the education and child welfare systems, to do their jobs well is the ideal scenario. That “ideal scenario” is really only occurring in a few states right now. The purpose of this paper, therefore, is to identify ways to protect status offenders—by appointing defense counsel to their cases and requiring that defense counsel provide holistic representation—when they are faced with court-involvement.

<sup>116</sup> *In re Gault* reached the United States Supreme Court after a writ of habeas was filed.

the Supreme Court must also agree to hear the case. The Supreme Court receives about 7,000 requests to hear cases each year.<sup>117</sup> Of these 7,000 cases, the Court usually selects 80–100 to hear.<sup>118</sup> Given that status offenses are viewed as less serious offenses and juveniles are not supposed to be incarcerated, this issue is not a particularly “hot topic.” Furthermore, the Court is not receiving many requests to hear these types of cases because there are not attorneys filing the appellate paperwork in these types of cases.

Moreover, it is not enough just to get a case in front of the Supreme Court. Children accused of status offenses only benefit from a favorable decision. In order for the Supreme Court’s review of a case to help status offenders, the Court must hold that failing to immediately provide counsel to children accused of status offenses is a violation of the federal constitution (either under the Sixth Amendment Right to Counsel, the Fourteenth Amendment Due Process Clause, or both). Given the Court’s “actual imprisonment” standard it has developed to determine whether failure to appoint counsel in criminal cases constitutes a violation of the Sixth Amendment, it is unlikely that the court would rule favorably to status offenders.<sup>119</sup>

Statutes mandating the appointment of counsel to status offense cases might also prove hard to pass. There are two key problems that hinder the ability, or willingness, of legislatures (both federal and state) to enact this type of statute. First, legislators are preoccupied with resolving other issues, such as “hot button” topics and “pet projects,” which in their minds might be more pressing than juvenile justice reform. Additionally, legislators might not realize that the lack of counsel in status offense cases exists, or that it is a problem.

The second problem that hinders the ability of legislatures to pass statutes can be summed up in two words: “the budget.” Both federal and state governments have tight budgets with which to work. Taking resources away from one program is sometimes only the only way to make implementing a new program feasible. Requiring states to appoint counsel to status offense cases comes with a financial cost, and it is this cost that some state legislatures cannot get past. Take the Tennessee legislature, for example: “State Sen. Andy Berke, D-Chattanooga, introduced a bill earlier this year that would have granted truancy defendants the right to a lawyer. The bill stalled in a Senate subcommittee after a fiscal note placed its

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<sup>117</sup> The Leadership Conference, *U.S. Supreme Court*, <http://www.civilrights.org/judiciary/courts/supreme.html> (last accessed Dec. 1, 2014).

<sup>118</sup> *Id.*

<sup>119</sup> *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that “the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense”).



potential cost at more than half-million dollars statewide.”<sup>120</sup>

Those who oppose appointing defense counsel to status offense cases based on the financial costs usually overlook the benefits, financial and otherwise, of providing counsel to status offenders immediately upon becoming court-involved: “Weighing quantifiable additional costs of providing appointed counsel against the difficult-to-quantify benefits that would flow from reducing juvenile court involvement and obtaining better educational and economic outcomes for youth accused of status offenses is a one-sided calculus: the cost of appointed counsel will invariably block reform.”<sup>121</sup>

Education, however, can help increase the likelihood that statutes will be enacted and that a favorable Constitutional ruling will be made. The first step in the education process is informing the members of the public of what is happening in their own communities. Advocates of juvenile justice reform can appeal to the public emotionally by pointing out the travesties that are occurring daily. They can tell the public about individual children with mental health issues who are being jailed for failing to go to a school—a school that, in all likelihood, did the bare minimum (if it did anything at all) to help the child succeed. They can write newspaper articles about runaway children, who have already suffered abuse at home, having to share a cell in detention with a delinquent sex offender.<sup>122</sup> They can publish articles on websites and blogs that document the negative effects incarceration has on children. They can reach out to local media and ask them to do stories on why defense counsel is crucial to a status offender’s future. In all of these ways, advocates for juvenile justice reform can begin to educate the public about the need for counsel in status offense cases.

The next step in the educational process is educating people about how appointing counsel actually saves taxpayers money and improves society. Appointing counsel to status offense cases improves society because the presence of counsel makes it more likely that the child’s needs will be addressed, thus keeping the child out of court and detention. If the child is not court-involved or detained, he or she is most likely on the path to becoming a productive member of society. Furthermore, appointing counsel to status offense cases early on will save society money in the long run. Collateral consequences, such as recursive court involvement and incarceration of status offenders, end up costing taxpayers more money than appointing counsel to status offense cases would cost. According to the Coalition for Juvenile Justice, “Not only is incarcerating our children expensive- costing nearly \$241 a day . . . Research shows that community-based programming, on the other hand, is more cost-effective, and is more

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<sup>120</sup> Matt Lakin, *End to practice of locking up truants sought*, KNOXVILLE NEWS SENTINEL (October 7, 2012).

<sup>121</sup> Rivkin & McGee, *supra* note 18.

<sup>122</sup> Coal. for Juvenile Justice, *supra* note 24.

likely to help meet the young person's underlying needs."<sup>123</sup>

By appointing counsel early, the attorney can help address underlying issues. Once these issues are resolved, children tend to stay out of court and detention facilities. Educating members of the public on the hard to quantify benefits of appointing counsel and encouraging them to lobby their legislatures on behalf of status offenders makes it more likely that, down the road, legislatures will pass statutes mandating appointment of defense counsel to status offense cases. Furthermore, if the emotional pleas are successful and the public makes enough of a stir about the lack of counsel in status offense cases, more public interest groups and pro bono attorneys might try to bring cases up on appeal—hoping to obtain a favorable Constitutional ruling one day.

Education will also prove helpful in accomplishing the second goal—ensuring that attorneys provide holistic representation to child clients. By focusing on holistic representation in Continuing Legal Education seminars, teaching the benefits of the method in law school courses and clinics, and educating local bars about its importance, we might begin to see the model adopted at a more rapid pace. The National Juvenile Defense Standards already alluded to the importance of holistic representation. Rule 1.4(f) of the NJDS states, “[c]ounsel should represent the client in ancillary proceedings that coincide with the delinquency charge or locate social workers, educational advocates, or other qualified individuals to represent the client.”<sup>124</sup> Ultimately, the Rules of Professional Responsibility should implement a similar rule that mandates “holistic representation” of child clients. As part of this rule, there should be a clear roadmap as to how to address potential ethical issues. Such ethical issues might include confidentiality issues when collaborating with (or referring a client to) social workers and other attorneys and avoiding conflicts of interest.<sup>125</sup> The establishment of this new rule, however, will not happen unless people are educated about why holistic representation is important and how it can realistically be achieved.

In addition to education, the utilization and collaboration of existing resources, such as private attorneys who are willing to engage in pro bono work, nonprofit organizations, graduate program students, and legal clinics are is the key to attaining the lofty goals of 1) ensuring that all status offenders are appointed counsel, and 2) ensuring that all defense attorneys are engaging in holistic representation of their clients.

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<sup>123</sup> Coal. for Juvenile Justice, *supra* note 98.

<sup>124</sup> National Juvenile Defender Center, *National Juvenile Defense Standards*, Rule 1.4, 2012.

<sup>125</sup> McElhinny, *supra* note 10 (Providing holistic representation to juveniles can present a unique type of conflict of interest—one between parent and child. At all time, it is the defense attorney's job to represent the expressed interest of the child. If the attorney is also helping the parent with housing or with enforcing the child's education rights and the interests of the parent and child diverge, the attorney must conflict off the parent's case and might even be required to withdraw from the child's case, too.).

In jurisdictions where counsel is not being appointed to status offense cases, pro bono attorneys, nonprofit organizations, and legal clinics can provide status offenders (alleged and adjudicated) with access to legal representation in status offense cases. While any attorney can go down to juvenile court and agree to represent an alleged status offender “pro bono,” there may be more effective ways to get the private bar involved in a pro bono initiative that is centered around providing representation to alleged status offenders. For example, perhaps the American Bar Association could encourage members of local bar associations across the nation to compile a list of attorneys who are interested in taking status offense cases pro bono. This list could be published in the local juvenile court and on the local bar association’s website. Attorneys from this list might also take turns going down to juvenile court on “status offense” days. Once they are at the courthouse, these attorneys can pick up new clients, as well as answer any questions that accused children and their parents might have about status offenses and the inner workings of juvenile court. If this type of program struggles to get volunteers, perhaps incentives could be offered. For example, if an attorney takes X number of pro bono “status offense” cases, that attorney will be given X hours worth of CLE credit. This type of incentive would save the attorney money on CLE programs while helping address the lack of counsel issue in status offense cases.

Nonprofit organizations and legal clinics can also help address the lack of counsel problem in status offense cases, by informing the public of their ability and willingness to take status offense cases. Sometimes there are resources available in the community of which the public is unaware. There might be nonprofits and clinics that are willing and able to take on status offense cases, but nobody knows about the resource. Nonprofits and clinics that wish to represent status offenders must develop systems through which they can connect with potential clients. For example, the Domestic Violence clinic at the University of Tennessee has recently implemented a referral system, through which local nonprofits (like the Family Justice Center) can connect victims of domestic violence with the clinic. This referral system primarily entails the Family Justice Center filling out intake sheets and faxing them to the clinic. The clinic also maintains a table at the courthouse where victims of domestic violence can come ask for representation. Similar methods could work for organizations and clinics that wish to aid status offenders.

Nonprofits and legal clinics can also play a key role in ensuring that all juvenile clients receive holistic representation. For example, when the Knox County Public Defender runs across a client who seems to have several underlying issues, the PD often refers the case to the University of Tennessee Legal Clinic or Education Law Practicum. The idea is that, while the PD is able to represent the child on a delinquency petition, the PD might not have the time or resources to help the child with his or her underlying issues. By relying on collaboration, however, attorneys can work together

to provide holistic representation to clients.

Juvenile Defender McElhinny believes that the lack of holistic representation of children is really just the “lack of coordination of existing resources,” namely the failure of defense attorneys to utilize local graduate programs.<sup>126</sup> In her opinion, collaborating with masters of social work students and law students is the key to providing holistic representation.<sup>127</sup> Local bar associations should encourage its attorneys to think outside of the box and to use all available resources when it comes to providing holistic representation to children.

## V. CONCLUSION

Status offenses are often manifestations of underlying problems that a child is facing. These underlying problems make adjudication as a status offender inappropriate, as adjudication can have serious collateral consequences—including incarceration in some cases—that can hurt more than help the child. Children who are victims of underlying problems are better dealt with outside of the court system. Appointment of defense counsel to status offense cases is critical, because defense counsel can identify the existence of these underlying problems, advocate for a solution that does not entail court-involvement, prevent the child’s rights from being violated, and stop the imposition of unfair dispositions.

Once defense counsel is appointed to a child’s case, he or she should strive to provide holistic representation to the child. It is through holistic representation that the child’s underlying problems are addressed. Once these problems are solved, the child is less likely to wind up in court or in detention and more likely to become a responsible member of society.

Ensuring that children receive defense counsel in status offense cases and that defense attorneys are providing holistic representation to juveniles can be accomplished by the following: educating members of the public (especially members of local bar associations) about the importance of these goals, encouraging attorneys to appeal status offense cases, lobbying legislatures, developing local bar association programs that ask local attorneys to work status offense cases “pro bono,” connecting alleged status offenders to resources through referral programs, and motivating attorneys to collaborate with social workers, nonprofits, legal clinics, and other attorneys to provide holistic representation.<sup>128</sup>

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

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