In a Child's Best Interest: Juvenile Status Offenders Deserve Procedural Due Process

Erin M. Smith*

Between 1986 and 1988, the Rhode Island Family Court adjudged Eric Unger "wayward" three times.[1] Under Rhode Island law wayward offenses do not constitute criminal wrongdoing and therefore Unger argued that they were "status offenses."[2] The United States Sentencing Guidelines (U.S.S.G.) section 4A1.2(c)(2)

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* B.A. 1990, University of St. Thomas; J.D. 1993, University of Minnesota Law School

1. United States v. Unger, 915 F.2d 759,762 (1st Cir. 1990) *cert. denied*, 111 S.Ct. 1005 (1991). Rhode Island law defines wayward as follows:

> 14-1-3. Definitions.
> (G) The term "wayward" when applied to a child shall mean and include any child -
> (1) Who has deserted his or her home without good or sufficient cause; or
> (2) Who habitually associates with dissolute, vicious or immoral persons; or
> (3) Who is leading an immoral or vicious life; or
> (4) Who is habitually disobedient to the reasonable and lawful commands of his or her parent or parents, guardian or other lawful custodian; or
> (5) Who, being required by chapter 19 of title 16 to attend school, wilfully and habitually absents himself therefrom, or habitually violates rules and regulations of the school when he or she attends; or
> (6) Who has on any occasion violated any of the laws of the state or of the United States or any of the ordinances of cities and towns, other than ordinances relating to the operation of motor vehicles.

R.I. GEN. LAWS § 14-1-3 (Supp. 1991).

2. *Unger*, 915 F.2d at 762. See R.I.GEN.LAWS § 14-1-40 (1981 & Supp.1989). Kim Brooks, *Noncriminal Offenders: An Enigma to the Juvenile Justice System*, CHILDREN'S LEGAL RTS. J. 14, 16 (state statutes vary as to what constitutes status offenses but the most common behaviors include truancy, curfew violations, running away from home, and incorrigibility); H. TED RUBIN, JUVENILE JUSTICE: POLICY, PRACTICE, AND LAW 57 (1985) (many states relabel noncriminal status offenders as CHINS or PINS (children/persons in need of supervision)); JOHN L. HUTZLER, JUVENILE COURT JURISDICTION OVER CHILDREN'S CONDUCT: 1982 COMPARATIVE ANALYSIS OF JUVENILE & FAMILY CODES AND NATIONAL STANDARDS, 2 (1982) (42 states and the District of Columbia have separate categories for children who commit behavior that would not be criminal if they were an adult; the other eight states include this behavior under a delinquency, unlabeled or general jurisdiction category).

Status offenses differ from adjudications of delinquency. Children found guilty of delinquency have committed acts which would be criminal by adult standards. An example is the Rhode Island law which defined delinquent as follows:

provide that "status offenses" should not be considered when calculating a defendant's adult criminal history score.[3] Despite the clear mandate of section 4A1.2(c)(2), when Unger was convicted as an adult two years later these juvenile wayward judgments were used to increase his criminal history score and subject him to the maximum sentence.[4]

In taking these status offenses into account, the First Circuit

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14-1-3. Definitions.-
(F) The term "delinquent" when applied to a child shall mean and include any child-
Who has committed any offense which, if committed by an adult, would constitute a felony, or who has on more than one occasion violated any of the other laws of the state or of the United States or any of the ordinances of cities and towns, other than ordinances relating to the operation of motor vehicles.

R.I.GEN. LAWS § 14-1-3 (Supp. 1991).

3. The pertinent part of U.S.S.G. § 4A1.2(c) reads:

. . . Sentences for misdemeanor and petty offenses are counted [in compiling an offender's criminal history score], except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:
Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Fish and game violations
Gambling
Hindering or failure to obey a police officer
Leaving the scene of an accident
Local ordinance violations
Non-support
Prostitution
Resisting arrest
Trespassing

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, *are never counted*:
Hitchhiking
Juvenile status offenses and truancy
Loitering
Minor traffic infractions
Public intoxication
Vagrancy (emphasis added).

U.S.S.G. § 4A1.2(2)(1989). Since November 1987, when a defendant is convicted in a federal court, the sentencing judge must impose a sentence based on the United States Sentencing Guidelines. U.S.S.G. § 1A2 (1989). The court determines the defendants criminal history score by taking into account prior offenses. A defendant with a higher criminal history score will receive a more severe sentence under the Guidelines. U.S.S.G. § 4A1.1 (1989). For an analysis of the constitutional problems raised when juvenile sentences are used in a defendant's criminal history score to enhance later adult sentences *see*, David Dormont, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769 (1991).

4. *Unger*, 915 F.2d at 760.

Court of Appeals held that when determining whether an offense was a "status offense" the court should "look to the substance of the underlying state offense" rather than the particular offense of which the juvenile was convicted.[5] For example, Unger allegedly engaged in a variety of criminal conduct as a juvenile, including breaking and entering, receiving stolen goods and assault and battery.[6] This conduct, however, could not be proved and therefore Unger was not convicted of any of these criminal offenses but was instead found "guilty" of being "wayward." Nonetheless, in looking to the substance of the offense, the First Circuit determined that Unger's alleged youthful conduct in no way constituted status offense behavior.[7] Consequently, the First Circuit ultimately included Unger's three wayward convictions in calculating his criminal history score as an adult under the Federal Sentencing Guidelines.[8] The *Unger* case illustrates that finding a child guilty of status offense behavior can ultimately have serious repercussions at the time of an adult conviction.

In addition to affecting a defendant's adult sentencing, another danger of a status offense is that it can easily lead to a more severe juvenile criminal conviction. Once status offenders are in the juvenile court system, they can more easily be deemed delinquents.[9] A court, for example, may conclude the child is a delin-

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5. *Id.* at 763.

6. *Id.*

7. *Id.* The court noted that:

> Under no stretch of the imagination can these malefactions be considered 'status offenses' like, say, hitchhiking, truancy, loitering, or vagrancy. Nor can the fact that the Rhode Island Family Court adjudged the defendant 'wayward' in response to this behavior transmogrify his wrongful acts into status offenses for purposes of the sentencing guidelines.

See also, United States v. Martinez, 905 F.2d 251, 253-254 (9th Cir. 1990) (offenses listed in U.S.S.G. § 4A1.2(c)(2) are excluded from defendant's criminal history because they are of minor significance to goals of sentencing).

8. Unger was included in Criminal History Category number V with a total of 10 points. The sentencing table for an offense level of 15 and a Criminal History Category of V has a range of imprisonment of 37-46 months. Unger was sentenced to the peak of the applicable range. 915 F.2d at 760; U.S.S.G. ch. 5, Part A. (1991) (Sentencing Table). However, had Unger's argument that the criminal history points assessed for his status offenses violated the Guidelines § 4A1.2(c)(2) prevailed, he would have been included in Criminal History Category III with a sentencing range of 24-30 months. *Id.* Consequently, Unger's three juvenile status offense adjudications increased his sentence by at least seven months of imprisonment [37-30 (the lowest sentence in Category V minus the highest sentence in Category III)].

9. H. TED RUBIN, JUVENILE JUSTICE: POLICY, PRACTICE, AND LAW, 58 (2d.ed. 1985) (Description of differences between status offenders and delinquents.) Status offenders commit offenses which would not be considered criminal if the offense were committed by an adult. Juvenile delinquents are guilty of behavior which would be considered a crime if committed by an adult. *See also*, Steven H.Clarke,

quent for violating the court orders of her status offender sentence. Similarly, a court may find the status offender in contempt of court, allowing for secure confinement.[10] All these possible repercussions of a status offense conviction demand scrutiny of the procedural rights available at the underlying status adjudication.

This article examines adjudications of status offenders, and the serious consequences of these adjudications for juveniles. Part I examines the procedural protections that juvenile status offenders receive. This section focuses on the disparity between the procedural protections juvenile delinquents receive in comparison to status offenders and the philosophy purportedly justifying this disparity. Part II analyzes bootstrapping and contempt of court proceedings that increase the severity of status offenders dispositions.[11] Finally, this article concludes that because status offense adjudications can result in deprivations of liberty through home removal dispositions or secure confinement of the juvenile and increased sentences of the juvenile as an adult, there is no justification for denying these noncriminal offenders the procedural protections afforded both adults and juvenile delinquents.

I. Procedural Protections and the Juvenile Court

A. In re Gault *and its Progeny*

The juvenile court differs from the adult court system in

Status Offenders Are Different: A Comparison of Offender Careers By Type of First Known Offense, 12 J. RES. IN CRIME & DELINQ. 51 (1975) (concluding that efforts should focus on delinquents because they are more likely to recidivate); *But See*, Charles W. Thomas, *Are Status Offenders Really So Different?*, 22 CRIME & DELINQ. 438 (1976) (concluding that status offenders are not so different since they reoffend at the same rate as delinquents).

10. Facilities for placement of children are normally defined by the level of securement. See e.g., MINN. STAT. § 260.015: a

> Subd. 16. "Secure detention facility" means a physically restricting facility, including but not limited to a jail, a hospital, a state institution, a residential treatment center, or a detention home used for the temporary care of a child pending court action.
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> Subd. 17. "Shelter care Facility" means a physically unrestricting facility, such as but not limited to, a hospital, a group home or a licensed facility for foster care, used for the temporary care of a child pending court action (1990);

N.J. STAT. ANN. § 2A:4A-22 (West 1987):

> c. "Detention" means the temporary care of juvenile in physically restricting facilities pending court disposition.
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> d. "Shelter care" means the temporary care of juveniles in facilities without physical restriction pending court disposition *Id.*

11. *See* RUBIN, *supra* note 9 at 68 (bootstrapping in this context, is the term given to the practice of reclassifying a status offender as a delinquent for violating the terms of her sentence).

many respects. One significant difference is that the juvenile court has not followed the traditional practices of adult criminal due process. The Supreme Court criticized the denial of traditional due process protections in the seminal decision *In re Gault*,[12] which finally extended some procedural protections to juvenile delinquents.

The Supreme Court recognizes that the juvenile court system differs from the adult court system in both conception and practice.[13] The juvenile court developed with the intention of providing child offenders rehabilitation and treatment, rather than focusing on the punishment of offenders.[14] The overarching goal of this "treatment approach" is to act in the "best interests" of the child.[15] The common law justification for intervention and treatment was the *parens patriae* doctrine - the right of the state to take control of children whose parents were unable or unwilling to meet their responsibilities or of children who pose a threat to the community.[16]

Another major difference between the two court systems is that juvenile courts do not deal solely with criminal offenders.[17] The doctrine of *parens patriae* allowed courts to assert control over criminal and noncriminal conduct of juveniles. Noncriminal behavior over which the courts exercise jurisdiction can include truancy, running away, smoking, sexual activity, or living a wayward, idle, and dissolute life.[18] These behaviors are generally categorized as "status offenses." It is the status of being a child combined with the misbehavior that allows the juvenile courts to intervene.[19] In general, a status offender's behavior is unacceptable by societal standards but would not constitute criminal conduct if committed by an adult.

Historically when adjudicating status offenders and juvenile criminal offenders, juvenile courts did not follow traditional no-

12. 387 U.S. 1 (1967).

13. *Id.* 14-19; Schall v. Martin, 467 U.S. 253, 263 (1984).

14. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 148-151 (1984).

15. *Id.* at 150.

16. *Id.* at 148.

17. *Id.* at 148-49.

18. *See* RUBIN, *supra* note 9, at 56. *See also* FRANCIS BARRY MCCARTHY & JAMES CARR, JUVENILE LAW AND ITS PROCESSES 171 (1989) (relating the Task Force on Juvenile Justice and Delinquency Prevention efforts to reduce the use of vague labels governing status jurisdiction); Brooks, *supra* note 2, at 16 (attacks on vagueness of status offense jurisdiction that have failed are indicative of the sustencance of the parens patriae doctrine).

19. *See* Rubin, *supra* note 9 at 51.

tions of adult criminal due process.[20] In order to meet the "best interests" of the child, intervention was to be informal and individualized.[21] Unfortunately, this discretionary process left juveniles to suffer from "the worst of both worlds."[22] Juveniles received "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[23]

The Supreme Court's groundbreaking 1967 decision, *In re Gault*[24] squarely addressed the apparent failings of the traditional juvenile justice system. *Gault* acknowledged that the justifications for denying juveniles procedural protections no longer reflected reality, because juveniles received punishment like adults rather than treatment and rehabilitation.[25] The Court concluded that children should at the very least receive some procedural protections. Therefore, the Court extended the rights of notice, assistance of counsel, a privilege against self incrimination, and opportunity to confront and cross examine witnesses.[26] *Gault* expressly limited its holding to the adjudicatory hearing for a child determined to be a delinquent, *i.e.*, those charged with a crime and facing institutional confinement.[27] Consequently, the procedural rights of status offenders were left for the state courts to determine.

The Supreme Court subsequently expanded the procedural protections for juveniles first recognized in *Gault*. In *In re Winship*, the Court held that juvenile criminal conduct must be proved beyond a reasonable doubt.[28] Consistent with the limitation imposed in *Gault*, this evidentiary standard also extended to the ad-

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20. Kent v. United States, 383 U.S. 541, 555 (1966); *In re* Gault, 387 U.S. at 14.

21. The modern juvenile court, however, increasingly focuses on the offense committed rather than the individual offender. *See* Barry C. Feld, *The Juvenile Court Meets The Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U.L.REV. 821, 821 (1988).

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

23. *Id.*

24. 387 U.S. 1 (1967).

25. The Supreme Court noted:

> The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine, and institutional hours. . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide.

Id. at 27.

26. *Id.* at 31-57.

27. *Id.* at 13.

28. 397 U.S. 358, 364 (1970).

judication of delinquency only.[29] Similarly, the Court later applied the double jeopardy clause of the Fifth Amendment to delinquency proceedings.[30] Although *Gault* and *Winship* were milestones on the road to affording greater protection, status offenders continued to suffer from the "worst of both worlds."[31] The majority of status offenders enjoyed few procedural protections, and the goal of fulfilling the child's "best interests" remained an empty promise.

B. State Protections for Status Offenders.

Left to their discretion, most state courts have refused to grant status offenders the same procedural protections guaranteed delinquents by the Supreme Court. Perceived differences between delinquents and status offenders underlie the denial of the right against self-incrimination, the right to counsel, and the proof beyond a reasonable doubt standard. Compounding many courts' mistaken reliance on labeling, is the misguided belief that status offenders are being reformed and thus can be denied procedural protections. Since these children are not simply being treated and rehabilitated this justification is not tenable and should no longer be followed.

Since status offenders were not included in the holdings of *In*

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29. The Court noted that: "[t]his case presents the single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." 397 U.S. at 359 (citing *In re* Gault, 387 U.S. at 30). Note one of the *Winship* opinion clearly states that "we intimate no view concerning the constitutionality of the New York procedures governing children in need of supervision." *Id.* at n.1.

30. Breed v. Jones, 421 U.S. 519 (1975). *Breed* held that the double jeopardy clause prevented adult prosecution after a conviction in juvenile court for the same offense. *Id.* at 541. Although *Breed* did not mandate double jeopardy for status offenders, a litigated case in Illinois did extend this right to juveniles in Illinois. *In re* R.L.K finds that a strict dichotomy either between minors in need of supervision (MINS) and delinquent proceedings is not realistic or in the child's interest. 384 N.E.2d 531, 534 (Ill. Ct. App. 1978). The court found that because the dispositions available to MINS and delinquents are substantially similar and because both proceedings can stigmatize the child that double jeopardy should be applied to MINS children. *Id.* at 534.

31. *See* Feld, *supra* note 14, at 168. Juvenile delinquents are also left with the worst of both worlds since the protections afforded juveniles are less adequate than those afforded adults. For example, not all procedural protections were extended to juvenile delinquents. McKeiver v. Pennsylvania, 403 U.S.528 (1971). *McKeiver* held that a jury trial is not required in a juvenile adjudication. Furthermore, reality shows that juvenile delinquents are not necessarily receiving the constitutional protections that *Gault* provided. *See* Barry C. Feld, *The Right to Counsel in Juvenile Courts: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185 (1989) (less than fifty percent of juvenile adjudicated delinquent receive assistance from counsel).

re Gault or *In re Winship*, state courts have developed inconsistent ways of dealing with status offenders.[32] Generally, the theory of *parens patriae* is still prevalent and constitutes the primary basis for allowing status offenders fewer procedural protections. Simply put, the theory is that since these children did not commit crimes, the court's role is not to punish but to treat.[33] Therefore, juvenile courts do not recognize due process protections as necessary or desirable. What the courts fail to realize is that once procedural protections are eliminated, the goals of accurate fact finding and prevention of governmental oppression are effectively abandoned.[34] Although courts attempt to justify the denial of procedural protections by stating that these children receive less punitive dispositions, the courts' treatment of status offenders is not solely rehabilitative since committing noncriminal behavior twice can ultimately provide the basis for incarceration.[35] Furthermore, any home removal of the juvenile is a deprivation of the juvenile's liberty interest.

The inequality between protections afforded juvenile delinquents and status offenders is manifest in the denial of the right against self-incrimination. The Maryland case of *In re Cindy Ann Spalding* epitomizes the dominant view of denying the Fifth Amendment right against self-incrimination to non-criminal offenders.[36] The *Spalding* court employed the two pronged test out-

32. The various state approaches produces a patchwork of case law on status offenses. This patchwork is especially eclectic because the amount of case law on status offenders is relatively undeveloped. There is not much law on the subject due to the fact that so few children receive lawyers and without laywers to raise cases for appeal, the area of law cannot develop and instead remains a patchwork of inconsistencies. *See* Feld, *supra* note 31. This article analyzes the variation of rates of representation of juvenile delinquents and status offenders in Minnesota. Table three reveals that children who commit more serious offenses receive higher rates of representation, than children who commit status offenses. *Id.* at 1220-1223.

33. *See* Feld, *supra* note 14, at 141, 148-150.

34. *See In re* Winship, 397 U.S. 358, 363-364 (1970); *In re* Gault, 387 U.S. at 47.

35. *See infra* part II.A-B.

36. 332 A.2d 246 (Md. 1975). *See* FRANCIS B. MCCARTHY & JAMES G. CARR, JUVENILE LAW AND ITS PROCESSES 356 (1989); FRANK W. MILLER ET AL, THE JUVENILE JUSTICE PROCESS 526 (2nd ed. 1976). State v. Henderson, 199 N.W.2d 111 (Iowa 1972), also thoroughly analyzes whether children who do not commit criminal acts deserve the extension of the right against self incrimination. The *Henderson* court specifically states:

> [W]here there is no public offense charged we believe the requirement of advising the juvenile and his parents of this right to remain silent would frustrate the very purpose of the juvenile proceeding. Admittedly, upon the findings of the trial court the child may have to spend some time away from his home but such time will not be spent in a completely institutionalized setting. The record establishes visitation rights are lenient, and that the average stay for a child at the Home is about one year.

Id. at 119.

lined in *Gault* to determine whether the constitutional right against self-incrimination was due. According to *Gault*, the proceeding must 1) be to adjudicate delinquent criminal conduct; and 2) the delinquency must be such that it could result in commitment to a state institution.[37] The Maryland Department of Juvenile Services initially charged Cindy Spalding as both a "delinquent child" and as a "child in need of supervision."[38] However, the *Spalding* court determined that she was, in fact, a victim of all the events that had occurred; consequently the charge of delinquency was "an unexplained anomaly."[39] The court concluded that being a victim did not constitute a crime and therefore found the privilege against self-incrimination inapplicable to the proceedings.

The language of the Supreme Court in *Gault* supports extending the right of self-incrimination. The *Gault* court stated that "it would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."[40] The *Spalding* court, however, denied the right because it

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The dissent in *Henderson* strongly disagrees with the holding, finding it unfair to give some children more rights than others. *Id.* at 123.

37. *Spalding*, 332 A.2d at 252. The *Spalding* court cites the *Gault* court's holding that a "juvenile proceeding to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self incrimination." *Gault*, 387 U.S. at 49.

38. The court noted that:

These allegations are 'that the respondent had. . .engaged in acts of sexual intercourse and sexual perversion with an unknown number of male and female adults for a period of more than one year. The respondent is ungovernable and beyond the control of her parent, deports herself in a manner as to be a danger to herself and others and is in need of care and treatment.'

332 A.2d at 248n.2.

Maryland statutory law defines these terms as follows:

§ 3-801. Definitions.

(f) *Child in need of supervision.* - 'Child in need of supervision' is a child who requires guidance, treatment, or rehabilitation and

(1) He is required by law to attend school and is habitually truant; or

(2) He is habitually disobedient, ungovernable, and beyond the control of the person having custody of him; or

(3) He deports himself so as to injure or endanger himself or others; or

(4) He has committed an offense applicable only to children.

(k) *Delinquent act.* - 'Delinquent act' means an act which would be a crime if committed by an adult.

(l) *Delinquent child.* - 'Delinquent child' is a child who has committed a delinquent act and requires guidance, treatment, or rehabilitation.

MD. CTS. & JUD. PROC. CODE ANN. § 3-801 (1989).

39. 332 A.2d at 256. Maryland defines victim as follows:

(s) Victim. - (1)"Victim" means a person who suffers direct or threatened physical, emotional, or financial harm as a result of a delinquent act.

MD. CTS. & JUD. PROC. CODE ANN. § 3-801 (1989).

40. *Gault*, 387 U.S. at 47.

believed the category Children in Need of Supervision (CINS) was established "to insure that treatment of children guilty of misconduct peculiarly reflecting the propensities and susceptibilities of youth, will acquire none of the institutional, quasi-penal features of treatment. . ."[41] According to this reasoning, providing Fifth Amendment rights would establish a penal atmosphere to the detriment of these non-criminal offenders. *Gault* struck down this same rationale for denying procedural protections to delinquents.[42] *Gault* held that "the absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures."[43] Rather "[d]epartures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[44] *Gault* also noted that the label given the proceeding should not determine whether the privilege is extended.[45] Instead, "the nature of the statement or admission and the exposure it invites" should be the deciding factors.[46] Since status offenders are "exposed" to the possibility of institutionalization, which is no more rehabilitative than the institutionalization of delinquents, they deserve the protection of the Fifth Amendment.[47] Furthermore, any home removal is a deprivation of liberty which should provide a basis for the extension of the right against self-incrimination.[48]

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41. 332 A.2d 246, 251 citing to the Court of Special Appeals decision, 318 A.2d at 281.

42. *Gault*, 387 U.S. at 15-16. In discussing the creation of the juvenile court Justice Fortas explains:

> The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive. *Id.*

43. 387 U.S. at 18.

44. *Id.*

45. 387 U.S. at 49.

46. *Id.*

47. Although Spalding was ultimately placed in a foster home, the majority admits that Maryland's current statutory law would have permitted detention of Spalding and other Children in Need of Supervision. *In re* Spalding, 332 A.2d 246, 256. Current Maryland statutes say children in need of supervision may not be placed in secure facilities. *See*, MD. CTS. & JUD. PROC. CODE ANN. § 3-815 (e) (1989) (dispositions available to a child in need of supervision can still effect their liberty, as they may be placed in a private home or shelter care facility). *Id.* at (e)(iii).

48. The *Gault* court stated:

> And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty - a command which this Court has broadly

Delinquency was not being adjudicated in *Spalding*. Consequently, the court determined that it need not consider whether the second prong of the *Gault* test was met, and, as a result, the possible denial of the juveniles' liberty interest was left unaddressed.[49] *Gault* recognized that "commitment is a deprivation of liberty. . . it is incarceration against one's will, whether it is called 'criminal' or 'civil.' "[50] However, this liberty interest is not unqualified.

In *Schall v. Martin*, the Court concluded that a "juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *'parens patriae* interest in preserving and promoting the welfare of the child.' "[51] Spalding could have been placed in a secure facility,[52] and although recognizing the Supreme Court's previous acknowledgment in *Gault* that secure confinement does not promote the welfare of children, the *Spalding* court nevertheless took a narrow approach to Spalding's liberty interest when it upheld the actions of the trial court in compelling her to take the witness stand and testify against herself.[53] Furthermore, placement in a foster home is also a deprivation of liberty under *Gault* since it is forced living for a period away from ones' own home and

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applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.

387 U.S. at 50.

49. 332 A.2d at 256. Cindy argued that at her hearing the possibility for commitment to a state institution existed, along with confinement with juvenile delinquents. Furthermore, she notes that she is now "one step closer" to imprisonment. An issue made clear in Part II of this note. Despite the *Spalding* court's recognition that there is "much to commend these arguments" the court refused to address whether potential confinement would mandate application of the Fifth Amendment right to self incrimination.

50. 387 U.S. at 50.

51. Schall v. Martin, 467 U.S. 253, 265 (1984) (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)). In *Schall*, Justice Rehnquist acknowledges that juveniles do have a liberty interest, yet this interest he finds "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody." 467 U.S. at 265.

52. *See supra* note 10 and accompanying text.

53. 332 A.2d 246, 249. The dissent explains the sequence of events compelling Cindy to testify against herself:

> Mr. Newell (prosecuting attorney): I call Cindy Ann Spalding to the stand.
> Mr. Meola (petitioner's attorney); Objection
> The Court: Well-
> Mr. Meola: I instruct my witness not to testify at all. She may be-
> The Court: All right, take the stand, Cindy, step up to the stand. All right you will be sworn first.'
>
> Petitioner was then examined extensively by the trial judge and the prosecuting attorney. Objections made by her attorney to incriminating questions were ignored or overruled.

Id. at 260 (dissenting opinion).

family.[54] Unfortunately, the *Spalding* court ignored the fact that the dispositions available to Spalding were such an infringement on her liberty as to warrant the Fifth Amendment protection. Thorough analysis of the available dispositions reveals that this situation necessitates a *Gault* extension of the right against self-incrimination.[55]

In denying Spalding procedural protections, the *Spalding* court mistakenly relied on labels. The dissent correctly noted the detrimental effect a decision such as *Spalding* could have on the constitutional rights of children labeled by something other than delinquent.[56] Although the acts Spalding committed would be criminal acts if committed by an adult, the court labeled her a "victim" and a "child in need of supervision."[57] The court relied on these two labels to distinguish her from a delinquent and to deny her her constitutional rights. As the dissent explained, these labels should not be determinative of the application of constitutional protections, since a court could adjudicate a child who committed criminal acts as a "child in need of supervision" or label a child who committed any criminal activity with an adult as a victim.[58] Thus, under both examples, the arbitrary label not the actual behavior, allows denial of the rights *Gault* mandated.

Several courts agree that *Gault* and its progeny do not require courts to provide the same spectrum of rights to juveniles who are not subjected to the possibility of incarceration.[59] In the Oregon case, *In re K*, although some alternatives for K's disposition included a foster home or child care center, the court did not believe these would place any more restrictions on K than a normal home and thus he was not entitled to the rights of *Gault* and *Winship*.[60] Specifically, *In re K* held that preponderance of the

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54. 332 A.2d 246, 259 (dissenting opinion citing to *Gault*, 387 U.S. at 36).

55. *Id.* at 259 (dissenting opinion citing *Gault* 387 U.S. at 36).

56. *Id.* 257-260.

57. *Id.* at 258. Both acts of using "controlled and prohibited narcotics" and engaging in "acts of . . .sexual perversion" are criminal acts under Maryland law. MD. ANN. CODE art. 27, § 276 et seq.(1987); MD. ANN. CODE art. 27, § 554 (1991).

58. This is an example of the discretion courts have in deciding with what to charge a juvenile. With a lower standard of proof and high likelihood the child will not have counsel a court may charge a child with status behavior, and thus finding a juvenile guilty is much easier. *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 699 (1991).

59. *In re* K., 554 P.2d 180, 183 (Or. Ct. App. 1976). *See also*, State v. Gillard, 528 S.W.2d 545 (Tenn. 1975) (preponderance of the evidence is the standard of proof for juvenile probation revocation hearings); State v. Henderson, 199 N.W.2d 111 (Iowa 1972) (clear and convincing standard of proof for uncontrolled child); *In re* Faith Potter, 237 N.W.2d 461 (Iowa 1976).

60. 554 P.2d at 183.

While any of these alternatives would theoretically have resulted in

evidence is the standard applicable to adjudications of non-criminal offenders who do not face the threat of incarceration.[61]

Courts rely on perceived differences between delinquents and status offenders to justify a different standard of proof. One basis for denying non-criminal children "proof beyond a reasonable doubt" rests on the principle that the proceeding adjudicates behavior that is injurious to the offender or others but not to society.[62] According to this rationale, if courts are serious about helping these children, a more relaxed standard of proof will allow more courts to find children "guilty" of status offense behavior and ultimately help these children. Conversely, if the standard of proof is beyond a reasonable doubt, it will be more difficult for the state to prove its case and in theory the child will leave the juvenile court system without receiving any rehabilitation, treatment, or help. This rationale is faulty considering that both the Supreme Court and the majority of commentators have recognized the inability of juvenile institutions to treat and rehabilitate these children.[63] Courts also rely on the wide range of available dispositions in denying proof beyond a reasonable doubt.[64] Although non-criminal children may initially receive less punitive dispositions for running away the first time, juvenile courts may later place them in secure confinement for running away a second time. This has not led courts to provide proof beyond a reasonable doubt, although the first adjudication made the possibility of secure confinement real.

In *Wagstaff v. Superior Ct.*, the possibility of detention in a

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the imposition of some limitations upon K's personal 'liberty,' none would have produced a 'deprivation' equivalent in kind or degree to that necessarily resulting from placement in MacLaren or any other 'camp' or 'program' maintained for the confinement and rehabilitation of youths requiring secure custody.

61. *Id.*

62. *In re* Potter, 237 N.W.2d 461 (Iowa 1976).

63. *Gault* 387 U.S. at 17-30; Winship, 397 U.S. at 365-366 (1970) *See also infra* note 160.

64. State statutes approach the disposition of juveniles in different ways. Some States like Minnesota lay out extensive lists of possible dispositions for children in need of supervision and delinquents. MINN. STAT. § 260.191, 260.185 (1990). *See also* ALASKA STAT. § 47.10.080. (1990). Other states state a general purpose for deciding on a disposition. N.C. GEN. STAT. § 7A-646 (1989).

Even in the extensive lists available under Minnesota law the dispositions available to delinquents and status offenders are not necessarily mutually exclusive. The Minnesota Court of Appeals heard a status offender argue that he should not be placed in a House Work Program because delinquents are also placed there and it is "much like a military boot camp". Although the court said they were not insensitive to this problem, the solution must rest with the legislature since there is no statutory requirement for separation of the two categories of juveniles. *In re* L.J.C., 367 N.W.2d 101, 103 (Minn. Ct. App. 1985).

child in need of supervision (CINS) proceeding led the Supreme Court of Alaska to award express due process protection by allowing the child the right to choose an attorney.[65] Alaska is one state in which the legislature gave the right to counsel to all juveniles. The Alaska Supreme Court affirmed its application to juveniles deemed CINS.[66] The juvenile in *Wagstaff* contacted her own attorney and the attorney informed the court that he wished to represent her.[67] However, the court master denied the request and concluded it was the court's duty to assign the juvenile counsel.[68] On appeal, the court held that juveniles may retain counsel of their choice.[69] Furthermore, when the child and parent's interests are in direct conflict, the juvenile's choice of counsel in a "child in need of supervision" proceeding must be respected.[70]

Many states have statutes like Alaska's extending the right of counsel to all children whose dealings with the juvenile court reach the adjudication stage,[71] however, actual representation is rare.[72] Unfortunately, the high degree of consideration given to the child's rights and interests in *Wagstaff* is the exception not the rule. Recent studies of representation in juvenile courts report that although states may extend the right of counsel to status offenders, these children are represented by an attorney less often than those accused of delinquent acts.[73] There are several possible explanations for this disparity. One is that judges are more likely

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65. 535 P.2d 1220 (Alaska 1975).

66. *Id.* Alaska extends the right of counsel to children in need of supervision (now labeled "children in need of aid"). ALASKA CT. RULES, CHILD IN NEED OF AID RULES, 12, Right to Counsel (Supp. 1992).

67. *Wagstaff*, 535 P.2d at 1222.

68. The attorney for the state argued "that the juvenile did not have a right to an attorney in a 'child in need of supervision' proceeding, and to allow one in a non-delinquency 'family problem' would be contrary to the beneficent purposes of the family court." *Id.* at 1223. The master did not accept this argument because the juvenile did face possible detention, although he concluded the parents should be able to choose the attorney. *Id.*

69. *Id.* at 1227.

70. *Id.*

71. *See* Rubin, *supra* note 9, at 68. *See, e.g.*, ALASKA CT. RULES, CHILD IN NEED OF AID RULES, 12 (1992); MD. CTS. & JUD. PROC. CODE ANN. § 3-821 (1989); MINN. STAT. § 260.155 subd. 2. (1990).

72. *See infra* note 73.

73. *See* Barry C. Feld, *"In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 404 (1988) (table three reveals that in California, Minnesota, New York, and North Dakota the percentage of status offenders receiving counsel is less than the overall percentage of juvenile offenders in each state receiving counsel); *see also* Feld, *supra* note 31 (study of how two decades after *Gault* the promise of counsel to juveniles is largely unrealized); Table three reveals that status offenders in Minnesota receive counsel 28.9 percent of the time, whereas the overall percentage of counsel at the adjudication stage is 45.3 percent. *Id.* at 1220.

to advise a juvenile of his or her right to counsel if it involves a felony charge as opposed to a minor offense.[74] Also, since parents and teachers often refer status offenders to the juvenile court, these persons are usually less interested in protecting the constitutional rights of the child and more interested in allowing the court discretion to " 'do something' with the troublesome child."[75]

Although the Alaska Supreme Court in *Wagstaff* recognized the importance of counsel in a Child in Need of Protection (CHIP) proceeding that could ultimately lead to confinement, other jurisdictions have not been as sensitive to the child's due process rights.[76] *In re Walker* analyzed many arguments surrounding the

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74. Chris E. Marshall, et al., *The Implementation Of Formal Procedures In Juvenile Court Processing Of Status Offenders*, 11 J. CRIM. JUST. 195, 197 (1983) (it is easier for a judge to handle a case without counsel if she has already decided against incarceration as a possible disposition).

75. *Id.* Compared to the status offender's position, the delinquent is normally brought to the court by a police officer. *Id.* Parents are then less likely to waive the right to legal representation for the child. *Id.*

There are a variety of actions the court may take as it attempts to "do something". Available dispositions for truants and runaways in Minnesota under the state's statutory law include:

> (1) counsel the child or the child's parents, guardian, or custodian;
> (2) place the child under the supervision of a probation officer or other suitable person in the child's own home under conditions prescribed by the court, including reasonable rules for the child's conduct and the conduct of the parents, guardian, or custodian, designed for the physical, mental, and moral well-being and behavior of the child; or with the consent of the commissioner of corrections, place the child in a group foster care facility which is under the commissioner's management and supervision;
> (3) subject to the court's supervision, transfer legal custody of the child to one of the following:
>
> (i) a reputable person of good moral character. No person may receive custody of two or more unrelated children unless licensed to operate a residential program under sections 245A.01 to 245A.16; or
>
> (ii) a county probation officer for placement in a group foster home established under the direction of the juvenile court and licensed pursuant to section 241.021;
>
> (4) require the child to pay a fine of up to $100. The court shall order payment of the fine in a manner that will not impose undue financial hardship upon the child;
> (5) require the child to participate in a community service project;
> (6) order the child to undergo a chemical dependency evaluation and, if warranted by the evaluation, order participation by the child in a drug awareness program or an inpatient or outpatient chemical dependency treatment program;
> (7) if the court believes that it is in the best interests of the child and of the public safety that the child's driver's license be canceled, the court may recommend to the commissioner of public safety that the child's license be canceled for any period up to the child's 18th birthday. . .
> (8) require the child to perform any other activities or participate in any other treatment programs deemed appropriate by the court.

MINN. STAT. § 260.191 subd.1 (b)(1)-(8) (1990).

76. *See supra* note 73 and accompanying text. Children are not only denied

counsel issue and ultimately held against providing procedural protections to status offenders.[77] The *Walker* case dealt with a fifteen year old girl, Valerie Walker, whom the juvenile court found was "an undisciplined child and in need of the discipline and supervision of the State," because she was "regularly disobedient to her parents in that she goes and comes without permission, keeps late hours, associates with persons that [her] parents object to, and goes to places where her parents tell her not to go."[78] The court placed Walker on probation with the conditions that she obey her mother and attend school.[79] She violated terms of her probation and on this basis the court determined she was a delinquent and committed her to the North Carolina Board of Juvenile Corrections.[80]

On appeal, the two main arguments for providing counsel to a non-criminal offender such as Walker failed. One contention was that counsel should have been present at the first hearing that determined Walker was an undisciplined child.[81] The court found she lacked a right to counsel since, as an undisciplined child, she could not be incarcerated in a juvenile detention center.[82] Secondly, Walker argued that despite the narrow holding of *Gault*, a right to counsel should be recognized since a violation of probation means the child is delinquent and subject to commitment. This argument failed because the court found the original adjudication not to be a criminal prosecution under the Sixth Amendment.[83]

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counsel in their status offense adjudications but also in home placement revocation hearings. In Gillard v. Cook, 528 S.W. 2d 545, 548 (Tenn. 1975), the Tennessee Supreme Court held that although a home placement revocation hearing lead to imprisonment of the juvenile he has no right to counsel. The court went on to say that although there was no right to counsel, "as a general rule [it] should be provided . . .[and] any doubt should be resolved in favor of appointment of counsel." *Id.* at 548.

77. *In re* Valerie Lenise Walker, 191 S.E.2d 702 (N.C. 1972).

78. *Id.* at 704.

79. Valerie's terms of probation included:

1. That she be of good behavior and conduct herself in a law abiding manner;
2. That she mind and obey her parents and not leave home without permission and then to go only to places that she has permission to go and return as directed;
3. That she attend school regularly during the school year and obey the school rules and regulations;
4. That she report to the court counselor as directed, truthfully answer questions put to her concerning her conduct, behavior, associates and activities and carry out requests given her concerning such.

Id. at 705.

80. *Id.* The court determined she was a delinquent because she violated conditions No. 1,2, and 3 of her probation terms.

81. *Id.* at 707.

82. *Id.* at 708.

83. *Id.* at 709. (Stating that the initial adjudication finding a juvenile undisciplined is incidental to any later petitions.)

The *Walker* case illustrates that even though a conviction of a status offense may ultimately effect later adult adjudications and may place the child at risk of being incarcerated for violating the terms of her conviction, courts still refuse to recognize a right to counsel for this group of juveniles. The serious ramifications of a conviction should demand that a status offender receive the right to counsel.

Courts rely on the differences between adults and juveniles as justification for the denial of procedural protections, although the available penalties are similar.[84] Walker argued that the risk of incarceration violates the Equal Protection Clause of the Fourteenth Amendment because the child has committed no criminal offense and courts subject adults to probation and incarceration for actual criminal offenses only.[85] The *Walker* court based its decision on "many valid distinctions" between adults and juveniles.[86] The Court concluded that these differences are "to provide children the needed supervision and control."[87]

Once again the *Walker* court relied upon an erroneous label to justify the denial of constitutional protections. Walker argued that a North Carolina statutory law violated the Equal Protection Clause since it required counsel for children being adjudicated "delinquent" but not for children adjudged "undisciplined."[88] The court acknowledged that these two categories of children were treated differently, but it justified the inequality on two bases. First, state legislatures are presumed to have acted within their constitutional power, despite the fact that some inequality exists.[89] Secondly, the court found the distinction relevant to the achieve-

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84. *Gault*, 387 U.S. at 14-31 (discussion of the development of the juvenile court and the denial of procedural protections which are granted to adults).

85. *Walker*, 191 S.E.2d at 709.

86. *Id.* at 709-10. The North Carolina Supreme Court noted that adults are self sufficient, whereas juveniles are in need of supervision and control because they are unable to protect themselves. *Id.* at 709. Besides this difference the *Walker* court fails to list the "many valid distinctions" between adults and children that allow for the strikingly different approaches to noncriminal behavior.

87. *Id.* at 710. The *Walker* court also noted that juvenile acts in other states have upheld as constitutional the classification and treatment of juveniles as different than adults. *See* Monrad G. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167.

88. *Walker*, 191 S.E.2d. at 710. *See* N.C. GEN. STAT. § 7A-451(a)(8)(1989). Scope of entitlement:

> (a) An indigent person is entitled to services of counsel in the following actions and proceedings:
>
> (8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible.
>
> *Id.*

89. *Walker*, 191 S.E.2d at 710 (citing to McGowan v. Maryland, 366 U.S. 420

ment of the state's objective because "the one needs protection while the other needs correction."[90]

Gault held that delinquents cannot be denied procedural due process because in reality they are not merely being treated and protected, but are also subject to punishment and incarceration. This reasoning applies with equal force to status offenders and justifies their receiving the same procedural protections. As *Gault* noted, it is possible a court could commit a child to an institution and restrain his or her liberty for years.[91] Thus the Supreme Court determined, "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process'," for "[u]nder our Constitution, the condition of being a [child] does not justify a kangaroo court."[92] An adjudication of a status offense can result in any number of dispositions that restrain the child's liberty, including a group home, foster home, forestry camp or a non-secure institution.[93] Moreover, since a status offense can effect an adult adjudication as in *Unger*, as well as be used to sentence a child to secure confinement, the label "status offender" should not justify a "kangaroo court." Status offenders, no less than delinquents, deserve the protection of procedural regularity.

II. Effects of the Adjudication

A. Climbing up the Juvenile Court Ladder

Once a status offender has entered the juvenile court system it is more likely that a court will find the child guilty as a "delinquent" if the problem behavior does not change. If the court finds the child is a delinquent, the court can then impose a more serious sentence.[94] This can be accomplished either by violating a court order or a contempt of court proceeding. National legislation originally discouraged turning a status offender into a delinquent for committing the same non-criminal misbehavior twice and many states have followed these recommendations. Unfortuantely, later

(1961), that a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.") *McGowan*, 366 U.S. at 426.

90. *Walker*, 191 S.E.2d at 710.

91. *In re* Gault, 387 U.S. at 27-8.

92. *Id.*

93. *Cf.*, Barry C. Feld, *supra* note 31 (in Minnesota where institutionalization of status offenders is no longer authorized, 3.5 percent of status offenders are still incarcerated in state or county institutions).

94. *See, e.g.*, MINN. STAT. 260.191 (Dispositions; Children who are in Need of Protection and Services or Neglected and in foster care) and 260.185 (Dispositions; Delinquent Child) (1990).

amendments allowed institutionalization of status offenders for "court order" violations.[95]

A majority of status offenders are habitual runaways, a category that presents unique problems for the courts in handling and protecting these repeat offenders.[96] A controversial judicial approach which has developed to deal with repeat offenders is "bootstrapping." Bootstrapping is the label given to the practice of reclassifying a status offender as a delinquent for violating a court supervision order.[97] A new adjudication of delinquency opens the door for courts to sentence these children with more serious dispositions.

The United States Juvenile Justice Prevention and Delinquency Prevention Act of 1974 (Act) discouraged bootstrapping and encouraged similar treatment for initial status offenders and reoffenders.[98] In particular, the Act denied states federal funding for their juvenile court system, if they continued to detain status offenders in secure facilities.[99] Due to these national policy reforms, many states made statutory changes concerning how to deal

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95. *See infra* note 151 and accompanying text.

96. *See*, Richard E. Boehm, *Legislative Response to In re Ronald S.: Cal. A.B. 958*, 5 PEPP. L. REV. 847, 850 (1978) (quoting *In re* Ronald S., 138 Cal. Rptr. 387, 391 (App. 1977).

97. *See* Rubin, *supra* note 9, at 68.

98. 42 U.S.C. §§ 5601-778 (1974); Pub. L. No. 93-415, § 223(a) 88 Stat. 1109, 1119.

> SEC. 223 (a): In order to receive formula grants under this part a State shall submit a plan. . . such plan must:
>
> (12) provide within two years after submission of the plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult, shall not be placed in juvenile detention or correctional facilities, but must be placed in shelter facilities.

99. Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5603(a)(12)(A) (1983).

> (12) [T]he term "secure detention facility" means any public or private residential facility which—
>
> (A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in such facility; and
>
> (B) is used for the temporary placement of any juvenile who is accused of having committed an offense, of any nonoffender, or of any other individual accused of having committed a criminal offense.

42 U.S.C. § 5603(12)(A)-(B).

> (13) [T]he term "secure correctional facility" means any public or private residential facility which—
>
> (A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in such facility; and
>
> (B) is used for the placement, after adjudication and disposition, of any juvenile who has been adjudicated as having committed an offense, any nonoffender, or any other individual convicted of a criminal offense. 42 U.S.C. § 5603(13)(A), (B).

with status reoffenders.[100]

Several states, however, continued bootstrapping status offenders despite the Act's recommendations.[101] One particularly striking case is that of *K.K.B. v. State of Texas*.[102] K.K.B. was a runaway and adjudicated "a child in need of supervision" under Texas law. She was placed in a foster home, and ordered to obey all the foster family's instructions. Three weeks after her placement, her foster mother returned her to a county unit of the Department of Human Resources, and the unit then filed a delinquency petition alleging her as a delinquent. The foster parent testified that she refused to do her homework and had become unhappy and uncooperative. The trial court, basing their decision solely on her refusal to do homework, found K.K.B. delinquent and committed her to the Texas Youth Council.[103] This bootstrapping was upheld by the Texas Court of Civil Appeals, as it has been in other states.[104]

Other states oppose bootstrapping and follow the recommendations of the 1974 Act.[105] *In re Ronald*,9 an often cited California juvenile court case, strongly criticized the practice of bootstrapping characterizing it as a "vicious practice."[106] An earlier California statute allowed a non-criminal offender to be classified as a crimi-

100. Evelyn C. Knauerhase, *The Federal Circle Game: The Precarious Constitutional Status of Status Offenders*, 7 COOLEY L. REV. 31 (1990). This article discusses the effect of statutes which prevented the secure detention of status offenders, finding that these children were then placed in mental health facilities by their parents. This practice of "transinstitutionalization" is made possible by the Supreme Court decision of Parham v. J.R., 442 U.S. 584 (1979). *Parham* held that a parent may admit a child to an inpatient mental facility and this admission will be considered voluntary and the child is not entitled to a hearing, even if the child objects to the placement. *Id.* at 602-608. *See, e.g.*, Ira M. Schwartz (IN) JUSTICE FOR JUVENILES 131-148 (1989) (discussion of commitment of status offenders to inpatient psychiatric and chemical dependency units of hospitals); Ira M. Schwartz, *The "Hidden" System of Juvenile Control*, 30 CRIME & DELINQ. 371 (1984) (study done in Minnesota finding that the deinstitutionalization of status offenders resulted in increased numbers of youths being institutionalized in chemical dependency and mental health systems).

101. John L. Hutzler, *Juvenile Court Jurisdiction over Children's Conduct: 1982 Comparative Analysis of Juvenile & Family Codes and National Standards*, 1982 NAT'L CTR. JUV. JUST. 1, 20-21. Hutzler found that status offenders who violated court orders may be adjudicated delinquent under state statutes in Colorado, Florida, Kansas, Montana, Nevada, Ohio, Oklahoma, and Texas.

102. 609 S.W. 2d 824 (Tex. Civ. App. 1980).

103. *Id.* at 825.

104. *Id.* at 826; *See also* Rubin, *supra* note 9, at 68.

105. *See, e.g.*, State v. Baker, 376 N.E.2d 1005 (Ill. 1978); *In re* Bellanger, 357 So.2d 634 (La. 1978); *In re* M.S., E.O., D.K., E.M., 374 A.2d 445 (N.J. 1977); *In re* Jones, 297 S.E.2d 168, (N.C. 1982); *In re* Darlene C., 301 S.E.2d 136 (S.C. 1983). *See also*, Hutzler, *supra* note 2 at 20-21.

106. 138 Cal. Rptr. 387, 391 (App. 3rd 1977).

nal offender if the juvenile failed to obey a lawful order of the juvenile court.[107] Therefore, simply by walking out of a foster home a runaway child could become a criminal offender and sentenced to the California Youth Authority, although commitment to the Youth Authority was not allowed for non-criminal offenders.[108] To curb the inequity facing status offenders, the California Legislature enacted the 1976 Amendments to the California Welfare and Institutions Code, which provided that a non-criminal offender cannot become a criminal offender simply by violating an order of the court.[109] Unfortunately, as Ronald's case reveals, juvenile

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107. *Id.* at 391. In California, the juvenile court is divided into three parts. The Welfare and Institutions Code is divided into §§ 600, 601, and 602. Section 600 covered the dependent children which includes victims of abuse and neglect. However, section 600 currently falls under the 300 category. Section 602 covers children who violate the law. The acts they commit would be crimes if committed by an adult. The § 601's are noncriminal offenders who fall in between these two categories, and according to the *Ronald* opinion have "always been a major headache to the juvenile court." *Id.* at 389. As Justice Gardner explains the 601 category originally included behavior even "the most straight-laced individual would have difficulty defining as sinful." *Id.* at 390. Behaviors previously included under 601 were:

> 1. The incorrigible. An incorrigible is defined as a minor who persistently or habitually refuses to obey the reasonable and proper orders and directions of a parent or guardian or who is beyond the control of that parent or guardian.
> 2. The truant.
> 3. The curfew violator.
> 4. One who for cause is in danger of leading an idle, dissolute, lewd or immoral life.

Id. Currently § 601 includes:

> (a) Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parent, guardian, or custodian, or who is beyond the control of such person, or who is under the age of 18 years when he violated any ordinance of any city or county of this state establishing a curfew based solely on age is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

CAL. WELF. & INST. CODE § 601 (West 1984).

In Justice Gardner's criticisms of the juvenile court's exercise of jurisdiction over 601's, he states:

> The 601 was a judicial nightmare. He resented being in court. He had violated no law. He usually did not get along with his parents and, when one met the parents, this was often understandable. He was often severely maladjusted presenting bleak hope of effective treatment. Just as often he was a time-consuming minor nuisance some inadequate parent was trying to fob off on the court.

Justice Gardner also criticizes the intermingling of 601's and 602's in the same institutions. He states "the youngster whose only offense against society was that he could not get along with his parents, found himself cheek by jowl with the underage rapist, robber or heroin peddler." *Id.*

108. The California Youth Authority is a state department developed to oversee California's youth and juvenile corrections programs. Pearl S. West, *The California Youth Authority*, 607 PEPP. L. REV. 607 (1979). Commitment to the authority is governed by CAL. WELF. & INST. CODE § 1731.5 (West 1984).

109. CAL. WELF. & INST. CODE § 602 (West 1984); 138 CAL. RPTR. 387, 391.

court judges attempted to circumvent this legislative change. After Ronald was adjudicated a non-criminal offender the court ordered him to remain at the juvenile crisis center. When Ronald left the crisis center without permission, a petition under a criminal offender status was filed for a criminal contempt of court violation under Penal Code Section 166(4). Since contempt of court was a criminal offense he was deemed a criminal offender and could be incarcerated as a delinquent. Contempt of court provided an alternative means for the court to bootstrap a juvenile non-criminal offender into a criminal delinquent. As Justice Gardner points out, the court was "doing by indirection what cannot be done directly."[110] Therefore, Justice Gardner and the Fourth District Court of Appeals ruled that a status offender who runs away may be neither adjudicated a law violator nor placed in secure detention.[111]

In addition to turning a status offender into a delinquent for violating a court order, courts use other means to indirectly bootstrap juvenile offenders. One example of an indirect route to adjudication of delinquency is through the crime of "escape." In New Jersey, four children adjudicated "juveniles in need of supervision" were placed in shelter care facilities and subsequently classified by the trial judge as delinquents for committing the crime of escape when they left these facilities.[112]

The New Jersey Supreme Court rejected this practice. The court held that "[t]he unauthorized leaving of a shelter is symptomatic of the very problem for which shelter care is being provided.[113] Furthermore, "[i]t would be incongruous to classify a

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110. 138 CAL RPTR. at 392.

111. *Id.* at 387-88. Justice Gardner states "while it may seem ridiculous to place a runaway in a nonsecure setting, nevertheless, that is what the Legislature has ordained." *Id.* at 392.

112. *In re* M.S., E.O., D.K., and E.M., 374 A.2d 445 (N.J. 1977). The Appellate Division upheld the adjudications of delinquency based on criminal escape. *Id.* at 446.

113. *Id.* at 448.

The New Jersey Juvenile Act defined "juvenile in need of supervision" to mean:

a. A juvenile who is habitually disobedient to his parent or guardian;
b. A juvenile who is ungovernable or incorrigible;
c. A juvenile who is habitually and voluntarily truant from school; or
d. A juvenile who has committed an offense or violation of a statute or ordinance applicable only to juveniles. Evidence of conduct which is ungovernable or incorrigible may include but shall not be limited to:
   (1) habitual vagrancy,
   (2) immorality,
   (3) knowingly visiting gambling places, or patronizing other places or establishments, the juvenile's admission to which constitutes a violation of law,

juvenile as a delinquent for the same kind of conduct which under the Act constitutes him or her as being in need of supervision only."[114] The Supreme Court of New Jersey explained that a child who runs away from a shelter is only harming his or her own well being; by contrast the court believed the crime of escape "offends social order and the rule of law."[115] Therefore, the court found the juvenile should not be subject to the stigma of delinquency when she has not committed a crime against society.[116] This is a positive result recognizing that a child who has not committed a criminal act should not be wrongly treated as a criminal.

In general, state courts have responded to national criticism of bootstrapping juveniles by ruling that juveniles may not become delinquents by running away or disobeying their court orders.[117] Unfortunately, these same courts have found ways to bypass the bootstrapping limitations and have instead relied on judicial contempt powers to serve status offenders with stiffer penalties.[118] In effect, the court can turn a chronic status offender into a contemnor but not a delinquent. The contemnor may then receive a sentence of secure detention.

B. Contempt of Court as a Default

Most courts have found that imposing a more severe sentence

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(4) habitual idle roaming of the streets at night,
(5) deportment which endangers the juvenile's own morals, health or general welfare.

Id. at 446 n.3; N.J. STAT. ANN. § 2A:4-45 (West 1987).

As used in this act, 'delinquency' means the commission of an act by a juvenile which if committed by an adult would constitute:

a. A homicide or act of treason;
b. A high misdemeanor or misdemeanor;
c. A disorderly persons offense; or
d. A violation of any other penal statute, ordinance or regulation.

Id. at 446 n.2.

Current New Jersey Statutory law changed the label of child in need of supervision to that of "juvenile family crisis". *See*, N.J. Stat. Ann. § 2A:4A-22,23 (West 1987).

114. 374 A.2d at 448.

115. *Id.*

116. *Id.*, citing to *In re Gault*, 387 U.S. 1, 24 (1967).

117. *See, e.g., In re* Toni Carole Baker, a minor, 376 N.E.2d 1005 (Ill. 1978) (under the Illinois Juvenile Court Act a juvenile runaway adjudged in need of supervision can not be adjudicated delinquent for violating the court's order); *In re* Doris Louise Jones, 297 S.E.2d 168 (N.C. Ct. App. 1982) (holding that noncriminal activities which violated a court order of an undisciplined child could not be used for adjudication of that child as a delinquent); *In re* Darlene C., 301 S.E.2d 136 (S.C. 1983) (Family Court could punish juvenile who committed criminal contempt by running away in violation of court order under its inherent contempt power; however the court could not adjudicate as delinquent a chronic status offender).

118. Kim Brooks, *supra* note 2 at 17-21.

on a status offender for violating her court orders is a valid use of the courts' contempt power. State courts, however, have placed different restrictions on this power.[119] Morever, national legislation has affirmed the use of the contempt power as a means to incarcerate repeat status offenders.[120]

There is considerable conflict over the use of contempt of court when a child has committed the same non-criminal behavior twice, resulting in inconsistent and unique state solutions. One of the first cases to deal with the issue is *L.A.M. v. State*.[121] In this decision, the Alaska Supreme Court held that before holding a juvenile in criminal contempt four elements must be established: (1) there must be a valid court order directing the alleged contemnor to do or refrain from doing something and the court's jurisdiction to enter that order; (2) the contemnor must have sufficient notice of the court order; (3) the contemnor must be able to comply with the order; and (4) there must be a wilful failure to comply with the order.[122] After establishing these elements, a child may then be placed in a secure facility for contempt of court.

The *L.A.M.* court relied upon the *parens patriae* doctrine to justify the juvenile court judges' use of the contempt power in these non-criminal cases.[123] The court rejected L.A.M.'s argument that running away only harmed herself and that consequently the state should not interfere with her liberty interest. The court held that in addition to the child's liberty interest the parents' and state's interests also must be considered.[124] The state's interest in "protecting children from venereal disease, from exposure to the use of dangerous and illicit drugs, from attempted rape, and from

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119. *See infra* note 137 and accompanying text.

120. Juvenile Justice Amendments of 1980, Pub.L. No. 96-509, § 11(a)(13)(A), 94 Stat. 2750, 2757 (1980) (codified as amended at 42 U.S.C. § 5633(a)(12)(A) (1982)).

121. 547 P.2d 827 (Alaska 1976).

122. *Id.* at 831.

123. *Id. But see*, Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977). *Calendine* held that status offenders must be treated consistently with the *parens patriae* doctrine, meaning they must be helped and not punished. Due to the need to treat and rehabilitate the court held that there was no rational justification for attempting to accomplish these goals through placing children in secure facilities. *Id.* at 326. Furthermore, the court specifically held that:

> [F]or those extreme cases in which commitment of status offenders to a secure, prison-like extreme cases cannot be avoided, the receiving facility must be devoted solely to the custody and rehabilitation of status offenders. In this manner status offenders can be spared contact under degrading and harmful conditions with delinquents who are guilty of criminal conduct and experienced in the ways of crime.

Id. at 329.

124. 547 P.2d at 832.

physical injury" justifies a more severe penalty.[125]

Although contemnors are only committing behavior that under statutory law warrants non-secure dispositions, courts have ignored legislative intent[126] and sentenced children to dispositions normally unavailable to a non-criminal offender. L.A.M. argued that because her conduct of running away had not changed, the new sanction of being placed in a locked setting was inappropriate.[127] The court, however, believed the McLaughlin Training School where L.A.M. was sent was different from a maximum security institution, since Alaska sent its most serious juvenile offenders to secure institutions in other states.[128] The court believed chronic runaways such as L.A.M. would be no different then the rest of the population at McLaughlin. As a result, the Alaska Supreme Court found the sanction was not unreasonably onerous and a court should be allowed to use its inherent contempt powers to enforce orders.[129]

Consistent with the rationale of *L.A.M.* but adding more restrictions on the contempt power, is the oft cited case of *Hammergren*.[130] The Minnesota Supreme Court held that "only under the most egregious of circumstances" may the juvenile courts exercise their contempt power in such a manner that a status offender will be incarcerated in a secure facility.[131] In addition, the record must

125. *Id.* at 834. The court admits it will never be completely successful in protecting its young people but it has the obligation to try. *Id. But see*, David L. Bazelon, *Beyond Control of the Juvenile Court*, 21 JUV. CT. JUDGES J. 42, 44 (1970). When the Chief Judge of the U.S. District Court of Appeals, District of Columbia addressed a convention of juvenile court judges he explained:

> The situation 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 the 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 (emphasis added).

126. *See infra* note 130 and accompanying text.

127. 547 P.2d at 834.

128. *Id.* The *L.A.M.* court explains that in Colorado, California, Illinois, and New York children in need of supervision (CINS) can be placed in juvenile halls or youth centers, which are buildings with locked doors, but these CINS cannot be placed in state training schools which are in actuality maximum security institutions *Id.* at 835 (citing *In re* Presley, 264 N.E.2d 177 (Ill. 1970); *In re* Tomasita N., 287 N.E.2d 377 (N.Y. 1972); C. v. Redlich, 300 N.E.2d 424 (N.Y. 1973)). The court then determined that the McLaughlin Youth Center is more analogous to a juvenile hall then a maximum security institution and therefore L.A.M. and other CINS may be placed there. The court bases the decision on the fact that Alaska sends delinquents who have committed very serious crimes to state training schools in Colorado or California rather than McLaughlin. *Id.*

129. *Id.* at 835-36.

130. 294 N.W. 705 (Minn. 1980).

131. *Id.* at 707.

detail that all less restrictive alternatives failed in the past.[132]

The *Hammergren* holding is openly at odds with a Minnesota statutory law, which states that wayward children who violate their court orders shall be placed in shelter care facilities only.[133] The *Hammergren* court recognized that the statute had been amended from a previous provision which allowed repeatedly wayward children to be placed in secure rather than shelter care facilities. The reasons for the amendment included the potential negative effects on status offenders detained with children who have committed crimes.[134] Similarly, the court admitted that "the Legislature may well have determined that removing status offenders from facilities designed for and used for law violators would result in better treatment, better programs, and better services for the child and that child's family."[135] Despite the court's recognition of the statutory changes, which brought Minnesota into compliance with the Juvenile Justice and Delinquency Prevention Act of 1974, the court nonetheless held that status offenders may be incarcerated.[136]

The implications of *Hammergren* are significant considering the court rejects the plain language of the statute prohibiting secure confinement of repeat status offenders, while still acknowledging many valid reasons to forbid the incarceration of status offenders. The *Hammergren* ruling remains in force today, and many other states that have dealt with the same or similar issues have adopted its analysis.[137]

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132. *Id.* at 708.

133. *Id.* at 708 (Wahl, J. concurring). The previous statute stated that "a child taken into custody by reason of being wayward or habitually disobedient who had previously escaped from a shelter care facility might be placed in a secure facility." MINN. STAT. § 260.173 (1976). MINN. STAT. § 260.173, subd. 3 (b) (1978) states:

> Having been previously adjudicated delinquent, or. . . conditionally released by the juvenile court without adjudication, has violated his probation, parole, or other field supervision under which the child had been placed as a result of behavior described in this subdivision; the child may be placed only in a shelter care facility.

Other pertinent definitions include:

> Secure detention facility means a physically restricting detention facility, including a detention home.
>
> Shelter care facility means a physically unrestricting facility, such as a group home or a licensed facility for foster care, excluding a detention home.

MINN. STAT. § 260.015 subd.16, subd. 17 (1978).

134. 294 N.W.2d 705, 707. The *Hammergren* court also noted that the ABA Juvenile Justice Standards Project, Standards Relating to Noncriminal Misconduct, concluded that wayward youth are best served outside the juvenile court system. *Id.*

135. *Id.* at 707.

136. *Id.*

137. *See, e.g.*, *In re* Michael G., 747 P.2d 1152 (Cal. 1988) (adopts similar qualifica-

The use of a court's "inherent contempt powers" or an adjudication of delinquency against a repeat status offender can both result in the juveniles secure confinement. Despite the same consequences, many courts will not allow a repeat offender to become a delinquent but will allow the incarceration of a contemnor.[138] In *In re Michael G.*, the Supreme Court of California found that the *In re Ronald S.* holding[139] which prohibited detention of contemptuous status offenders based on an elevation to delinquency status, did not address whether contemptuous status offenders could be placed in secure facilities without converting the youth to the criminal offender delinquent status.[140] In resolving this question, the *Michael G.* court determined that without express legislation prohibiting the use of judicial contempt powers, the power is too fundamental to be eliminated.[141] Although the contempt power was not expressly limited, the court did recognize that the legislature's general intent was to deinstitutionalize status offenders. Therefore, the California Supreme Court used a restrictive test for exercising contempt powers and incarcerating a juvenile non-criminal offender.[142] The limitations imposed were borrowed from the

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tions as *Hammergren*); *In re* J.E.S., 817 P.2d 508 (Colo. 1991) (despite a legislative *ban* a court can still use the contempt power to incarcerate status offenders); *In re* G.B., 430 N.E.2d 1096 (Ill. 1981); *In re* Ann. M., 525 A.2d 1054 (Md. 1987) (power to punish for contempt does not depend on legislative grant); *In re* Darlene C., 301 S.E.2d 136, 137 (S.C. 1983) (adopts the egregious standard); State v. Norlund, 644 P.2d 724, 726 (Wash. Ct. App. 1982) ("[o]nly under the most egregious circumstances should the juvenile court exercise its contempt power to incarcerate a status offender in a secure facility"); *In re* D.L.D., 327 N.W.2d 682, 689 (Wis. 1983) (Allowing incarceration of the status offender when the contemptuous act is egregious and less restrictive alternatives have failed or would fail). *But see*, W.M. v. State, 437 N.E.2d 1028 (Ind. Ct. App. 1982) (contempt power can not be used in contravention of legislation. . . "[a]ny change must come from the Legislature").

138. *See, e.g., In re* Baker, 376 N.E. 2d 1005, 1007 (Ill. 1978). "Juvenile contemnor, civil or criminal, may be punished for their contumacy, but the court clearly cannot use a contempt finding as a basis for an adjudication of delinquency under the valid and unambiguous terms of the Juvenile Court Act."; *In re* Darlene C., 301 S.E.2d 136, 138 (S.C. 1983). The South Carolina Supreme Court concluded that a chronic status offender can not be sentenced as a delinquent but remanded the case so the juvenile runaway could be punished in a secure detention facility under the court's inherent contempt powers.

139. *In re* Ronald S., 138 Cal Rptr. 387.

140. *In re* Michael G., 747 P.2d 1152 (Cal. 1988).

141. 747 P.2d at 1156-59.

142. *Id.* at 1160-63. In justifying their departure from the legislature the court states:

> Thus, although the legislature's general prohibition on the secure detention during nonschool hours for section 601 wards does not apply to contemnors, respect for the intent of our co-equal branch of government demands that courts exercise caution when imposing such sanctions against contemptuous status offenders.

Id. at 1160.

Wisconsin Supreme Court opinion *In re of D.L.D.*[143] Following the reasoning of the *D.L.D.* decision, the *Michael G.* court believed these restrictions would balance the legislature's intentions of deinstitutionalization with the inherent contempt powers of the court.[144]

Express legislative provisions denying secure detention as a possibility for non-criminal offenders in contempt of court have also been repudiated. *In re Michael G.* did not answer the constitutional question of whether the legislature could override the inherent contempt power of the courts.[145] However, a recent decision by the Supreme Court of Colorado held that a legislative amendment prohibiting courts from using contempt of court to incarcerate truants was unconstitutional.[146] The *J.E.S.* court relied on the separation of powers doctrine finding that a legislature may provide reasonable regulations as to the procedures observed in exercising the contempt power but cannot divest courts of the power altogether.[147]

J.E.S. argued that the legislative amendment was a reasonable regulation of the contempt power because the court could still impose other sanctions such as community service on children who disobeyed a court order to attend school.[148] The court disagreed holding that "by prohibiting courts from incarcerating juveniles who repeatedly act in contempt of a court order, the amended section unreasonably limits the courts' inherent contempt power."[149] The court further supported its decision by stating its belief that

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143. 327 N.W.2d 682. These limitations include:

> (1) the juvenile is given sufficient notice to comply with the order and understands its provisions; (2) the violation of the court order is egregious; (3) less restrictive alternatives were considered and found to be ineffective; (4) special confinement conditions are arranged consistent with § 48.209 (no intermingling with delinquents).

144. 747 P.2d 1152, 1159-60.

145. 747 P.2d at 1160.

146. *In re* J.E.S., 817 P.2d 508 (Colo. 1991).

147. This same separation of powers argument was used successfully in *In re* G.B. to ignore legislative intentions. 430 N.E.2d 1096 (Ill. 1981). An interesting aspect of the *In re* G.B. case is the dissents' criticism of the circumvention of the legislature's attempts to develop sentencing schemes, and the unjust outcome of the decision. Justice Simon writes:

> Sentencing a 16-year old boy to 60 days in a detention center for contempt of court because he refused to attend school is in my judgment a circumvention of the statutory policy of this State. I also believe it is harsh to the point of being an abuse of discretion and that confinement for that length of time in a detention center is likely to do the minor as well as society more harm than good.

430 N.E.2d at 1101.

148. 817 P.2d at 510-11.

149. *Id.* at 513.

the threat of incarceration is what makes other truancy sanctions effective. The court also cited language from other decisions which stand for the proposition that without the contempt power courts are meaningless.[150]

Although state courts have reached strikingly different results concerning the use of the contempt power to incarcerate repeat status offenders, Congress did step in and permit the secure detention of these children.[151] The 1980 Amendments to the Juvenile Justice and Delinquency Prevention Act (Amendments) received considerable opposition, but the National Council of Juvenile and Family Court Judges strongly urged recognition of this inherent power of the court.[152] The Amendment's purpose was to aid courts in responding to "youth who chronically refuse voluntary treatment."[153] Before forcing this "treatment" on the child with secure detention, Congress established restrictions similar to those found in the *Hammergren* and *Michael G.* opinions.[154] The juvenile must be adjudicated a status offender subject to a court order, and given fair warning of the consequences of violating the court order.[155] However, the "proper procedures" a court must follow in establishing the court order are not defined. Due to

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150. *Id.* (citing *In re* Ronald S., which discusses the problems courts have with runaway status offenders). *J.E.S.* quotes the *Ronald S.* statement that "[i]f the juvenile court is to be saddled with the responsibility of [status offenders], it must also be afforded the tools and authorities to handle these cases." 138 Cal. Rptr. 387, 392-93 (1978).

151. Juvenile Justice Amendments of 1980, Pub.L. No. 96-509, § 11(a)(13)(A), 94 Stat. 2750, 2757 (1980) (codified as amended at 42 U.S.C. § 5633(a)(12)(A) (1982)). Under § 5433, the requirements for funding now provide:

> 12(A) provide within three years after submission of the initial plan that juveniles who are charged with or have committed offenses that would not be criminal if committed by an adult *or offenses which do not constitute violations of valid court orders*, or such nonoffenders as dependent or neglected children, shall not be placed in secure detention facilities or secure correctional facilities (emphasis added).

Besides the many different decisions denying or allowing for incarceration through contempt of court, the uniqueness of state solutions is apparent in states that have tried to meet some middle ground. *See, e.g., Julia S.*, 719 P.2d 449, 454, 104 N.M. 222, 227 (N.M. Ct. App. 1986) (Children in Need of Supervision (CHINS) can only be incarcerated if they violate their probation terms three times. Even then the incarceration cannot exceed ten days).

152. *See* 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, 55 n.63 (1981). *See also*, SCHWARTZ, *supra* note 89 at 89-97.

153. 126 CONG.REC. H10,932 -38 (daily ed. Nov. 19, 1980).

154. *Michael G.*, 747 P.2d 1152, 1161 (Cal. 1988); L.E.A. v. Hammergren, 294 N.W.2d 705, 708 (Minn. 1980).

155. 28 C.F.R. § 31.303(f)(iii)(3)(i-iii) (1989).

> (3) 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

the narrow holding of *Gault* and *In re Winship* and the insufficient representation status offenders receive, it is unlikely the juvenile will have received adequate legal counsel, and thus have no advocate for other "proper" procedural protections.

Despite the Congressional changes allowing for the incarceration of status offenders in contempt of court proceedings, a minority of states have held that incarcerating a repeat status offender for contempt of court circumvents the intent of the states' legislature.[156] In 1978, the North Carolina legislature removed a violation of probation from the definition of a delinquent child.[157] Construing this statutory change, the North Carolina Supreme Court determined that the legislative purpose behind this amendment would be frustrated if courts used contempt of court to incarcerate probation violators.[158]

Congressional legislation and the majority of contempt cases allow a status offender to be incarcerated for committing non-criminal behavior twice. These cases reveal that jurisdiction over status offenders does not meet its goal of rehabilitation and treatment. Therefore, the justifications for denying non-criminal of-

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of the following conditions must be present prior to secure incarceration:

(i) The juvenile must have been brought into a court of competent jurisdiction and made subject to an order issued pursuant to proper authority. The order must be one which regulates future conduct of the juvenile.

(ii) The court must have entered a judgment and/or remedy in accord with established legal principles based on the facts after a hearing which observes proper procedures.

(iii) The juvenile in question must have received adequate and fair warning of the consequences of violation of the order at the time it was issued and such warning must be provided to the juvenile and to the juvenile's attorney and/or legal guardian in writing and be reflected in the court record and proceedings.

156. Kim Brooks, *supra* note 2 at 19 (Indiana, Louisiana, West Virginia, and Pennsylvania have adopted this position).

157. G.S. 7A-517(12). The statute currently is as follows:

Delinquent Juvenile.—Any juvenile less than 16 years of age who has committed a criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws.

The provision which allowed an undisciplined child to become a delinquent by violating her probation without committing a crime was deleted from the statute effective 1 July 1978.

158. *In re* Doris Louise Jones, 297 S.E.2d 168 (N.C. 1982). Fifteen year old, Doris Jones was ordered "to attend school every day, to be at her grandmother's home by 8:00 p.m. on weeknights and 11:00 p.m. on weekends and to notify her grandmother where she is at all times." *Id.* at 168. When she violated the trial court's order she was committed to a secure facility for thirty days. *See also*, *In re* Bellanger, 357 So.2d 634 (La. 1978) (truant could not be found delinquent and commitment to Department of Corrections for violating probation).

fenders the same procedural protections provided juvenile delinquents are flawed.

III. Addressing the Consequences

When the Supreme Court handed down *Gault* in 1967, the Court recognized that the rationale of acting in the child's best interest without regard to procedural protections was no longer realistic. Children were not being treated and rehabilitated but rather punished and confined in institutions very similar to those serving adults.[159] Despite *Gault*, the treatment and rehabilitation rationales continue to deny universal application of procedural due process rights to non-criminal juvenile offenders. A more thorough examination of the juvenile justice system reveals that status offenders, like delinquents, deserve the full protection of the Fourteenth Amendment.

Despite many recommendations to remove status offenders from the jurisdiction of the juvenile court altogether, jurisdiction over this group persists, and far too often the system falls short of its goal of serving the child's "best interests."[160] Of particular concern is that legislative restrictions on secure detention have been undermined.[161] As discussed, juvenile courts have found ways to

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159. *Gault*, 387 U.S. at 21-27. *See also*, *In re* Ellery C., 300 N.E.2d 424 (N.Y. 1973) (confining a PINS with juvenile delinquents in a training school can not serve as treatment or supervision, rather "it may well result in [the child's] emerging well tutored in the ways of crime.") *Id.*

160. *See* Feld, *supra* note 14 at 162 n. 73 (nearly every professional group which has considered status jurisdiction has recommended its elimination from the juvenile court). For a concise look at the arguments for and against the repeal of status offense jurisdiction *see* Rubin, *supra* note 9, at 62-65. *See also* Board of Directors, National Counsel on Crime and Delinquency, *Jurisdiction over Status offenses Should be Removed from the Juvenile Court: A Policy Statement*, 21 CRIME & DELINQ. 97 (1975); Orman W. Ketchman, *Why Jurisdiction Over Status Offenders Should Be Eliminated From Juvenile Courts*, 57 B.U.L. REV. 645 (1977); Ira M. Schwartz (IN) JUSTICE FOR JUVENILES 50-51 (1989). *Cf.* Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 223(a) (12), 88 Stat. 1109, 1121 (1974) (codified at 42 U.S.C. § 5701 (1988).

> The Congress hereby finds that-
> (4) the problem of locating, detaining, and returning runaway children should not be the responsibility of already overburdened police departments and juvenile justice authorities; and
> (5) in view of the interstate nature of the problem, it is the responsibility of the Federal Government to develop accurate reporting of the problem nationally and to develop an effective system of temporary care outside the law enforcement structure.

But see, Lindsay G. Arthur, *Status Offenders Need A Court of Last Resort*, 57 B.U.L. REV. 631 (1977); Charles H. Logan & Sharla P. Rausch, *Why Deinstitutionalizing Status Offenders Is Pointless*, 31 CRIME & DELINQ. 501 (1985).

161. The Juvenile Justice and Delinquency Act (JJDPA), 42 U.S.C. § 5601-5640 (1983), as amended by Juvenile Justice Amendments of 1980, Pub. L. No. 96-509, 94 Stat 2750.

ignore these reforms and place non-criminal offenders in institutions. Most strikingly, the national legislation condoning contempt of court as a basis for incarceration results in children receiving severe sentences. Allowing secure confinement reveals the unfortunate reality that these juveniles are not simply receiving rehabilitation and treatment but punishment. Finally, status adjudications can ultimately effect a later adult sentence as in *Unger*, further illustrating the unfairness of current judicial and legislative approaches to status offenders.

State legislatures should clearly provide the right of representation to status offenders. Furthermore, this right must in practice be realized. The juvenile courts should make it mandatory that any child facing the possibility of home removal or commitment to a secure or non-secure institution receive counsel. Once counsel is provided to these children, no child could be removed from his home under the facade of treatment without fair representation. Furthermore, increased representation will allow the case law to more fully develop with increased judicial decision making. With the efforts of both state legislatures and the judiciary in giving these children specific attention and heightened procedural rights, they can no longer be channeled through the juvenile court system in such a discretionary manner.

Finally, since status offenders are the final group of children suffering from the "worst of both worlds," they deserve the same procedural protections afforded juvenile delinquents. The differences in the treatment of status offenders and delinquents is in reality negligible, since a status offender can easily become a delinquent simply by engaging in non-criminal behavior twice. The Supreme Court in *Gault* held "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[162] As long as status offenders continue to be at the mercy of a capricious and unaccountable juvenile justice system, the promise of procedural protections for everyone remains unfulfilled.

162. 387 U.S. at 13.