ARE WE CRIMINALIZING *Adolescence?*

BY JAY D. BLITZMAN

We now know, as the founders of the juvenile court system intuited at the dawn of the twentieth century, that children are not little adults. Relying in large part on brain imaging studies and psychological research regarding the maturational arc of adolescence, the United States Supreme Court has abolished the juvenile death penalty and mandatory juvenile life without parole. (Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).) Youth are accountable, but in a constitutional sense are different than adults. Practitioners across the country are considering the implications of the message of proportional sanctioning and sentencing in a variety of contexts, including zero tolerance in schools, capacity to form mens rea, mandatory transfer, and collateral consequences. (*See, e.g.*, Laurence Steinberg, Should the Science of Adolescent Brain Development Affect Juvenile Justice Policy and Practice?, Keynote Address at the 2014 Models for Change Cross Action Network Meeting, Nat'l Ctr. for Mental Health & Juvenile Justice (May 20, 2014), http://tinyurl.com/qgxbyww.) However, this landscape has been complicated by a disturbing and counterintuitive narrative—the recriminalization of status offense conduct

that was decriminalized in the aftermath of *In re Gault*, 387 U.S. 1 (1967), and the enactment of the Juvenile Justice and Delinquency Prevention Act (JJDPA) in 1974.

This article examines the unintended consequences of such policies and practices that have adversely affected our most vulnerable youth and exacerbated racial disparities in the juvenile and child welfare system. It has been argued with some persuasiveness that "the trend in the United States has been to criminalize the very nature of adolescence in the name of social welfare, with youth of color bearing the brunt of what is actually social control." (James Bell & Raquel Mariscal, *Race, Ethnicity, and Ancestry in Juvenile Justice*, *in* Juvenile Justice: Advancing Research, Policy, and Practice 111, 115 (Francine T. Sherman & Francine H. Jacobs eds., 2011).)

Alarmingly, recriminalization is occurring at a time of declining national juvenile arraignment rates. The process has been characterized by dramatic increases in school referrals to juvenile justice, treating status offenders who violate conditions of supervision as delinquent probation violators, and sanctioning for so-called "technical" probation violations, i.e., for reasons other than the alleged commission of new offenses. In exploring this terrain, this article reviews the history and rationale for treating status offenders differently than youth accused of criminal acts and the unintended consequences of current practices that have undermined the rehabilitative promise of the post-*Gault* era. "During the past two decades, many youth have come to the attention of the juvenile justice system from schools, child welfare agencies, and the mental health systems." (Nat'l Research Council of the Nat'l Academies, Reforming Juvenile Justice: A Developmental Approach 3 (Richard J. Bonnie et al. eds., 2013) [hereinafter Reforming Juvenile Justice].)

Wide-scale implementation of zero tolerance disciplinary regimes, deployment of police officers in schools without first defining their relationship and scope of authority, and the use of the valid court order (VCO) are reminiscent of the *parens patriae* philosophy of the pre-*Gault* era. As will be discussed, the VCO amended the JJDPA in 1980, which enables states to convert status offense cases into delinquency probation violations for youth who do not follow conditions of care. This narrative has very concerning racial overtones, as black and ethnic minority youth make up a disproportionate number of adolescents disciplined by schools, managed by the child welfare system, and diagnosed with mental health problems such as emotional disturbances. (*Id.*)

> Racial and ethnic disparities is one of the most intransigent and disturbing issues facing juvenile justice in the United States. While comprising approximately 38% of the population eligible for detention, the overrepresentation of youth of color in secure confinement has increased to almost 70% over the past decade. These startling increases in disparities for youth of color occurred while arrest rates for serious and violent crimes declined by 45%.

(Bell & Mariscal, *supra*, at 111 (citations omitted).)

While "race and ethnic disparities exist in the adult criminal justice system, they are more pronounced in the juvenile justice system where social factors . . . are part of the decision-making process at every stage." (*Id.* at 115.)

Gault is often cited for the heralding of a juvenile due process revolution. The founders of the system "believed that society's role was not to ascertain whether the child was 'guilty' or innocent,' but '[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'" (*In re* Gault, 387 U.S. 1, 15 (1967).) The child was to be "treated" and "rehabilitated." The results were to be achieved without coming to constitutional grief by insisting that the proceedings were not adversary, but that the state was proceeding as parens patriae. However, the reality did not match the rhetoric. In spite of the ostensible intent, the "enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context." (*Id.* at 17.) In evocatively depicting the reality of the treatment youth experienced, the Court noted that "Juvenile Court history has . . . demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." (*Id.* at 18.) As Dean Pound observed in 1937, "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . ." (*Id.* (quoting Roscoe Pound, *Foreword to* Pauline V. Young, Social Treatment in Probation and Delinquency, at xxvii (1937)).)

The comparison to the oppressive and secretive court of English monarchs might seem hyperbolic, but the harm done to children in the Houses of Refuge that devolved into training schools and prisons would have made Dickens blush. In the nonadversarial medical model, there was a nonrebuttable presumption that a child needed treatment or "fixing." In this world, a youth's noncompliance with home or school rules was treated as a criminal matter often leading to lengthy periods of incarceration. There was no differentiation between civil offenses or conduct that we now consider to be status offenses—e.g., not attending school, running away from home, violating curfew, or being stubborn—and allegations of criminal conduct.

On June 8, 1964, Gerald Gault and a friend, Ronald Lewis, were arrested by the sheriff of Gila County, Arizona. Gault was 15 years old and had been on probation for having been in the company of another boy who had stolen a wallet from a lady's purse. A neighbor had made a verbal complaint about a telephone call in which the caller or callers had made remarks "of the irritatingly offensive, adolescent, sex variety." (*Id.* at 4.) As there was no evidentiary hearing, it was never conclusively established which statements, if any, could be attributed to Gault or to Lewis. On June 15, 1964, after a session in the judge's chambers, without the right to counsel or confrontation of witnesses, Gault was committed to the State Industrial

JAY D. BLITZMAN *is the First Justice, Massachusetts Juvenile Court-Middlesex Division.* *The author wishes to thank research assistants Jessica Acosta-Muller, Hilary Smith, and Joy Rizos.*

School for the period of his minority (i.e., until age 21), unless sooner discharged by "due process of law." (*Id.* at 7.)

At the time the State Industrial School was the functional equivalent of juvenile prison. Under Arizona law, no appeal was permitted. The youth in *Gault* had received a six-year sentence. An adult in similar circumstances would have faced a maximum term of not more than two months or a fine of $5 to $50. Of course, an adult in the criminal system would have also been entitled to the benefit of due process. This disparity of treatment underlines the danger of net widening or greater exposure to state intervention in the name of fixing and treating. This pattern was the hallmark of the pre-*Gault* era and is being resurrected today.

While prolonged detention for minor offenses in the name of treatment characterized the era, there was little, if any care, provided. In dramatically concluding that "the condition of being a boy does not justify a kangaroo court," the Court cited Justice Fortas's observation that "[a]child receives the worst of both worlds:…he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." (*Id.* at 18 n.23, 28 (quoting Kent v. United States, 383 U.S. 541, 556 (1966)).) Youth who would today be considered status offenders were treated the same as those accused of crimes. Common adolescent behaviors such as talking back and staying out late could land a child in an institution without a modicum of due process.

Gault Introduces Due Process

Gault introduced the concept of due process into juvenile adjudicatory proceedings by providing counsel for indigent youth, notice of the charges, the right of confrontation, and, the right to remain silent. The case also exposed the false dichotomy between due process and rehabilitation. In decreeing that there is no substitute for fairness, the Court cited Justice Felix Frankfurter's observation that "[t]he history of American freedom is, in no small measure, the history of procedure." (*Id.* at 21 (quoting Malinski v. New York, 324 U.S. 401, 414 (1945)).) In spite of benevolent intent, "the essentials of due process . . . may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." (*Id.* at 26.) Given the phenomena of increased court referrals for conduct of the adolescent variety in the modern era, the power of this message cannot be underestimated. "Treating youth fairly and ensuring that they perceive that they have been treated fairly and with dignity contribute to positive outcomes in the normal processes of social learning, moral development, and legal socialization during adolescence." (Reforming Juvenile Justice, *supra*, at 6.) Permitting state intervention and often subjective best-interest determinations without honoring the presumption of innocence and conducting rigorous fact finding unnecessarily entangles youth in the system and resurrects the horrors of the pre-*Gault* world.

In 1974, Congress passed the JJDPA, which created the Office of Juvenile Justice and Delinquency Prevention (OJJDP). The JJDPA provided federal juvenile justice dollars to the states in return for compliance with sweeping reforms. As has been noted, the pre-*Gault* practice was that all children in the system—regardless of the nature of their offense—required corrective guidance. The JJDPA reflected the national consensus that status offenses should be decriminalized. Accordingly, the JJDPA's initial core requirements were the deinstitutionalization of status offenders and sight and sound separation from adults. Removing juvenile offenders from adult prisons and reducing disproportionate minority contact (DMC) with the juvenile justice system later became the other core principles of the legislation. (Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 42 U.S.C. §§ 5601 *et seq.*).) Deinstitutionalization was designed to keep youth accused of status offenses from being housed with juveniles accused of criminal acts. Many states responded by enacting comprehensive statutory schemes with titles such as Children in Need of Services (CHINS) or Persons in Need of Services (PINS) to address offenses that only apply to minors, such as truancy, running away, or being stubborn or ungovernable. (Francine T. Sherman & Jay D. Blitzman, *Children's Rights and Relationships: A Legal Framework*, *in* Juvenile Justice, *supra*, at 68.)

However, the so-called due process revolution was short-lived. Only four years after *Gault*, a reconstituted Supreme Court, viewing the history of juvenile justice through a different lens, held that jury trials in juvenile proceedings were not constitutionally mandated. (McKeiver v. Pennsylvania, 403 U.S. 528 (1971).) *Gault* had only addressed the basics of fundamental fairness during the adjudicatory stage. Issues such as bail, transfer, and sentencing were not reached. Accordingly, each state was left to design the contours of its juvenile system, and the full realization of *Gault*'s promise of due process remains aspirational. (*See*, *e.g.*, Jay D. Blitzman, Gault*'s Promise*, 9 Barry L. Rev. 67, 84 (2007).) In 1980, the JJDPA was amended with the enactment of the VCO. (41 U.S.C. § 5663.) The VCO enabled states that adopted the provision to treat children accused of violating conditions of treatment as the functional equivalent of delinquent probation violators, and subject them to secure detention. The rehabilitative impulses of *Gault* were quickly countered by social and cultural concerns about rising arrest rates, the pernicious mythology of juvenile predators, and demographic projections forecasting a tsunami of juvenile crime. The "tough on crime" rhetoric had great resonance, and most jurisdictions raced to amend legislation targeting violent offenders for adult prosecution. By 2006, 29 states and the District of Columbia had adopted some form of the VCO. (Blitzman, Gault*'s Promise*, *supra*, at 83 (citing Linda A. Szymanski, *Probation as a Disposition for Status Offenders*, NCJJ Snapshot Extended (Nat'l Ctr. for Juvenile Justice), Apr. 11, 2006).) With the power to incarcerate nonviolent offenders, the juvenile due process revolution was over shortly after its inception.

The demographic projections about a rising adolescent arrest rate were accurate, but no tsunami reached our shores. National juvenile arrest rates for all offenses peaked in 1996 and by 2011 had declined by 54 percent. (*Law Enforcement & Juvenile Crime: Juvenile Arrest Rate Trends*, OJJDP Statistical Briefing Book, http://tinyurl.com/n6bu6y9 (last updated Dec. 9, 2014).) At the same time, school suspensions, expulsions, and referrals to law enforcement have soared, and many children have been securely detained. (Aaron J. Curtis,

Tracing the School to Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions, 102 Georgetown L.J., 1251, 1258–60 (2014) (discussing overall trends in student discipline through zero-tolerance policies).) Additionally, as arrest rates declined, detention rates increased. (Diane M. Myers & Anne F. Farrell, *Reclaiming Lost Opportunities: Applying Public Health Models in Juvenile Justice*, 30 Child. & Youth Services Rev. 1159 (2008).) While detention rates have declined recently, in part because of the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI) and the OJJDP, "75% of all youth incarcerated in the U.S. are locked up for non-violent offenses." (Henrick Karoliszyn, *Juvenile Justice 40 Years On: Unfinished Business*, Crime Rep. (Sept. 7, 2014), http://tinyurl.com/l5ywu8l.)

Status Offense Redux

In 2013, the VCO exception previously described was used by 27 states and the territories to detain youth for status offenses. (*Use of the Valid Court Order: State-by-State Comparisons*, Coalition for Juv. Just. (Feb. 18, 2015), http://tinyurl.com/or79pqx.) Despite a national decline in the overall number of status offenders since the enactment of the JJDPA, Judge Brian Huff testified in 2010 that nearly 40,000 status offenders pass through our detention systems annually. Approximately 12,000 of those detained individuals would not be eligible for detention without the VCO exception. (*Meeting the Challenges Faced by Girls in the Juvenile Justice System: Hearing Before the House Subcomm. on Healthy Families and Communities*, 111th Cong. 2 (2010) (statement of Hon. Brian J. Huff, Presiding J., Jefferson County Family Court, North Birmingham, Ala.).)

Researchers have started to focus on what has been described as the "school-" or "cradle-to-prison pipeline." (*See, e.g.*, Marian Wright Edelman, *Justice for America's Children*, *Foreword to* Juvenile Justice, *supra*, at xi; Johanna Wald & Daniel J. Losen, *Deconstructing the School-to-Prison Pipeline*, 99 New Directions for Youth Dev. 9–13 (2003).) The multifaceted factors that have contributed to the pipeline implicate questions of race, class, geographic segregation, and access to public education. Sixty years after *Brown v. Board of Education*, our schools are still largely segregated. In a real sense, we live in a world that is still separate and unequal. In 2004, Professor Charles Ogletree wrote, "In the end, I reach the sad conclusion that . . . fifty years after *Brown* there is little left to celebrate." (Charles J. Ogletree Jr., All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education, at xv (2004).) The school-to-prison pipeline "runs through economically depressed neighborhoods and failing schools." (Edelman, *supra*, at xii.) The dramatic increase in school exclusions and court referrals has compounded issues of racial and educational equity. The process has been accelerated by zero tolerance policies and the deployment of police in schools. These issues will be discussed separately.

Zero tolerance policies. Zero tolerance, which became widespread in the 1990s, was initially a response to drug enforcement and later expanded in reaction to media coverage about gangs and school shootings, such as Columbine, although school crime rates were declining or stable. (Bell & Mariscal, *supra*, at 121.) As Bell and Mariscal have indicated, "One initial appeal of zero tolerance was the perception that because these laws were objective and therefore apparently race neutral they might be fairer to youth of color and other students who had been overrepresented in school disciplinary proceedings." (*Id.* at 121.) Research, however, has demonstrated what they describe as the myth of race neutrality. African Americans have been consistently overrepresented among students who are suspended and expelled, a finding that cannot be entirely explained by economic disadvantage. (*Id.*) This pattern is consistent with what they cogently suggest are racial and ethnic disparities that predate the creation of our first juvenile courts and have been reflected in the "juvenile justice system's social welfare mission." (*Id.* at 115.) The original Houses of Refuge that predated the opening of the first juvenile court in Cook County, Illinois, in 1899 were not initially intended to admit children of color. When children of color were "begrudgingly" admitted, "services proved to be meager and insufficient. As a result, African American children were disproportionately confined in adult jails and prisons." (*Id.* at 116.) As the juvenile court system evolved and the Houses of Refuge came more and more to resemble prisons, children of color were disproportionately represented. First there was exclusion from care, then overinclusion in a system without care.

Police in the schools. On its face, deploying police in schools seemed a logical response to protect students from external threats. Instead, it has had the unintended consequence of increasing arrests of children for normative behaviors inside of schools. (Robin L. Dahlberg, ACLU, Arrested Futures: The Criminalization of School Discipline in Massachusetts' Three Largest School Districts 5 (2012) [hereinafter Arrested Futures], *available at* http://tinyurl.com/m56a7fl.) Moreover, while the majority of the publicized school shootings have occurred at suburban or rural schools, police presence has been featured in urban settings with high populations of youth of color. According to the National Association of School Resource Officers, school-based policing is the fastest growing area of law enforcement. (*Id.* at 9.) Sixty years ago, only Flint, Michigan, employed school resource officers. By 2005, 48 percent of public schools responding to a US Department of Justice survey reported having police on site in schools. Today, there are an estimated 17,000 school police officers. (*Id.*)

Research has shown that the presence of police in schools frequently results in significant increases in student arrests for misbehavior previously addressed by educators and parents. (*Id.*) At the same time, studies have demonstrated that police in schools, "particularly ones who use arrest as a means to resolve student discipline issues, do not make schools safer." (*Id.* at 9–10 (citing Matthew P. Steinberg et al., Consortium on Chi. Sch. Research at the Univ. of Chi., Urban Educ. Inst., Student and Teacher Safety in Chicago Public Schools, The Roles of Community Context and School Social Organization 26 (May 2011)).) The research also shows that students of color and students with emotional issues and learning disabilities are disproportionately affected. (*Id.*) A 2011 New York Civil Liberties Union report indicates that youth with disabilities are four times as likely to be suspended as students

without disabilities. (*Id.* at 11.) New York City has over 5,000 school police. As the age of criminal court jurisdiction in New York is still 16, a student of that age arrested for misconduct in school can end up in Rikers Island awaiting arraignment.

There is a need to consider the relationship between police and school administrators as well as the training of the school resource officer. In looking at school policing patterns in the Massachusetts cities of Boston, Worcester, and Springfield, the *Arrested Futures* study concludes that school arrest patterns are dramatically affected by whether or not districts have their own security, have city police on site, or call for assistance on an as-needed basis. For example, as of the date of publication, the only city in the study to have armed, uniformed police stationed in its schools was Springfield. For the years in which data were collected, 2007–2010, Springfield's arrest rate in schools was approximately three times higher than either of the other districts. Although Boston's arrest rate for public disorder was lower overall than Springfield's, Boston's arrest rate of students of color was disproportionate. "In both Boston and Springfield, arrest rates at schools for learning and behavioral difficulties were particularly high—in some cases up to 23 times higher than the rates of other schools in the district." (*Id.* at 21.)

In 2000, there were over three million school suspensions and over 97,000 school arrests. (NAACP Legal Def. & Educ. Fund, Dismantling the School-to-Prison Pipeline 2 (2005), *available at* http://tinyurl.com/njq4lj6.) African American students represent 16 percent of school enrollment, but 31 percent of the arrests. (Sentencing Project, Policy Brief: Disproportionate Minority Contact in the Juvenile Justice System 6 (May 2014) [hereinafter Policy Brief], *available at* http://tinyurl.com/kbvt96c.) By comparison, white students accounted for 31 percent of enrollment, but 21 percent of the arrests. (Donna St. George, *Federal data show racial gaps in school arrests*, Wash. Post, (Mar. 6, 2012) *available at* http://tinyurl.com/qeztcqp.)

African American students were more than 3.5 times more likely to be suspended or expelled as white students; 20 percent of African American males were suspended from school during the 2009–10 school year. (*Id.*)

Disciplinary data show that African American and Latino students also routinely receive harsher punishment for similar misbehavior than their white peers. (Bell & Mariscal, *supra*, at 111–113, 119; Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 Ind. Sch. Psychol. Rev. 85 (2011).) For example, in the Los Angeles Unified School District (LAUSD), 93 percent of the 90,000 combined arrests and tickets issued in the 2011–12 school years were for African American or Latino children. The costs of school failure are substantial. "Students who are arrested at school are three times more likely to drop out than those who are not. Students who drop out are eight times more likely to end up in the criminal justice system than those who remain in school and graduate, and the cost of housing, feeding and caring for prison inmates is nearly three times that of educating public school students." (Arrested Futures, *supra*, at 5 (footnotes omitted).)

Understanding the Problem, Changing the Solutions

Efforts have been made to understand the points of entry to our juvenile justice system. The JDAI is working nationally to help states use limited public safety dollars more wisely and to understand and attack disproportionate minority contact. As of 2009, approximately 110 localities and 27 states and the District of Columbia were participating in the endeavor. The John D. and Catherine T. MacArthur Foundation's Models for Change, started in 2007, has also been working to address the issues. The W. Haywood Burns Institute for Juvenile Justice Fairness and Equity (BI) has been involved in more than 40 jurisdictions across the country to develop institutional responses and reconsideration of policy and practice. The National Council of Juvenile and Family Court Judges' School Pathways to the Juvenile Justice System Project recently launched a 16-site project designed to assist counties across the country in mapping how school-based cases reach our court system. In 2012, retired Chief Judge Judith Kaye, of the New York Court of Appeals, convened a national summit, "Keeping Kids in School and Out of Court" to address school-to-prison pipeline issues. The Office of Civil Rights and the Department of Education statistics, documenting the racial disparities and rates of school suspension and court referral, were focal points of discussion. Forty-eight states and the territories sent multidisciplinary delegations. Strength-based alternatives to zero tolerance, including positive behavioral support, emotional supported learning, restorative justice, and positive youth development were presented. Collaborative systemic partnerships between schools, police, advocates, and juvenile courts designed to divert cases and provide alternatives to legal processing were also featured. A positive example in this context is Judge Steven Teske's Clayton County, Georgia, School Offender Protocol, sponsored by the JDAI, which developed a memorandum of understanding that allows for communication between school resource officers and educators prior to an arrest being made.

States are also rethinking school suspension and expulsion policies. Given the 2008 fiscal crisis, many jurisdictions have realized that community-based treatment alternatives are more affordable than costly incarceration that has not reduced recidivism. It is important to be smart on crime. The adult sanctioning model in schools and juvenile justice is inconsistent with what we know about adolescent development. It is also inconsistent with the message of proportional accountability articulated in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012). The American Bar Association and the American Psychological Association (APA) have challenged the use of zero tolerance. In 2008, for example, the APA issued a policy statement questioning the use of zero tolerance policies as not being consonant with what we know about adolescent development. (APA Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 Am. Psychologist 852 (2008).) Accountability is important, but zero tolerance becomes intolerance when educators and jurists sanction in a way that is not proportionate.

The recriminalization process has also affected adolescents in the child welfare system. A significant percentage of youth who are status offenders in our child welfare system are also involved in the juvenile justice system. These "crossover" youth who have both civil and criminal contact with the court are more likely to be female, children of color, truant, and/or lower performing in school than the general population. (Lorrie Lutz & Macon Stewart, Georgetown Univ. Ctr. for Juvenile Justice Reform, Crossover Youth Practice Model (2007), *available at* http://cjjr.georgetown.edu/pdfs/cypm/cypm.pdf.) One Arizona study found that 73 percent of the state's dependent children who were in the care of the child protection agency had contact with the juvenile justice system as well. (Gregory J. Halemba et al., Nat'l Ctr. for Juvenile Justice, Arizona Dual Jurisdictional Study: Final Report (2004), *available at* www.ncjj.org/pdf/azdual_juri.pdf.) Forty-nine percent of those dependent children were placed on probation, and 51 percent had been detained at some time, even if only briefly. (*Id.* at 11.) In addition, dependent children referred to the juvenile court were twice as likely to recidivate as the general delinquency population. (*Id.* at 30.) Similarly, in Massachusetts, 38 percent of all youth held and 58 percent of female youth held in secure detention by the Department of Youth Services were involved with the state's child protection services. (Citizens for Juvenile Justice, Unlocking Potential: Addressing the Overuse of Juvenile Detention in Massachusetts 12 (2014), *available at* http://tinyurl.com/pkftu5q.) Georgetown University's Center for Juvenile Justice Reform has made recommendations to address the unique issues faced by crossover youth. (Larry Brown, Georgetown Univ. Ctr. for Juvenile Justice Reform, Bridging Two Worlds: Youth Involved in the Child Welfare and Juvenile Justice Systems 19–25 (2008), *available at* http://tinyurl.com/mawzcbd.) These recommendations include the reauthorization of the JJDPA and phasing out the use of VCOs to criminalize status offenders. (*Id.*)

The use of the VCO has also had a disparate impact on marginalized youth. While females constitute only 28 percent of petitioned delinquency cases, adolescent girls comprise a significantly higher percentage of all classes of status offenders. (Sarah Hockenberry & Charles Puzzanchera, Nat'l Ctr. for Juvenile Justice, Juvenile Court Statistics 2011 at 9 (2014), *available at* www.ncjj.org/pdf/jcsreports/jcs2011.pdf.) Girls made up 53 percent of runaways, 45 percent of truants, and 43 percent of "ungovernables," as well as 39 percent of alcohol violations and 32 percent of curfew violations. (*Id.* at 71.) In every category of status offense, the number of female offenders was greater than their average percentage of the delinquency population. (*Id.*) Similarly, 32 percent of girls committed in the juvenile justice system were committed to youth authorities as the result of technical violations or status offenses, while only 17 percent of the boys were committed for such infractions. (Francine T. Sherman, *Reframing the Response: Girls in the Juvenile Justice System and Domestic Violence* 18 Juv. & Fam. Just. Today, no. 1, Winter 2009, at 16.)

The numbers are particularly troubling given the context of the often violent and dangerous households from which many runaway girls flee. (*Id.*) Girls, who are more likely to be the victims of physical and sexual abuse, are being detained for violating court orders not to run away again from these destructive environments. (Alecia Humphrey, *The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 Hastings Women's L.J. 165 (2004).) Similar scenarios apply in cases of sexual exploitation. (*Id.*) Data from an American Correctional Association study indicates that of the females in juvenile correctional facilities, 61 percent had experienced physical abuse and 54 percent had experienced sexual abuse. (Meda Chesney-Lind & Lisa Pasko, The Female Offender: Girls, Women and Crime 24 (1997).)

The VCO has also had an adverse racial impact, with youth of color being detained at higher rates than their white peers. Whites and Hispanics account for the vast majority of status offenses. In 2011, 17 percent of white juveniles and 16 percent of juveniles who belonged to racial minorities were detained on technical violations of probation and violations of VCOs. (Sarah Hockenberry, *Juveniles in Residential Placement, 2010* at 12, OJJDP (June 2013), *available at* http://www.ojjdp.gov/pubs/241060.pdf). Despite the relative number of offenders, African Americans were 269 percent more likely to be arrested for truancy than their white peers. (Policy Brief, *supra*, at 3.) The same racial disparities that occur in the juvenile justice system are reflected in the application of VCOs and other technical probation violations. (*Id.*)

Action can be taken to address these disconcerting trends, as there are ways to limit the number of youth detained for minor, often noncriminal, conduct. The JJDPA was last reauthorized in 2002 and has been due for reauthorization since 2007. In 2009 and 2010, versions of reauthorization provisions were passed in both houses of Congress, but no action has been taken on either bill. (Juvenile Justice and Delinquency Prevention Act, H.R. 6029, 111th Cong. (2010); Juvenile Justice and Delinquency Prevention Act, S. 678, 111th Cong. (2009).) Both the House and Senate bills include a three-year phaseout of the VCO provision, with a one-year hardship exception should a state qualify. The proposed modification would prevent any new status offenders from being detained during the three-year phaseout and would limit detention of status offenders to a seven-day holding period. In February 2014, a new bill that would end the detention of status offenders with the complete reauthorization of the JJDPA was filed, but action has not been taken. (Prohibiting Detention of Youth Status Offenders Act, H.R. 4123, 113th Cong. (2014).)

There is a consensus among major juvenile justice organizations and prominent jurists in favor of the reauthorization of the JJDPA and the repeal of the VCO. However, while the reauthorization legislation has not been acted on, Congress has effectively eliminated the Juvenile Accountability Block Grants (JABG) Program. The JABG program is a federal initiative designed to aid state and local juvenile justice systems. The program's budget allocation has been reduced by 90 percent since 2002. (Karoliszyn, *supra*.) As federal juvenile justice dollars decline, states have less incentive to comply with the JJDPA mandates, and some have opted out from the law's requirements altogether (e.g., Wyoming). (Hockenberry &

Puzzanchera, *supra*.) This process creates the opportunity for states to criminalize status offense conduct such as truancy. Private initiative to avoid VCO include the Vera Center on Youth Justice's Status Offense Reform Center. This MacArthur Foundation-supported project helps educate and initiate community based services for juveniles who face status offenses by steering them to programs that will keep them away from the juvenile court system. (Annie Salsich & Jennifer Trone, *From Courts to Communities: The Right Response to Truancy, Running Away, and Other Status Offenses*, VERA, 2–9 (Dec. 2013), *available at* http://tinyurl.com/oyrccnj.)

There are, of course, arguments to be made in support of the VCO. For example, some judges are understandably frustrated by the inability to keep a child safe who is engaging in risky behaviors such as substance abuse or running away. In such circumstances, even in states where the VCO is not used, children have been detained or held on bail. While the ostensible purpose of bail is to ensure court appearance or to address allegations of dangerousness, safety concerns have resulted in detention orders for children who judges believe cannot be securely detained in the child welfare system. The practice, however, can lead to the slippery slope of pre-adjudicatory best-interest determinations that harken back to *Gault*. Washington's Becca Bill is a classic example of the safety concern and the unintended consequences of net widening as the result of the wide-scale application of the VCO.

The 1995 Becca Bill (Wash. Rev. Code ch. 13.32A) is named after Rebecca Hedman, who was murdered while living on the streets. At the time of her death, she was 13 years old, engaged in prostitution, and abusing drugs, and had been on the run from her therapeutic group home. (Kery Murakami, *Would "Becca Bill" Have Saved Becca?*, Seattle Times, June 23, 1995.) The law enables parents to seek an "at-risk youth petition," which is a valid court order prohibiting teens from running away from home, once a child has been on the run for 72 hours. A child who then runs again in violation of the court order can be detained under the VCO exception of the JJDPA. Significantly, the legislation also created new truancy reporting requirements for local schools that increased the truancy case load in the state from 91 children in 1994 to 16,236 in 2007. (*Id.*) This widens the net of the juvenile justice system by greatly expanding the reach of the VCO and the number of youth subject to secure detention.

Locking up children for not going to school criminalizes truancy and begs the question of whether this solves the problem of providing them with an education. Detention for any reason is traumatizing, and holding children for even brief periods compromises successful reentry to school and increases dropout rates, which in turn greatly compromises public safety. (Arrested Futures, *supra*.) In 2011 alone, Washington reported detaining 2,461 status offenders under the VCO as a result of the Becca Bill. (Coalition of Juv. Just. Safety: Opportunity and Success Project, *Use of the Valid Court Order, State-by-State Comparisons* (2013) at 1 *available at* http://tinyurl.com/nthhd8b.) Rebecca Hedman's case is beyond tragic, but the scope of the legislative response is concerning. The case raises provocative questions that often arise in juvenile sessions. There are no panaceas for such complicated family and systemic issues, but it seems that the primary response and focus should be in the child welfare system, including the development of staff secure programs.

Even in states that do not utilize the VCO, detention decisions are often crafted that implicate conditions of release that are status offense-like in nature, such as "attend school without incident." (*See, e.g.*, Jake J. v. Commonwealth, 740 N.E.2d 188 (Mass. 2000).) The outcome of this practice is the functional equivalent of the VCO. The unintended consequences of using the VCO in broader contexts or detaining youth pretrial may be motivated by well-intentioned rehabilitative impulses. However, these practices criminalize what is often normative adolescent behavior.

Conclusions

If the pendulum of juvenile justice is to find equilibrium, we have to consider the criminalization of status offense conduct in all contexts. In 1980, the Institute of Judicial Administration and the American Bar Association published the IJA-ABA Juvenile Justice Standards. One of the standards that was not adopted called for the abolition of status offense jurisdiction nationwide. The history and use of the VCO provides traction for this argument. (*See*, *e.g.*, Merril Sobie & John D. Elliott, *The IJA-ABA Juvenile Justice Standards: Why Full Implementation Is Long Overdue*, 29 Crim. Just., no. 3, Fall 2014, at 24.) However, abolition might lead to a "beware of what you wish for" scenario, as states may impose status offense conditions in other contexts, including conditions of release and conditions of supervision. Reauthorization of the JJDPA and repealing the VCO are prudent first steps to ensure that youth are not detained for normative adolescent behavior. Strategies concerning deconstructing the school-to-prison pipeline have to be expanded beyond the implementation of school policies and use of police. To attack the cradle-to-prison pipeline, we have to soberly address access to public education, the realities of geographic segregation, and implicit and explicit bias.

Criminalizing status offense conduct has compromised public safety and disproportionately affected our most vulnerable populations. "The juvenile justice system has become the default system—the warehouse—for low-risk, high-need youth." (Bell & Mariscal, *supra*, at 124.) Due process is perhaps our most potent antidote. In striking down the application of criminal sanctions for a curfew ordinance against minors, the Massachusetts Supreme Judicial Court concluded that the practice was illegal, as it criminalized status offense conduct. (Commonwealth v. Weston, 913 N.E.2d 832 (Mass. 2009).) The court observed, that "[s]tatus offenses such as being abroad at night may not be 'bootstrapped' into criminal delinquency." (*Id.* at 846.) This case should be cited whenever detention determinations are being made or conditions of release are requested. If we are to redress current patterns and realize *Gault*'s promise, thinking about fundamental fairness is necessary. We must also be wary of unnecessary state intervention that entangles youth and families in our juvenile and child welfare systems. In this context our version of the Hippocratic Oath should be "Do as little harm as possible." ■