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KIDS ARE DIFFERENT: USING SUPREME COURT JURISPRUDENCE ABOUT CHILD DEVELOPMENT TO CLOSE THE JUVENILE COURT DOORS TO MINOR OFFENDERS

Kimberly P. Jordan*

I. INTRODUCTION

Over the last decade, the Supreme Court has developed a line of jurisprudence acknowledging the major differences in the way children and adults make decisions and react to stressful situations. The Court’s reasoning and use of developmental science in Roper,1 Graham,2 Miller,3 and J.D.B.4 have changed the way that courts and legislatures will address sentencing for young people in the future. Rather than treat teenagers like small adults, the Court has mandated that the criminal justice system and police officers take into account the fact that teenagers’ brains do not process information in the same way as adults’. Because of their reduced culpability in committing crimes, says the Court, kids are not eligible, carte blanch, to receive the harshest punishments our system has to offer.

For those youths already subject to long sentences, the impact of these cases continues to play out.5 For the majority of juveniles involved with the criminal justice system, however, the “kids are different” reasoning has been under-

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1. See generally Roper v. Simmons, 543 U.S. 551 (2005) (determining that the death penalty is disproportionate punishment for offenders who committed offense before attaining age 18).

2. See generally Graham v. Florida, 560 U.S. 48 (2010) (holding the 8th Amendment does not allow a juvenile to be imprisoned for life without parole for non-homicide offense).

3. See generally Miller v. Alabama, 132 S. Ct. 2455 (2012) (holding that sentencing a juvenile to life in prison without the possibility of parole without considering the “mitigating factors of youth” is cruel and unusual punishment).


utilized. The Court’s analysis in each of these cases built on each other in a way to influence the way the juvenile justice system operates. In this paper, I seek to apply the Court’s analysis regarding teenagers’ culpability to argue that states should re-evaluate their approach to juvenile crime, especially minor crimes and status offenses.

State jurisdictional codes draw hundreds of thousands of children into courts across the country each year. While the purpose behind these laws is to provide some sort of meaningful intervention to stop a youth from spiraling into further crime, the reality is that court involvement, as it currently stands, does little to deter youth. By drawing upon the Supreme Court’s language in recent cases, I will highlight why subjecting these children to court intervention is not developmentally appropriate or effective. Based on that conclusion, I will highlight some innovative programs from a variety of jurisdictions to encourage judges, court administrators and legislatures to re-think how they view minor offenders.

II. SUPREME COURT JURISPRUDENCE: CHILDREN ARE DIFFERENT

In a series of cases, the Supreme Court has recognized that children are constitutionally different. This determination has primarily been applied in the context of the most severe sentences our criminal justice system has to offer: the death penalty and life in prison without the possibility of parole. However, the Court’s analysis and reasoning in these cases has now extended to the determination of when a child is “in custody” for purposes of Miranda warnings, and is therefore important for all children facing juvenile charges. This section will examine the Supreme Court decisions regarding juveniles who commit crimes.

In Roper v. Simmons, the Court re-considered its earlier stamp of approval on the use of the death penalty in cases where the offender was under the age of eighteen at the time of the offense. Christopher Simmons, age seventeen at the time of his horrific crime, argued that a new consensus had emerged that the death penalty is an inappropriate punishment for juvenile offenders. Citing adolescent development studies, early brain imaging studies, and international law, the Court agreed.

The Roper Court examined the evidence that a majority of states had barred the use of the death penalty for youthful offenders and then turned to its Eighth

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6. Roper, 543 U.S. at 555-56 (explaining a divided Court had previously considered the death penalty for juveniles in Stanford v. Kentucky, 492 U.S. 361 (1989)).
7. See id. at 556-60. Simmons and two friends broke into a woman’s house, bound and gagged her, and later threw her over a train trestle to drown in the water below. Id. at 556. As required by Missouri law, Simmons was tried for murder as an adult and sentenced to death. Id.
8. See id. at 569-78.
9. Id. at 564 (“... 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”).
Amendment proportionality analysis. It stated that, “today our society views juveniles . . . as categorically less culpable than the average criminal.” The decision identified three reasons that youth are different. First, juveniles are immature, and “as any parent knows,” they have an underdeveloped sense of responsibility. The Court found it significant that states have historically recognized this lack of maturity by limiting juveniles’ right to vote, serve on juries, and get married. The Court also noted that immaturity “often result[s] in impetuous and ill-considered actions and decisions.” Second, juveniles are more vulnerable and susceptible to negative influences and outside pressures. Here, the Court re-iterated its prior finding: “[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” The Court noted that children, in particular, have little control over their environment, and have difficulty extricating themselves from dangerous situations. Finally, the Court observed that a juvenile is a still-developing person whose character is not well formed, with personality traits that are less fixed than an adult. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.

These key differences between juveniles and adults, said the Court, lead to the conclusion that juveniles cannot be the worst of the worst offenders; they are not as morally reprehensible for their actions as an adult. Given that conclusion,

10. Id. at 567 (citing Atkins v. Virginia, 536 U.S. 304, 316 (2002)).
11. Id. at 569.
13. Id. (citing Johnson v. Texas, 509 U.S. 350, 367 (1993)).
14. Id.
15. Id. (quoting Eddings v. Oklahoma, 455 U.S. 104, 115, (1982)) (internal quotation marks omitted). Some have used the age distinction to argue in favor of abolishing the juvenile court, moving all child crime into the adult system, and letting the system deal with age as a mitigating factor in all cases. See Barry C. Feld, Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy, 88 J. CRIM. L. & CRIMINOLOGY 68, 106 (1997) (“Even a youth fourteen-years-of-age or older who abstractly knows ‘right from wrong,’ who understands intentionality, and who possesses the requisite criminal mens rea for a finding of guilt still deserves neither the blame nor the comparable punishment of an adult offender. Juveniles possess less ability than adults to make sound judgments or moral distinctions, or to act with the same culpability as adults. Because youths possess less ability than adults to control their impulses or to appreciate the consequences of their acts, they deserve less punishment even when they commit the same criminal harm.”).
16. Roper, 543 U.S. at 569. This point becomes a significant point when considering children involved with the child welfare system who are later charged with delinquencies. Mistreated by their families of origin, these youth have little control or say over their living situation.
17. Id. at 570.
18. Id.
19. Id. (“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”).
the Roper Court held that the death penalty cannot be a proportional punishment when the offender was under eighteen at the time of the crime.  

Five years later, the Court expounded on this line of reasoning in Graham v. Florida. Considering whether a sixteen year old, originally convicted as an adult for armed burglary and attempted armed robbery, was subject to a life in prison without the possibility for parole sentence, the Court returned to the developmental psychology cited in Roper. Notably, however, the Court focused on the advancements in brain science and psychology, noting that “fundamental differences” exist between juveniles and adults. Because juveniles’ brains continue to develop through late adolescence, said the Court, a juvenile offender “who did not kill or intend to kill has a twice diminished moral culpability.” Noting that life without the possibility of parole is second only to the death penalty in terms of severity, the Court ordered the sentence overturned, finding it to be a violation of the Eighth Amendment.

Likewise, in a pair of cases considered two terms later, the Court decided to forbid the juvenile life without the possibility of parole (“JLWOP”) sentence for homicide offenses where the statutory framework for sentencing foregoes consideration of the mitigating factors of youth. The two juveniles in Miller and Jackson were only fourteen at the time of their offenses; a consideration for the Court, to be sure. Both were mandated to a JLWOP sentence based on their states’ sentencing scheme. The Court noted that “Roper and Graham establish that children are constitutionally different from adults for purposes of sentencing.” Linking juveniles’ lessened culpability with their “greater capacity

20. Id. at 574. The Roper decision leaves the age question open for further argument–as some are making (and as Justice O’Conner points out in her dissent)–that difficult decisions about punishment are not solved by “arbitrary categorical age-based rule, but rather through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant’s immaturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth.” Id. at 602-03.
22. Id. at 53 (explaining that although Florida law allowed the prosecutor to choose between juvenile and adult court, Terrance Graham’s prosecutor elected to try him as an adult).
23. Id. at 67-68.
24. Id. at 68.
25. Id.
26. Id. As one scholar has argued, Graham solidifies the Roper decision by applying the “children are different” language outside of the death penalty context. See Sarah Jane Forman, Countering Criminalization: Toward a Youth Development Approach to School Searches, 14 Scholar 301, 353-54 (2011).
28. Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012). Evan Miller was initially charged in juvenile court, but his case was removed to adult court, where he was convicted of murder in the case of arson. Id. at 2462. Kuntrell Jackson’s prosecutor was allowed to charge him in adult court, where he was convicted of capital felony murder and aggravated robbery. Id. at 2461.
29. Id. at 2460.
30. Id. at 2461-62.
31. Id. at 2464.
for change,” the Miller Court insisted that juvenile defendants must be afforded individualized sentencing.32 Failing to provide a sentencing authority with an opportunity to consider the “mitigating factors of youth” would violate Graham and Roper’s “foundational principle: that imposition of a state’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”33

The Miller Court encouraged the limited use of the JLWOP sentence, reiterating its statement in Roper and Graham that it is difficult to distinguish “at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’”34 In future sentencing, the Court mandated that the “characteristics of youth” be considered, including the juvenile’s age; developmental attributes (including “immaturity, impetuosity, and failure to appreciate risks and consequences”); his family and home environment, the circumstances of the offense (including extent of participation and way family and peer pressures may have impacted behavior); the juvenile’s lack of sophistication in dealing with a criminal justice system designed for adults; and juvenile’s potential for rehabilitation.35

The J.D.B. decision is where the Court’s new juvenile jurisprudence really takes root.36 The posture of the case was not about a sentencing consideration, but at the front end of the system’s contact with children: the arrest. The thirteen-year-old child involved in the case was interrogated at school by law enforcement officers and school personnel.37 After at least a half an hour of questioning, J.D.B. confessed to breaking into a local home.38 After acknowledging his role in

32. Id. at 2468. Miller blends together two strands of 8th Amendment jurisprudence; the first addresses sentences that are disproportionate to the offense, and the second involves the mandatory imposition of the death penalty, without regard for any mitigating factors. See Marsha Levick, From A Trilogy to a Quadrilogy: Miller v. Alabama Makes It Four in a Row For U.S. Supreme Court Cases that Support Differential Treatment of Youth, 91 CRIM. L. REP. 748, 749 (2012). The Miller Court discusses the first strand of 8th Amendment law with regard to a juvenile’s diminished culpability and greater capacity for change. Id.; see also Miller, 132 S.Ct. at 2464-65. Moving to the mandatory nature of the JLWOP sentences given to Miller and Jackson, the Court invokes its death penalty strand of cases, finding that courts must give some consideration to the characteristics of the individual juvenile defendant before imposing a JLWOP sentence. Miller, 132 S.Ct. at 2467. 33. Miller, 132 S. Ct. at 2466. The Court also expresses concern that offenders sentenced to life as minors would actually serve a greater percentage of the sentence than adults who commit the same crime. Id. 34. Id. at 2469 (citing Roper, 543 U.S. at 573; Graham, 130 S.Ct. at 2026–2027). The Court goes on to say: “Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” Id. 35. Id. at 2468. 36. See generally J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (holding “a child’s age properly informs the Miranda custody analysis”). 37. Id. at 2399. 38. Id. at 2400.
the crime, J.D.B. was told that he was free to leave and cease the interrogation. The North Carolina district court overruled the motion to suppress his statement, and he was adjudicated delinquent. The question for the Court was whether the trial court should have considered J.D.B.’s age as a factor in its custody analysis. Writing for the majority, Justice Sotomayor explained it is “beyond dispute” that children are more likely than adults to feel compelled to cooperate with police officer questioning. Rather than cite to studies of developmental psychology, Justice Sotomayor referred to “commonsense conclusions” about the characteristics of youth. The Court said, interrogations are inherently more coercive and stressful for a juvenile than for an adult, leading to an increased likelihood of false confessions. The J.D.B. Court concluded that, so long as the child’s age is “reasonably known” to the interrogating officer, it must be included in the evaluation of whether the child was in custody for purposes of Miranda.

J.D.B. is an important case to include in any discussion of Roper, Graham, and Miller, because it made clear that, for the Court, “kids are different.” Courts considering juvenile crime have to acknowledge, as the J.D.B. Court did, that juveniles do not think or act in the same ways as the “reasonable person.” This reality is now a fact that can be used by practitioners across the board in representing children. In addition, J.D.B. challenged a foundational rule in the criminal justice system—Miranda—and forced it to incorporate the Court’s observations about youth. That the Court has now ruled that juvenile arrest is subject to developmental considerations opens the door to a discussion about the juvenile justice system as a whole.

III. JUVENILE COURT PAST AND PRESENT

The historical purpose of the juvenile court system has been to rehabilitate wayward youths. When the first juvenile court opened in Chicago in 1899, its

39. Id.
40. Id.
41. Id. at 2401.
43. Id. at 2403; see also Martin Guggenheim & Randy Hertz, J.D.B. and the Maturing of Juvenile Confession Suppression Law, 38 WASH. U. J.L. & POL’y 109, 154 (2012) (making the point that Justice Sotomayor’s language makes it easier for lower courts to apply the J.D.B. standard).
44. J.D.B., 131 S. Ct. at 2401.
45. Id. at 2406.
47. See Guggenheim & Hertz, supra note 43, at 176 (arguing that J.D.B. opens the door to substantial reform of the juvenile justice system).
founders envisioned a system that would address a child’s misbehavior by evaluating the whole child. The parens patriae role of the court was emphasized, in stark contrast to the adult criminal court, which focused on punishment for specific acts. By the 1960’s, juvenile courts had spread across the country, and the Supreme Court described them as “clinical” rather than punitive entities. In 1967, the Court expanded due process rights of children subject to juvenile court jurisdiction, but acknowledged that the mission and goal of the courts remained rehabilitation and treatment.

During the 1990’s, the myth of the child “super-predator” spread, leading to great increases in the number of school-based arrests and delinquency cases. Legislators reacted to the fear of the juvenile super-predator by making it easier for youths to be tried as adults. The tide shifted in juvenile courts, as well, and proceedings became more punitive in nature. As crime rates dropped throughout the 1990’s, research began to debunk the super-predator theory, and initiatives emerged to re-examine some of the changes that had occurred in the juvenile court model. It is in this context that the Supreme Court took a fresh look at the


50. See Kent v. United States, 383 U.S. 541, 554 (1966) (stating that the objectives of juvenile courts “are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment”); see also Joanna S. Markman, In Re Gault: A Retrospective in 2007: Is It Working? Can It Work?, 9 BARRY L. REV. 123, 125 (2007) (“Under the parens patriae doctrine, the state, in protecting its interest, has the right to benevolently intervene in directing the care and custody of its youth.”).


52. See In re Gault, 387 U.S. 1, 26-27 (1967); see also OHIO REV. CODE ANN. § 2152.01 (West 2013) (describing the purpose of the Ohio juvenile courts as providing “for the care, protection, and mental and physical development of children” subject to delinquency jurisdiction).

53. The number of juvenile delinquency cases peaked in 1997, at 1,878,505. Nat’l Ctr. for Juvenile Justice, Year of Disposition By Age of Referral, EASY ACCESS TO JUVENILE COURT STATISTICS: 1985-2010, http://www.ojjdp.gov/ojstatbb/ezajcs/asp/display.asp (last visited Jan. 27, 2014); see Howard N. Snyder, Not This Time: A Response to the Warnings of the Juvenile Superpredator, 69 (2) CORRECTIONS TODAY 116 (2007), available at http://www.aca.org/research/pdf/research_notes_04_07.pdf (concluding that the increasing number of dangerous youth committing crimes never materialized, which led the myth’s creators to back-track their claims); see also Tamar R. Birckhead, Toward a Theory of Procedural Justice for Juveniles, 57 BUFF. L. REV. 1447, 1498-99 (2009) [hereinafter Justice for Juveniles] (discussing the increase in police presence in schools and decline of confidentiality of juvenile records).


55. The Juvenile Detention Alternatives Initiative, funded by the Annie E. Casey Foundation, is the largest reform initiative. JDAI focuses on reducing juvenile detention to meet its “vision that all youth involved in the juvenile justice system have opportunities to develop into healthy, productive adults.” Juvenile Detention Alternatives Initiative, THE ANNE E. CASEY FOUND., http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx (last visited Jan. 27, 2014).
death penalty in *Roper* as a possible punishment for a crime committed when the offender was a juvenile at the time of the crime.\footnote{See supra notes 6-20 and accompanying text (discussing Roper v. Simmons, 543 U.S. 551 (2005)).}

Today, states have re-evaluated their approach to serious juvenile offenders. Several trends have emerged, including expanding juvenile court jurisdiction to older teens, allowing juveniles to stay out of adult jails and prisons, reducing the pathways for youth into adult court, and reducing sentences for children tried as adults.\footnote{See Core Strategies, THE ANNE E. CASEY FOUND., http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/CoreStrategies.aspx (last visited Jan. 27, 2014).} These changes have occurred in part due to the Supreme Court’s intervention in *Roper*, *Graham*, and *Miller*;\footnote{See supra Part II.} but are also due to research showing that youth tried as adults have higher recidivism rates and are at greater risk of harm in adult facilities than juvenile institutions.\footnote{See generally Juvenile Detention Alternatives Initiative, supra note 55. See also Terrance T. Allen et al., *Public Attitudes Toward Juveniles Who Commit Crimes: The Relationship Between Assessments of Adolescent Development and Attitudes Toward Severity of Punishment*, 58 CRIME & DELINQ. 78, 98 (2012), available at http://cad.sagepub.com/content/58/1/78.full.pdf+html (noting that youth placed in adult facilities are more likely to commit suicide than if placed in juvenile institutions, and are also experience a higher incidence of mental disorders).} In addition, a longitudinal study of serious offenders revealed a majority of youthful offenders will cease criminal activity as they mature.\footnote{See MODELS FOR CHANGE, RESEARCH ON PATHWAYS TO DESISTANCE 3 (2012), available at http://www.pathwaysstudy.pitt.edu/documents/MIC_RPD_2012_final.pdf. The study followed more than 1300 offenders for an average of seven years. In order to measure re-offending, the study relied both on self-report from the participants and official re-arrest reports. Id; see also B.J. Casey et al., *Braking and Accelerating of the Adolescent Brain*, 21 J. RES. ON ADOLESCENCE 21, 23 (2011), available at https://www.sacklerinstitute.org/cornell/programs/developing_researchers/papers/Casey.et.al.JResAdol.2011.pdf (suggesting that the ability to make good decisions and control impulses increases as a child ages); Allen et al., supra note 59, at 99 (noting that the pre-frontal cortex, which is responsible for “executive function” in the brain, continues to develop throughout later adolescence, explaining at least in part why teens are unable to make wise decisions).} What led to lower recidivism rates was both the threat of arrest and appropriate substance abuse treatment, when needed.\footnote{MODELS FOR CHANGE, supra note 60, at 3; see generally RICHARD A. MENDELL, THE ANNE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION (2011), available at http://www.aecf.org/OurWork/JuvenileJustice/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf (documenting that the majority of juveniles re-offend after periods of confinement).} Most interestingly, the study found that the rate of return on long sentences was negligible; the rate of re-arrest remained relatively stable regardless of whether the stay in juvenile prison was three months or twelve months.\footnote{See id. at 6. What did change the risk of re-arrest was the provision of needed services to youth. When services were well matched to need and the youth felt positive about their institution, the probability of re-arrest decreased. Id. at 7.} Finally, studies have shown that
Incarceration is "no more effective than probation or alternative sanctions in reducing the criminality of adjudicated youth."64

Despite this evidence, juvenile courts across the country are dealing with an ever-increasing number of children. Juvenile courts have jurisdiction over some of society's most difficult youth.65 Children who commit violent and dangerous acts require state intervention, and court processes attempt to provide services in order to stop a youth on the path to a life of crime. Too often, though, juvenile courts are addressing the needs of children who are not dangerous or violent. At this end of the spectrum are children who fail to attend school regularly,66 who are difficult for parents to discipline,67 and who commit other harmless acts (such as violating curfew, for example). These children can be, and regularly are, charged in juvenile court as status offenders.68 None of these acts would be crimes but for the so-called offender's age.

In addition, the school-to-prison pipeline regularly diverts responsibility for student behavior from schools to courts, without regard for the seriousness of the conduct.69 Schools push out large numbers of students via suspensions and expulsions for conduct that used to be handled by in-school discipline.70 Many students are routinely referred to juvenile court based on zero-tolerance policies that mandate predetermined consequences for misbehavior, regardless of the seriousness of behavior or mitigating factors.71

Courts are dealing with these children not because juvenile crime is on the rise, but because of policies that lead children into the criminal justice system.72 What happens when these children cross the juvenile court threshold? Just as in

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64. See Mendel, supra note 61, at 11.
65. Juvenile court abolitionists use this fact in arguing that the juvenile court should no longer exist, as it has become increasingly similar to the adult criminal court. See, e.g., Feld, supra note 13, at 97; but see Thomas F. Geraghty, Justice for Children: How Do We Get There?, 88 J. CRIM. L. & CRIMINOLOGY 190, 198-99 (1997) (maintaining that a separate system for juveniles remains necessary and can be beneficial for both serious and minor offenders).
67. See, e.g., OHIO REV. CODE ANN. § 2151.022 (West 2013) (defining an unruly child as "Any child who does not submit to the reasonable control of the child's parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient").
68. See, e.g., id. (defining habitual truancy).
69. See Elbert H. Aull IV, Zero Tolerance, Frivolous Juvenile Court Referrals, and the School-To-Prison Pipeline: Using Arbitration as a Screening-Out Method to Help Plug the Pipeline, 27 OHIO ST. J. ON DISP. RESOL. 179, 179 (2012) (citing cases where students were charged in juvenile court for doodling on a school desk, stealing chicken nuggets in the lunch line at school, or repeatedly "passing gas").
70. See Mendel, supra note 61, at 14; see also Markman, supra note 50, at 124 ("Behaviors historically addressed within the home, community, or educational system, are now the impetus for 'criminal' charges.").
71. See Markman, supra note 50, at 130.
72. See Mendel, supra note 61, at 32 (noting that though arrests for serious offenses have fallen dramatically, juvenile court petitions have not dropped by nearly the same margin).
the adult criminal world, most of them are admitting to the charges against them. In Ohio, for example, juvenile courts handled 92,871 delinquency cases in 2012, and an additional 16,104 unruly cases. Of those delinquency matters, only 170 were certified or a waiver was granted to try the juvenile in adult criminal court. Of the delinquency cases were resolved by admission to the juvenile judge or magistrate, while only 5,450 went to trial. These numbers are significant because all of the children adjudicated in juvenile court, regardless of charge and regardless of whether the state had enough evidence to convict, now carry a record. At least some of those children are admitting guilt without truly understanding the process or the charge against them.

Once a child has been adjudicated, the child is subject to juvenile court disposition, or sentencing. Juvenile court judges are often privy to a wealth of information about the children in their courtrooms prior to making dispositional orders. They are aware of the child’s prior contacts with the court; may have some information about the child’s family, including any child welfare involvement; and will likely hear some report about the child’s educational involvement. Having that information, however, does not always lead to positive interventions for the youth. Kids are routinely subject to probation, curfew orders, drug and alcohol testing, and more in the hopes of teaching them a lesson. However, “research demonstrates that punitive approaches to youth misbehavior fail to reduce recidivism and can negatively impact long-term problem solving efforts.”

Children fail at following dispositional orders because of the very characteristics that the Supreme Court has identified as making them different than adults. First, maturity is a developmental attribute that is a moving target.

73. The Supreme Court of Ohio, Ohio Courts Statistical Report 125 (2012), available at http://www.supremecourt.ohio.gov/Publications/amnrep/12OCS/2012OCS.pdf. These numbers do not represent the true number of cases handled in Ohio juvenile courts. Juvenile courts in Ohio can have jurisdiction over not only delinquency and unruly cases, but probate, domestic relations (including parentage and child support), adult criminal charges, juvenile traffic charges, and some combination thereof. Id.

74. See id. This number represents just .18% of all delinquency cases in state of Ohio.

75. Id. Of the remaining cases, 13,995 were dismissed; some cases were also handled informally. Id.

76. See Tamar R. Birckhead, Juvenile Justice Reform 2.0, 20 J.L. & Pol’y 15, 36-37 (2011) (noting that despite the promise of Gault, many youth are adjudicated delinquent despite a lack of sufficient evidence against them); see also Justice for Juveniles, supra note 54, at 1487 (noting that juvenile courts have an almost streamlined process for accepting juvenile admissions).

77. See Justice for Juveniles, supra note 53, at 1487.

78. Markman, supra note 50, at 128 (“Further, prior to rendering a decision regarding the child, juvenile judges are privy to the child-defendant’s entire background, including previous encounters with law enforcement and juvenile justice, school academic and behavioral records, the child’s interactions within his or her family dynamic, and even his or her family’s history (i.e., the conduct of siblings, etc.).”), supra note 50, at 128.

Immaturity shows itself in a youth’s inability to anticipate potential outcomes, minimization of danger, and reaction to stress. Because youths also fail to appreciate risk and danger in the same way as adults, their potential for making poor choices increases. When a child is in the presence of peers, he may be less likely to be able to make an appropriate decision in the face of a stressful situation. For a child on probation with the court or facing a dispositional hearing, making a poor choice in that stressful situation may mean the difference between freedom and detention.

In addition to immature reasoning skills, youth have an immature identity. This manifests in peer association and fidelity, leading children to be more likely to succumb to pressure from their friends to behave in a certain way. When faced with an influential peer, a child may be unable to remain true to his morals and seek acceptance instead. Once the child is under the microscopic lens of the court, however, he will face an uphill battle in explaining his impetuous decision to the adults in charge of his treatment and punishment.

Finally, the Court emphasized that juveniles are more vulnerable in all areas of their lives, including in limiting the negative influences in their environment. Many youths in juvenile court have a history of trauma; one study found that youth in the juvenile justice system have up to eight times higher incidence of posttraumatic stress disorder than the general community. Trauma can impact all areas of a youth’s development, making it difficult for him to reconcile his emotions and experiences in a way that makes sense to those around him. Such a child is likely unable to follow court orders in the way that most adults would expect, setting the child up for deeper involvement in the system, including the use of detention as punishment for making poor decisions.

The juvenile justice system has historically struggled with overuse of detention. As the Juvenile Detention Alternatives Initiative has well documented, when detention can be avoided—it should be—in the name of creating better outcomes for youths and allowing the courts to utilize their

81. See Allen et. al, supra note 59, at 83 (citing research that suggest that adolescents commit risky acts (including crimes) in the company of peers, both in order to fit in and in order to conform to their peers attitudes, as opposed to adults, who commit risky acts alone).
82. Beyer, supra note 80, at 7-8.
83. See, e.g., Casey et. al., supra note 60, at 23 (citations omitted) (discussing the evolutionary development of adolescents, when “peer-directed social interactions and intensification in novelty seeking” impacts teens’ propensity for risky behavior).
84. See supra Part II.
85. Beyer, supra note 80, at 9 (internal citations omitted).
86. See id. at 10-11 (citing common issues in traumatized youth).
87. See generally MENDEL, supra note 61 (discussing high historical numbers of incarcerated youth).
resources in creating more positive interventions for the families who need it.\footnote{88\textsuperscript{.}} Detention does not scare children into making better choices; it increases the likelihood for future court involvement and exposes non-violent offenders to those youth who have committed serious crime.

Furthermore, putting younger teens on probation, or subject to juvenile court orders to refrain from certain activity, does not make sense given their developmental stature. Studies have shown that juveniles fifteen years of age and younger act more impulsively than older teens, and definitely more so than adults.\footnote{89\textsuperscript{.}} Courts should not expect that any given youth will be able to extricate himself from a stressful situation or from peers committing a criminal act.\footnote{90\textsuperscript{.}} That very inability is what the Supreme Court has recognized about juveniles in each of its recent cases.

There needs to be a re-evaluation of how our society treats children who commit minor offenses. The over-arching feeling at juvenile court is that the kids who are there are “bad.” They have committed a crime, or what would be a crime if they were adults. There is little talk about the consequences of adjudication for a child; the approach is more about teaching the child a lesson for misbehavior. Underneath the surface, however, it is clear that those adjudications do matter. A child adjudicated on a misdemeanor offense faces stigma, educational disruption, and, at worst, incarceration.\footnote{91\textsuperscript{.}} Every state allows for detention of children after a delinquency adjudication.\footnote{92\textsuperscript{.}}

In addition to the juvenile court disposition, the youth in court face additional collateral sanctions. Juveniles adjudicated on a drug offense, for example, can be banned from their public housing unit, leading to homelessness or child welfare

\footnotesize{88. See id. at 32 (“The Juvenile Detention Alternatives Initiative has reduced the daily detention populations in participating sites by 41 percent.”).

89. See generally Casey et al., supra note 60 (suggesting that risk taking decreases before impulse control increases, leading to a time in adolescence when decision-making is critical).

90. See Marsha Levick, J.D.B. v. North Carolina: The U.S. Supreme Court Heralds the Emergence of the “Responsible Juvenile” in American Criminal Law, 89 CRIM. L. REP. 753, 753 (2011) (“In the juvenile justice system, courts should likewise not ignore relevant characteristics of youth in deciding such fundamental questions as the scope of a child’s blameworthiness, the voluntariness of a child’s confession, the reasonableness of the child’s belief that he was threatened with or subject to force, or the reasonableness of his belief that he could not extricate himself from peers or circumstances resulting in otherwise criminal conduct.”); see also Roper v. Simmons, 543 U.S. 551, 569 (2005) (recognizing that children have difficulty extricating themselves from situations).

91. Sue Burrell, Contracts for Appointed Counsel in Juvenile Delinquency Cases: Defining Expectations, 16 U.C. DAVIS J. JUV. L. & POL’Y 313, 318 (2012). In more serious cases, of course, the consequences can range from lengthy incarceration to lifelong registration. Id. Many jurisdictions also allow the use of juvenile adjudications as an enhancement in adult criminal sentencing. Id; see also Birckhead, supra note 53, at 1466 (discussing the fact that juveniles generally are more likely to be subject to incarceration - and receive longer terms - than young adult offenders charged with the same crimes).

92. McLaurin, supra note 51 at 225.}
involvement. Youths also may face limited employment options, be barred from military service, and be barred from obtaining public benefits. Even worse, children who have been in detention are far less likely to complete their education. Undocumented juveniles may face deportation, a potential lifetime punishment for an act committed during their youth, a time when they are immature, vulnerable, and still developing.

The evidence shows that juvenile court involvement does not rehabilitate, but instead is a predictor of criminal activity as an adult. The court views the offered services as a benefit to the child and his family; the family, on the other hand, often views the intervention negatively. Additionally, confidentiality, once a strong virtue of the juvenile court, is no longer guaranteed to children in juvenile court. The media follows the serious offenders and often names the youth in its reports. Collateral consequences follow from involvement, even in non-serious cases. For all these reasons, it is time to re-evaluate how courts intervene with these children.

IV. SUGGESTIONS FOR CHANGE

The argument in favor of current policies allowing juvenile court jurisdiction for misdemeanants and school-based offenses is two-fold: first, children must be stopped on the path to further criminal activity; and second, that schools have an obligation to keep their buildings safe for all students. Looking to the language from the Supreme Court, it is equally clear that the counter-argument is that, because children are continuing to develop, they should not be treated as small adults. In other words, in order to accomplish the goal of correcting problematic behavior, society needs to address those behaviors in a developmentally

95. See Jessica Feierman et al., The School-to-Prison Pipeline ... and Back: Obstacles and Remedies for the Re-Enrollment of Adjudicated Youth, 54 N.Y.L. SCH. L. REV. 1115, 1117 (2010) (citing study that found 66% of youth drop out of school after release from custody). See also COMM’N ON YOUTH AT RISK, AM. BAR ASS’N, REPORT ON RESOLUTION 118B 2 (2009), available at http://cleweb.org/sites/cleweb.org/files/assets/ABA.118B.RighttoRemaininSchool.pdf (citing studies that found that high-school drop-outs have difficulty finding employment; those who are employed are paid less and have less opportunity for advancement).
96. Id.
97. Birckhead, supra note 76, at 44.
98. Id. (noting that this negative reaction is compounded by the threat of prolonged involvement for noncompliance, via probation violations, additional detention, or eventual commitment to juvenile prison).
99. See Markman, supra note 50, at 124 (noting that the media also contributes to the community ramifications of juvenile court involvement). “Due to the proliferation of media outlets and the fact that jurisdiction over even the most menial of delinquent offenses is now addressed outside of the child’s immediate environment, these criminal charges often lead to resolutions that can dramatically affect the lives of all the children involved and that of their families.” Id.
appropriate way. Because it is unclear that juvenile court involvement is successful in meeting either of the two goals articulated above, it is time for judges, court administrators, educators, and state legislatures to re-evaluate their approach to minor offenders.

1. Implement positive behavior supports in schools to deal with school misbehavior

As the Court recognized in each of the cases discussed, juveniles have little control over their living environments. For many of the youth that are involved with the juvenile system, their homes and families offer marginal support, and in the worst cases, are abusive or neglectful. For those youth, they are left to struggle with making choices that keep them out of trouble, even as they are faced with instability at home. School, once a safe zone for students seeking to improve themselves, is increasingly more of a police state than a nurturing setting for many students. If schools change their approach to problematic behavior, youths will respond and court referrals will decrease.

Positive Behavioral Interventions and Support (“PBIS”) is “a framework for enhancing the adoption and implementation of a continuum of evidence-based interventions to achieve academically and behaviorally important outcomes for all students.” PBIS focuses on student outcomes both at the individual and group level to determine what types of interventions and research-based practices can or should be implemented. Rather than dictate a set of practices, PBIS offers schools a framework for establishing a “continuum of behavior support practices and systems” designed to increase positive support for students and create more effective systems to manage student behavior.

100. See, e.g., Forman, supra note 26, at 359-60 (suggesting that developmental considerations should lead to increased level of scrutiny and change of approach in the school search jurisprudence).
101. See supra Part II.
102. See, e.g., Beyer, supra note 80, at 9-10 (describing characteristics of youth in juvenile justice system).
103. See Beth A. Colgan, Constitutional Line Drawing at the Intersection of Childhood and Crime, 9 STAN. J. C.R. & C. L 79, 84 (2013) (noting that the timing of youth and the developmental transition from childhood to adulthood creates this difficult balancing act for youth). “The developmental transition from childhood to adulthood coincides with the legal constructs that inhibit the ability of juveniles to shape their own environments. In most cases, these constructs provide guidance and structure for children as they develop and grow. But for those juveniles whose environments are toxic, this also means that they have little ability to extricate themselves from precarious situations during the very time they are most at risk of succumbing to external pressures and least able to successfully navigate the choices and consequences they face.” Id.
105. See id. (“First and foremost, student outcomes serve as the basis for practice selection, data collection, and intervention evaluations.”).
106. Id. at 3.
Research shows that creating a school-wide positive approach to school discipline reduces aggression, behavior problems, and delinquency. The American Bar Association has called for schools to implement both school-wide policies to address problematic behavior more positively, but also to implement preventive and supportive interventions with individual students before resorting to suspension and expulsion. Removing a student from school without providing any skill-building program does little to address problematic behavior and places the child at greater risk for delinquent acts. Positive intervention focuses both on teaching skills and reducing risk.

2. Increase use of diversion programs

Diversion programs offer youths the opportunity to address the behaviors that led to criminal activity without incurring the label that comes with a juvenile adjudication. Often, diversion programs refer youths to needed substance abuse or mental health treatment in lieu of formal court intervention. A creative use of diversion addresses the criminalization of truancy. Spear-headed by a juvenile court judge in Jefferson County, Kentucky, a coalition of service providers seeks to work with children and families to address reasons for the truancy, rather than bringing the family to court. School officials identify children with truancy problems, set small achievable goals, and link families with needed community resources. Working as a team with the family, stakeholders create a plan, including incentives for the child, to improve school attendance and keep the child out of the court system. Jurisdictions around the country have used the Jefferson County program as a model for creating their own truancy diversion programs.

In order to address school-based, low-risk misdemeanor offenses, Clayton County, Georgia, has implemented a School Referral Reduction Protocol. The

107. See, e.g., Baker et al., supra note 66.
108. See id. at 9 (calling for discipline statistics, specifically suspension, expulsion, and office referrals).
109. See id.
111. See James G. Dickerson et al., How Collaborative the Collaboration? Assessing Interagency Collaboration within a Juvenile Court Diversion Program, 63 JUV. & FAM. CT. J. 21, 22 (2012) (describing the purposes of juvenile court diversion programs).
114. Id.
115. See Testimony before the Senate Subcommittee on the Constitution, Civil Rights, and Human Rights: Hearing on “Ending the School to Prison Pipeline” Before the S. Subcomm. on the
local judge, Steven Teske, convened community stakeholders after recognizing that school based offenses (including fights, disorderly conduct, and disruptive behavior in school) constituted 1,400 referrals to juvenile court in 2004. After implementing the protocol, which prohibited referral to juvenile court on certain misdemeanors until after other diversionary tactics were utilized, the numbers fell.\textsuperscript{116} By 2011-12, the number of school-based referrals was reduced by 83%.\textsuperscript{117} Besides the obvious positives in such numbers, Judge Teske also cited improvement in recidivism among more serious offenders, noting that prosecutors and probation officers are more able to focus their attention and services, improving outcomes.\textsuperscript{118}

3. Increase Communication Across Systems

Another growing trend with positive reports involves multi-system youths: those children who have the misfortune of being involved in both the child welfare system and the juvenile justice system. The Center for Juvenile Justice Reform has developed the Crossover Youth Practice Model (“CYPM”), which focuses on increasing collaboration between systems in order to produce better results for these youth.\textsuperscript{119} The CYPM recognizes that there are multiple points in the either system’s contact with youth where intervention can take place to prevent arrest, detention, and juvenile delinquency charges.\textsuperscript{120} CYPM is based on


\textsuperscript{116} \textit{Id.} The first time an incident occurred, a warning would be sent to both the student and parent. On the second offense, the student was referred to a conflict skills workshop. Only after both of these steps were taken could the student be referred for formal juvenile court proceedings. \textit{Id.} at 3.

\textsuperscript{117} \textit{Id.} at 4. Judge Teske noted, as a side benefit, that more serious, felony school-based referrals fell as well, by 30%. \textit{Id.} School weapons offenses fell by 73%. \textit{Id.} He attributes the drop in other categories of crime to the positive development of relationships between school resource officers and students, who no longer viewed the police as an entity to avoid, but a potential partner in creating safer schools. \textit{See id.} (“This positive engagement coupled with the students’ perception that the police were there to help (because arrests drastically declined) produced sharing of information by students to police about concerns on campus.”).

\textsuperscript{118} \textit{See id.} at 5. (“The implementation of this protocol has reduced the average probation caseload size to 25, which includes the kids that scare us - not the ones that make us mad. Consequently, the increase in surveillance and the intensive interventions employed with our probationers has resulted in a reduction in recidivism of 24% - down from over 70%. This decline represents greater success among these troubled youth and fewer victims.”).

\textsuperscript{119} \textit{See} DENISE HERZ ET AL., ADDRESSING THE NEEDS OF MULTI-SYSTEM YOUTH: STRENGTHENING THE CONNECTION BETWEEN CHILD WELFARE AND JUVENILE JUSTICE 5-6 (2012), http://cjjr.georgetown.edu/pdfs/msy/AddressingtheNeedsofMultiSystemYouth.pdf (“While [System Integration Initiative] SII focuses on the structural foundations for the coordination and integration of the child welfare and juvenile justice system, the Crossover Youth Practice Model focuses on specific practice improvements [and] provides a mechanism for agencies to strengthen their organizational structure as contemplated by the SII, as well as to implement or improve practices that directly affect the outcomes for crossover youth.”).

\textsuperscript{120} \textit{See id.} at 35-44 (discussing the phases of system contact). The report describes in detail the model, which is based on one particular type of multi-system youth: the cross-over youth, who is
the premise that families are best for youths, and involving the family at each decision point is crucial to a youth’s success.\textsuperscript{121} The model emphasizes communication across systems so that cross-over youths are identified as such.\textsuperscript{122} Sharing of information across systems allows for the best possible diversionary procedures to be utilized, keeping already-vulnerable children from further involvement with the juvenile court.\textsuperscript{123} For example, the model calls for a team meeting, bringing together all of the system-wide players dealing with a particular child, before a charging decision is made.\textsuperscript{124} Once a child “crosses over” from one system to the next, cross-system communication must continue through case and treatment planning and implementation through case closure and aftercare.\textsuperscript{125}

V. CONCLUSION

Each of the highlighted programs offers alternative ways for courts to deal with children who commit minor offenses. More importantly, they each recognize that as the juvenile courts have evolved, the pendulum has swung away from the rehabilitative focus and moved, just as the adult system has, toward a more punitive model.\textsuperscript{126} The evidence is now clear that juvenile court involvement - as it now exists - does not stop these children on the path to further criminal behavior. Rather, juvenile court involvement is the biggest predictor of future misbehavior.\textsuperscript{127} The juvenile court system, through its judges, court administrators, and state legislatures, need to take seriously the Supreme Court’s view of children. Doing so, and making appropriate changes to the way interventions are structured, will improve outcomes for both children and court systems.

\begin{itemize}
  \item \textsuperscript{121} See id. at 34-35 (“The model is governed by principles that ensure the family voice is at the forefront of every level of decision making, including assessment, planning, and case review.”).
  \item \textsuperscript{122} See id. at 36-37 (describing the communication between police officer, child welfare caseworker, and juvenile intake worker before or at the time of arrest).
  \item \textsuperscript{123} If a child does need to be formally processed through the delinquency system, the model further calls for both the child’s juvenile justice caseworker and child welfare worker to attend all of the minor’s court hearings, regardless whether it is related to the delinquency or child welfare case. Id. at 37. Simply adopting this recommendation, in any jurisdiction, would lead to improved communication across systems.
  \item \textsuperscript{124} Id. at 38. While police entities in many jurisdictions would be loath to consider such an idea, a re-imaging of the system must include players from across the systems in order to be effective.
  \item \textsuperscript{125} See Herz, supra note 115, at 41 (discussing coordinating case supervision for dually-involved youth).
  \item \textsuperscript{126} See Markman, supra note 50, at 140 (arguing that the adult system fails to offer an adequate model for enforcing and expanding juvenile’s constitutional rights).
  \item \textsuperscript{127} Studies show that incarcerating low-level offenders makes them more likely to recidivate. See generally No Place for Kids, supra note 61.
\end{itemize}
Abstract: The current policies of juvenile bindover to adult criminal court and severe sentencing have been unsuccessful in the decrease of juvenile crime and recidivism. The policies are based on theories that threats of severity lead to deterrence and rational decisions regarding commission. However, legal socialization of juvenile offenders plays a decisive part through cognitive development and social learning. Few studies have been conducted on juvenile offenders’ awareness of sentencing as adults. This article reviews literature on quantitative and qualitative studies and reports on a qualitative phenomenological study of offenders’ understanding, knowledge, and perceptions of their sentencing as juveniles. Participants were 12 adult inmates in four Ohio prisons (10 males, 2 females; age range 19-30; sentenced as juveniles at ages 14-17; serving sentences from 2 to 45 years). Findings of 12 open-ended questions indicated that few of the participants had heard of juvenile transfer to adult court and none understood that juvenile transfer court could apply to them for their crimes, thus precluding their rational decision-making and deterrence. These findings should supplement the existing literature on juvenile transfer and support the evidence that severe punishment or threat of punishment does not discourage adolescent crime. Recommendations are offered for further research, more effective deterrent policies, and early education of juveniles by juvenile justice officials and attorneys.

I. INTRODUCTION

The U.S. Office of Juvenile Justice Prevention recorded that an estimated 2.11 million juvenile were arrested in 2008, and 96,000 of these arrests were for violent crimes, such as murder, rape, robbery, and assault. As of 2010, 70,792 youths were held in incarceration facilities on a given day.

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2. Redding, supra note 1.
Between 1992 and 1999, 49 states amended their juvenile laws by expanding types of crimes, such as violent crimes, that would provide for juvenile offenders to be tried as adults in adult criminal courts. Some states increased the offenses that mandated transfer to the adult court, limited judicial discretion, and expanded the number of offenses statutorily excluded from the juvenile courts. For example, 35 states created or expanded laws for automatic transfer to adult court; 27 states extended judicial waiver laws that granted transfer to adult court, with lowering of age requirements and extension of eligibility; and 13 states signed into law new presumptive waiver provisions.

Today, most states specify no minimum age for juvenile prosecution, with the upper age limit 16 or 17 years old. However, all states now have provisions for trying certain juveniles (dependent on seriousness of crime) as adults in criminal court. Under judicial waiver provisions, the juvenile court judge can waive juvenile court jurisdiction and transfer the case to criminal court. A total of 21 states and the District of Columbia have at least one provision for transferring juveniles to criminal court, with no minimum age specified. Present penal trends continue to waive large numbers of juveniles to adult court, and the cost continues to grow; consequences include increased marginalized cultures, decreased social spending in distressed areas, and increased crime.

The current trend for sentencing of juveniles as adults, or juvenile bindover, derives largely from the presumption that more punitive sentences will have a deterrent effect. The theory of specific deterrence holds that generally severe punishment should discourage offenders from repeat offenses. This theory also presupposes rational choice: before committing a crime, an individual will consciously weigh the risks and rewards inherent in the act. This article examines the issue of juvenile offenders tried as adults, including the theories behind this policy, its efficacy in decreasing juvenile crime, and the findings of a study by this author on the actual knowledge and understanding of juvenile offenders.
offenders who were tried and sentenced as adults. Results should aid juvenile justice officials and attorneys in better informing adolescents and juvenile offenders of the bindover consequences of criminal behavior.

II. LITERATURE REVIEW

A. Legal Socialization

Legal socialization constitutes the development and process of an individual’s acquisition of standards, attitudes, beliefs, and behaviors about the legal system, institutions, and authorities. Acquisition takes place through cognitive development as one ages and social learning as one is exposed to the law-related media and interacts with others, such as relatives, police, and other judiciary officers.

Investigating the developmental course of two characteristics of legal socialization, legal cynicism and legitimacy of the law, Alex Piquero, Jeffrey Fagan, Edward Mulvey, Laurence Steinberg, and Candice Odgers studied 1,355 serious adolescent offenders, ages 14-18, in two U.S. cities. They measured legal cynicism by using a questionnaire that asked participants to rate their degree of agreement on statements such as the following: “Laws are meant to be broken.” They measured legitimacy with a questionnaire that asked for degree of agreement on statements such as the following: “The courts generally guarantee everyone a fair hearing (trial).”

Over the 18-month period after court ruling, both aspects showed little developmental change. However, with regard to cynicism, those with more prior arrests reported greater cynicism than those with fewer prior arrests, and Hispanics reported more cynicism than Caucasians. For legitimacy, older adolescents viewed the law as less legitimate than younger ones (those 14 years of age), and respondents who were incarcerated as well as African Americans had lower legitimacy perceptions than those not incarcerated and Caucasians.

Jeffery Fagan and Tom Tyler found different results, with age differences in cynicism and legitimacy with a sample of 215 children and adolescents, ages 10

14. See generally ALBERT BANDURA, SOCIAL FOUNDATIONS OF THOUGHT AND ACTION (1986); Ellen S. Cohn & Kathryn L. Modecki, Legal Socialization, in 2 ENCYCLOPEDIA OF PSYCHOLOGY AND LAW 450 (Brian L. Cutler ed., 2008).
15. Piquero et al., supra note 13 at 277.
16. Id. at 278.
17. Id.
18. Id. at 295.
19. Id.
20. Id. at 296.
to 16, from two New York City neighborhoods. One research site was more economically disadvantaged, was 90% African American, and had high felony crime and arrest rates; the other site was less economically disadvantaged, 49% Caucasian, and had half the crime and arrest rates.

The findings showed that for these respondents, legal cynicism increased with age, and legitimacy decreased with age. Peer networks and high crime neighborhoods contributed to cynicism and low perceptions of legitimacy, as well as social learning of the “acceptability” of antisocial behavior. Thus, legal socialization apparently varied with many characteristics, including age, neighborhood, and socioeconomic context.

With 1,393 adolescents and young adults, ages 11 to 24, from the several states and including arrested participants and comparable community youth, Jennifer Woolard, Samantha Harvell, and Sandra Graham examined racial differences in adolescents’ and young adults’ perceived unfairness of the justice system. A total of 62% were male with 40% African American, 35% Caucasian, 23% Latino, and 2% from other groups. Ninety percent were of low socioeconomic status.

Jennifer Woolard and Samantha Harvell found that African American and Latino adolescents and young adults who had previous experience with the justice system had greater perceptions of anticipatory unfairness. Their negative legal socialization may have been affected by their perceived sense of injustice and consequent greater reoffending.

B. How Effective Are Harsher Sentences?

Studies addressing the issue of juvenile bindover and longer incarceration as contributory to greater public safety have yielded alarming results. Contrary to expectations, youth tried in adult court reoffend more often and with more serious offenses than their counterparts in juvenile courts. Richard Redding
reported that juveniles with the highest recidivism rates were those tried and sentenced in adult criminal court (excepting drug offenses).  

Enrico Pagnanelli contended that juvenile bindover actually encourages recidivism.

Benjamin Steiner, Craig Hemmens and Valerie Bell examined arrest data in 22 states that added statutory exclusion laws placing juvenile offenders in adult criminal court. Violent juvenile arrest rates declined in only two states, with one of these showing a sudden and permanent change. Jeffery Fagan, Aaron Kupchik, and Akiva Liberman compared similarly situated youths assigned to the juvenile or adult courts in contiguous states. Youth charged and punished as adults were more likely to be arrested for serious crimes more quickly and more often than their counterparts who remained in the juvenile courts. Such studies indicate higher recidivism and an absence of deterrence. The study is largely based on the assumption that more punitive sentences will lead to a greater general deterrent effect.

C. Juveniles’ Knowledge of Criminal Sentencing

Although general deterrence—sentence severity perceived as a risk in the decision to commit a crime—is often cited as a primary reason for desistence, this rationale is weakened by juveniles’ general ignorance of the laws and sentencing. As Gary Kleck, Brion Sever, Spencer Li, and Marc Gertz noted,
youth may be inclined to weigh information rationally and consider potential costs and benefits, but they cannot make informed decisions without accurate perceptions of those costs and benefits. Nevertheless, policy makers continue to rely on deterrence theory as a primary basis for sentencing programs, including those for juveniles.

Only a few qualitative studies have been conducted to better understand the subjective understanding, motivations, intentions, and perceptions of youth tried as adults. For example, Richard Redding and Elizabeth Fuller studied 37 juveniles from Georgia charged with murder or armed robbery who were tried and sentenced as adults. The majority said that they never knew or believed that the law transferring them to adult court would ever apply to them. This study is the only one of its kind to explore qualitatively juveniles’ knowledge regarding punishment and the effect of knowledge on general deterrence. In later work, Richard Redding observed that if juveniles had known they could be tried as adults, they might not have committed their offenses.

As Michelle Peterson-Badali, Martin Ruck, and Christopher Koegl observed, there is “a paucity of research reporting on juvenile offenders’ perceptions about dispositions.” Such research is necessary for the design and development of more evidence-based crime policies. A major impetus for the present author’s study, reported on next, was Richard Redding’s suggestion of future research focusing on three relevant questions: (1) Are juveniles aware of transfer laws?, (2) Do they believe the laws will be enforced against them?, (3) Do this awareness and belief deter criminal behavior? Richard Redding also pointed out that a law can only act as a deterrent if the targeted population is aware of its provisions and consequences.
III. THE CURRENT STUDY

A. Sample

To address Richard Redding’s questions, this author conducted a mixed-method (qualitative phenomenological and quantitative) study of the knowledge and perceptions of punishment of incarcerated adult offenders for crimes they committed as juveniles.45 The voluntary sample was 12 incarcerated adults who were bound over as juveniles and currently serving sentences for juvenile crimes in four prisons in Ohio under the state’s waiver law.46 Written approval for data collection was given by the managing officers at each facility, and potential participants were given a letter of introduction to the study.47 Over 100 inmates volunteered, and the author chose a purposive sample based on variation in age, offending type, sentence length, and gender.48

The sample was comprised of 10 males and 2 females; 50% Caucasian and 50% African American.49 Current ages at time of interviews varied from 19 to 30 (mean 22.6), the ages at waiver 14 to 17 (mean 16.5), and the sentences from 2 to 45 years.50 The crimes included murder (6 participants), aggravated robbery (3), felonious assault (1), kidnapping (1), and voluntary manslaughter (1).51 Table 1 summarizes the offender-related characteristics of participants.52

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Mean</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current age</td>
<td>22.6</td>
<td>19-30</td>
</tr>
<tr>
<td>Age at waiver</td>
<td>16.5</td>
<td>14-17</td>
</tr>
<tr>
<td>Sentence</td>
<td>169</td>
<td>24-540 months</td>
</tr>
</tbody>
</table>

47. Id.
48. Id. at 15.
49. Id.
50. Id.
52. See id.
Months served to date

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</tr>
</thead>
<tbody>
<tr>
<td>Months served</td>
<td>81.4</td>
<td>24-168 months</td>
</tr>
<tr>
<td>Months remaining to serve</td>
<td>115.6</td>
<td>18-384 months</td>
</tr>
</tbody>
</table>

B. Methods

Individual interviews structured around 12 questions were arranged in private meeting rooms with each inmate, with appropriate security measures. A safety button was within the author’s reach to alert nearby corrections officials if needed. Officials were also stationed nearby in the administrative area in which the interviews took place.

Pursuant to recommendations for qualitative research in criminology (Miller, 2008), the interviews took place for approximately one hour each, structured around 12 interview questions. This author took notes and recorded the interviews with inmates’ prior written consent. On conclusion of the interviews, this author collected demographic data and performed data analysis.

C. Findings

In response to the 12 research questions, participants answered in a variety of ways. These are reported by question with summaries and illustrative responses.

1. As a juvenile offender, what was your understanding regarding possible adult criminal sentences?

Most participants reported that they had no knowledge of juvenile bindover, and all indicated that they did not understand juvenile bindover. Only two participants said they had even a vague notion that juvenile bindover existed, but they never knew that adult sentences applied to them. In addition, in response to this question, many expressed intense frustration, anger, and dismay.

53. Id. at 14.
54. Id. at 13.
55. Id.
58. Id. at 14.
59. See generally id.
60. See id. at 16.
61. Id. at 24.
62. Id. at 25.
P1: We don’t have no understandin’. We still seein’ it as a game—we still wild, young, didn’t care.  

P1: Nobody knew!

2. As a juvenile, where did you get your knowledge of sentencing? This question applied only to the two participants who said they had some knowledge of juvenile bindover. They both reported that their source was television news.

3. If you had such knowledge, when did you learn about possible adult sentences?

This question applied only to the two participants who knew something about juvenile bindover. Neither, however, could recall when they had learned of it.

4. What was the influence of the source(s) on your understanding of possible sentencing?

This question was applicable only to the same two participants. However, with their admittedly vague knowledge, no meaningful responses were reported.

5. What was the influence of the source(s) on your use of the knowledge about possible sentences?

This question again was applicable to the same two participants who had heard of juvenile bindover. Similarly, no meaningful responses were reported.

64. Id.
65. Id.
66. See id. at 16.
67. Id. at 26
68. Id.
69. See Dissertation, supra note 45, at 16.
70. Id. at 26.
71. Id.
72. See id. at 16.
73. Id. at 26
74. Id.
75. See Dissertation, supra note 45, at 17.
76. Id. at 26.
77. Id.
6. How much did you believe your source of knowledge of juvenile bindover?78

Again, this question pertained only to the two participants who had heard of juvenile bindover.79 Both said they believed the source, television news.80

P7: It was on the news, and I figured they not going to lie . . . .81

7. As a juvenile, how seriously did you consider the possible punishment and sentencing possibilities?82

The responses of the same two participants were applicable here.83 Neither seriously considered adult sanctions prior to committing their offenses; they did not believe that juvenile bindover applied to them or their offenses.84

P7: I just didn’t think about it, you know. It just wasn’t on my mind. I was just trying to have fun.85

However, several participants admitted they thought of punishment but it did not deter them.86 P5 explained that his crimes started out small and escalated, and his need to survive outweighed punishment.87

P5: I’ve always had it [punishment] in the back of my mind, but it was never really, ‘cause my situation [early crime] it was small. I was homeless. My parents had kicked me out . . . . I robbed a lot of houses to get by.88

8. If you considered possible punishment and sentencing possibilities, when did you do so—before, during, or after your decision to commit your crime?89

Again, because of the minimal responses of the same two participants, this question was inapplicable.90

78. See id. at 17.
79. Id. at 26.
80. Id.
82. See id. at 17.
83. Id. at 27.
84. Id.
85. Id.
86. See id. at 27-28.
87. Dissertation, supra note 45, at 27.
88. Id. at 28.
89. See id. at 17.
90. Id. at 28.
9. What contributed to your consideration of punishment and sentencing possibilities?\textsuperscript{91}

This question encouraged participants to expand their responses with more personal and subjective rationales as to why they did not consider punishment prior to committing their offenses.\textsuperscript{92} Their responses indicated clearly the subjective nature of their logic.\textsuperscript{93}

P9: Your wrong may be my right.\textsuperscript{94}

Most considered juvenile crime as a normal part of their daily lives.\textsuperscript{95}

P3: Near my whole family been in jail. Like I was destined to come in here.\textsuperscript{96}

P8: I was just trying to protect myself because of the life I was livin’, period.\textsuperscript{97}

Half reflected that the juvenile sanctions for earlier crimes were not a threat because of their shorter duration and easier conditions than adult sentences.\textsuperscript{98}

P6: I didn’t care really . . . I was still young when I got out. Juvenile detention centers is like daycare compared to here [present adult incarceration].\textsuperscript{99}

P1: We still seein’ it as a game, we still wild, young, didn’t care.\textsuperscript{100}

As a follow-up question, respondents were asked if they would have considered adult sanctions had they known and understood that the sanctions could have applied to them and their offense.\textsuperscript{101} All but one answered in the affirmative.\textsuperscript{102}

\begin{footnotesize}
\begin{enumerate}
\item See id. at 17.
\item Id. at 28.
\item Dissertation, supra note 45, at 28.
\item Id. at 28.
\item Id.
\item Id. at 29.
\item Id.
\item Id.
\item Id. at 29.
\item Id.
\item Id.
\item Dissertation, supra note 45, at 29.
\item Id.
\item Id. at 30.
\item Id.
\end{enumerate}
\end{footnotesize}
P2: ‘Cause then I wouldn’t have committed the crime. It would have helped me out in the long run, through my life that way I would at least know what I was gettin’ into.103

P6: I think it would have made a big difference!104

P10: I think my life would have went a whole different route.105

10. How could your current sentence affect your possible future decision to reoffend or not commit a crime?106

A large majority of the participants explained that they had thought about this question.107 Their current sentence, including its length and conditions of incarceration (such as loss of freedom and daily violence), had significantly affected their future intent not to reoffend.108

P4: Yeah, ‘cause I don’t want to be here. This ain’t no place to stay by choice.109

P7: Being away from family, friends, worrying about safety, worrying about stuff getting’ stolen from you, worrying about having to fight for your life. You know, that’s a pretty good deterrence from reoffending.110

However, half revealed that their current sentence could be either a deterrent to future offending or promote future offending.111

P10: It’s got a negative and it’s got a positive. The positive when you doing a lot of time, it make you think about never comin’ back again . . . . [The negative is] You doin’ a lot of time you feel like I can’t do nothing so I’m just goin’ go out and do the same thing.112

103. Id.
104. Id.
106. See id. at 17.
107. Id. at 31.
108. Id.
109. Id.
110. Id.
112. Interview with Anonymous Participant #10 (on file with author).
11. What might stop you from committing crime in the future?\textsuperscript{113}

Participants identified maturation, growth, supportive family members, and institutional training programs as possible insulators against future criminal behavior.\textsuperscript{114}

P2: You gotta take the time to think about the things before you do them . . . you get more mature and grow up.\textsuperscript{115}

P3: I got two sons and a daughter; that will stop me.\textsuperscript{116}

P11: I have taken a lot of programs in here. I’ve done plumbing, I’ve learned how to do plumbing, horticulture. But, I do feel like I learned a lot here, and I do feel that once I leave here that I will, I will be able to adapt.\textsuperscript{117}

However, the prospect of finding employment with a felony record was also a major concern.\textsuperscript{118}

P6: If you can’t get a job, if people ain’t tryin’ to hire you ‘cause you a felon. It’s going to be hard to get a job.\textsuperscript{119}

12. Are there any other comments you would like to add?\textsuperscript{120}

Participants were given the opportunity to discuss any other issues they deemed relevant.\textsuperscript{121} Several gave emphatic warnings to juveniles not to offend and end up like them.\textsuperscript{122}

P2: I mean, just that for every juvenile out there, just think of what you do before you do it. Whatever you gonna do to make sure you don’t commit a crime and have to spend the rest of your life in prison or be bound over as an adult and still have to be away from your family and friends and loved ones.\textsuperscript{123}

\begin{footnotes}
\item[113] See Dissertation, supra note 45, at 17.
\item[114] Id. at 33.
\item[115] Id.
\item[116] Id.
\item[117] Interview with Anonymous Participant #11 (on file with author).
\item[118] Dissertation, supra note 45, at 33.
\item[119] Id.
\item[120] See id. at 17.
\item[121] Id. at 33
\item[122] See id.
\item[123] Id.
\end{footnotes}
Other participants censured the present system.\textsuperscript{124}

P12: But, I feel like sending juveniles to prison is stupid. It, it makes them angry.\textsuperscript{125}

All participants suggested educating young people in schools, as early as middle school, as well as community and legal institutions, and certainly at arrest.\textsuperscript{126}

P9: [Departments of Youth Services] and school; that’s where you got the population at.\textsuperscript{127}

P6: I think it would make a big difference if they started letting kids know when they get arrested.\textsuperscript{128}

As an adjunct to understanding participants’ responses to these qualitative questions, descriptive statistics were calculated. Table 2 summarizes the percentages of participants to each question.\textsuperscript{129}

Table 2

\textit{Statistical Summary of Participants’ Responses (N = 12)}

<table>
<thead>
<tr>
<th>Question</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Understanding of possible adult criminal sentences</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No knowledge</td>
<td>10</td>
<td>83</td>
</tr>
<tr>
<td>Vague knowledge</td>
<td>2</td>
<td>17</td>
</tr>
<tr>
<td>No understanding</td>
<td>12</td>
<td>100</td>
</tr>
<tr>
<td>2. Where knowledge of sentencing obtained: TV news</td>
<td>2</td>
<td>17</td>
</tr>
</tbody>
</table>

\textsuperscript{124} See Dissertation, supra note 45, at 33.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 25-26.
\textsuperscript{127} Id. at 26.
\textsuperscript{128} Id. at 25.
\textsuperscript{129} See id. at 22-24.
<table>
<thead>
<tr>
<th>Question</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. When learned of adult sentences</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Could not say</td>
<td>2</td>
<td>17</td>
</tr>
<tr>
<td>4. Influence of sources on understanding of possible sentences</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>5. Influence of sources on use of knowledge about possible sentences</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>6. Extent of belief in source of knowledge: Complete belief</td>
<td>2</td>
<td>17</td>
</tr>
<tr>
<td>7. Serious consideration of consequences before commission of crime</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>10</td>
<td>83</td>
</tr>
<tr>
<td>Briefly</td>
<td>2</td>
<td>17</td>
</tr>
<tr>
<td>8. Consideration of sentencing before, during, after commission</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>9. Contribution to consideration of punishment and sentencing possibilities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Juvenile crime normal part of daily lives</td>
<td>10</td>
<td>83</td>
</tr>
<tr>
<td>Would have considered adult sanctions before committing crime</td>
<td>11</td>
<td>92</td>
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<tr>
<th>Question</th>
<th>Number</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>10. Current sentence affect decision to reoffend</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deter</td>
<td>9</td>
<td>75</td>
</tr>
<tr>
<td>Deter or encourage</td>
<td>5</td>
<td>50</td>
</tr>
<tr>
<td>11. Possible deterrents to future crime</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maturation, supportive family, institutional training programs</td>
<td>6</td>
<td>50</td>
</tr>
<tr>
<td>Current sentence</td>
<td>9</td>
<td>75</td>
</tr>
<tr>
<td>Recidivate because of difficulty of employment</td>
<td>2</td>
<td>17</td>
</tr>
<tr>
<td>12. Additional comments</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plea to juveniles to think before acting antisocially</td>
<td>4</td>
<td>33</td>
</tr>
<tr>
<td>Unreasonableness of juvenile bindover</td>
<td>2</td>
<td>17</td>
</tr>
<tr>
<td>Education of adolescents to juvenile bindover</td>
<td>12</td>
<td>100</td>
</tr>
<tr>
<td>in schools, communities, legal institutions</td>
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<td></td>
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IV. CONCLUSIONS

The intent of juvenile transfer to adult court was to deter would-be serious juvenile offenders, lower crime rates, and improve public safety.\textsuperscript{130} Yet, the efficacy of this severe sentencing strategy is dubious at best.\textsuperscript{131} Previous


\textsuperscript{131}. See \textit{generally} Benjamin Steiner & Emily Wright, \textit{Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance}, 96 J. CRIM. L. & CRIMINOLOGY 1451 (2006); Peterson-Badali et al., \textit{supra} note 12; Redding, \textit{supra} note 40.
quantitative research has illustrated no general or specific deterrent impact and possibly even counterdeterrent effects.\textsuperscript{132} The findings of this study indicate that participants had little to no understanding of juvenile bindover, either generally or as it applied to them, as evidenced by the fact that only two participants had even heard of the provision. This conclusion concurs with the results of Ashkar and Kenny (2008),\textsuperscript{133} Redding (2005),\textsuperscript{134} and Redding and Fuller (2004).\textsuperscript{135}

Respondents generally did not consider the consequences of their criminal acts, for reasons of being “young,” having “fun,” or survival. Several reflected that crime was considered a normal activity by their peers and in their communities or families, supporting the theory of social learning.\textsuperscript{136} In addition, some participants questioned the legitimacy of the law. With their mean age at participation of 22.6 and age at waiver 16.5, this questioning supports the findings of Piquero et al. (2005)\textsuperscript{137} that older adolescents view the law as less legitimate than younger ones. The majority also reflected they might not have committed their crimes with understanding of trial and sentencing as adults. Many thought they would be incarcerated for only a few months, and all expressed strong beliefs that adolescents should be educated about juvenile bindover.

With regard to the possibility of future offending, participants admitted that their current knowledge of harsh sentences and incarceration in adult facilities would deter them from repeat offending. Because they did not know of juvenile sanctions prior to their offenses, they could not apply rational choice. That is, they did not engage in cost-benefit decision-making, weighing the costs of offending against the “benefits” of commission of their crimes.\textsuperscript{138}

The present findings support those of earlier quantitative studies as well as the few qualitative studies conducted to determine the understanding and knowledge of juvenile offenders regarding bindover. The distressing and

\textsuperscript{132} See generally Benjamin Steiner, Craig Hemmens & Valerie Bell, Legislative Waiver Reconsidered: General Deterrent Effects of Statutory Exclusion Laws Enacted Post-1979, 23 JUST. Q. 34 (2006); Fagan et al., supra note 29; Lanza-Kaduce et al., supra note 29.
\textsuperscript{133} Ashkar et al., supra note 29.
\textsuperscript{134} See generally Redding, supra note 40.
\textsuperscript{135} See generally Redding et al., supra note 29.
\textsuperscript{137} See generally Piquero et al., supra note 13.
\textsuperscript{138} See generally Kleck et al., supra note 36; Peterson-Badali, et al., supra note 12.
indisputable findings of this study indicate a preclusion of general deterrence in contrast to policy goals. This finding should lead to future research, policy modifications, and educational initiatives.

V. RECOMMENDATIONS

A. Research

The results of the present study were limited by a small sample of adult offenders incarcerated by juvenile bindover in adult court for criminal offenses committed when they were adolescents. Thus, further research is suggested with similar and larger samples of offenders in other states. For example, in Ohio, the current research site, 803 juvenile offenders ages 14-19 are currently incarcerated who were bound over as juveniles.\footnote{Ohio Dept. of Rehab. and Corr., January 2013 Census of ODRC Institutional Population, Demographic and Offense Summary 1 (2013), available at http://www.drc.ohio.gov/web/Reports/Institution Census/Institution%20Census%202013.pdf.}

Larger, random samples and more extensive research with both quantitative and qualitative approaches are advised. Quantitative approaches could include current juveniles incarcerated as well as adults bound over as juveniles. Additional demographic data could be collected, similar to research by Fagan et al. (2007)\footnote{See generally Fagan et al., supra note 29.} and Lanza-Kaduce et al. (2002),\footnote{See generally Lanza-Kaduce et al., supra note 29.} such as sentence length, offense history, education, and parental income. Environmental and cultural elements also should be explored, including family history of criminal activity, number of family members on welfare, gang membership, ethnicity, and geographic location. Studies could be conducted with juvenile justice officials as to how often they inform juvenile offenders about juvenile bindover.

In the present study, repeated question sequencing revealed that no participant had heard of juvenile bindover from any juvenile justice official. Qualitative research could include larger samples such as those of the current study as well as others, such as released offenders, recidivated and reincarcerated offenders, and juvenile justice officials and attorneys for their views and insights on juvenile bindover. Interview questions could replicate those used in this study, as well as others, such as the roles of families, schools, and peers in informing adolescents about juvenile transfer and specific role models of offenders. Such studies could provide more generalizable data for use as empirical evidence for policy changes and dissemination of education about juvenile bindover.

B. Policies

The results of the current study and subsequent research could contribute to policies that could help increase juveniles’ deterrence from committing crimes.
and enhancing public safety. Findings that inform legislators and the public that juveniles rarely, if ever, weigh the costs and benefits of offending, and that juvenile bindover to adult court and consequent harsh sentencing do little to stem recidivism could be disseminated to legal and judicial authorities. Hopefully, presentation of research evidence would lead to revision of the juvenile crime control models and current laws.

As a consequence, state and community stakeholders may be more inclined to develop and extend institutional rehabilitative programs for juveniles incarcerated as adults. Additional support programs could be developed specifically for this population on release into their communities. One participant emphasized that she had taken many institutional programs and felt that they would help her adapt in the outside world. Thus, additional programs could aid offenders’ adjustment to the mainstream and help support nonviolent lifestyles.

C. Education

The fact that only two respondents had even heard of juvenile transfer, and their source was television, further attests the need for education of adolescents who have not committed crimes but may be inclined to do so. All 12 participants spoke about education of juveniles to the possibilities and conditions of juvenile transfer as a deterrent.

Adolescents can be reached especially in at-risk and inner city neighborhoods, schools, and community venues. Teachers, guidance counselors, social workers, and other advocates should be educated themselves to the juvenile transfer laws. Juvenile law and its ramifications should be emphasized in law schools and law firms so that future attorneys and attorneys become more aware of juvenile bindover and act on their duties to inform clients and families.

Redding (2005) summarized the problem, which continues today:

There is no out-of-control juvenile crime problem . . . the public still supports the rehabilitative goals of the juvenile justice system, and research does not support the efficacy of punitive juvenile justice policies. Convincing policy makers of these realities will require vigorous and sustained efforts by researchers and advocates. 142

The present study, although with limitations of size and scope, confirms the sparse research on the ineffectiveness of juvenile bindover and need for research, reform of policies, and wider education with regard to juveniles tried as adults. Perhaps the strongest evidence is embodied in the expressions of two participants. One wrote a letter to the governor (with a copy to the researcher) recounting this participant’s antisocial adolescent influences and experiences. He pointed out the ineffectiveness of juvenile bindover and strongly advocated educational resources for young people in many venues to avoid life-destroying

142. Redding, supra note 40.
experiences such as his. Another participant implored the researcher, “Tell them so they do not end up like us.”
A COLLABORATION OF A JUVENILE JUSTICE LAW SCHOOL CLINIC AND LEGAL SERVICES AGENCY TO FULLY SERVE THE LEGAL NEEDS OF CHILDREN

Sara DePasquale and Victoria Silver*

I. INTRODUCTION

Non-profit legal advocacy programs and law school clinics have similar client-focused missions, to provide free or low-cost legal services to those who cannot afford an attorney to protect basic needs such as liberty, safety, shelter, health care, and education. Often these two program types serve a similar subset of clients: children, victims of domestic violence, the disabled, the elderly, and recent immigrants; they may also specialize in the same or related legal substantive areas, such as juvenile, family, education, disability, housing, or immigration law. The similarities of the potential client groups, missions, and substantive legal areas of a non-profit legal advocacy program and a law school clinic provide an opportunity for these programs to work collaboratively for a shared client base. By working together through a formal collaboration, the effectiveness of legal outcomes realized by their clients is improved, and the exposure to additional legal practices for law school clinic students who work in partnership with community lawyers enhances students’ experiential learning.

This article explores the opportunities that arise for law school students, community non-profit legal advocacy agencies, and their shared client community when law school clinics and non-profit legal advocacy agencies develop partnerships. Specifically, a partnership between the Juvenile Justice Clinic at the University of Maine School of Law and the KIDS LEGAL project at Pine Tree Legal Assistance, a community legal services agency, both of which specialize in children’s legal issues, will be discussed to illustrate how the collaboration benefits juvenile clients, law school clinic students, and the two legal programs.

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II. THE AGENCIES

A. The Juvenile Justice Clinic at the University of Maine School of Law

The idea and curriculum for the Juvenile Justice Clinic (hereinafter “JJC”) was developed over a period of two years, and offered for the first time to University of Maine School of Law (hereinafter “Maine Law”) students in the fall of the 2006 – 2007 academic year. The JJC is part of Maine Law’s Cumberland Legal Aid Clinic (hereinafter “CLAC”).1 CLAC has been a recognized provider of legal assistance to low-income2 residents of Southern Maine since its founding in 1970. All legal representation through CLAC is provided by third-year law students who have completed certain coursework and who are certified to practice as “student attorneys” in Maine courts,3 under the close supervision of CLAC’s faculty. Up to thirty students participate in CLAC each semester, and five students work as full-time interns each summer. CLAC is staffed by four full-time faculty members, one adjunct professor, and two administrative staff.

Maine Law decided to develop the JJC after the American Bar Association and the New England Juvenile Defender Center released an assessment of juvenile defense representation in Maine.4 This study identified a number of impediments to the quality of legal services provided to juveniles accused of delinquent activities.5 Most compelling for Maine Law was the indictment of juvenile defenders’ education, “[t]he caliber, education and support of juvenile defenders in Maine needs immediate attention, resources, and support.”6 After the release of this report Maine Law engaged in discussions with juvenile defenders, judges, and children’s advocates about how to best address this challenge. The decision was made, since the problems were wide-spread throughout the state’s juvenile system,7 that the school’s new program should be a “juvenile justice” rather than a “juvenile defense” clinic.

Of the students enrolled in CLAC, the JJC accepts five students during the academic year and employs one intern during the summer. The JJC is a one-

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2. Id. CLAC represents clients with household incomes up to 125% of the Federal Poverty Level with legal matters in courts in the following Maine counties: Cumberland, York, Androscoggin and Sagadahoc. The JJC operates with a presumption of indigency for all children even though such a statutory presumption does not exist in Maine.
3. See Me. R. Civ. P. 90; Me. R. Crim. P. 56.
5. Id. at 25.
6. Id.
7. Id. at 47.
semester course offering three or six credit hours. The primary focus of the JJC caseload is the direct representation of juveniles with pending delinquency matters before the Maine District Court, where student attorneys appear in juvenile court each week as “Lawyer of the Day” or represent their individual clients in various stages of the juvenile proceeding. In addition, JJC students develop caseloads of varying substantive areas affecting juveniles, such as emancipation, child protective actions, and family matters.

In their work on behalf of their juvenile clients, student attorneys work closely with social service agencies, legal aid providers, schools, and other community representatives to develop and implement personalized, comprehensive, and targeted programs for each client. Such programs are designed to ensure that the juveniles avoid incarceration by developing or building upon positive aspects of their lives. Accordingly, student attorneys advocate for services to address underlying substance abuse or mental health issues, appropriate educational programming, and suitable housing and supervision needs of their juvenile clients.

In addition to direct representation of clients, most of the student attorneys have some involvement with ongoing policy projects, e.g. disproportionate minority contact in Maine’s juvenile system. Such work offers students the opportunity to contribute to initiatives with far reaching impact.

B. KIDS LEGAL at Pine Tree Legal Assistance, Inc.

KIDS LEGAL is a statewide project housed within Pine Tree Legal Assistance, Inc., a nonprofit legal services provider in Maine that focuses exclusively on civil law issues impacting low-income individuals and families in Maine. Pine Tree Legal has been in operation since 1967 and receives funding from the Legal Services Corporation (LSC). Pine Tree Legal seeks to promote access to justice by providing high quality, free legal assistance responsive to the immediate needs of individual low-income clients and also seeks to address the long-range barriers to justice affecting low-income people in Maine. Priority substantive areas for its general program include housing, income, public benefits

8. UNIVERSITY OF MAINE SCHOOL OF LAW, STUDENT MANUAL: CUMBERLAND LEGAL AID CLINIC 1-4 (2013) (on file with the CLAC). A three-credit clinic is approximately five cases and ten hours of work per week. A six-credit clinic is approximately ten cases and twenty hours of work per week.


10. LEGAL SERVICES CORPORATION, http://www.lsc.gov/about/what-is-lsc (last visited Feb. 14, 2014) (“Established in 1974, LSC operates as an independent 501(c)(3) nonprofit corporation that promotes equal access to justice and provides grants for high-quality civil legal assistance to low-income Americans. LSC distributes more than 90 percent of its total funding to 134 independent nonprofit legal aid programs with more than 800 offices.”).
including Medicaid, and safety.\footnote{PINE TREE LEGAL ASSISTANCE, supra note 9.} There are six offices\footnote{Augusta, Bangor, Lewiston, Machias, Portland, and Presque Isle. PINE TREE LEGAL ASSISTANCE, http://www.ptla.org/contact-us (last visited Feb. 14, 2014).} located throughout the state of Maine and six specialized units,\footnote{Id. Native American Unit, Farmworker Unit, Taxpayer Clinic, Employment Law Project, KIDS Legal, and Foreclosure Prevention, http://www.ptla.org/about-us (Shows foreclosure prevention. Administration under “contact us” refers to the business office of Pine Tree. It does not handle client matters.).} one of which is KIDS LEGAL.

Following a long planning period with key leaders in Maine’s justice community, KIDS LEGAL\footnote{KIDS LEGAL, http://kidslegal.org/.} was launched in May of 2004 in response to the growing need for a statewide children’s law project, the first and only such project in Maine. KIDS LEGAL serves three main purposes: (1) to provide direct representation to children and youth on legal issues specific to minors, (2) to inform and educate children, youth, and their parents of the legal rights of minors in Maine, and (3) to act as a statewide clearinghouse providing consultations and trainings to professionals in Maine who work with low-income youth.

Eligibility for KIDS LEGAL does not require a child be involved in the court system because of a child protective or juvenile delinquency action. Rather, KIDS LEGAL provides legal representation to minors or their parents (or legal guardians) on their (the minors’) behalf\footnote{The determination of whether the client is the minor or the adult is based upon who has legal standing. For example, a child regardless of his/her age has the right to be represented by an attorney in a school disciplinary proceeding that seeks the student’s removal for more than ten school days. See ME. REV. STAT. ANN. tit. 20-A, § 1001(8-A)(B)(2) (2013). In contrast, a parent or legal guardian has standing to pursue the due process protections provided by the federal Individuals with Disabilities Education Act (IDEA). See generally Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1491 (2006).} in actions where attorneys are not available through court appointments\footnote{In Maine, attorneys are provided to income eligible juveniles in juvenile offense proceedings; all teens filing an emancipation proceeding; and upon Court discretion to teens aged fourteen and over in legal guardianship proceedings. See ME. REV. STAT. ANN. tit. 15, § 3306 (2013); ME. REV. STAT. ANN. tit. 15, § 3506-A (2013); ME. REV. STAT. ANN. tit. 18-A, § 5-212(c) (2013).} or in actions where the private bar in Maine only minimally addresses the need. KIDS LEGAL prioritizes cases that involve children who need assistance in securing appropriate educational services or require help to remain or return to school, with an emphasis on assisting children who are disaffected from school either due to their exclusion from or chronic failure in school. In addition to education matters, KIDS LEGAL prioritizes cases that address a juvenile’s safety and stability by working with runaway, homeless, or unaccompanied youth, and young victims of dating violence or sexual assault.

\footnote{11. PINE TREE LEGAL ASSISTANCE, supra note 9.} 12. Augusta, Bangor, Lewiston, Machias, Portland, and Presque Isle. PINE TREE LEGAL ASSISTANCE, http://www.ptla.org/contact-us (last visited Feb. 14, 2014).\footnote{13. Id. Native American Unit, Farmworker Unit, Taxpayer Clinic, Employment Law Project, KIDS Legal, and Foreclosure Prevention, http://www.ptla.org/about-us (Shows foreclosure prevention. Administration under “contact us” refers to the business office of Pine Tree. It does not handle client matters.).} 14. KIDS LEGAL, http://kidslegal.org/.\footnote{15. The determination of whether the client is the minor or the adult is based upon who has legal standing. For example, a child regardless of his/her age has the right to be represented by an attorney in a school disciplinary proceeding that seeks the student’s removal for more than ten school days. See ME. REV. STAT. ANN. tit. 20-A, § 1001(8-A)(B)(2) (2013). In contrast, a parent or legal guardian has standing to pursue the due process protections provided by the federal Individuals with Disabilities Education Act (IDEA). See generally Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1491 (2006).} 16. In Maine, attorneys are provided to income eligible juveniles in juvenile offense proceedings; all teens filing an emancipation proceeding; and upon Court discretion to teens aged fourteen and over in legal guardianship proceedings. See ME. REV. STAT. ANN. tit. 15, § 3306 (2013); ME. REV. STAT. ANN. tit. 15, § 3506-A (2013); ME. REV. STAT. ANN. tit. 18-A, § 5-212(c) (2013). Maine is a guardian ad litem state for children involved in child protective, and all children taken into state child protective custody are provided a court appointed guardian ad litem. See ME. REV. STAT. ANN. tit. 22, § 4005 (2013).}
KIDS LEGAL employs an interdisciplinary approach to working with children in an effort to insure that civil legal services are integrated within a multi-disciplinary support network for Maine’s low-income children and youth. Given the multi-disciplinary approach utilized by KIDS LEGAL, partnerships with other agencies and disciplines are integral to its operation.

III. THE KIDS LEGAL-JUVENILE JUSTICE CLINIC PARTNERSHIP

KIDS LEGAL and the JJC were formed within two years of one another, and the proximate timing of the creation of these two specialized programs within their larger agencies, Pine Tree Legal and CLAC, provided the opportunity for collaboration. Although the substantive legal priorities of each specialized program differed, both children’s programs were uniquely focused on the same client base. With this shared client group, the need for a juvenile justice partnership was recognized early on because of the number of compulsory school age youths involved in juvenile court who were either absent from or failing school. In an effort to fully serve a child who contacted only one agency but presented with both juvenile justice and education issues, the two programs developed a protocol where they could work in partnership to address the multiple challenges faced by shared clients rather than reinforcing a system that funneled their shared clients on parallel yet never intersecting paths.

This partnership initially employed a “team child” approach for those youth charged with a juvenile offense and simultaneously experiencing school disruption or failure. In the course of their representation of juvenile clients, student attorneys from JJC screened for those cases that their juvenile clients’ status or performance at school either contributed to the problem giving rise to that juvenile’s involvement in the delinquency system or interfered with the juvenile’s ability to comply with court-ordered conditions, such as successfully attending and participating in school. The student attorney referred those clients who would benefit from an assessment of their educational rights and receive advocacy in the educational setting to KIDS LEGAL. Similarly, KIDS LEGAL staff referred youth they were representing in an education matter to the JJC if that client was also charged with a juvenile offense. Working in tandem, JJC student attorneys and KIDS LEGAL attorneys comprehensively addressed the

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18. TEAMCHILD, http://www.teamchild.org/index.php/about/6/histor/ (last visited Feb. 14, 2013 do you mean 2014?) (“TeamChild began in 1995 as a collaborative project between The Defender Association (TDA) and Evergreen Legal Services, now known as Columbia Legal Services (CLS). TeamChild was born out of the frustration of seeing young people with significant mental health, education and housing needs cycle in and out of the criminal justice system without getting the help and support they needed to remain healthy and trouble-free in the community. Public defenders for these youth could recognize the barriers, but didn’t have the resources to address the problems. In contrast, civil legal aid attorneys didn’t have a mechanism for identifying and serving youth.”).
juveniles’ needs in the respective fora and kept the juvenile court informed of those efforts.

The second year of the KIDS LEGAL-JJC partnership expanded when it responded to the request of staff at a local teen homeless drop-in center\(^{19}\) to address the needs of this uniquely vulnerable subset of the two legal programs’ shared client base. Both student attorneys and KIDS LEGAL staff conducted weekly outreach hours in order to inform homeless youth of their rights, accept cases for representation, and provide consultations and trainings to shelter staff.

**IV. CLIENT BENEFIT**

Law school clinics and non-profit advocacy programs that are subject matter programs and focus on specific substantive areas, e.g. “disability law” or “civil rights,” operate within their own arenas, which can result in an overly narrow approach to client advocacy that misses the broader context of the clients’ needs.\(^{20}\) As a result, clients experiencing a multitude of legal issues are not fully served by one program. For clients who are fortunate enough to be working with two separate legal agencies on their different legal matters, coordination of services does not regularly occur even though the opportunity for an improved client benefit is there. A formal partnership between two legal programs that specialize in issues affecting the same client population offers a variety of benefits to their clients. The programs can collaborate to fill the gaps and address the legal needs of the client by providing comprehensive representation. This collaborative model uses a “client-theory” rather than “case-theory” by assessing what the client needs to avoid “pigeon-holing clients into discrete case or service categories.”\(^{21}\) It also eliminates arbitrary limits placed upon the representation provided by one agency defined by the legal problem and instead allows the collaboration to treat clients as multifaceted people and not a concrete set of legal issues, thereby providing “client-centered” representation.\(^ {22}\)

**A. The Intake Process**

Legal programs, including law school clinics, have their own established client eligibility criteria, such as income, geographic service area, substantive issue, and citizenship status, which can limit who may be served by the program. These narrow eligibility criteria result in a potential client who does not meet all the criteria being turned away at initial intake. Instead of receiving sought after legal assistance, the potential client may receive an informal referral to another

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\(^{21}\) *Id.* at 269 n.83 (analogizing to malpractice in dental work when not addressing all of the client’s needs).

\(^ {22}\) *Id.* at 269.
legal provider in the form of a name and number for an agency that may be able to assist him or her in the matter for which he or she called. This informal referral process presents a barrier to people seeking legal assistance. It also demonstrates the gaps in services available to legal consumers who contact one agency. With a formal partnership between agencies providing companion services, these gaps can be closed, allowing the client to benefit from the collaboration at the moment the client begins the intake process with one of the project partners.

For example, if a potential client called KIDS LEGAL because of a summons to juvenile court, KIDS LEGAL would not accept the case for extended representation as it does not fall within the agency’s substantive priority areas. Instead, the caller would receive a “warm referral” to the JJC, meaning upon receiving the informed consent of the caller, his or her contact information and summary of legal problem would be provided by KIDS LEGAL staff to the JJC so that the JJC could then contact the caller and initiate its intake process. This collaborative process is more user-friendly as the caller only needs to make initial contact with one legal partner agency and does not need to continue seeking assistance elsewhere.

The warm referral is important not only because it reduces the burden on the potential client by offering “one stop shopping” but because there is a great demand for legal services from low-income and poor legal consumers that cannot be met. The demand for free or low-cost legal representation sought by the low-income community outweighs the supply available. Across the country, less than twenty percent of those requiring civil legal assistance actually receive it. In Maine, more than eighty percent of those who need legal representation are unable to obtain it. Through the KIDS LEGAL-JJC partnership, the caller gets in the door of the legal provider’s office, a door that statistics show is closed to low-income legal consumers more often than it is open. The 2009 LSC report found that one legal aid lawyer was available for every 6,415 low-income persons in comparison to one attorney for every 429 people in the general population.

In addition to closing the gaps that exist for legal consumers in seeking legal services, clients of partnering legal programs, such as the KIDS LEGAL-JJC partnership, benefit from improved legal screenings that allow for better issue


25. Documenting the Justice Gap Updated, supra note 23 at 20, 27. Legal aid lawyer was defined as including both LSC and non-LSC funded lawyers. Low income was defined as having income at or below 125% of the Federal Poverty Level. Id.
identification and subsequent representation. A 2005 LSC report found that “[n]ationally, on average, low-income households experienced approximately one civil legal need per year,” 26 and a follow up 2009 report found that “low-income households experience a per-household average of legal needs ranging up to three legal needs per year.” 27 Both reports found that legal help was hard to come by—help was received from a legal aid provider or the private bar for roughly one in five of all problems identified. 28 Through formalized partnerships, staff 29 in each program are trained to identify issues that are addressed by the partnership, regardless of which program partner specialized in the legal issue. The development of intake protocols allows staff of both programs to engage in a series of questions that examine the client’s situation in a comprehensive manner in order to identify all the legal issues that may exist, rather than just the one legal issue that the client presents with or in only those substantive areas the agency addresses.

The homeless outreach component of the KIDS LEGAL-JJC partnership best illustrates how potential clients benefit at initial contact with partnering legal providers. Homeless youth have often been forced to leave their homes because of emotional, physical, or sexual abuse. 30 They may struggle with substance abuse issues, mental illness, physical medical complaints, malnutrition, learning disabilities, and educational deficits. 31 Homeless youth have a high risk of pregnancy and/or sexually transmitted diseases. 32 As they struggle to survive, many homeless youth become involved with the criminal justice system. 33
legal needs of homeless youth mirror their basic needs: safety, shelter, nutrition, health care, income, and freedom. Yet, legal providers often do not specialize in the multitude of substantive areas that the homeless youth might need.

The JJC and KIDS LEGAL formed the “Preble Street Law” partnership specifically to conduct outreach at the Preble Street homeless teen drop-in center,34 a program in Portland, Maine that serves minors and young adults up to the age of 21. The outreach took place one day a week during meal time and consisted of a table in the dining area that was staffed by a student attorney and KIDS LEGAL attorney. With legal services available on-site, youth could easily approach the Preble Street Law table and request a consultation. That consultation occurred with both the student attorney and KIDS LEGAL attorney. The joint interview was critical to ensuring that the youth was fully served, as eligibility barriers could quickly arise. For example, if a young adult between the ages of 18 and 21 sought a consultation on a criminal matter, KIDS LEGAL could not assist that young adult due to LSC restrictions prohibiting the provision of legal services for adult criminal matters.35 However, the student attorney could serve that young adult and provide needed advice and representation in court through the JJC umbrella agency, CLAC. If, on the other hand, the youth sought assistance with obtaining public benefits, such as Medicaid and Food Stamps, a KIDS LEGAL staff member who had an expertise in public benefits and unaccompanied minors could help.

The consultation initially focused on the issue presented by the youth, but during that consultation, a more in-depth screening process occurred so that the youth’s legal needs were assessed more globally to ensure that if other legal issues existed, between the two agencies and their different areas of expertise, those legal needs were met. Legal issues that have been addressed by “Preble Street Law” include: juvenile defense, adult criminal defense, eviction defense, public benefits advocacy, changing representative payees for minors receiving Social Security benefits,36 legal guardianship, emancipation, collections disputes resulting from identify theft of minors by their parents for utility bills, parental rights and responsibilities for teen parents, wage and hour claims against employers, and protection from abuse and/or harassment actions. Neither KIDS LEGAL nor the JJC or the umbrella agencies Pine Tree Legal Assistance and CLAC specialize in the all the areas presented above, but together, they do.

34. See generally PREBLE STREET: TEEN CENTER, supra note 19.
36. Social Security benefits may consist of Supplemental Security Income (SSI) for the youth himself/herself based upon his/her own disability or a dependent’s benefit based upon a minor parent’s death or disability. See generally 20 C.F.R. § 416 (2013); 20 C.F.R. §§ 404.350–404.368 (2013)).
B. Legal Advocacy

Moving beyond initial intake, formal partnerships between legal providers result in improved services and outcomes to shared clients. This is demonstrated through the juvenile justice collaboration between KIDS LEGAL and the JJC. There is a strong relationship between education and juvenile justice that reinforces both the need for and the benefit to clients of a partnership such as the one discussed here.

While involvement in the juvenile justice system is often a symptom of unmet needs with which a child is struggling, the system itself has little ability to address those needs. For instance, many low-income children involved in juvenile proceedings are also experiencing difficulties in school and may have undiagnosed disabilities for which services would provide assistance. However, within the juvenile proceeding, the juvenile court has no authority to order a school or other outside agency to provide services to the juvenile. In addition, the juvenile justice system in Maine does not compensate juvenile defenders who wish to advocate on behalf of their indigent client in those other forums outside of juvenile court. Although juvenile defenders can refer their clients directly to community providers, additional advocacy may be required within the educational or other outside systems in order to secure services that will allow juveniles to meet their conditions of release or probation and avoid detention and/or incarceration.

Juvenile defense attorneys lack the expertise to advocate in the educational arena as they are often unfamiliar with various complex federal and state statutes and regulations that govern elementary and secondary education. In addition,
budgetary constraints limit what a juvenile defense attorney can and cannot bill for, often capping hours that would allow for additional advocacy outside of the courtroom. In contrast, legal aid attorneys are experts at providing advocacy on civil matters but, historically, have not been involved in Maine’s juvenile justice system. The partnership discussed here demonstrates how juveniles benefit from the tandem advocacy occurring both in the courtroom and in an arena outside of the courts on related legal issues the juveniles present.

Although there is a constitutional right to attorney representation in criminal, including juvenile, matters, that same right is not available in civil court actions, even when those actions impact basic needs. For children, basic needs include a right to an appropriate education resulting in the successful completion of high school. Without it, children cannot effectively transition to independence and self-sufficiency upon becoming adults. Adults without a high school diploma earn only sixty-seven percent of those who obtained a high school diploma and have a shortened life span of six to nine years as a result of living conditions, work safety, and access to health insurance.

Youth involved in the juvenile justice system have limited school success. Statistics show that seventy percent of children in the juvenile justice system have an educational disability, and the majority of those youth have either an Emotional Disability (“ED”) or a Specific Learning Disability (“SLD”). “Children with ED have the worst graduation rate of all the disabilities; nationally, only thirty-five percent graduate from high school compared to seventy-six percent of all students.” It is estimated that the prevalence of students with emotional disabilities is three to five times greater for those students in juvenile correctional facilities than in public school. Laws exist that could dramatically improve these students’ educational performance. One such attorneys who cannot themselves incorporate special education practice should team up with other attorneys who can provide special education representation for delinquency clients).

41. Court appointed juvenile defense attorneys in Maine are paid $50/hour and fees are capped at $450. Mc. CODE R. ch. 301 §§ 2, 4 (2013).
43. Elisabeth Yu et al., Improving Educational Outcomes for Youth in Care, A National Collaboration, 7 (Child Welfare League of America, 2002).
46. 34 C.F.R. § 300.8(b)(4) (2014).
47. 34 C.F.R. § 300.8(c)(10) (2014).
49. Id.
law is the federal Individuals with Disabilities Education Act (hereinafter “IDEA”).

Congress recognized the need for students with disabilities to be protected educationally with the passage of IDEA, which “confers upon disabled students an enforceable substantive right to public education.” The Supreme Court found that through the passage of IDEA, “... Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”

During the 2009-2010 school year, approximately thirteen percent of school students received services under IDEA. “Within the juvenile justice system, however, children and adolescents with disabilities are grossly overrepresented and are disproportionately detained and confined. Studies and meta-analysis of disabling conditions among incarcerated juveniles estimate the prevalence rate at twelve percent to seventy percent.” Thus, the importance of educational advocacy for youth involved in the juvenile justice system cannot be overstated.

Students who are properly identified with a disability are entitled to not only school inclusion but to a free appropriate public education (“FAPE”) that


53. Id. at 323.


55. See supra note 40. (citing multiple national studies concerning the mental health needs of at-risk youth and youth involved in the juvenile justice system).

56. See IDEA, 20 U.S.C. § 1401 (2006). Defining a “child with a disability” as follows:

(A) In general. The term “child with a disability” means a child--

(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title [20 USCS §§ 1400 et seq.] as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9. The term “child with a disability” for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child--

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

57. See IDEA, 20 U.S.C. §1412(a)(1)(A) (providing that, as a condition to assistance eligibility, states must ensure that “[a] free appropriate public education [FAPE] is available to all
is designed to meet that student’s individual and unique needs. This includes the provision of specially designed instruction and related services such as psychological or social work services, counseling, and therapeutic recreation. With proper identification, students receive educational programming designed to meet all their educational needs, which courts have interpreted broadly to include both academic and non-academic skills. Some states define “educational performance,” and in Maine, it includes both academic and “functional performance,” which is further defined as skills and behaviors in cognition, communication, motor, adaptive, social/emotional, and sensory areas. A public school student who has a disability under IDEA is entitled to an Individual Education Program (“IEP”). The IEP contains all the services, including duration, frequency, and location, as well as modifications the student requires, and for students with behavioral needs, a positive behavior intervention program must be developed and included in the student’s IEP.

New or changed educational services provided to juveniles who are entitled to services under IDEA may assist a juvenile defense attorney in negotiations with the district attorney’s office. At pre-adjudication negotiations, the juvenile defense attorney may seek dismissal of the charges, deferred disposition, or reduced charges. If the educational services under IDEA are not developed and implemented prior to the adjudication hearing, the juvenile defense attorney may use those new services to advocate for the least restrictive disposition, either in negotiations with the district attorney’s office or at the dispositional hearing before the juvenile court. As a result, in the KIDS LEGAL-JJC partnership, student attorneys assess their clients’ educational performance to determine if a referral to KIDS LEGAL for educational advocacy is needed.

KIDS LEGAL may then assist a parent with a referral of his or her child under IDEA or represent the parent at the IEP Team meeting to seek an
improved IEP for the juvenile. Eligibility determinations and the development of an IEP are made through a student’s IEP Team, which must include specified school personnel and parents, who are equal participants. The IEP Team may also include the juvenile, if appropriate, and any person with specialized knowledge or expertise regarding the juvenile, which may include an attorney or advocate for the parent on behalf of his or her child. A parent has the right to initiate a referral to “special education,” which should result in a comprehensive evaluation in all suspected areas of the student’s disability. The evaluation itself may also prove helpful in advocating for the juvenile client in the delinquency proceeding.

In addition to the overlap between special education and juvenile delinquency, school exclusion also carries over to the juvenile justice arena. School exclusion may contribute to delinquent behaviors. Youth who are disaffected and/or failing school prior to any involvement in the juvenile justice system are at greater risk of entering that system. During the 2002-2003 school, an estimated 89,000 students were expelled. For the individual student, expulsion may lead to grade retention, drop out, and increased criminalized behaviors.

All stages in the juvenile justice system require youth to participate in an education program; however, youth charged with a juvenile offense or crime may...

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70. 34 C.F.R. §§ 300.301, 300.304 (2013).
71. See Locating the School-to-Prison Pipeline, AM. CIV. LIBERTIES UNION, http://www.aclu.org/images/asset_upload_file966_35553.pdf (last visited Jan. 26, 2014) (“For most students, the pipeline begins with inadequate resources in public schools. . . . [F]ailure to meet educational needs increases disengagement and dropouts, increasing the risk of later court involvement.”).
73. See The Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense, JUST. POL. INST., http://www.justicepolicy.org/images/upload/09_05_REP_CostsOfConfinement.pdf (May 2009) (“Research continually links education and the likelihood of participating in illegal behavior or ending up in prison. Forty-one percent of adults in prison and jails do not have a high school diploma and . . . dropouts are 3.5 times more likely than high school graduates to be arrested.”) (internal citations omitted).
74. See What If I’m Charged with a Juvenile Offense?, KIDS LEGAL, http://www.kidslegalaid.org/what-if-im-charged-juvenile-offense (Apr. 2013) (listing diversion in to community programs by the juvenile probation officer, which in Maine is referred to as an “informal adjudication,” pre-adjudication conditions of release, post adjudication disposition including probation, incarceration, and “after care”); see also Maine Juvenile Code, ME. REV. STAT. ANN. tit. 15, § 3301-3319 (2014).
have been removed from school in some way – either from formal school disciplinary action, such as a suspension or expulsion; informal and often unconstitutional school action, such as a “disinvitation” from school; or student action, such as truancy or drop out. As a result, the educational assessment of the juvenile by the student attorney is not limited to IDEA eligibility and programming, it also includes exploring the student’s school attendance in terms of whether or not legal advocacy by a KIDS LEGAL attorney is needed under Maine’s school residency, discipline, truancy, or students experiencing educational disruption statutes.

The KIDS LEGAL-JJC partnership addresses zero-tolerance policies and practices in schools. Mass school shootings reinforced the practice of zero tolerance initially established by the federal Gun-Free Schools Act of 1994 and justified the expansion of the zero tolerance policies and practices from firearms to student infractions involving weapons, acts of violence, drugs, or disorderly or disobedient behaviors. This has resulted in rigid and punitive school disciplinary policies that are overly severe and excessive when applied to minor infractions or actions that do not warrant any disciplinary action at all.

In Maine, school suspension and expulsion are particularly problematic because an expulsion applies to every public school in Maine and may be for an indefinite period of time. During a long-term suspension or expulsion, Maine

76. ME. REV. STAT. ANN. tit. 20-A, §§ 1001(8-A)-(9-D).
78. ME. REV. STAT. ANN. tit. 20-A, §§ 5161-5162.
79. Zero tolerance involves the automatic removal of a student from school for committing certain infractions at school, on school grounds or at a school function. Although initially introduced during the “drug war” of the 1980s, “zero tolerance” formally commenced on a national level in schools with the enactment of the federal Gun-Free Schools Act of 1994, Pub L. 103-227, 108 Stat. 270 (1994) (codified as amended in scattered sections of 20 U.S.C. (2006)). The Gun Free Schools Act of 1994 barred the receipt of federal funding by local educational agencies unless such agencies had in effect “a policy requiring the expulsion from school for a period of not less than one year of any student who is determined to have brought a weapon to a school . . .” Id.
80. Most known is Columbine High School in Colorado (Apr. 20, 1999). Other mass shootings by students of fellow students include West Paducah, Kentucky (Dec. 1, 1997), Thurston High School in Springfield, OR (May 21, 1998), and Red Lake, MN (Mar. 21, 2005).
81. Zero Tolerance, Youth Violence Project, CURRY SCH. OF EDUC., available at http://curry.virginia.edu/research/projects/violence-in-schools/zero-tolerance (last visited Feb. 18, 2014) (“LONGMONT, CO (Apr., 1999) -- A 10-year-old student was expelled when she turned in the small cutting knife her mother had placed in her lunchbox to cut her apple. (USA TODAY) ALEXANDRIA, LA -- A second-grader was expelled for bringing her grandfather’s gold-plated pocket watch to school because the watch had a tiny knife attached. (USA TODAY) NEWPORT NEWS, Virginia (Oct. 1996) -- A kindergartner was suspended for bringing a beeper from home and showing it to classmates during a field trip. (CNN) FAIRBORN, Ohio (Oct., 1996) -- A 13-year-old honor student was suspended from school for 10 days for accepting two Midol tablets from a classmate. (CNN) FORT MYERS, Fla. (May, 2001) -- An 18-year-old senior and National Merit Scholar was suspended and charged with a felony count of possessing a weapon when a kitchen knife was found on the floor of her car while she was in class. (FOX NEWS)”).
82. ME. REV. STAT. ANN. tit. 20-A, § 1001(9-C) (2014).
law does not require a school district to provide any educational services to a student. There is one exception: students that are eligible for IDEA services and are suspended for more than ten days in a school year or expelled from school must still receive educational services appropriate to meet their individual needs.

IDEA allows for students to be referred for evaluation, identification, and resulting educational programming even after a student’s suspension or expulsion, meaning that during a period of suspension or expulsion, a student may be referred under IDEA for the first time, or for those students who were identified with one of the categories of disability under IDEA, a subsequent referral for a different or additional category of disability may be made. For students who have been suspended or expelled and who are suspected of having or have been determined to have a disability under IDEA advocacy in the school setting is critical to ensuring those students receive appropriate educational services.

For juveniles who are required to participate in an education program as a condition of pre-adjudication release or of post-adjudication probation, the development of an alternative education program, an IEP for those students with qualifying disabilities, or a return to the mainstream school will be critical in ensuring the institutionalized practice of school exclusion does not cause a juvenile’s violation of the educational component of his or her court ordered conditions.

Zero tolerance has also led to the criminalization of student behavior. Schools now contract for police officers, commonly referred to as school resource officers, to be present in their schools. With the on-site presence of the police in the school building, there has been an increase in juvenile charges resulting from student conduct at school. Ironically, this is occurring at a time when juvenile crime rates have been decreasing. Schools are seeking to hold students accountable for their behaviors by pursuing school disciplinary action and involving law enforcement and the courts. These bifurcated processes result in the school discipline and juvenile court actions running on parallel tracks, with the school proceeding moving at a

83. See generally ME. REV. STAT. ANN. tit. 20-A §1001(8-A) – (9-D).
84. ME. REV. STAT. ANN. tit. 20-A § 1001(9-B); see also IDEA, 20 U.S.C. §§ 1412(a)(1)(A), 1415(k) (2006) (detailing the IDEA’s procedural safeguards and processes when discipline of a student is involved); see also 34 C.F.R. § 300.101(a) (2013).
86. Peter Price, When is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools, 99 J. CRIM. L. & CRIMINOLOGY 541, 549 (2009) (“Police presence at schools must be justified by action, and therefore there has been a marked increase in the criminalization of infractions that would have been previously handled by school officials.”).
87. Cf. id. at 547 (“[B]y the time zero-tolerance policies began to take hold in education, the violence was already subsiding. Crime in school, and outside of the school walls, dropped significantly in the 1990s, dropping by half in schools between 1992 and 2002.”) (internal citations omitted).
much faster pace than the juvenile court proceeding. Because the resulting school and court actions stem from the same incident but involve different substantive and procedural rights and occur in different settings, it is more important than ever for juvenile defense attorneys and educational attorneys to team up.

The United States Supreme Court has recognized that although there is no federal constitutional right to an education, students have a property interest in an education under state constitutions and/or compulsory attendance laws. As a result, students are entitled to due process protections as guaranteed by the Fourteenth Amendment when it comes to long-term suspensions and expulsions. These protections include a hearing before an impartial tribunal with the right to be represented by an attorney and basic standards of due process: notice, the right to be heard, the right to cross-examine witnesses and the right to present evidence.

The school disciplinary hearing raises issues that cross over to the juvenile court action warranting a team approach between the KIDS LEGAL attorney and JJC student attorney. In presenting its case, the school administration must present witnesses. Hearsay alone violates a student’s right to cross-examine witnesses and also does not constitute substantial evidence warranting school removal. By attending the hearing, the student defense attorney has the

88. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”).

89. See e.g., Goss v. Lopez, 419 U.S. 565, 573 (1975) (deciding that, on the basis of Ohio state law, appellees “plainly had legitimate claims of entitlement to a public education” and that Ohio law “direct[ed] local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law require[d] attendance for a school year of not less than 32 weeks.”) “[H]aving chosen to extend the right to an education to people of appellees’ class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.” Id.

90. See id. at 572-76 (deciding that public school students facing temporary suspensions had property and liberty interests that qualified for protection under the Due Process Clause of the Fourteenth Amendment).

91. ME. REV. STAT. ANN. tit. 20-A, § 1001(8-A) (2014) (providing that in Maine, due process standards for an expulsion proceeding include the right to be advised of the charges, informed of the nature of evidence, opportunity to be heard in her own defense, not punished except on the basis of substantial evidence, permitted the assistance of a lawyer, confront and cross-examine witnesses and conducted before an impartial tribunal); see also LaBrecque ex rel. T.N. v. Sch. Admin. Dist. No. 57, No. 06-16 PS, 2006 WL 3483784 (D. Me. Nov. 30, 2006); Carey ex rel. Carey v. Me. Sch. Admin. Dist. No. 17, 754 F. Supp. 906, 919 (D. Me. 1990).

92. See Carey ex. rel. Carey, 754 F. Supp. at 919 (presenting and discussing the “seven minimum requirements” which must be observed in student disciplinary hearings to assure due process: (1) The student must be advised of the charges against him; (2) the student must be informed of the nature of the evidence against him; (3) the student must be given an opportunity to be heard in his own defense; (4) the student must not be punished except on the basis of substantial evidence; (5) the student must be permitted the assistance of a lawyer in major disciplinary hearings; (6) the student must be permitted to confront and to cross-examine the witnesses against him; and (7) the student has the right to an impartial tribunal). Note, however, that using other students’ statements during a disciplinary hearing without providing the subject student with the opportunity to cross examine those other students does not necessarily violate the subject student’s
opportunity for discovery in listening to what the opposing witnesses have to say and observing the kind of witnesses they are. If the student testifies in his or her own defense, the student attorney can also observe how the juvenile handles him or herself in a hearing. For the student who is facing juvenile charges in addition to school removal, issues related to self-incrimination at the school disciplinary hearing arise. The student attorney can advise the juvenile appropriately and can also speak before the school disciplinary tribunal to explain why the juvenile will not be answering certain questions specific to the alleged incident.

In the event that the juvenile is indefinitely expelled, the educational advocacy has not concluded, for re-admission through another hearing must occur, with the burden on the student to prove he or she is not likely to reengage in the behavior resulting in expulsion.93 The KIDS LEGAL attorney representing the juvenile at the re-admission hearing often looks to the JJC student attorney for assistance. Witnesses that can be presented before the school tribunal on a re-admission may include those professionals working with the youth as a result of the juvenile court action, such as the juvenile community corrections officer, a counselor who the child has been court ordered to see, and the adult the youth is living with. The student attorney will know if the juvenile has complied with his or her court ordered conditions and who of the potential witnesses will be helpful.

The benefit to the juvenile client of a team approach by the two legal programs is reciprocal in that the educational advocacy and issues may give rise to defenses in the juvenile case. Evidence that is admissible in the school discipline case may be excludable from the juvenile court case. For example, student searches are permitted by school administrators without probable cause and/or a warrant if it is made under the context of ensuring that school rules are being complied with.94 However, if the school resource officer conducts the search, it may be an unreasonable search if the officer employed the school administrator standard. As such, a motion to suppress that evidence could be made by the student attorney in the juvenile court proceeding. The questioning of a student resulting in a confession may also be the subject of a motion to suppress if the student was in fact in custody when being questioned by or in the presence of a school resource officer and was not given his or her Miranda due process rights. Such due process concerns may be vitiated if the other students’ statements are merely corroborative of evidence already in the record.

94. See New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (“Under ordinary circumstances, a search of a student by a teacher or other school official will be ‘justified at its inception’ when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”).
Whether or not the student was in custody will, of course, be fact specific. If Miranda warnings were provided to the juvenile, a defense attorney can explore whether a waiver, if given, was voluntarily and knowingly made. If the student has a specific learning disability or a processing deficit that makes it difficult for the student to understand what he or she reads and/or hears, or if the student has an emotional disability that manifests itself in anxiety where the student simply agrees with all adults to avoid confrontation, the waiver may not have been voluntarily and knowingly made. If the student requires a one-on-one aide at all times and that aide was not present during the questioning of the student, the Miranda waiver may be invalid. Working with the educational attorney to obtain the school records and understand the educational services that are provided to the juvenile to address his or her disability is of great benefit to the student attorney and ultimately the juvenile client.

For those students who are identified with a disability under IDEA, if a school removal of ten or more days occurs, the IEP Team for that student must convene in order to conduct a “manifestation determination.” The purpose of this meeting is to determine if there is a nexus between the behavior and the disability, and two questions are posed to the team: (1) is the behavior directly and substantially related to the disability and (2) was the school’s failure to implement the IEP directly related to the behavior. If the answer to either question is yes, then the student may not receive any further disciplinary action; instead the student’s IEP must be amended in order to add services that will address the inappropriate behaviors. This manifestation finding by the IEP Team could prove invaluable to the defense attorney in negotiations, hearing, and/or argument for either dismissing the charges or for the least restrictive disposition.

Shared advocacy efforts between KIDS LEGAL and the JJC also benefit those juveniles who have been detained and/or committed to the youth detention center, and thereby experience a school transfer. Research shows that each time

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95. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2398 (2011) (holding that a child’s age is a factor that must be considered when making a Miranda custody analysis, if the age of the child is known or objectively apparent to a reasonable officer).


97. See 20 U.S.C. § 1415(k)(E). Detailing manifestation determinations:
   (E) Manifestation determination. (i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine—(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or (II) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.

98. Me. Rev. Stat. tit. 15, §§ 3341(1), 3203-A(4)(C)-(D) (2013). In Maine, there are two youth detention centers, Long Creek Youth Development Center located in South Portland and
a child changes school, he or she loses approximately four to six months of grade attainment.\textsuperscript{99} This can be even more difficult for students with disabilities. Students with disabilities are entitled to a free appropriate public education even when incarcerated.\textsuperscript{100} If a student identified under IDEA is in a different educational program or placement for ten consecutive school days, that new placement is considered a change of placement, warranting an IEP team meeting. The student who is placed at the youth development center, either as a detained or committed youth, must have special education and related services provided to him or her. The student’s existing IEP transfers with him/her to the development center. Services cannot be limited by what is or is not available at the detention center as IDEA requires all services that are needed for the student to receive an educational benefit, which means that the detention center may need to contract out with providers, such as a speech therapist. By referring juveniles who receive or should receive services under IDEA and are detained or committed by the juvenile court for more than ten school days, the student defense attorney continues to assist the juvenile by ensuring that a KIDS LEGAL attorney can then advocate for appropriate educational services for the youth while in custody. Ensuring that the youth’s educational needs are met during this transfer period is critical for the youth’s long-term success.

The team approach utilized by the KIDS LEGAL-JJC partnership results in the comprehensive provision of legal advocacy to the juvenile client in a manner that not only improves the advocacy in school and court, but also provides needed services to the juvenile.

V. LAW STUDENT BENEFIT

In addition to the benefits realized by the client, formal collaborations also enhance the additional and non-client centered mission of law school clinics, which is to provide an experiential learning environment for law students while increasing their experiences with and exposure to public interest law.

Professor and Clinic Director, David Chavkin, asks, “What are the educational outcomes that we want to achieve for our students?”\textsuperscript{101} Chavkin looks at the Legal Education Standards of the ABA objective 301(a): “A law school shall maintain an education program that is designed to qualify its graduates for admission to the bar and to prepare them to participate effectively and responsibly in the legal profession.”\textsuperscript{102} The clinical model as an important

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\textsuperscript{101} CHAVKIN, supra note 20, at 275.
\textsuperscript{102} Id. at 275 n. 97 (citing AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS, 301(a) (2003) available at http://www.americanbar.org/groups/legal_education/resources/standards.html) (“A law school
component of legal education was the focus of the 1992 MacCrate Report: “Legal Education and Professional Development – An Educational Continuum” and was highlighted in the 2007 publication by The Carnegie Foundation for the Advancement of Teaching in its exploration of the legal profession. Both studies considered the engagement of students with a “practical skill” component of the legal curriculum to promote professionalism and public service.

In 1989, “The Task Force on Law Schools and the Profession” was appointed by the American Bar Association to explore the “gap” between the legal profession and the legal education community, which resulted in the 1992 publication of the MacCrate Report. The task force “identified the fundamental professional needs of a new practicing lawyer.” Under the statement of skills and values, the report identified that “teaching of these skills and values is the joint responsibility of law schools and the practicing bar,” and urged “legal educators and practicing lawyers to recognize that they have different capacities and opportunities to impart these skills and values.” The MacCrate Report also identified the value of teaching ethical issues and dilemmas of practice, along with introducing a student to the organizational and management techniques required for practice. The report emphasized the need for the professional bar to assist in the teaching of the “fundamental values of the profession” such as “competent representation,” “striving to improve the profession,” and “professional self-development.” It also urged the bar to show students that “the practice of law is not measured by financial rewards alone, but also by a lawyer’s commitment, in practice and in the lawyer’s other activities, to a just, fair, and moral society.”

The 2007 Carnegie Report identified clinical training as one of the pedagogies that engages students in shaping their professional identity. This
report presented the questions: who am I as a member of this profession; what am I like, and what do I want to be like in my professional role; and what place do ethical-social values have in my core sense of professional identity? Developing a student’s professional identity and purpose occurs by being “confronted with the realities of practice” on a regular basis and being “taught to persist in analyzing their field experiences in light of their current knowledge of the law and moral understanding.” By analyzing their field experiences, students “learn to re-examine their own beliefs and potentially re-structure them in light of their new experience.”

In order to provide students with experiential learning, law schools offer externships and clinics, which may be an in-house clinic, a hybrid clinic, or what this article refers to as a collaborative model. The KIDS LEGAL-JJC partnership, which is a collaborative model, promotes the mentoring and modeling of professionalism to build the pedagogy that Carnegie calls for as students enter the JJC after two years of traditional classroom education. With only a few opportunities for skills based courses students come into their clinical experience knowing only hypothetical cases. At the JJC, students face the enormous and ever-changing issues of troubled adolescents. Unlike law school hypotheticals, their clients present with a personality, feelings, and fluidity. Many of the juveniles that are assisted by the JJC experience some or all of the following: pending delinquency charges, problems at school, mental health issues, physical health issues, family conflict, housing problems, peer issues, and struggles with substance abuse. The student

113. Id. at 126.
115. Id. at 419.
116. An externship can broadly be described as “a type of clinical experience in which a student works for academic credit in a legal setting outside the law school under the supervision of an attorney and also attends a related seminar class at the law school.” Kelly S. Terry, Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose, 59 J. LEGAL EDUC. 240, 243 (2009) (quoting J.P. Ogilvy, Guidelines with Commentary for the Evaluation of Legal Externship Programs, 38 GONZ. L. REV 155, 179 (2003)). A description of Maine Law’s externship program is available at http://mainelaw.maine.edu/academics/clinical-programs/externships.html (last visited on Feb. 8, 2014).
117. The in-house model relies on learning developed from the student “representing clients or performing other professional roles under the supervision of members of the faculty.” Some programs allow students to take the role as “lead counsel” and in some, clinical faculty remains primary counsel. Roy Stuckey and Others, Best Practices For Legal Education; A Vision And A Road Map, in Anthology, supra note 107, at 37.
118. A hybrid model combines supervision of the student with a clinical professor and an outside attorney by placing the student and supervisor within the outside attorney’s office or the outside attorney bringing a caseload into the law school clinic. See Mary A. Lynch, Designing a Hybrid Domestic Violence Prosecution Clinic: Making Bedfellows of Academics, Activists and Prosecutors to Teach Students According to Clinical Theory and Best Practices, 74 MISS. L. J. 1177, 1185-86 (2005); see also id. at n.22 (providing a further definition of hybrid clinics from the ABA).
attorney realizes that the legal analysis learned in the traditional classroom will only address one or two of the client’s problems.

The KIDS LEGAL-JJC partnership teaches law students to practice their collaborative skills, which is important:

[C]ollaborative work methods cannot improve the work of lawyers unless they approach their work with an understanding of the value and the limits of collaboration and with good collaborative skills. Law students are unlikely to achieve such understanding and skills unless law schools and practicing lawyers make serious attempts to teach them.119

The collaborative model allows the student to experience the art of collaboration and practice the skills necessary to develop partnerships with other lawyers and community members.

The collaborative model incorporates the thrust of ABA Model Rules of Professional Responsibility Rule 1.1, which encourages attorneys to consult with other attorneys who are competent in a substantive area that the less knowledgeable attorney is learning.120 The collaborative model benefits the student attorney by increasing his or her exposure to and competence in legal areas. Although the collaborative model may branch into new legal areas for a clinical supervisor, it also allows for the clinical supervisor to consult with the legal service attorney to aid in the advising of the student.121 Combining a community lawyer with a clinical professor enhances the students’ learning potential. Partnering with community lawyers with different experience levels also mimics the manner in which most law students are likely to practice law in their careers.122

Additionally, the collaborative model “expose[s] the clinic students to a range of activities that community lawyers perform and . . . encourage[s] the students to think broadly about the boundaries of ‘lawyering’ in a community, social justice context.”123 This is a perspective the clinical supervisor may not offer when the focus is on clinical education associated with the law school as opposed to the focus of the lawyer and agency situated in the community. There is strength in combining a practicing attorney as role model and the clinical professor as teacher.124 With the collaboration, faculty can continue to focus on the reflective side of the learning and work through the student’s case on the

120. MODEL RULES OF PROF’L CONDUCT R 1.1.
122. Id. at 364.
123. Id. at 358 n.105.
clinic specialty, while the student watches a “competent and responsible” professional in practice.125

VI. PROGRAM BENEFITS

A. Addressing client conflicts

The collaborative model keeps each program separate and distinct so that client conflicts are not imputed from the law school clinic to the non-profit legal advocacy program and vice versa. Unlike externships or the in-house or hybrid model of law school clinics, the collaborative model ameliorates potential client conflicts. This is especially important for those legal programs that serve juveniles because in some cases the client is the juvenile, and in other cases, the client is the juvenile’s parent or legal guardian. For example, a child who is charged with a juvenile offense or crime is always the client for his or her defense attorney; however, that is not always the case in an education matter. Education laws vary as to whom, the parent or the minor student, has legal standing to exercise a statutory or constitutional right. For example, children with disabilities under IDEA are entitled to a free appropriate public education; however, the procedural rights under IDEA are vested with their parents, so long as the student is not emancipated or has not reached the age of majority.126 In 2007, the Supreme Court resolved any issues related to whether parents also had independent enforceable substantive rights under IDEA by finding that they did.127 For non-emancipated minor students needing attorney representation in IDEA matters, the parent or legal guardian must be the client for the education attorney. The parent or legal guardian acts on behalf of the juvenile and makes decisions based upon what he or she believes is in the child’s best interests. Although the juvenile’s preference may be considered, ultimately, the education attorney follows the parent’s decisions. In contrast, a juvenile defense attorney follows the wishes of his or her client, the juvenile. Through the KIDS LEGAL-JJC partnership, the student attorney represents the juvenile in the delinquency proceeding while the KIDS LEGAL attorney represents the parent or legal guardian on behalf of that same juvenile in the IDEA matter, thereby avoiding potential conflicts arising from differences in the juvenile’s and parent’s wishes.

Other education matters require the juvenile to be the client. Students, not their parents, have a right to formal procedural due process when facing a school removal exceeding ten school days.128 In situations where the juvenile is facing either a long-term suspension or expulsion and a juvenile court delinquency

125. Jennifer A. Gundlach, This Is a Courtroom, Not a Classroom: So What is The Role Of The Clinical Supervisor?, 13 CLINICAL L. REV. 279 (2006), in Anthology, supra note 107, at 85.
action, the client is the juvenile in both matters. However, if a simultaneous case regarding IDEA eligibility, services, or manifestation determination is pending or needs to be initiated, the juvenile’s parent or legal guardian would be the client. Under the KIDS LEGAL-JJC partnership, the student attorney would be able to represent the juvenile in both the school disciplinary and juvenile court proceedings. The KIDS LEGAL attorney would represent the parent or legal guardian in the IDEA matter. By working together but separately for the same juvenile, the student attorney would consult with the KIDS LEGAL attorney about the school disciplinary process and laws, thereby complying with ABA Model Professional Rule 1.1.

Conflicts between parents and their children arise when they differ on what the proper course of action should be in a case: settle or go to hearing. They may have different desires on the ultimate case outcomes. A parent may want his or her child identified as a student with an emotional disability under IDEA while the juvenile may not want to be identified as needing special education services. A juvenile may view expulsion as a reward, in contrast to his or her parents wanting their child to be fully engaged in the school community. A juvenile may want to be placed outside of his or her home as a pre-adjudication condition of release or disposition order, in direct contradiction to what his or her parent wants. In these situations, one legal program could not represent both the parent in the school matter and the juvenile in the court matter because a client conflict is present.

Because the clients are different but the legal matters are integrally related, communication between the two legal advocates is critical. Appropriate informed consent forms must be obtained.129 This is also true in those situations where the client for both legal programs is the juvenile. A joint meeting between the legal advocates and their respective clients may also be needed to determine and agree on one consistent course of action for the juvenile, with the input of both legal advocates presenting the strengths and weaknesses as well as legal consequences of each varying course of action.

Not all meetings, however, should be scheduled jointly because of attorney-client privilege. In addition, there is no “parent-child privilege.” If a child admits criminal behavior to his or her parent, Maine does not recognize that communication as privileged if a parent is called to testify against his or her child.130 Similarly, federal circuit courts have also disavowed a parent-child privilege.131 If the parent discloses to the juvenile defense attorney that his or her

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129. ME. RULES OF PROF’L CONDUCT R 1.6 (2012). This provision mirrors MODEL RULES OF PROF’L CONDUCT R 1.6.
131. See FED. R. EVID. 501; see also IN RE GRAND JURY PROCEEDINGS, 103 F.3D 1140 (3D CIR. 1997); IN RE GRAND JURY PROCEEDINGS OF DOE, 842 F.2D 244 (10TH CIR. 1988); UNITED STATES v. DAVIES, 768 F.2D 893 (7TH CIR. 1985); UNITED STATES v. ISMAIL, 756 F.2D 1253 (6TH CIR. 1985); IN RE GRAND JURY SUBPOENA OF SANTARELLI, 740 F.2D 816 (11TH CIR. 1984); IN RE MATTHEWS, 714 F.2D 223 (2D CIR. 1983).
child admitted to the alleged offense, attorney-client privilege does not apply as the juvenile, not the parent, is the client. Ethical issues regarding candor to the court\textsuperscript{132} will be raised if the juvenile subsequently denies guilt. However, if the parent informs the education attorney that the child admitted to the alleged activity, and that attorney is representing the parent on the child’s behalf, attorney client privilege does exist. That educational attorney can then advise the defense attorney that the parent should not be called as a witness without disclosing why.

B. Sharing Resources

Through the collaboration, resources may be shared between the two programs. This can consist of something as simple as the use of a meeting space at one of the program’s facilities, or it can include “coverage” issues to address schedule conflicts or to be more efficient with time. For example, either the student attorney or the community attorney may attend a meeting with the juvenile’s providers to learn how the juvenile is functioning in the community and what services are being implemented and sought. Information learned from that meeting can then be shared with the legal partner who did not attend. Another way to share resources involves legal research when both proceedings result from shared facts. The student attorney, who has access to the robust research resources available to a law student, can maximize resources by completing research that pertains to both matters: education and delinquency.

VII. FUNDING

Formal collaborations between existing non-profit agencies are especially important to consider in this time of shrinking resources and the resulting decrease in available legal services to the poor. It is imperative that each partnering agency be open and candid about funding. Because of the crossover between the two legal agencies given their companion substantive issues and shared client base, there is the danger that the programs will compete for the same available funding. This can result in program cannibalism, where one program obtains the sought after funding, resulting in a reduction or the elimination of the other program’s services. Competition for the same money also places the programs in adversarial rather than partnering positions with one another. The effect of competition is the destruction of a viable partnership.

In discussing funding, it is important to consider applying for funding for the joint work of the partnership. One agency would apply for funding as the lead agency and contract out with the partner agency for the companion legal work. By discussing this explicitly, the agencies would agree that it would not seek

\textsuperscript{132} ME. RULES OF PROF’L CONDUCT R 3.3 (2012). This provision mirrors MODEL RULES OF PROF’L CONDUCT R 3.3.
funding from a particular source for anything other than what is agreed to, thereby eliminating potential competition with that particular funder. By selecting a lead agency for different funders, more funding opportunities become available to both agencies because there are some funding sources for which only one agency will be eligible.

Even if no funding is available and/or obtained for a partnership project, the collaborative model is viable and worthwhile. Each agency is already performing the work. The agencies need only to reach out to one another and discuss shared client issues, gaps in services, and intake protocols. The partnership could start out small and function on a pilot project basis. There, systems and protocols can be developed and refined. Data on the process and outcomes can be collected as well. By doing so, when and if funding is sought for a formal partnership, the groundwork will be laid and can be referred to in the application.

VIII. EXPANSION OPPORTUNITIES

There are many opportunities for collaboration between law school clinics and non-profit legal advocacy programs that go beyond the partnership presented here. Law school clinics that focus on educational advocacy can partner with a children’s law program that works with children involved in the abuse, neglect, and dependency systems. Children and youth who are placed in state custody as a result of abuse, neglect, or dependency are a particularly vulnerable population. Although there is either a guardian ad litem or attorney appointed to the child(ren), their education is oftentimes adversely impacted as a result of school disruption. According to a 1999 Maine Study on improving educational outcomes for children in foster care, forty percent of those youth repeat one or more grades, thirty-three percent are at least one year behind academically, and sixty-five percent missed two to four weeks of school during the previous year.133 Children in state custody who are identified with disabilities under IDEA must have a surrogate parent appointed to them.134 Advocacy in the educational arena for children in state custody is a need that is often ignored or unfunded. A partnership between the guardian ad litem or attorney for the child protective agency and a legal program that practices education law could fill such a need.

Law school clinics or other non-profit legal advocacy programs that prioritize housing law (e.g. eviction or foreclosure defense work) or domestic violence advocacy may consider partnering with another legal program or law school clinic that addresses the educational rights of elementary and secondary school students. In focusing on the substance of the legal matter, housing, or protection from abuse, the companion school advocacy piece for school-age children affected by the eviction, foreclosure, or need to flee the home due to domestic violence is overlooked and, therefore, unaddressed. Under the federal

McKinney-Vento Act,\textsuperscript{135} protections are in place for homeless students that ensure a seamless continuation of their schooling despite being homeless, by either their continuation in their school of origin\textsuperscript{136} with transportation provided or their immediate enrollment in their school of current location. Homelessness is broadly defined to include students who are lacking a regular, adequate, fixed, nighttime residence and specifically include students who are staying in shelters, transitional housing, motels, campgrounds, are on the streets or in cars, or are doubled up with friends or relatives.\textsuperscript{137} It is estimated that twenty percent of homeless students do not attend any school.\textsuperscript{138} A collaboration could ensure that the McKinney-Vento Act is being complied with for those students who experience homelessness, even if briefly, as a result of domestic violence, eviction, or foreclosure.

IX. CONCLUSION

A partnership between a law school clinic and a non-profit legal advocacy agency works for those shared clients who would benefit from multi-issue representation. To be successful, there must be clear expectations regarding the project, such as purpose, priorities, differing roles of each agency, ethical protocols for client consent and possible client conflicts, and funding (if available). Through a “client-centered” approach to legal advocacy, a client benefit starts at intake and continues through the resolution of the legal matters because of the provision of comprehensive services from two legal advocates working in tandem for improved legal outcomes for their shared client.

Contextually, the juvenile requiring delinquency legal representation and educational legal representation for inclusion and appropriate programming are not the only beneficiaries of a fluid collaboration. This model enhances a law student’s skills component and the development of social and ethical aspects of a student’s professional identity. The fluidity also benefits both legal entities by streamlining resources by using not only the efforts of the student attorney but sharing clock time for intake, fact-finding and assessment.

\textsuperscript{136} The school the student was attending at the time the homelessness event occurred.
\textsuperscript{137} 42 U.S.C. § 11434a(2) (2002).
SHARED RESPONSIBILITY: THE YOUNG ADULT OFFENDER

Rebecca Ballard DiLoreto*

“I would there were no age between ten and three-and-twenty, or that youth would sleep out the rest; for there is nothing in the between but getting wenches with child, wronging the ancentry, stealing, fighting.”

Shakespeare: A Winter’s Tale, Act 3, Scene 3

Those who truly know Kentucky often recall our Thoroughbred, Cardinal and Goldenrod, the Commonwealth’s treasured horse, bird, and flower.¹ The cardinal comes to maturity after a year of life;² the Goldenrod’s ripeness is measured at six to eight feet tall;³ on the other hand, there is debate about our state horse.⁴ Some believe that the thoroughbred is mature enough to race by its third birthday.⁵ Others assert that the horse’s bone structure is not fully formed until the sixth year of life.⁶ Maturity—it is something we think about in regards to all life—we study the question and we re-evaluate based on the knowledge available to us. Are we at a new place in terms of our understanding of the process of human maturation? Do we see behavior differently today than it was understood by Shakespeare? This article engages us in some thoughts about this issue with respect to the young adults who grow up in our homes, live in our communities, and break the law. Are we at a new day in terms of how our Kentucky Criminal Justice System should address these young/emerging adult offenders?

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5. Id.
6. See id. at 8 (noting that horses’ vertebrae do not finally fuse until five and one-half years for females and an additional six months for males).
I. INTRODUCTION

The United States Supreme Court has recognized that youth are a cognizable class to be treated differently under the law. The Court has recognized that “youth” as a class are less culpable for their actions because their development as human beings is not yet complete. Youth lack the social, physical and psychological maturity deemed appropriate to hold them equally responsible as adults for their actions. The brain science relied upon by the Court, established that the human brain does not complete its development until a person reaches their mid-twenties. This research indicates that lawmakers should consider amendments to appropriately address the “young adult,” or what is sometimes called the “emerging adult” population, when such persons break the law.

Public safety is served by a criminal justice system that balances the objectives of prevention, punishment and rehabilitation. Given what we know about the developmental reality of young/emerging adults, should we alter how we address this population for acts of criminal wrongdoing? Said otherwise, what do the Roper, Graham, Miller, and JDB cohort of cases suggest about how to effectively and justly deter, punish, and rehabilitate newly adult offenders?

7. See Roper v. Simmons, 543 U.S. 551, 569 (2005) (“[D]ifferences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”).
8. See id. at 569–71.
9. See generally id.
10. See id. at 569 (citing Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003); see also, Laurence Steinberg, What the Brain Says About Maturity, N.Y. TIMES (May 29, 2012), www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/adulthood-what-the-brain-says-about-maturity (“Significant changes in brain anatomy and activity are still taking place during young adulthood, especially in prefrontal regions that are important for planning ahead, anticipating the future consequences of one’s decisions, controlling impulses, and comparing risk and reward. Indeed, some brain regions and systems do not reach full maturity until the early or mid-20s.”)).
11. See Barbar Hofer, A Parent’s Role in the Path to Adulthood, N.Y. TIMES (May 28, 2012), www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/a-parents-role-in-the-path-to-adulthood (“Emerging adults’ – whom Jeffrey Arnett defines as individuals between 18 and 25 – need opportunities to make their own choices, whether that’s about their major, what courses to take, their social lives or summer plans, and they need practice in making mistakes and recovering, and in owning the outcomes of their choices.”); see also, JEFFREY J. ARNETT EMERGING ADULTHOOD: THE WINDING ROAD FROM LATE TEENS THROUGH THE TWENTIES (2004).
13. See generally Roper v. Simmons, 543 U.S. 551 (2005) (holding that execution of individuals who were under eighteen years of age at time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments); Graham v. Florida, 560 U.S. 48 (2010) (holding unconstitutional sentences of life without parole for juvenile, non-homicide offenders); Miller v. Alabama, 132 S. Ct. 2455 (2012) (holding that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment’s...
United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also referred to as the “Beijing Rules”) require that efforts “be made to extend the principles embodied in the Rules to young adult offenders” and to extend the protection afforded by the Rules to cover proceedings dealing with young adult offenders.14

Several states and other countries have created young adult offender categories.15 Options include easier access to diversion than that allowed for older adult offenders; the option of keeping convictions confidential; greater leniency at sentencing with a preference for probation; confinement in facilities structured to meet the young adults need for education and vocational training with mentors and counselors; a reduction in years of confinement with earlier consideration for parole.16

Kentucky has not employed any of these options. The only area of the Kentucky penal code where youthfulness is recognized in mitigation of punishment for adults is with capital cases.17 Thus, the law of the Commonwealth mandates that a jury or judge in sentencing a young woman convicted of capital homicide, one of the most serious crimes, must consider her young adult status in mitigation for punishment.18 Yet, the car thief, facing a sentence of one to five prohibition on cruel and unusual punishments); J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (holding that a child’s age properly informs the Miranda custody analysis).


15. See, e.g., Colo. Rev. Stat. Ann. § 18-1.3-407(2)(a)(III)(B) (2013) (“Young adult offender means a person who is at least 18 years of age but under 20 years of age when the crime is committed and under 21 years of age at the time of sentencing pursuant to this section.”); GA. CODE ANN. § 42-7-2(7) (2013) (defining “youthful offender” to include male offenders aged at least 17, but less than 25 years of age).

16. See, e.g., Colo. Rev. Stat. Ann. § 18-1.3-407(2)(a)(I) (“The court shall have a presentence investigation conducted before sentencing a juvenile or young adult offender pursuant to this section. Upon the request of either the prosecution or the defense, the presentence report shall include a determination by the warden of the youthful offender system whether the offender is acceptable for sentencing to the youthful offender system. When making a determination, the warden shall consider the nature and circumstances of the crime; the age, circumstances, and criminal history of the offender; the available bed space in the youthful offender system; and any other appropriate considerations.”); DEL. CODE ANN. tit. 11, § 6701 (2013) (includes short military style program for young adult offenders); HAW. REV. STAT. § 706-667(1)-(2) (2013) (providing for special and individualized correctional and rehabilitative treatment as may be appropriate to the young adult defendant’s needs if under twenty-two years of age); ME. REV. STAT. ANN. tit. 34-A, § 3816 (2013) (authorizing placement of young adult offenders below the age of twenty-six in separate facilities more suited for juvenile offenders); TRANSITION TO ADULTHOOD ALLIANCE, TRANSITION TO ADULTHOOD: A NEW START: YOUNG ADULTS IN THE CRIMINAL JUSTICE SYSTEM, available at http://www.barroedcadbury.org.uk/wp-content/uploads/2011/01/T2A-A-New-Start-Young-Adults-in-the-Criminal-Justice-System-2009.pdf (describing the need for a “distinct and radically different approach to young adults in the criminal justice system; an approach that is proportionate to their maturity and responsive to their specific needs”).

17. See KY. REV. STAT. ANN. § 532.025(2)(b) (2013) (noting that age can be considered as a mitigating factor in sentencing for capital cases).

18. Id.
years in prison for a Class D felony, has no statutorily defined right to leniency based on lack of complete adult development. This article argues that models of reform adopted by other states and nations should be sensibly considered and, where appropriate, incorporated into Kentucky’s penal code. Our area of concern herein is with those convicted of felony offenses. Kentucky’s misdemeanor provisions place discretion for sentencing and supervision of probation squarely upon the sentencing court and incarceration is at the local jail level. The youthfulness of adult offenders can more easily be taken into account by district court judges. However, those young adults convicted of felony offenses are more likely to be placed indiscriminately on the assembly line of a justice system attempting to be fair and expedient by applying standards that make little to no exception for youthfulness.

II. COSTS OF RELYING ONLY UPON INCARCERATION OR STANDARD TERMS OF PROBATION FOR THE YOUNG ADULT POPULATION

A. Incarceration

For a person to be counted as a prisoner by the United States government, they must be physically held in a facility under the jurisdiction of a state or the Federal Bureau of Prisons. A locality, state, or the Federal Bureau of Prisons may hold inmates over whom a different government maintains jurisdiction. Hence, in Kentucky, state and federal prisoners can be held in local jails, and prisoners from other states may be held in the private prisons located in Kentucky that also house state prisoners.

19. Compare id. (noting age as mitigating factor in sentencing for capital crimes), with § 514.030(2)(d) (noting that theft of property with a value between $500 and $10,000 is a Class D felony) and § 532.060(d)(2) (providing for a sentence of not less than one year or more than five years for a Class D felony).

20. See id. § 439.177 (noting that the sentencing court has discretion with regard to sentencing, parole, and parole conditions); see also § 439.179 (noting that the sentencing court has discretion to grant work release, and that local probation and work release agencies are responsible for obligations under this section).


22. Id.

23. See KY. REV. STAT. ANN. § 532.100(4) (West 2013) (stating that inmates can be held in local or state facilities depending on the class of crime, length of sentence, etc.); 501 KY. ADMIN. REGS. 2:060 (2013) (detailing procedures for housing of Class D and Class C felons); see also Lee Adjustment Center, CCA, http://cca.com/facilities/lee-adjustment-center (last visited Mar. 16, 2014) (showing an example of a Corrections Corporation of America correctional facility located in Kentucky that houses Vermont inmates); Andrew Cohen, Yes, West Virginia, a Private Prison Transfer is a Terrible Idea, THE WEEK (Feb. 5, 2014), http://theweek.com/article/index/255972/yes-west-virginia-a-private-prison-transfer-is-a-terrible-idea (stating that West Virginia is considering transferring 400 inmates to a private prison in Kentucky).
To calculate the costs of incarceration requires an accounting of the number of people incarcerated. The main source for annual prisoner counts is the National Prisoner Statistics Program (NPS) data collection, which began in 1926 under a mandate from Congress to collect statistics on prisoners.\textsuperscript{24} Imprisonment rates refer to the number of persons under the jurisdiction, or legal authority, of state or federal correctional officers per 100,000 U.S. residents.\textsuperscript{25} When prison populations are combined with local jail counts, they are referred to as the incarcerated population, and the incarceration rate is the number of persons in prison or jail per 100,000 U.S. residents.\textsuperscript{26} The United States government reported spending an average of $28,893.40 per prisoner during fiscal year 2011.\textsuperscript{27}

Kentucky operates twelve prisons, including one women’s prison, and provides grants to community corrections programs and facilities.\textsuperscript{28} Kentucky ended its practice of contracting with private prisons, though one private prison located in Kentucky continues to house out of state prisoners.\textsuperscript{29} In 2009, Kentucky reported spending $384,336,582 on the approximately 22,553 inmates housed in its facilities.\textsuperscript{30} Persons convicted for offenses committed from age eighteen upward can be housed in these prisons in Kentucky.\textsuperscript{31} The reported figure does not include monies allotted to local jails for general maintenance.\textsuperscript{32} Inmates are incarcerated pretrial in local jails on misdemeanor and felony offenses and often serve out their sentences on Class D and C felonies in the local jail.\textsuperscript{33} The $384,336,582 does include the monies paid to local jails for the convicted C and D felons.\textsuperscript{34}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{29} Tom Loftus, Kentucky Ending Private Prisons, Courier J. (June 25, 2013), www.courier-journal.com/article/20130625/NEWS01/306250074/?nclick_check=1.
\item \textsuperscript{31} See Institutions & Facilities, supra note 28 (stating that Kentucky’s twelve correctional facilities house Kentucky’s adult inmate population); see also 505 Ky. Admin. Regs. 2:010(26) (2013) (defining “juvenile” as a person under the age of eighteen).
\item \textsuperscript{32} Cost of Incarcerating Adult Felons, supra note 30, at viii.
\item \textsuperscript{33} See Ky. Rev. Stat. Ann. § 532.100(4)(a) (West 2013) (requiring persons convicted of a Class D felony with a term of five years or less to serve that term in a local jail); § 532.100(4)(b)
\end{itemize}
\end{footnotesize}
An inmate’s placement after a felony conviction is determined based on a classification instrument used by the Department of Corrections and developed with assistance from the National Institute of Corrections. Kentucky has one male and one female intake facility where the classification occurs. Elderly, middle age, and young inmates may be housed together. Women are kept in separate institutions from men, except when Class C and D felons are retained in the county jails. In the jails, men and women are locked up in separate areas.

KRS 532.100(4) requires the Department of Corrections to house qualifying Class D and Class C felons in county jails. Administrative regulations establish the procedures to implement the required housing program. Qualifying Class D or C felons can also be placed in home incarceration or on conditional release. None of these provisions or accompanying procedures differentiates treatment of adult offenders based on age.

B. Probation and Parole

Probation refers to adult offenders whom courts place on supervision in the community through a probation agency, generally in lieu of incarceration. Some jurisdictions sentence probationers to a combined short-term incarceration sentence immediately followed by probation, which is referred to as a “split

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34. COST OF INCARCERATING ADULT FELONS, supra note 30, at viii-ix.
37. See id. (indicating by inference that if Kentucky has one male and one female intake facility, then adult inmates of all ages may thus be housed together).
38. See id. (noting that Kentucky has separate intake facilities for males and females); KY. REV. STAT. ANN. § 532.100(4)(a) (West 2013) (requiring persons convicted of a Class D felony with a term of five years or less to serve that term in a local jail; § 532.100(4)(b) (stating that persons convicted of a Class D or C felony with a sentence of more than five years may serve under certain conditions serve the term in a local jail).
40. KY. REV. STAT. ANN. § 532.100(4) (West 2013).
41. See 501 KY. ADMIN. REGS. 2:060 (West 2013) (noting procedures for housing of Class D and Class C felons).
42. See KY. REV. STAT. ANN. § 532.060 (West 2013) (the Editor’s Notes include the 1974 Kentucky Crime Commission, Legislative Research Committee comments: “[T]he trial judge has at his disposal the power of modification granted by KRS 532.070 and the power granted by KRS Ch 533 to substitute probation or conditional discharge in place of imprisonment.”).
Kentucky uses “shock probation,” a process wherein the felon serves a period of time in the county jail, which theoretically “shocks” her into good behavior, and then, is granted probation under terms determined by a trial judge.

Probationers can be subject to different levels of supervision. Some may have to report on a weekly or monthly basis to a probation officer, others may be permitted to communicate with their probation officers by mail or phone. Some states include the status of inactive supervision, removing the obligation of regular reporting. In most states, as in Kentucky, the law permits that terms of probation be constructed to meet the particular facts of the case and the identified needs of the convicted felon placed on probation. In Kentucky, the local Office of Probation and Parole completes a presentence investigation to gather the facts needed by the trial judge to impose an appropriate sentence. This report includes inquiry about an offender’s educational status, but makes no reference to or consideration of youthfulness. Uniformly, probationary terms include fulfillment of certain conditions such as the payment of fines, fees or court costs, participation in treatment program and adherence to specific rules of conduct while in the community. Probation officers can seek court orders to incarcerate for the failure to comply with any condition.

45. KY. REV. STAT. ANN. § 439.265 (West 2013).
46. Id. § 533.030(1) (“The conditions of probation and conditional discharge shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.”).
47. Id. § 533.030(2).
49. KY. REV. STAT. ANN. § 532.050 (West 2013) (requiring a presentence investigation report identifying counseling treatment, education, and rehabilitation needs of the defendant).
50. Id. § 532.050(2).
51. Id. § 532.050(3) (requiring the presentencing report to include “an analysis of the defendant’s history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, and personal habits”).
52. See, e.g., id. § 533.030 (stating probationary terms and conditions that the court may impose on defendant); Community Corrections (Probation and Parole), supra note 43 (providing examples of probationary conditions such as payment of fines, fees or court costs, participation in treatment programs, and adherence to specific rules of conduct while in the community).
53. See KY. REV. STAT. ANN. § 532.060(4) (West 2013) (stating that an offender violating the terms of his or her probation may be incarcerated); § 532.020(1) (“[T]he court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.”).
In Kentucky, the sentencing judge determines whether a convicted felon is placed on probation and the terms of that probation.\textsuperscript{54} The Parole Board, whose members are appointed by the Governor, grants and establishes the terms of parole.\textsuperscript{55} An inmate generally faces the Parole Board only after being denied probation or violating the terms of probation, going to jail or prison, and then qualifying for review by the Parole Board based on the amount of time served.\textsuperscript{56}

The presentence investigation report continues as a point of reference for the state in assessing a convicted felon while he remains under the jurisdiction of the Department of Corrections.\textsuperscript{57} It affects how the inmate is classified by the Department of Corrections.\textsuperscript{58} In Kentucky, the same community based office that supervises probation of Kentucky felons also supervises those placed on parole.\textsuperscript{59} The same presentence investigation report gives guidance to the parole officer for determining the conditions of supervision for parole.\textsuperscript{60}

\textbf{C. Financial Cost of Reliance Upon Incarceration}

Recognizing that the financial costs alone of incarcerating both violent and non-violent offender alike has burdened the state and federal economy, officials sought alternatives to incarceration.\textsuperscript{61} In 2012, the number of admissions to state

\begin{itemize}
\item \textsuperscript{54} Id. \S 533.030.
\item \textsuperscript{55} See id. \S 439.330 (describing the duties of the Parole Board); \S 439.320 (requiring the Governor to appoint members of the Parole Board).
\item \textsuperscript{56} See \textit{generally id.} 533.030 (describing the general requirements for an inmate to receive consideration for parole).
\item \textsuperscript{57} See id. \S 439.330 (requiring the Parole Board to “study the case histories of persons eligible for parole, and deliberate on that record); \textit{Aaron v. Com.}, 810 S.W.2d 60 (Ky. Ct. App. 1991) (holding that presentencing reports are court records and reviewable by the Parole Board without the need to redact dropped criminal charges or any other information included in the report).
\item \textsuperscript{58} See Ky. Dep’t of Corr., Policy No. 28-01-03, Presentence, Postsentence, and Other Investigation Reports 10 (Mar. 12, 2012), available at \url{http://corrections.ky.gov/communityinfo/Policies\%20and\%20Procedures/Documents/CH28/28-01-03\%20PSI.pdf} (noting that the presentencing report is available to the Classification and Records Department via the Kentucky Department of Correction’s case management).
\item \textsuperscript{59} See Division of Probation and Parole, KY. DEP’T OF CORR., \url{http://corrections.ky.gov/depts/Probation\%20and\%20Parole/Pages/default.aspx} (last visited Mar. 22, 2014) (noting that the division also provides services for Community Centers, Halfway House pre-release programs, and jail-based Class D programs).
\item \textsuperscript{60} See Ky. Dep’t of Corr., Policy No. 27-02-02, Duties of Probation and Parole Officers and Investigators 1 (Jan. 1, 2012), available at \url{http://corrections.ky.gov/communityinfo/Policies\%20and\%20Procedures/Documents/CH27/27-02-02\%20Duties.pdf} (noting that probation and parole investigators prepare pre-sentence investigation reports and provide recommendations on supervision of offenders to the courts and probation and parole officers).
\end{itemize}
and federal prison in the United States had dropped to 609,800, the lowest number of offenders admitted since 1999.62

In 2011, the U.S. government reported 4,814,200 adults under state and federal community supervision.63 This number likewise represented a drop in population from the previous year.64 Based on data from 2012, Kentucky identified 14,419 adults on parole, 54,511 on probation, and 17,814 in prison.65

A long look back allows us to see the trend towards reliance on incarceration in Kentucky, as noted by the original architect of Kentucky’s penal code, Professor Robert G. Lawson:

In the early 1970s, Kentucky held about 3,000 convicted felons in its prisons. It had two major prisons for men, a small prison for women, and a separate facility for juveniles. It had no inmates in private prisons, had none housed permanently in county jails, and had not engaged in major prison construction for more than three decades. By late 2005, the state held more than 19,850 felons in custody, an increase of more than 650 percent since the early 1970s. It operated thirteen state prison facilities (ten major prisons for men, a major prison for women, and two smaller facilities); it had more than 1,500 inmates housed in private prisons; and with all its prisons full, the state held more than 5,600 inmates in county jails across the state. Kentucky opened a new prison for men (almost 1,000 beds) in July 2005, and not long thereafter, the state contracted for an additional 400-bed private prison for women. Near this time, the state looked ahead and concluded that it would have 26,527 inmates by 2010 and 31,057 by 2014. This means that the state will need a new 1000-inmate prison every year for the next decade and will incur truly staggering increases in prison operating costs.66

Professor Lawson’s trend analysis was echoed in another, more recent, article: “In the midst of immense budget shortfalls, America’s incarceration costs continue to skyrocket. It is not surprising that the recent financial crisis has attracted an increased level of attention to the nation’s allocation of fiscal resources and its costly incarceration practices called into question.”67

64. Id.
To cut such costs, states have been urged by the right, the left, and the middle to reevaluate statutory mandates and regulatory policies that route those on probation or parole back to prison every year, often times not for new crimes, but for technical violations. The length of prison terms and their relationship to recidivism “is one of the central points of debate in sentencing and corrections policy.”

Many people assert that longer prison terms are more effective at deterring future crimes because they set a higher price for criminal behavior and because they hold offenders until they are more likely to “age out” of a criminal lifestyle. Others argue the opposite—that more time behind bars increases the chances that inmates will reoffend later because it breaks their supportive bonds in the community and hardens their associations with other criminals.

Research indicates that the two theories, however, “may cancel each other out.” Studies examining this relationship “have failed to find a consistent impact, either positive or negative.”

III. PERSONAL COST OF RELIANCE UPON INCARCERATION AS


70. Id.

71. Id.

PRIMARY STRATEGY FOR KEEPING PUBLIC SAFE

The personal costs of relying upon incarceration for the violent and nonviolent offender alike is obvious to most observers. Offenders and families suffer from long-term separation and the inability to sustain positive relationships.73 Removal from society generally creates greater alienation once an individual is released and must try to find a place for herself, living within a community.74 Many felons are challenged by years of institutionalization, not able to make basic decisions for themselves upon their release.75 These costs are only magnified for the young adult offender.76 While incarcerated, these young adults, who would only begin to be establishing their own way in the world, are removed from positive peer relationships; too easily assume an identification with the status of being a felon; are overtaken by the stigma of a conviction; lose the opportunity for education or job training; are disassociated from their family of origin; and are unable to begin to build a family of their own.77

A. Critical Nature of Ages Eighteen to Twenty-Four

Upon graduation from high school, many young people begin college, pursue vocational training, or seek employment often at the bottom of the pay scale.78 Everyone recognizes these years as foundational for building a solid future.79 Young people may engage in their first serious romantic relationships.80 They remain heavily influenced by their peers, for good or ill.81 Young adults are primarily concerned with image, and thus any stigmatization can have long lasting effects on self-perception.82

74. Craig Haney, The Psychological Impact of Incarceration: Implications for Postprison Adjustment, in PRISONERS ONCE REMOVED, supra note 73, at 33, 42.
75. Id. at 40-41. Additionally, twenty-eight plus years that the author has spent representing those who move in and out of our prison system confirms the statements made.
77. Id.
80. Id. at 13-17.
Communities recognize the need to reach out to this population as it is seen as a time of both great promise and great risk. At eighteen, young people are invited to join and often play leadership roles with youth groups at their places of religious worship. Young people may be more highly sexualized than at any other time in their lives. Thus, they have a great risk of bearing children without the means to care for their offspring.

A 2002 study by the Bureau of Justice Statistics indicated that of the adults who had been released from state prison in 1994, “those in the 18-24 year old age bracket had the highest rates of re-arrest (75.4%), reconviction (52%) and return to prison with a new sentence (30.2%) within three years of release.” What has been happening with these young adult offenders when we treat them in the same manner as older offenders has compelled other states and countries to try something different.

B. Defining the Class of Young/Emerging Adults

For purposes of this discussion and in consideration of making room for the realities of young adulthood in Kentucky’s sentencing scheme, “young adulthood” is defined as the years between eighteen and twenty-four. From the twin perspectives of culture and biology, the age band is not clear-cut. Statistics indicate that most adults desist from crime by the end of young adulthood (the peak crime age being between the late teens and early twenties). This age group has been described as “the invisible early twenties” by Great Britain’s Social Exclusion Unit 6, and the “lost generation” by Britain’s former Chief Inspector

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Mainstreaming: The Self-Esteem of Young Adults with a Mild Mental Handicap, 6 MENTAL HANDICAP RESEARCH 217-236 (1993).


86. TRANSITION TO ADULTHOOD ALLIANCE, supra note 16, at 12.


88. Id. at 3.


of Prisons. It could be argued that the upper boundary should be when a young adult turns twenty-six years of age. Thus, limiting leniency to the eighteen to twenty-four age range should satisfy the concerns of hardliners and yet make some allowance for those transitioning to adulthood years.

Eighteen is recognized by most states as the upper limit for emancipation. The federal government and subsequently all states recognize twenty-one years of age as the permissible age for possession and consumption of alcohol. The federal government has changed the law to permit young adults to be covered on their parents’ health care insurance until the individual reaches twenty-six years of age. The business world relies upon actuarial tables to inform decisions concerning age and financial risk. Full adulthood status is often deferred until the age of 25. Examples include car rental agencies, hotels that require greater proof of ability to pay for younger guests and banks that demand more proof of financial backing for the younger adult borrower.

The hard sciences are on par with the actuarial tables relied upon by business interests. MRIs and CAT scans allow us to see concrete evidence that brain development is not completed until a person reaches the mid-twenties. The particular impact of this growth in the brain indicates that a person between the ages of 14 and 24 is more likely to be governed by their emotions than rational judgment and even take greater risks impairing their safety and that of others than the same individual may have chosen to do at age 12, before physical

91. TRANSITION TO ADULTHOOD ALLIANCE, supra note 16, at 12.
94. 45 C.F.R. § 147.120 (2013).
changes occur in the prefrontal cortex. This area of the brain is associated with planning, problem-solving, and related tasks.

Young adult brains continue to experience growth of myelin over the nerve fibers in the brain. Myelin insulates the fibers so that signals can be transmitted more efficiently. The brain in young adults is also undergoing what is called “synaptic pruning” or the cutting back of connections resulting from nerve growth. The end result is that signals are transmitted more efficiently. However, during the transition years, more often than not emotion rules over judgment and there is a natural attraction to risk-taking behavior. These tendencies are magnified given the preference for peer relations over intergenerational connections. Thus, young adults “hanging together” can influence one another toward more risk-taking, adventuresomeness, and less guarded or thoughtful actions.

In referring to the “Executive Suite” that guides our judgment, a prominent MIT study notes that:

The cluster of functions that center in the prefrontal cortex is sometimes called the “executive suite,” including calibration of risk and reward, problem-solving, prioritizing, thinking ahead, self-evaluation, long-term planning, and regulation of emotion. . . . It is not that these tasks cannot be done before young adulthood, but rather that it takes less effort, and hence is more likely to happen.

The human brain does fully mature “until at least the mid-20s.” The specific neurological changes of young adulthood have not yet been thoroughly studied, “but it is known that they involve increased myelination and continued adding and pruning of neurons.” However, the research shows that “the rental car companies have it right.” This is because “[t]he brain isn’t fully mature at 16, when we are allowed to drive, or at 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.”

99. Id. at 10.
100. Id. at 11.
101. Id. at 10.
102. Id.
103. Id.
104. MASSACHUSETTS INSTITUTE OF TECHNOLOGY, supra note 98, at 10.
105. Id. at 6.
106. Id. at 15.
107. Id. at 10 (internal references omitted).
108. Id at 11 (citing J.N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 ANNALS N.Y. ACAD. SCI. 77 (2004)).
109. Id.
110. MASSACHUSETTS INSTITUTE OF TECHNOLOGY, supra note 98, at 11.
111. Id.
In accord with this brain science evidence, international norms also recognize the value of greater protections in the law until a person moves through young adulthood. Penal codes in several countries create distinct sanctions for young adults.\textsuperscript{112} These sanctions address developmental concerns including education, living environments, relationship building, career and job training, mental health, and substance abuse.\textsuperscript{113}

\textbf{C. Models to Consider}

Several states and nations have instituted models that Kentucky could evaluate. They include establishing guidelines for the allowance of diversion, which would include appropriate terms for this age range.\textsuperscript{114} Diversion is used across Kentucky at the discretion of county and commonwealth attorneys for misdemeanor convictions, but such programs are neither encouraged nor mandated in the law.\textsuperscript{115} Some states permit the prosecution of young adults to take place under the cloak of confidentiality.\textsuperscript{116} Courts have found that this approach cannot be practically implemented when the accused seeks a jury trial, thus a young adult often has to choose a path that reduces her due process rights in order to avail herself of the protections of confidentiality.\textsuperscript{117} Several states and the laws of other nations mandate consideration of leniency at sentencing and establish presumptions in favor of probation for the young offender.\textsuperscript{118}

Some systems go so far as to sentence youth offenders to incarceration in young adult facilities tailored to the criminogenic needs of the young adult population.\textsuperscript{119} London, England opened a training prison for eighteen to twenty four year-olds in 2010.\textsuperscript{120} The prison curriculum includes academics, vocational training, substance abuse and mental health interventions, and physical...
training. All offenders are given access to full-time occupation designed to support their reintegration and employment upon release.

Other approaches require or permit a reduction in the years of confinement with earlier parole consideration. Finally, some legislative schemes have created accountability courts, which operate with more intensive terms of probationary supervision. Such programs are akin to the well-known drug courts that Kentucky has had for over a decade. Accountability courts for young adults can provide boundaries to a young adult’s decision-making and open opportunities that may not be readily available or apparent to a young adult offender, affecting where the probationer lives, receives education or job training, works, and receives substance abuse intervention or mental health counseling. Likewise, courts can mandate parenting courses where necessary and participation in mentoring programs.

IV. WHAT MAKES SENSE FOR KENTUCKY?

A. Diversion

Creating a more uniform, well publicized, and clearly understood diversion program for young adult offenders would strengthen public safety in Kentucky. When diversion programs rest in the absolute discretion of the prosecuting authority, there is a greater likelihood of disparate results that too often place those programs out of reach of the disenfranchised. Hence, one sees diversion programs more readily available to the college athlete than the high school dropout who works at a fast food restaurant. Clearly defining the standards for admission to such programs for young offenders would help Kentucky move beyond current charges of bias that plague our criminal justice system. Diversion makes sense for first time misdemeanants and Class D felons, and may be appropriate for Class C felons. It is not reasonable for those who would otherwise be convicted of Class B or A felonies.

121. Id.
122. Id.
126. See, e.g., LABRIOLA, supra note 124, at 4.
127. Id. at 7-8.
B. Restoration of Civil Rights & Expungement Rather Than Confidentiality

As previously indicated, some states permit a confidential court process for young adult offenders in certain classifications. As the public availability of case law reflects, this process is not practical with the open nature of district and circuit court. Already, juvenile court confidentiality is largely illusory given Internet access to information and the ever-broadening amount of information shared between the court system and schools in Kentucky. Rather than trying to create a new cloak of confidentiality, Kentucky could instead open the door to an easier path for restoration of civil rights and expungement of records for the young offender who maintains a clean record for a given number of years. Young adults generally lack the resources to hire lawyers to navigate these two processes. It serves the public interest to keep our young people engaged in democratic processes and employed. Permitting clearly defined and automatic restoration of civil rights and expungement of identified types of offenses would enhance the futures of the young, reformed offenders and strengthen our larger body politic.

C. Mandated Leniency

Changes in our laws can be left to the discretion of the judge or the prosecutor. However, Kentucky has seen challenges to the implementation of policy changes when the implementation relies upon individual discretion. Additionally, when the law clearly mandates changes, the costs for the alternative approach intended can be more carefully set forth; monies redirected to meet the need; and appropriate limits placed on the policy shift, to temper those forces whose enthusiasm for reform may exceed the capacities of the system. Yet, following the United States Supreme Court’s rulings in Roper and its progeny, it only makes sense to mandate a measure of leniency in sentencing the young adult offender. The Court’s proscriptive language, requiring that the judge or jury must be able to identify youthfulness as a mitigating factor of punishment in the most serious of offenses logically should influence how we judge young adult offenders because of their immaturity. The question is not whether we punish the young adult offender or not. Rather, the question that must be posed is—should relative youthfulness be taken into account at sentencing? Currently, it is only

133. See supra note 13.
taken into account for a young adult facing the death penalty. Youthfulness or immaturity merits no consideration for any other lesser offense in Kentucky. It would be an easy matter to include a presumption of leniency for the offender who is between the age band of eighteen to twenty-four in the statutory guidelines for sentencing, probation, and conditional discharge.

D. Confinement of Young Adult Offenders in Designated Facilities

Criminal justice systems that are more intentional about where young adult offenders are held in confinement make sense. Though a large restructuring of Kentucky’s prison classification system may be impractical, some monies could be set aside to create a pilot program at one of Kentucky’s current penal institutions. An effective program would be explicitly designed to meet the criminogenic needs of the young adult offender. In some regards, to create prototypes consistent with our current penal structure, we can look to units Kentucky has set up for geriatric offenders, the mentally ill, substance abusers, and sex offenders. Such programs make sense for incarcerated young adult offenders who have sentences of ten years or less before they see the Parole Board.

E. Mandated Reduction in Years of Confinement or Opportunity for Earlier Parole

Sentencing structures in other countries mandate that young adult offenders must receive a reduction in years of confinement. Such an approach is unlikely to win favor in Kentucky. Rather, given the term of years available for every felony class, the obligation to exercise leniency within the already established range of years can permit the system to appropriately account for the impact of immaturity for the young adult offender. If the Kentucky Department of Corrections is able to more intentionally meet the deficits of the young adult offender, successfully rehabilitate and prepare that individual for integration back in the community; then the possibility of earlier parole for that offender would rationally serve public safety. Amending the parole process to give greater consideration to the young adult offender and to provide the Parole Board with guidance would be consistent with the purpose of the Kentucky Parole Board.

135. See supra notes 15-17 and accompanying text.
136. See Ky. Rev. Stat. Ann. § 532.007 (containing the Commonwealth’s sentencing policy); § 532.040 (containing the provisions for probation and conditional discharge).
138. See, e.g., Carla Cesaroni and Nicholas Bala, Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges, 34 Queen’s L.J. 447, 448 (2008) (Can.) (highlighting the restricting of custodial sentences in favor of community-based approaches to youth offenses).
The board’s stated mission is to “make decisions that maintain a delicate balance between public safety, victim’s rights, reintegration of the offender and recidivism.” The board notes that it will achieve this balance by application of its “Core Values: Knowledge; Experience and Integrity.”

F. Accountability Courts With Appropriate Resources to Function As Intended

Accountability courts that can ensure speedy and age appropriate responses to young adult offenders may meet Kentucky’s public safety concerns more effectively than any other model of reform. Treating our young adults appropriately is a criminal justice system concern because it is first a community concern. Hence, effective solutions will require greater partnering between the courts and those who control community resources. Such accountability courts could also be operated through the county attorney’s office, where felony charges may be reduced to misdemeanors by agreement upon successful completion of accountability court terms. Alternatively, the programs could be run through the Commonwealth Attorney’s office using a speedier process of resolution through securing indictments by information or establishing agreements that would permit expungement of charges upon successful conclusion of court supervision.

These benefits that would inure to the offender after completion of process in an accountability court do not need to include amendments down to misdemeanors or expungement. Instead, the accountability court could be the mandatory process for young offenders to receive more lenient sentencing. However, Due Process protections would prohibit young offenders from being required to proceed through such courts if the sentencing options in these courts were equal in punishment to those available in regular circuit court prosecution. The young adult offender, who may not understand her long term interests, may perceive that more will be required to satisfy accountability court terms than the current probation required on the average Class D or C felony offense. Thus, to withstand constitutional scrutiny and secure necessary buy-in from prosecutors and defense counsel alike, the sentencing scheme in these accountability courts would need to offer opportunity for a reduction in sentence upon compliance with court orders or leniency with regard to alternative sentencing terms or probation.

140. Id.
There is a value to structuring this accountability court so that it is mandatory for young offenders. It may take time for the young offender to appreciate the benefit of a more prolonged and intrusive court process. Thus, if the process is only optional, young adults facing prosecution may throw caution to the wind and want to proceed along the same path as their elders. Creating a required, separate path, structured to meet the well-identified needs of the young adult offender, so that rehabilitation and healthy maturation can be secured, is in accord with public safety.

V. CONCLUSION

All of us share a responsibility to care for the next generation. Many adults may feel that they raised themselves by their own bootstraps and the young among us do not deserve a break. Yet, when we look at our own adult children, we are hesitant to cut off all assistance, guidance, or support. Other states and countries have innovatively tackled this problem of what to do with the young adult offender. Kentucky can benefit from their efforts. As noted, Robert G. Lawson, one of the architects of our Kentucky penal code pleaded with Kentucky’s lawmakers and prosecutors to end an addictive reliance upon incarceration as the premier method to address criminal wrongdoing. Perhaps, nowhere in the adult arena should his plea be taken more seriously than as regards our young adult offenders.

Applying the science we know regarding maturation, risks, and needs of young adults to our criminal justice system will serve public safety and help us all care more intelligently for future generations of Kentuckians. To avoid all harm, Shakespeare would put us on the shelf while we age to mature adults. Yet, experience tells us that this approach yields more harm than good. Kentucky would do well to consider the possibilities so that we might improve how we ensure that young adult offenders make reparation for their offenses, are appropriately punished, and are rehabilitated in a manner that will strengthen the likelihood that they can become participative members of a thriving democracy.
WE ARE YOUNG: STATUS OFFENDERS AND THE CRIMINALIZATION OF YOUTH IN KENTUCKY

N. Jeffrey Blankenship* and Erica Blankenship

I. INTRODUCTION

At the end of 2011, Kentucky judges were reported as “jailing youths for truancy and other noncriminal offenses at one of the highest rates in the nation, sidestepping federal and state laws and ignoring the near-unanimous agreement of experts and advocates that it harms children.”1 This alarming state in Kentucky will ultimately negatively impact the children of Kentucky and the future of the Commonwealth. Juveniles who are incarcerated or detained in secure locations are more likely to learn more criminal behavior and ultimately may return to adjudication and incarceration on more serious charges.2 To prevent a higher percentage of crime by adults who were detained or incarcerated as children, it is imperative that the Kentucky legislature take steps now to prevent unjust detainment of juveniles.

An important change to the juvenile system would be to prevent, or, at the very least, decrease the use of incarceration or secure detainment for status offenders.3 While the United States Supreme Court has allowed procedural safeguards for the proper adjudication of juvenile delinquents, status offenders have been largely disregarded. Status offenders have been incarcerated for offenses that are offenses only because of their age; to provide fair and equal treatment for these forgotten youths, a new court system and process is required. The juvenile system as-is fails to promote the betterment of Kentucky’s youth, nor does it serve the purpose of the juvenile justice system: the rehabilitation of youth that have strayed from the lawful path.4

Part II of this article will examine the juvenile justice system in Kentucky and trace its history in the nation and in the state. Part III will examine early attempts to reform the juvenile justice system and its consequences for juveniles.

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Part IV will then scrutinize recent legislative studies and action in Kentucky that attempt to change the system for the better.

II. INTRODUCTION TO THE JUVENILE JUSTICE SYSTEM IN KENTUCKY

The juvenile justice system initially developed within the United States as a result of a growing concern about the court system’s treatment of children. The adjudication process for youths was initially founded upon the principle of parens patriae, literally “parent of the nation.” The principle allowed the court to act on juveniles’ behalf when those children’s parents were labeled “unwilling or unable to care for and discipline their children.” One of the consequences of such a system was the broad discretion allowed to the juvenile court judges; the judges were intended to be the sole determiner as to the appropriate course of action to best serve the individual juvenile’s interests. However, this discretion led to unforeseen and rampant consequences that actually damaged the procedural and substantive rights of juveniles, most especially status offenders. Eventually, the system transformed into one that handled several matters involving juveniles, but retained the discretion granted at its inception.

Kentucky’s own juvenile justice system has undergone several changes throughout recent years. In 1991, Jefferson County began a Family Court pilot program. The Jefferson County Family Court was the first of its kind in the Commonwealth of Kentucky; it was intended to “focus solely on the needs of families and children… [It provided] a unique solution that would allow one judge to provide continuity by hearing all of a family’s legal problems and issues.” Since the Jefferson County Family Court was introduced, the model has expanded throughout the Commonwealth. In November 2002, an amendment was passed in all 120 counties in Kentucky making the Family Court model the uniform organization for such family legal problems. The theme of Kentucky family courts is: “One Family, One Judge, One Court.” Within the system, the same judge is intended to hear and address all of the legal issues and problems that may face one family.

5. Barnickol, supra note 3, at 431.
6. Id. at 432.
7. Id.
8. Kedia, supra note 2, at 559.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Family Court, supra note 10.
The model may have been intended to streamline and better address the legal needs of families throughout the Commonwealth. However, the system had unforeseen problems and consequences. The rules for the court were intended to “create unified family courts with jurisdiction over any offenses committed by anyone in one family, in order to allow the judge to fully understand the background of the parties to each proceeding.” One of the most troublesome consequences of this system is the inconsistency in adjudication. Judges in family courts are expected to resolve numerous and diverse issues: dissolution of marriage, spousal support, child custody, child support, paternity issues, adoption, domestic violence, abuse, neglect, termination of parental rights, as well as status offenses. Instead of uniform rules for all judges to apply to a particular area of law, judges are now faced with multiple areas of law left for adjudication to their broad discretion.

One area of law addressed by the juvenile justice system, and as such, Kentucky family courts, is the realm of status offenses. Status offenses are so called because they are infringements of the juvenile law system solely because of the juvenile’s age or status. Status offenses are only crimes while one is a juvenile; examples include truancy or running away from home. The predicament that a status offender finds himself in is a complicated one. As a juvenile, the potential consequences of actions are not as readily determinable or understandable and yet, a juvenile is expected to understand these consequences and make coherent and intelligent decisions in the adjudication process. Juveniles “are unable to speak for themselves or even to comprehend the nature of their offenses;” and yet the system fails to provide them with the same protections as children in dependency courts. “Status offenders are treated like adults because they can be punished through deprivation of their liberty, but they are treated like children because they are deprived of due process rights.” The system has the ability of producing distressing consequences for juveniles, thereby exhibiting its expectation that juveniles appreciate and understand those consequences.

17. Kedia, supra note 2, at 559
18. Id.
19. Family Court, supra note 10.
20. Kedia, supra note 2, at 559.
23. Id.
24. Kedia, supra note 2, at 543.
25. Id.
26. Id.
27. Humphrey, supra note 22, at 169.
It is questionable whether juveniles can even understand the court system’s ability to change their lives. Juveniles’ brains are still developing during their teenage years; the areas of the brain responsible for impulse control, planning, and evaluating consequences undergo dramatic changes as adolescents age. “[W]hile juveniles know that what they are doing is wrong, they may not be able to fully understand the consequences of their actions or be able to resist their impulses as adults can.” However, the courts are still required to hold these juveniles responsible, in some way, for their actions.

One alarming outcome presents itself when status offenders are “tagged” as criminal defendants and are thus “detained, adjudicated, and punished in the same manner as juvenile delinquents” without protections for their civil liberties. Status offenders are very different from juvenile delinquents; while status offenses are “offenses” simply because of the status of the juvenile, delinquency includes crimes that are also crimes if committed as an adult. Since the two types of offenders are, by definition, different, courts should be required to handle these offenders differently. However, history has shown that status offenders are also forced through the rungs of the juvenile justice system in much the same manner as juvenile delinquents.

Allowing status offenders to be treated as juvenile delinquents has severe consequences. It bears repeating that status offenders are children who commit crimes like talking back to their parents, skipping school, or running away. Juvenile delinquents, in contrast, are criminals who also happen to be juveniles. As such, juvenile delinquents are subject to statutory imprisonment according to their crime. For example, if a youthful offender is convicted of or pleads guilty to a felony, he is “subject to the same type of sentencing procedures and duration of sentence, including probation and conditional discharge, as an adult convicted of a felony offense” with some minor exceptions. Clearly, youthful offenders, or juvenile delinquents, are subject to statutory imprisonment befitting their crime. Thus, when status offenders are treated as juvenile delinquents, a child can suddenly be imprisoned for something as simple as skipping school.

29. Id.
30. Id.
31. Id.
33. Kedia, supra note 2, at 543.
34. Id. at 546.
35. Simones and Stone, supra note 32, at 2.
37. Id.
III. EARLY REFORMS TO THE JUVENILE JUSTICE SYSTEM

As a consequence of this discretionary punishment of status offenders, the late twentieth century saw activists and legislators attempt to create numerous reforms to cure what many saw as the defects within the juvenile justice system. These reforms were created through judicial and legislative reform.39

A. Gault: A Supreme Court Case and a National Change

Heretofore, the rights of certain juvenile offenders had been neglected and abused.40 The Gault case was adjudicated originally in Arizona; in Arizona, the Juvenile Code contained what many perceived (and still perceive) as severe deficiencies: it allowed unrecorded juvenile hearings; it gave probation officers powers to represent juveniles rather than counsel; and it also gave a judge the discretion to choose from several dispositions for various juvenile crimes.41

In 1967, the Supreme Court of the United States took an important step in creating changes that would dispense of some of these previously unaddressed issues. The adolescent in question, Gerald Francis Gault, was a fifteen-year-old teenager who had been committed as a juvenile delinquent.42 When he was first taken into custody, his parents were not notified of his arrest, nor did officials take any steps to advise Gerald’s parents of his arrest.43 A series of hearings followed, which ultimately led to Gerald’s incarceration.44 The Supreme Court acknowledged that at the time of Gerald’s suit, numerous rights were denied to juveniles, including: notice of charges; right to counsel; right to confrontation and cross-examination; and privilege against self-incrimination.45

The Court made numerous advances in the realm of juvenile justice. It held that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”46 The Court recognized that up until that time, the juvenile justice system had treated the juvenile as having only the right to custody rather than, as an adult has, the right to liberty.47 The juvenile justice system had attempted to create individualized justice and betterment for each juvenile who entered the courtroom; the individualized treatment, however, created a lack of procedural and substantive standards. The United States Supreme Court recognized this lack

41. Id.
42. In re Gault, 387 U.S. 1, 4 (1967).
43. Id. at 5.
44. Id. at 7.
45. Id. at 11.
46. Id. at 12.
47. Id. at 17.
of procedural and substantive standards.\textsuperscript{48} This lack of standards resulted as a direct consequence of the discretion afforded juvenile court judges. This “absence… has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.”\textsuperscript{49} The logic presupposed at the inception of the juvenile justice system created an unfortunate consequence; as a response, the Court attempted to limit at least some of this arbitrary power. The Supreme Court explicitly found that juveniles are entitled to notice of charges, right to counsel, confrontation, protection from self-incrimination, and cross-examination.\textsuperscript{50}

Although the \textit{Gault} ruling was important in advancing the rights of juvenile delinquents, the ruling was held to be expressly limited to delinquents.\textsuperscript{51} After the \textit{Gault} case, “there was a larger distinction between juvenile delinquents and status offenders.”\textsuperscript{52} And yet, while both groups were still being incarcerated, “delinquents had gained due process protections and some limits to \textit{parens patriae}, while . . . courts’ discretion over status offenders still went completely unchecked.”\textsuperscript{53} Therefore, status offenders were still generally neglected. Since the federal courts failed to provide clarified procedural standards for non-delinquent juveniles, state courts were forced to try to create their own standards.\textsuperscript{54} Generally, the \textit{parens patriae} mindset has continued in connection with status offenders.\textsuperscript{55} This mindset implicitly encourages the lack of procedural standards as required in the delinquency court system. Courts have been unable to acknowledge that, without these procedural safeguards, “the goals of accurate fact finding and prevention of governmental oppression are effectively abandoned.”\textsuperscript{56} The courts’ treatment of status offenders fails to meet the presupposed solely rehabilitative intent and can ultimately lead to “deprivation of the juvenile’s liberty interest” through incarceration.\textsuperscript{57} The substantive and procedural rights of status offenders have continued to be neglected even whilst juvenile delinquents have been granted numerous advancements by federal courts and legislation.\textsuperscript{58}

\begin{itemize}
\item 48. In re Gault, 387 U.S. 1, 14 (1967).
\item 49. \textit{id.} at 18-19.
\item 50. \textit{id.} at 31-58.
\item 51. Humphrey, \textit{supra} note 22, at 168.
\item 52. \textit{id}.
\item 53. \textit{id}.
\item 55. \textit{id.} at 260.
\item 56. \textit{id}.
\item 57. \textit{id}.
\item 58. Kedia, \textit{supra} note 2, at 559.
\end{itemize}
B. The Juvenile Justice Delinquency and Prevention Act: Its Purpose, Judges’ Exploitation, and Consequences

The Juvenile Justice and Delinquency Prevention Act ("JJDPA") was enacted by the United States Congress in 1974. The JJDPA culminated an "effort to address the growing concern over juvenile delinquency in the United States." Among many elements, the JJDPA encouraged all states to deinstitutionalize youth charged with status offenses. Thus, the JJDPA promoted the concept that status offenders warranted separate treatment and would not be contained in secure detention centers, thus reducing interaction with juvenile delinquents, violent juvenile offenders, and, occasionally, adult criminal offenders.

The JJDPA provided federal funds to encourage state and private programs to reduce juvenile delinquency. In order to receive such funds, the states had to submit a plan to the federal government that would, among other things, remove all status offenders from the juvenile justice system. Thus, although the JJDPA promoted and encouraged certain steps, the only incentive for states to follow it was through the funding that the JJDPA authorized.

The rationale behind the JJDPA’s incentives for deinstitutionalization of status offenders was clear and rational. Deinstitutionalizing status offenders is an important step towards a progressive and beneficial approach to reform the juvenile justice system. Status offenders, as a practice, have been generally detained and incarcerated in the same facility as juvenile delinquents. This practice actually promotes status offenders’ turning to criminal behavior rather than preventing it. Succinctly, “even though status offenders are not delinquents when they enter the court system, they often are when they leave it.”

However, the JJDPA left unfortunate gaps in the adjudication process that allowed its purpose to be subverted by judges and court systems. One example of this subversion is epitomized by what is termed “bootstrapping.” Many states allow judges to hold repeat status offenders in contempt of court, a criminal charge, or at least similarly punishable by incarceration as civil contempt. “Bootstrapping is the label given to the practice of reclassifying a status offender

59. Barnickol, supra note 3, at 429.
60. Id.
61. Id. at 430.
62. Id.
63. Kedia, supra note 2, at 543.
65. Id.
66. Kedia, supra note 2, at 543.
67. Id. at 543.
68. Id.
69. Id. at 559.
as a delinquent for violating a court supervision order. A new adjudication of
delinquency opens the door for courts to sentence these children with more
serious dispositions.” 70 The JJDPA did discourage the practice of bootstrapping.
Unfortunately, such discouragement did not prevent many states from continuing
that practice. 71

Kentucky is, most unfortunately for Kentucky residents, one of the states that
allows bootstrapping. Although there are certain safeguards in place, ultimately,
a juvenile can be incarcerated in a secure detention center for status offenses.
According to the Kentucky Statutes Chapter entitled “Status Offenders”, status
offenders cannot be detained in a secure juvenile detention facility or holding
facility unless “the child is accused of, or has an adjudication that the child has
violated a valid court order, in which case the child may be detained…” 72 The
statute also states that status offenders cannot be detained in intermittent holding
facilities nor can status offenders accused of or found guilty of violating court
orders be converted into public offenders because of that conduct. 73 The statute
seems to provide several safeguards to ensure that the juveniles within Kentucky
are protected from improper detainment. However, a problem still continues to
persist despite these preventive efforts.

As previously mentioned, in 2011, Kentucky judges were among the highest
in the nation in jailing status offenders. 75 In 2010, more than 1,500 children were
sent to juvenile jails for status offenses alone. 76 The number of youths detained
for status offenses has decreased from previous years, yet the number remains
higher than the majority of other states within the United States. 77 Thus, the
problem of incarcerating status offenders remains an avid problem in Kentucky
leading to a vicious cycle of incarceration and criminal behavior. 78

The process of bootstrapping evolved from the court’s use of its inherent
discretion in handling status offenders within its jurisdiction. During the
sentencing of youth charged with status offenses, it is a common protocol for
many judges to issue court orders mandating compliance with specified rules. 79
Most of the time, the court orders are tailored to the specific status offender in
that the order mandates that the juvenile discontinue the behavior that resulted in
the charges (e.g. do not run away, comply with house rules, do not miss school,

70. Smith, supra note 54, at 271.
71. Id. at 272.
75. Yetter and Riley, supra note 1, at 1.
76. Id.
77. Id.
78. Kedia, supra note 2, at 543.
79. KENTUCKY YOUTH ADVOCATES and the CHILDREN’S LAW CENTER, BLUEPRINT FOR
KENTUCKY’S CHILDREN , 2 (2012).
If the juvenile is then found to have violated that court order, he is subject to an additional penalty for contempt of court. Contempt of court can, in the court’s discretion, result in or lead to incarceration. Thus, the underlying offense, which still remains as nothing more than a status offense, is regrettably transformed into contempt that may lead to incarceration. Even though the juvenile has still only committed a status offense, which may not statutorily lead to detainment, judges have created an approved method to circumscribe the purpose of the federal guidelines. This hindrance to the JJDPA’s purpose serves only to create more problems to juveniles, more costs for the state, and further victimizes juveniles without addressing the root of the problems causing their unlawful behavior.

Kentucky enacted its own committee in accordance with the JJDPA under Kentucky Revised Statutes § 15A.300. The statute was originally enacted in 1998. The statute provides for the creation of a local organization for juvenile justice; it also statutorily provides that the organization may form local councils to encourage interagency cooperation and collaboration to address juvenile crime and status offenses. The Kentucky enactment is largely geared towards promoting cooperation between several organizations and agencies: law enforcement, school systems, the Department for Community Based Services, the Court of Justice, the Commonwealth’s attorney, the county attorney, the county juvenile detention facility, and the Department for Public Advocacy. Although the statutes related to juvenile justice seem to advocate the goals of the national JJDPA, the practice in the Kentucky juvenile justice system fails to adequately protect status offenders from incarceration.

In 1980, Congress amended the JJDPA. In the modification, Congress withdrew the prohibition of juvenile court judges to detain juveniles when they violated what could be considered a valid court order. Thus, the new amendments legislatively approved of bootstrapping, continuing the cycle of denying status offenders rights and opportunities to maintain liberty.

Kentucky Youth Advocates, a “non-partisan, non-profit, children’s advocacy organization” intends to create positive changes and policies through research.

81. Id.
82. KENTUCKY YOUTH ADVOCATES and the CHILDREN’S LAW CENTER, supra note 79, at 2.
87. Smith, supra note 54, at 281.
88. Knauerhause, supra note 64, at 33.
89. About Us, KENTUCKY YOUTH ADVOCATES (August 11, 2012, 6:03 PM), http://www.kyyouth.org/About_KYA/.
and collaboration with various groups.\textsuperscript{90} The group, which utilizes case advocacy, public education, administrative negotiation, and legislative monitoring in order to fulfill its goals,\textsuperscript{91} presented a study in May 2012 entitled \textit{Blueprint for Kentucky’s Children}. The group stated that despite the JJDPA modification, the JJDPA “still emphasizes deinstitutionalization of youth charged with status offenses, which is premised on the understanding that youth who misbehave, but have not committed a criminal offense or violated the law, are better served by social service programs in unsecured (unlocked) environments than through the use of incarceration.”\textsuperscript{92} The group found that incarceration is both expensive and ineffective.\textsuperscript{93} Detained juveniles face an increased risk of “poor education, work, and health outcomes, as well as future incarceration.”\textsuperscript{94} In fact, it has been determined that secure detainment actually increases the probability that a juvenile will commit another crime, ultimately leading to further detainment and adjudication.\textsuperscript{95}

In Kentucky, bootstrapping occurs on an unfortunately frequent basis.\textsuperscript{96} When a child is brought to the court for adjudication after an alleged status offense, the judge has the power and discretion to issue a valid court order.\textsuperscript{97} The court order, as in most states that practice bootstrapping, generally addresses the problem that the particular juvenile is facing. Thus, a habitual truant can be told to attend school, not leave school without permission, and other related orders.\textsuperscript{98} The judge’s established boundaries for the juvenile create a valid and enforceable court order.\textsuperscript{99} More often than not, incarcerated status offenders are detained because of contempt of court for violating these judge-issued orders, not for the underlying offense.\textsuperscript{100} The judge’s order generally assumes enforceability until the court loses subject matter jurisdiction over the minor.\textsuperscript{101} As a result of this practice, it is theoretically possible that a thirteen-year-old juvenile status offender brought to court on truancy charges could be ordered to never miss another day of school and then be incarcerated in a secure detention center if he violates such an order before his eighteenth birthday.\textsuperscript{102}

If the practice provided beneficial results, such as reducing recidivism or promoting a healthier juvenile, then it may be worthy of continued use. However, to the contrary, “[i]ncarceration has not proved effective in addressing

\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} KENTUCKY YOUTH ADVOCATES and the CHILDREN’S LAW CENTER, supra note 79, at 1-2.
\textsuperscript{93} Id. at 2.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} See Yetter and Riley, supra note 1, at 3.
\textsuperscript{99} KENTUCKY YOUTH ADVOCATES and the CHILDREN’S LAW CENTER, supra note 79, at 1-2.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
status offenses and in fact can increase the likelihood of offending when youth are locked up for minor things. Using incarceration fails to address factors that contribute to the inappropriate behavior." Thus, there is no valid, rational basis for condoning or approving this particular practice. Without addressing the actual cause of the juvenile’s behavior, the behavior cannot actually be cured.

“Overwhelmingly, abuse, particularly sexual abuse, is a factor in status offense-related behavior.” And yet, “because status offenders are the least dangerous” of juvenile offenders, “many of them may be returned to their home—regardless of family environment.” In addition, status offenders are often juveniles that have “come from broken homes, have suffered childhood trauma, and have unmet mental health and/or education needs.” Instead of incarceration and detainment, these troubled teenagers need “care, treatment, and services . . . to address the underlying causes of their troubling behavior and to prevent deeper and more costly entanglement in the juvenile or criminal justice systems.” Without programs or methods of addressing these root problems, the cycle of juvenile incarceration and later criminal activity cannot be amended and improved.

C. Consequences in Kentucky: Bootstrapping and the JJDPA’s Effect on Kentucky Juveniles

Kentucky case law provides several examples of the consequences that the JJDPA and bootstrapping have had on Kentucky’s juveniles. For example, fifteen-year-old C.R. clearly had a troubled past when she arrived in family court. In 2009, C.R.’s mother filed a petition claiming that he was “beyond control,” a status offense. The court issued “a juvenile status offender order,” which is similar in form to many other court orders. The court order simply required C.R. to “follow several rules of good behavior.” In April of 2010, C.R. was held in contempt after he had been involved in a car accident; evidence portrayed that C.R. had been drinking alcohol. C.R. was sentenced to thirty days detention, two served and twenty-eight probated. In June, 2010, C.R. was again held in contempt of court. Again, the court required C.R. to serve two

103. KENTUCKY YOUTH ADVOCATES and the CHILDREN’S LAW CENTER supra note 80, at 3.
104. Kedia, supra note 2, at 554.
105. Id. at 553.
107. Id.
109. Id. at *1.
110. Id.
111. Id. at *2.
112. Id. at *2.
113. Id.
days detention, probating a new balance of twenty-six days.\textsuperscript{115} C.R. was again held in contempt November, 2010.\textsuperscript{116} After this disposition, the court sentenced C.R. to commitment to the Cabinet for Health and Family Services.\textsuperscript{117} The JJDPA’s implicit approval of bootstrapping allowed the court to incarcerate C.R. on three separate occasions for failing to obey a vague and highly discretionary judge-issued court order. The court ultimately held the underlying order of contempt as invalid; however, this ultimate reversal could not reverse the fact that C.R. had already been forced to spend several days incarcerated. In addition, court orders, contempt charges, and detainment ultimately did nothing to address the root of C.R’s problems and prevent further acts of delinquency.

Logan Cunningham faced a similar situation. In 2007, a school agent had alleged Cunningham was beyond the school’s control.\textsuperscript{118} A standard school attendance order (“SSAO”) was recorded as entered although no written SSAO was ever found in the record.\textsuperscript{119} Over a year later, after Cunningham attained the age of majority and, thus, beyond the scope of the original jurisdiction of a juvenile action, the family court found Cunningham in contempt of the SSAO and ordered him to serve forty-five days in an adult county detention center.\textsuperscript{120} This case exemplifies another situation where a juvenile exhibited troublesome behavior but was ultimately sentenced to imprisonment for those juvenile behaviors instead of the court actually addressing the underlying problem.

Another troubled example from Kentucky involved a female teen, J.R. In 2009, a complaint was filed alleging that J.R. was a habitual truant.\textsuperscript{121} J.R. had accumulated over thirty absences and eleven tardy arrivals to school.\textsuperscript{122} In 2009, the family court entered an SSAO and a parental responsibility order.\textsuperscript{123} What ensued was a series of missed court hearings and inability to cooperate with the court system.\textsuperscript{124} Finally, in 2010, J.R. appeared in court again, this time over the age of eighteen.\textsuperscript{125} The judge issued a statement that clearly portrays the discretionary power family court judges hold:

\begin{quote}
[M]y perception of what I’ve got here is that I’ve got somebody that thinks she has been able to play the system, which is really a source of irritation to me. A whole lot of irritation… I have a clear court order in the file prior to the time you turned eighteen dealing with your
\end{quote}

\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
education and I maintain the authority to enforce my orders up until you shuffle off this mortal coil or I shuffle off this mortal coil. Now I’m done with the excuses and I’m ready to go on and deal with a contempt hearing for your failure to go to summer school.\footnote{126}

The judge found J.R. guilty of contempt of court and sentenced her to thirty days in County Jail.\footnote{127} The judge also stated that she would “conditionally discharge” the detainment if J.R. would “get started on the G.E.D.”\footnote{128} The judge warned, however, that she would be doing monthly reviews until she received her G.E.D. and stated that “the first time there is a bobble you’re going to the County Jail.”\footnote{129} The appellate court held that “[s]entencing an eighteen (18) year old person to thirty (30) days in jail for failure to attend summer school when neither she nor her parents were given official notice of an order, is palpable error.”\footnote{130} The court held that the sentence was invalid because notice of the underlying order requiring summer school had been inadequate.\footnote{131} However, the court’s ruling only held this sentence inappropriate because of the inadequate notice.\footnote{132} Thus, if notice of the order had been properly given, it can be assumed that J.R.’s detainment for thirty days, if she did not begin G.E.D. study, would be enforceable.

Similarly, L.A.S. appeared before the family court in 2009, where he admitted to habitual truancy.\footnote{133} The trial court entered a “juvenile status offender order” which required L.A.S. to attend school on time without any unexcused absences or behavior problems.\footnote{134} Later that year, the trial court found L.A.S. in contempt of the court order and sentenced him to six days in juvenile detention.\footnote{135} Luckily, L.A.S. appealed his sentence, which was suspended pending the appeal.\footnote{136} The contempt order was vacated, again for procedural deficiencies: in L.A.S.’s case, the court found that L.A.S. should not have been able to waive his right to counsel without a proper explanation to him and his parents.\footnote{137} Although the result for L.A.S. is fortunate, the fact that the order would be valid and legal with a simple explanation is still troubling for Kentucky’s youth.

\footnotesize{\begin{itemize}
\item \footnote{126}{Id. at 2.}
\item \footnote{127}{J.R. v. Commonwealth, 2011 WL 944368, at *2.}
\item \footnote{128}{Id.}
\item \footnote{129}{Id.}
\item \footnote{130}{Id. at *5.}
\item \footnote{131}{Id. at *7.}
\item \footnote{132}{Id.}
\item \footnote{134}{Id.}
\item \footnote{135}{Id.}
\item \footnote{136}{Id.}
\item \footnote{137}{Id. at 2.}
\end{itemize}}
In another case, N.W. was alleged to be beyond her mother’s control, a status offense pursuant to Kentucky Revised Statutes § 630.020(2). The family court subsequently issued an order encompassing several dictates: N.W. had to obey home rules, attend school without unexcused absences or tardies, be respectful to others, and attend counseling and psychiatric appointments. The following day, N.W. admitted to being in contempt. From that contempt charge, N.W. was sentenced to six months probation. In November of 2009, N.W. admitted to contempt related to school attendance and the family court committed her to the Cabinet. Three days detention was imposed but discharged conditionally for two years. In 2010, another contempt allegation was made and a finding of contempt entered. The court issued another order; N.W. was held in contempt again later in 2010. From these further contempt charges, the family court committed N.W. to the Cabinet and placed her in a rehabilitative center. N.W.’s contempt charges were ultimately reversed by the appellate court but N.W. had already been forcibly detained at the rehabilitative home.

This record of juvenile cases involving status offenders in Kentucky since 2009 shows a clear pattern. Trial judges repeatedly issue court orders in their discretion, which are ultimately disobeyed by the juveniles and, instead of coping with the causative problem area underlying the disobedience, judges issue contempt findings and incarceration or the threat of incarceration. Some juveniles are ultimately released without serving time after appeal. Some juveniles may not be quite as fortunate. In either situation, juveniles are sentenced to detainment and punishment in the absence of proper procedural safeguards to ensure that these orders are effectively and properly followed. However, even with proper orders, detainment for status offenses provides little to no rehabilitation or necessary treatment for the status offender; and in addition, the detainment costs the state money and time without any evidence that it yields positive results for the state’s youth.

140. N.W., 2012 WL 1383212, at *1.
141. Id.
142. Id.
143. Id. at *2.
144. Id.
145. Id.
147. Id. at *3.
148. See id. at *5.
149. Yetter and Riley, supra note 1, at 1.
IV. KENTUCKY’S PROPOSED LEGISLATION FOR AMENDING COURT’S TREATMENT OF STATUS OFFENDERS

In 2011, Representative Kelly Flood proposed a bill to the Kentucky General Assembly.150 The bill, 2012 Kentucky House Bill No. 61, proposes several changes to the treatment of status offenders. Although the bill still allows detainment after contempt of a court order, the bill does recommend certain restrictions on detainment.151 The bill allows that status offenders in contempt of court for violation of a court order may be detained in a non-secure facility or a secure juvenile detention center for a period less than twenty-four hours (not including weekends or holidays).152 In addition, status offenders cannot be detained in a secure juvenile detention facility without certain prerequisites being met.153 The juvenile must first receive an adjudication hearing in which he is represented by counsel and afforded full due process and in which the court determines that the juvenile has actually violated the valid court order.154 If these requirements are met, the juvenile can then be detained for up to forty-eight hours in a secure detention center.155 The bill further provides that status offenders found in contempt for violating court orders will not be converted into public offenders for that conduct.156

After Representative Flood’s bill was introduced, it was incorporated into a two-year study commission on reforming Kentucky’s juvenile code.157 The Task Force on the Unified Juvenile Code (“Task Force”) was then created during the 2012 Regular Session to “review and research the juvenile justice system and to make recommendations for changes to the Unified Juvenile Code.”158

The Task Force first made several findings relevant to improving Kentucky’s juvenile justice system. The findings largely reflected what scholars and legal professionals had been stating prior to the commission. The Task Force first found that, although juvenile crime had declined on the national level, Kentucky was one of several states that had “continued to hold large numbers of juveniles in residential secure and nonsecure facilities at high costs.”159 The financial cost of this detainment for Kentucky is more than $50 million dollars per year;160 out-

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151. Id.
152. Id.
153. Id.
154. Id.
155. Id.
157. E-mail from Representative Kelly Flood to Jeff Blankenship (Feb. 7, 2014 10:18 EST).
159. Id. at 3.
160. See id. (“[Department of Juvenile Justice] spends more than half of its $102 million annual budget on secure and nonsecure residential facilities.”).
of-home secure facility costs are more than $87,000 per bed annually.\textsuperscript{161} Among these costs, “[t]he state spends a significant amount on out-of-home placements for status offenders.”\textsuperscript{162} Yet, despite these costs, Kentucky continues to retain detainment and out-of-home placement for status offenders as an option.

Between 2002 and 2012, the average stay for out-of-home placements increased 31 percent for probation and court order violators\textsuperscript{163} (a group that would include status offenders who violate subsequent court orders; i.e., those who have been bootstrapped by a judge). Additionally, the stay for an out-of-home placement “did not vary substantially based on the severity of the offense.”\textsuperscript{164} The average length of the stay was six to seven months.\textsuperscript{165} In other words, a violent juvenile who committed a felony usually stayed in an out-of-home placement about the same amount of time as a juvenile who had skipped school habitually and then violated a court order generally related to that problem.\textsuperscript{166} Explicitly, the Task Force found that “[m]any juveniles are placed out of home by [the Department of Juvenile Justice] for violations of the conditions of supervision, and these juveniles are held out of home for approximately the same amount of time as felons and misdemeanants.”\textsuperscript{167} Additionally, even if “the juvenile has one or fewer court appearances for violations of his or her conditions of supervision,” out-of-home placement is still ordered.\textsuperscript{168}

The Task Force also focused on status offenders who had been placed out-of-home. As of October 2013, more than 250 juveniles had been placed outside of their home after being committed to the Department for Community Based Services.\textsuperscript{169} These juveniles remain away from their homes for an average of eight and a half months.\textsuperscript{170} Status offenders are often placed with public offenders.\textsuperscript{171} Thus, status offenders are housed with juvenile delinquents, perpetuating criminal behavior rather than attacking and curing the root of the problem. Data from the Department of Juvenile Justice (“DJJ”) shows that 13% of all juveniles in Kentucky’s secure detention centers are status offenders who

\begin{footnotes}
\footnote{161. \textit{Id.}}
\footnote{162. \textit{Id.} at 4.}
\footnote{163. \textit{Id.} at 5.}
\footnote{164. Task Force Report at 5 (emphasis added).}
\footnote{165. \textit{See id.}}
\footnote{166. \textit{See id.} (“The length of stay did not vary substantially based on the severity of the offense; there was less than a 1-month difference in the average length of stay out of home for felons (approximately 7 months) and misdemeanants, probation and court order violators (approximately 6 months.”).}}
\footnote{167. \textit{Id.}}
\footnote{168. \textit{Id.}}
\footnote{169. \textit{Id.}}
\footnote{170. Task Force Report at 5.}
\footnote{171. \textit{Id.}}}
have been detained for violating post-adjudicative and dispositional court orders, not for the underlying offense itself.\textsuperscript{172}

After making its findings, the Task Force then made several recommendations for changes to the juvenile justice system in Kentucky. The Task Force made eighteen separate recommendations in order to improve the system,\textsuperscript{173} although only the recommendations related to status offenders are relevant here. The relevant recommendations the Task Force made are:

- “Establish criteria for commitment of misdemeanor offenders to the DJJ.”\textsuperscript{174}

The Task Force recommended that criteria for committing misdemeanor juvenile offenders to the DJJ should be “based on the seriousness of the offense and the offender’s risk level” in order to guide out-of-home placements and commitment.\textsuperscript{175}

- “The length of time juveniles spend in out-of-home placement should take into consideration the seriousness of their offenses and their risk level.”\textsuperscript{176}

The Task Force found that low-level juvenile offenders (including status offenders who have violated court orders and misdemeanor offenders) spent about the same amount of time in detention as juvenile felons.\textsuperscript{177} Such a system encourages juveniles to distrust the system, learning that any wrong will punish them the same, no matter the variations in the offense. It also creates comingling

\textsuperscript{172} Id.

\textsuperscript{173} See id. at 6-10. The Task Force’s complete recommendations are: 1) “[e]stablish a fiscal incentive program;” 2) “[i]mprove disposition alternatives for lower-level Class D felonies;” 3) “[e]stablish criteria for commitment of misdemeanor offenders to the Department of Juvenile Justice;” 4) “[t]he length of time juveniles spend in out-of-home placement should take into consideration the seriousness of their offenses and their risk levels;” 5) “[e]stablish a finite period of supervision correlated to seriousness of offense and the juvenile’s risk level;” 6) “[r]equire graduated sanctions for violations of conditions of supervision and allow a sanction of up to 30 days detention only if the graduated sanctions are not successful;” 7) “[i]ncrease use of early invention options and disposition alternatives and increase training for juvenile justice professionals;” 8) “[e]stablish an effective and multiagency alternative process for status offenders;” 9) “[r]equire more involvement from parents in juvenile interventions;” 10) “[c]larify minimum requirements that schools must meet prior to filing court referrals and review the role of school resource officers;” 11) “[r]equire validation of the risk and needs assessment and increase its use in decision making;” 12) “[r]equire the use of evidence-based and promising programs and practices for status and public offenders;” 13) “[i]ncrease Department of Juvenile Justice supervision and aftercare requirements;” 14) “[e]stablish an oversight committee;” 15) “[r]equire tracking of juvenile recidivism rates and other key performance measures;” 16) “[r]equire schools and courts to report specific data on referrals and programs;” 17) “[c]larify the county attorney’s authority to elect not to file;” and 18) “[r]ecommend the maximizing use of federal funding.” Id. at 6-10.

\textsuperscript{174} Id. at 7.

\textsuperscript{175} Id.

\textsuperscript{176} Task Force Report at 7.

\textsuperscript{177} Id. at 5.
between low-level offenders and felon offenders, encouraging recidivism and further criminal activity. Overwhelmingly, a system that disregards the seriousness of offenses when determining punishment fails to address the root of the offender’s troubles and creates gaping facets of unfairness to the juveniles entrapped within the system.

In order to effectuate a process, in the status offender realm, that will address this particular recommendation, the juvenile system should resemble more of an administrative hearing rather than a criminal process in the family court system. In the current family court system, the judge makes findings of fact and relies on information from the family, the Kentucky Cabinet for Health and Family Services (“Cabinet”), and various witnesses. The judge then has the ability to create orders, which then provide an opportunity for bootstrapping and detention.

The juvenile law system, at least related to status offenders, should resemble an administrative process to ensure fairness, personal and unique approaches to the juvenile, and to encourage rehabilitation. Modes of punishment should be reserved for the most severe cases where only that option remains. The school, family, or relevant party can bring a complaint to the Cabinet or another newly created department to handle status offenses. The department will then assign the case to a magistrate, who would then meet with all the relevant parties and make findings of fact related to the status offense. Rather than a criminal hearing, the juvenile, magistrate, and parents or guardians will then meet at an informal consultation to discuss the findings and create realistic goals to address the underlying problems. Such goals can involve requirements for therapy, counseling, or tutoring. The magistrate should be confined to requiring reasonable accommodations that can objectively be reasoned to address the root of the juvenile’s problems. Presently, the juvenile system attempts to apply a band-aid to a gaping wound. A less formal administrative process will apply a tourniquet to allow time to find the source of the wound. This system will require the parties to work together to create a positive solution.

Of course, it must be recognized that in some instances, this less formal approach will not be fruitful. In those cases, if the parties refuse to comply with the requirements of the magistrate, the magistrate can transfer the case to a family court judge for further resolutions. However, by allowing this extra time in an administrative-type process, the juvenile is given more time to correct his or her behavior without the threat of detention. This process may further relieve many if not most status offenders from the family court docket. Only when the problem persists, and the magistrate deems court involvement the only remaining option, does the case go to a family court where the judge has more forceful methods. Moreover, transfer to the judiciary at this point may emphasize, to the juvenile, the significance of his/her past failures to comply. Thus, this alternative disposition system would:
• “Establish a finite period of supervision correlated to seriousness of offense and the juvenile’s risk level.”

This recommendation can be encompassed within the magistrate’s findings in the administrative system. The magistrate can order supervision by assigning the case to a particular social worker with the Cabinet, who will then supervise the juvenile and his or her family to ensure that the parties follow the magistrate’s orders. The magistrate’s orders and the supervision for status offenders should be limited to a reasonable finite period so long as the juvenile is demonstrating substantial compliance, unlike the current system allowing court orders to be entered until the juvenile reaches the age of majority. The magistrate should always consider the seriousness of the offense and the juvenile’s history in determining the length of supervision for the particular juvenile.

• “Require graduated sanctions for violations of conditions of supervision and allow a sanction of up to 30 days’ detention only if the graduated sanctions are not successful.”

Detention should be the last option in all cases involving juvenile status offenders. For this reason, although graduated sanctions may limit the time a juvenile is detained, it fails to limit detention for status offenders overall. The administrative juvenile proposal postpones the time when detainment can become an option. However, further efforts are necessary to limit status offender detention in addition to graduated sanctions.

• “Increase use of early intervention options and disposition alternatives and increase training for juvenile justice professionals.”

This particular recommendation facilitates the prevention of status offenses rather than the treatment of status offenders. Training for professionals involved in the juvenile justice system is a potent tool for increasing efficiency and effectiveness because recognition of the underlying cause is key to appropriate disposition. Additionally, Kentucky should fund more positive programs for juveniles, thereby increasing positive reinforcement programs and allowing early intervention possibilities for juveniles facing problems in their home or school life.

• “Establish an effective and multiagency alternative process for status offenders.”

178. Id.
179. Id.
180. Id. at 8.
Adoption of the latter criteria could be extremely important to address the continuing issues in Kentucky’s juvenile justice system. Although other steps are helpful, changing the approach to minimizing judicial involvement for status offenders should focus on actually addressing the root of the problem to educate and enlighten status offenders in the future. The Task Force recommended that this “effective and multiagency alternative process” should utilize early intervention programs and access to services and resources outside of the judicial process “to assist schools and families with addressing behaviors that constitute status offenses.”182 A way to implement this multiagency approach is through an administrative non adversarial juvenile process, in contrast to the current family court system.

Another important step for the Kentucky legislature to consider in creating this effective and multiagency process is to decriminalize status offenses. When the juvenile justice system was created, it had two separate classifications: delinquent children and dependent and neglected children.183 Over time, status offenders were enveloped within the delinquency jurisdiction of the juvenile courts.184 The policy in Kentucky of handling all of a family’s problems in one court185 tends to continue this encompassment, which, in turn, fails to distinguish the subtleties between the different juvenile issues that arise. “[C]hildren and families do not fit neatly into the boxes that constitute the formulations and turf of each of these systems. Rigid adherence to system-specific notions . . . bears little relation to the lives and needs” of these children and families.186 Some researchers have advised “the complete decriminalization of status offenses as [a] natural extension” of the JJDPA’s view that incarceration of youths for “essentially noncriminal” behavior is unjust.187

Decriminalization would separate juveniles according to whether the juvenile in court is a non-offender, status offender, or offender.188 Such a system addresses the needs of the juvenile justice system currently:

Specialization has been the trend in a number of markets, and it has been suggested that the juvenile justice system could also benefit from a more specialized approach to the needs of juveniles. By addressing

181. Id.
184. Id.
185. Family Court, supra note 10.
the needs of the juveniles in the juvenile justice system with greater attention to the needs of an individual group, a multiple-tier juvenile system would more effectively deal with the realities of what is now largely a punitive process masquerading as rehabilitation.189

The juvenile system needs a reform to allow the courts, judges, and officials to address “the needs of the juveniles…with greater attention to the needs of an individual group. . . .”190 Kentucky’s family court system intends for one judge to hear the entire spectrum of legal problems facing one family.191 However, this system fails to recognize the subtleties between different juvenile issues. Judges face the burden of becoming practitioners of all juvenile legal issues but such an overwhelming objective inhibits more complete comprehension of each of the system’s components. The needs of juveniles would be better addressed if separate judges (or assigned magistrates in an administrative process which is not adversarial by nature) became well-versed in specific areas of juvenile law, and the resources available to address each issue, allowing them to better manage specific needs of the juveniles before them. The long term effect may even reduce adult crime rates because of early and appropriate intervention.

The Task Force recognized that 13% of all juveniles held in secure detention facilities in Kentucky are status offenders.192 Secure detention should be wholly banned in the case of status offenders. “[C]onfining an individual without conviction for a criminal offense is contrary to traditional notions of justice.”193 Detainment fails to address the cause of the status offender’s behavior and, perhaps just as significantly, threatens to emotionally or psychologically damage the juvenile irreparably. The system must be altered “so that status offenders who continue to act out by violating court orders can receive treatment rather than immediate incarceration.”194 In addition, detainment degrades a status offender’s behavior rather than improving it. In detainment, “[n]ot only will status offenders not receive necessary services, but they are more likely to learn criminal behavior: according to one study, recidivism rates for equal or greater crimes are at least thirty-five percent.”195 Just as significantly, “no existing laws mandate the separation of nonviolent delinquents, status offenders, or nonoffenders from chronic, hardcore juvenile offenders.”196

Incarcerated status offenders “are more likely to view the justice system as unfair for rendering arbitrary and exorbitant punishments, thus undermining the rehabilitative purpose of confinement.”197 Incarceration makes the justice system

189. Id. at 695-96.
190. Id.
191. Family Court, supra note 10.
194. Id.
195. Kedia, supra note 2, at 561.
197. Id.
the enemy for status offenders, thereby pitting the juvenile against the
authoritative body that was created to facilitate his or her rehabilitation. Detainment thus makes the child feel like a prisoner.198

Since detainment is clearly a detriment rather than an aide in a status offender’s rehabilitation, one of the first measures taken in reforming Kentucky’s approach to juvenile justice is to outlaw any secure detainment of status offenders. Each court should examine the underlying charge rather than the court order violation in determining whether detainment is appropriate and seek to analyze the reason for the child’s behavior. Although violent offenses provide a sound basis for confinement, violation of a court order where the underlying charge is still a status offense should not be determined a proper ground for detainment. Detainment in such situations hinders the juvenile’s progress rather than aids it.

V. CONCLUSION

The purposes of the current system of juvenile justice in Kentucky are impaired by overwhelmed family court judges, frustrated parents, and disillusioned juveniles who face potential incarceration for offenses that would never undergo judicial scrutiny but for their age. Evidence of the ineffectiveness of the current protocol is empirically and unequivocally substantiated in the status offender incarceration statistics and recidivism rates. To halt further perpetuation of these escalating dilemmas, a new system of justice for status offenders is imperative. Removal of the status offenders into a non-adversarial administrative process, designed to discover and implement correction of the underlying problem, would have both short term and long term benefits. In the short term, the juvenile would not be incarcerated with more serious offenders, would not be subjected to the education process from serious offenders, would not sense the emotional consequences of the formal judicial system, and would be granted an opportunity to resolve the causative issue with the assistance of the system, not in spite of it. In the long term, juvenile status offenders would become less likely to become repeat offenders and, as a further consequence, reduce the risk of criminal behavior as adults. Thus, the consequences of continuing to disregard the ill effects of the current system could have a long ranging impact on the culture in that society will, for decades to come, reap the results of criminalizing non criminals.

198. Id.
EXPANDING ACCESS TO RESIDENTIAL TREATMENTS FOR MENTALLY ILL YOUTH THROUGH THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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Abstract: Mentally ill juveniles are at serious risk of poor academic performance and dysfunctional transitions into post-school life. Of the existing social service and intervention systems in the United States, the education system reaches the most children and has the ability to make the most impact. The failure of schools to identify and serve mentally ill juveniles ultimately results in many youths’ appearance in the juvenile justice system. Such children are more likely than children with other types of disabilities to drop out of high school (54.8% versus 36.4%), to be retained at grade level a year (16.1% versus 6.5%), or to be arrested within one year (25.0% to 12.2%) or three to five years (57.6% versus 29.5%) after leaving high school.

The Individuals with Disabilities Education Act (“IDEA”) requires public schools to provide a “free appropriate public education” to students with disabilities. The IDEA requires schools to provide education, not medical treatment. However, the IDEA also recognizes that, for some children, an appropriate education may require placement in a residential facility. In that case, the statute expressly requires the school to pay for the residential program, including non-medical care and room and board.

Mentally ill students are often the beneficiaries of such residential treatment. But the circuits are split on what criteria should be used to determine when the IDEA requires a residential placement for a particular student. This note surveys and compares the existing circuit tests for determining when the IDEA requires a public school to pay for residential treatment for mentally ill juveniles. Because of the severe individual and societal consequences that can result from the public school system’s failure to serve mentally ill students, this note advocates for a broad reading of the IDEA to encompass more students and to provide more targeted treatments.

I. INTRODUCTION

In 1975, Congress enacted the Individuals with Disabilities Education Act (“IDEA”). Educational and economic self-sufficiency were among Congress’s

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main objectives in passing the law. The IDEA requires school districts to provide all disabled children in their jurisdictions with a free, appropriate public education tailored to each child’s unique needs.

Before passage of the IDEA, more than half of the nation’s disabled children did not receive an appropriate education. Among the most poorly served were children with mental illnesses. A powerful stigma surrounds mental illness in this country. Parents and students are reluctant to acknowledge mental disabilities. Mentally ill students are difficult to teach because their disabilities are manifested in the form of defiant and delinquent behaviors. Though most educators would never turn a wheelchair-bound child away from school because the child could not walk into the building, it is often easier for the same educators to dismiss mentally-ill children whose disabilities are invisible. Though the IDEA guarantees significant protections for mentally ill students, rampant non-compliance eviscerates these protections. As a result, mentally-ill students leave school disproportionately early. Once outside the school system, such students often land in the criminal justice system. This phenomenon is commonly called the “school-to-prison pipeline.”

Schools have a critical role to play in drying up the school to prison pipeline. The IDEA recognizes that some students, particularly severely mentally-ill students, might be better served in a residential mental health facility than a school building. Residential facilities provide students with the services they need to lead productive lives. However, many schools balk at the cost of residential facilities and assert that they constitute medical treatment, a service the IDEA does not require districts to provide. The circuit courts have

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5. Id.
7. Yael Zakai Cannon, There’s No Place Like Home: Realizing the Vision of Community-Based Mental Health Treatment for Children, 61 DEPAUL L. REV. 1049, 1102 (2012).
10. NATIONAL COUNCIL ON DISABILITY, POLICY BRIEF: BACK TO SCHOOL ON CIVIL RIGHTS (2000).
13. Id.
developed conflicting tests for resolving the issue of when schools must pay for a student’s residential placement. The Third Circuit’s “inextricably intertwined” test analyzes whether the student’s medical and mental-health needs are so closely related that it would be impossible to separate them. If so, then the school must pay for the residential treatment. Under the Fifth Circuit’s “primarily oriented” test, the school must pay for the residential facility only when it is primarily oriented towards providing the student with an education, rather than mental health treatment.

While residential facilities can be costly, the cost of failing to educate mentally ill students is much greater. Over $10 billion is spent on juvenile incarceration in the United States—a cost that could be reduced by providing mentally-ill students with the appropriate education the IDEA guarantees them. This note mines the IDEA’s content and proposes a solution to the question of when schools must pay to educate students in residential facilities. Part II of this note surveys the history of the IDEA and its key provisions. Part III describes in detail the Third and Fifth Circuit approaches to this question. Part IV explores the immense societal costs of the school to prison pipeline and advocates for a broad resolution of the circuit split on statutory and public policy grounds. Part V concludes this note and suggests a Supreme Court resolution of this issue in favor of the Third Circuit’s “inextricably intertwined” test.

II. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

A. Historical Overview

In 1975, Congress stated that parents of disabled children had been “erroneously led to believe that their children will not be able to lead meaningful lives.” Whereas taxpayers were spending billions of dollars to maintain disabled persons, Congress observed that an education would enable many such persons to contribute to society. Congress further noted a groundswell of parents who had begun to recognize that denying their children an appropriate education amounted to a denial of their children’s equal protection rights. In response, Congress enacted the Education for All Handicapped Children Act, which later became known as the IDEA. In enacting the law, Congress found

17. Id. at 692.
19. Hicks, supra note 12, at 992-93.
21. Id.
22. Id.
that “disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society.”

The law seeks to improve educational opportunity for disabled children so that they may live independently and be economically self-sufficient. Before 1975, approximately one out of five children with disabilities received an education. Adults educated under the IDEA are twice as likely to be employed than adults who were not.

B. Statutory Framework

1. Eligibility

A student qualifies for services under the IDEA when: (1) the student has a disability, and (2) because of the disability, the student requires a special education and related services. It is insufficient to simply have a disability; rather the disability must cause some sort of educational defect that special education and related services, as opposed to medical treatment, can address.

2. Free Appropriate Public Education

Once a student has been identified as a child with a disability, the IDEA requires the child’s school to provide the child a free, appropriate, public education (“FAPE”). FAPE includes special education and related services that are provided at public expense. “Special education” requires the school to provide “specially designed instruction” that is tailored to the child’s unique needs. “Related services,” on the other hand, addresses non-educational services which are required to enable a child to benefit from an education, such as speech-language pathology, occupational therapy, counseling services, and transportation. Medical services, except those necessary for diagnostic and/or evaluation purposes, are explicitly excluded.
3. The Individualized Education Program

Once a student is identified for services, the school must develop an Individualized Education Program (“IEP”) for that student that outlines the special education and related services the student is to receive. The IEP is “the centerpiece of the statute’s educational delivery system for disabled children.” The IEP team, a committee which consists of the child’s parents, teachers, a school district representative, and others, develops the student’s IEP. Parental involvement in IEP development is a cornerstone of the IDEA.

4. Remedial Procedures

The IDEA requires states to develop procedures to resolve parent complaints regarding a school district’s failure to provide FAPE to a child. The hallmark of the remedial provisions is the right to an impartial due process hearing. A hearing officer conducts the hearing in accordance with general civil procedure rules. A party may appeal a hearing officer’s decision to the state’s educational agency. Beyond that, an aggrieved party may bring an action in any state court or in a federal district court, regardless of the amount in controversy. If the student’s parents believe the child’s public school is not providing the student with FAPE, the parents may unilaterally enroll the child in a private school that they believe will provide FAPE to the student. The parents can then seek reimbursement from the public school district by filing a request for a due process hearing. If the hearing officer finds that the public school district did not provide the child with FAPE, then he may order the public school district to reimburse the parents for the private school tuition.

During the pendency of the due process hearing or any appellate proceedings, the student must remain in his or her current educational placement unless the school and parents agree otherwise. This requirement is known as the “stay put” provision, and it operates as an automatic preliminary injunction.

35. 20 U.S.C. § 1414(d)(1)(a)(i). The Individualized Education Program is also colloquially known as an Individual Education Plan.
41. See 34 C.F.R. § 300.512 (2013). Due-process hearing parties have a right to be represented by counsel, present evidence, and confront, cross-examine, and compel the attendance of witnesses.
42. 20 U.S.C. § 1415(g)(1).
44. 34 C.F.R. § 300.148(c).
45. Id.
46. Id.
47. 20 U.S.C. § 1415(j).
once a request for a due process hearing is filed.48 The “stay put” provision represents Congress’s policy choice to err on the side of educating a child “too much” rather than too little.49

C. The IDEA and Mentally Ill Youth

Identifying and serving mentally ill youth under the IDEA presents several unique challenges. As the Supreme Court has acknowledged, “[o]ne who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma.”50 Because of the stigma against mental illness, parents and children may hesitate to acknowledge a disability or inform school personnel of it.51 Mental illness is invisible, and there is widespread misinformation regarding an individual’s ability to control mental illness.52 Though most educators would never suggest that a child was willfully wheelchair bound, many mistake mental illness for willful defiance of authority.53 Mental illness often goes hand in hand with disruptive behavior, which frustrates teachers and is sometimes indistinguishable from “normal teenage behavior.”54 Though a school counselor is the natural liaison in such situations, in schools strapped for resources, counselors are often recruited to coordinate the many assessments required by state and federal law.55 This illustrates the perceived discretionary nature of mental health service provision in schools.56 Despite this common misconception, provision of IEP services is not contingent upon a school’s resources or staff schedules.57 The IDEA does not permit a school to decline services based upon its limited resources.58

51. Cannon, supra note 7, at 1102 (“Without effective community education and outreach by state agencies, parents and children may go without necessary services due to the stigma associated with mental illness and involvement in mental health treatment. Stigma can lead to a failure to identify, diagnose, and treat children’s mental health needs, which can be particularly problematic in communities of color and those without financial resources, where a lack of education, outreach programs, and culturally competent mental health providers and materials exacerbates the problem.”).
52. Callegary, supra note 9 at 179.
53. Id. at 182.
54. Dimoff, supra note 8, at 331 (“[D]epending on who is observing these behaviors, they may likely qualify as normal adolescent behavior.”).
55. Callegary, supra note 9, at 181 (“Advocates still hear comments from school personnel at IEP Team Meetings about not being able to provide specific related services because: ‘The psychologist is only here on Wednesdays’ or, ‘She is spending all of her time doing assessments and can’t provide counseling’ or, ‘Our social worker isn’t doing social skills groups this quarter, maybe we can fit him into a group in the Spring’”).
56. Id. at 180-81.
57. Id. at 172.
58. Id. (“A recent Maryland federal district court decision makes it clear that if a related service is written into the child’s IEP, the service must be provided. A ‘good faith effort’ at service
Under the IDEA, mental illness is labeled “emotional disturbance.” Emotional disturbance is defined as:

[A] condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under . . . this section.

The regulation contains some challenging ambiguities. For instance, the definition explicitly excludes students who are “socially maladjusted,” but it includes students who display “inappropriate types of behavior or feelings under normal circumstances.” It is unclear where social maladjustment ends and emotional disturbance begins, and a difference in interpretation has serious consequences to an individual. Because the IDEA encourages parents, educators, and health professionals to work in concert, differences in professional jargon can lead to clashes over what a student needs. Different IEP team provision is not enough. The Court rejected the school district’s argument that ‘it attempted to implement [the student’s] IEP ‘to the best of its ability,’ stating that provision of those services is within the control of and is the obligation of the school as they have agreed that the services listed in the IEP are the ones required by the child to receive a FAPE. A ‘good faith effort’ will not meet the statutory and regulatory commands.” (quoting Manalansan v. Bd. of Educ. of Balt. City, No. Civ. AMD 01-312, 2001 WL 939699, at *13 (D. Md. Aug. 14, 2001)); see also Cedar Rapids COMM. SCH. DIST. V. GARRET F., 526 U.S. 66, 77-78 (1999) (“[the IDEA] does not employ cost in its definition of ‘related services’ . . . Congress intended to ‘open the door of public education’ to all qualified children.”).
members can apply the same statute to the same child and remain unsure about whether that child qualifies for services.\textsuperscript{65}

Once qualified, the IDEA mandates that disabled students be educated, to the maximum extent appropriate, with their non-disabled peers (i.e. in the “least restrictive environment”).\textsuperscript{66} However, some mentally-ill students are unable to access an education in a traditional classroom. The IDEA recognizes that, in some cases, the least-restrictive environment is a residential mental-health facility.\textsuperscript{67} When a residential placement is necessary, federal regulations require that the student’s placement, including room and board, be provided at no cost to student’s parents.\textsuperscript{68} Many residential facilities provide some level of medical treatment, but the IDEA explicitly states that schools are not required to provide medical treatment to students.\textsuperscript{69} As a result, many schools object to paying for residential placement when a medical crisis precipitates the placement or when the placement is primarily oriented toward treating the student’s illness.\textsuperscript{70}

The circuit courts have formed different approaches to solving this puzzle. The “inextricably intertwined” test, created by the Third Circuit, asks whether the student’s medical and educational needs are so intertwined that it would be impossible to address one without addressing the other.\textsuperscript{71} By contrast, The Fifth Circuit’s “primarily oriented” test asks whether the residential placement is primarily oriented towards providing an education, rather than treating the student’s illness.\textsuperscript{72}

III. THE CIRCUIT SPLIT OVER RESIDENTIAL PLACEMENTS FOR MENTALLY ILL STUDENTS

A. The “Inextricably Intertwined” Test

In the 1981 case, \textit{Kruelle v. New Castle County School District}, the Third Circuit created what has become known as the “inextricably intertwined” test for determining when and to what extent a school district must pay for a mentally-ill student’s residential placement.\textsuperscript{73} The case concerned Paul Kruelle, who suffered from cerebral palsy.\textsuperscript{74} He could not walk, speak, dress or feed himself, and he

\begin{itemize}
  \item \textsuperscript{65} \textit{Id}.
  \item \textsuperscript{66} 20 U.S.C. § 1412(a)(5) (2012).
  \item \textsuperscript{67} \textit{Id}.
  \item \textsuperscript{68} 34 C.F.R. § 300.104 (2013).
  \item \textsuperscript{69} 20 U.S.C. § 1401(26).
  \item \textsuperscript{70} \textit{See} Mary T. v. Sch. Dist. of Phila., 575 F.3d 235, 240 (3d Cir. 2009).
  \item \textsuperscript{71} \textit{Kruelle} v. New Castle Cnty. Sch. Dist., 642 F.2d 687, 693 (3d Cir. 1981).
  \item \textsuperscript{72} \textit{Richardson Indep. Sch. Dist. v. Michael Z.}, 580 F.3d 286, 299 (5th Cir. 2009).
  \item \textsuperscript{73} \textit{Kruelle}, 642 F.2d at 687. Note that the Third Circuit did not coin the phrase “inextricably intertwined.” \textit{Jefferson Cnty. Sch. Dist. v. Elizabeth E.}, 702 F.3d 1227, n. 4 (10th Cir. 2012) (“The term ‘inextricably intertwined test’ itself appears to have been coined not by any circuits which purportedly apply it, but rather by a circuit which rejected it.”).
  \item \textsuperscript{74} \textit{Kruelle}, 642 F.2d at 689.
\end{itemize}
was not toilet trained. Paul’s educational history consisted of a series of increasingly more supportive educational environments, culminating in a group home program, where he received round-the-clock care. When Paul’s family moved to another state, the school system there was unable to provide Paul with a residential placement similar to the one he received in the past. His parents filed a request for a due process hearing, which was eventually appealed to the Third Circuit.

The court began by stating that “the concept of education is necessarily broad with respect to persons such as Paul,” and that “where basic self-help and social skills such as toilet training...are lacking, formal education begins at that point.” The court held that the law guarantees a free appropriate public education for all disabled children, regardless of the severity of their disability. The key question is whether the student’s educational, social, emotional, and medical disabilities are so intertwined that it is not realistic for the court to perform the “Solomon-like task of separating them.” If they are, then the school district must pay for the residential placement. The court recognized that such a ruling would, in some instances, substantially burden the school district, but concluded that the IDEA “simply do[es] not entertain the possibility that some children may be untrainable.” Because Paul’s educational, social, emotional, and medical needs were so inextricably intertwined that it would be impossible for the facility to address one without the other, the IDEA required the school district to address those needs in a residential placement.

After Kruelle, every circuit that has taken up the issue of payment for residential placements has cited it. A majority of the circuits have adopted it (albeit some with semantic adaptations.)
In 2009, the Third Circuit had an opportunity to revisit the “inextricably intertwined” formulation in *Mary T. v. School District of Philadelphia*. Mary T., known as “Courtney,” resided in the Philadelphia public school district and suffered from a variety of mental health disorders. Courtney experienced psychotic episodes, abused chemical substances, and engaged in self-injury. After determining that Courtney’s public school district was not providing her with FAPE, Courtney’s parents unilaterally enrolled her in a psychiatric treatment facility with no educational accreditation or on-site school.

Courtney’s parents filed a request for a due process hearing. Among other things, the parents requested reimbursement for the cost of the psychiatric facility and compensatory education for the period she was not educated at the public school. The school district opposed reimbursement, arguing that a “medical crisis precipitated Courtney’s stay there.” To determine whether the placement was proper, the court turned to its holding in *Kruelle* and considered whether Courtney’s emotional and educational needs were inextricably intertwined. The court acknowledged that the psychiatric facility provided some educational benefit to Courtney. However, it also found that Courtney spent most of her days in various therapy groups. Courtney’s therapist testified that these groups taught Courtney to cope with her illness and manage her treatments. The court compared these services to programs in blood sugar management for diabetic children—while these skills are useful and important to the child, they target medical needs, and do not constitute specially-designed instruction as the IDEA defines it.

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89. *Id.*
90. *Id.*
91. *Id.* at 240.
92. *Id.*
93. *Id.*
94. *Mary T.*, 575 F.3d at 243-44.
95. *Id.* at 245.
96. *Id.*
97. *Id.*
98. *Id.*
B. The “Primarily Oriented” Test

Richardson Independent School District v. Michael Z. concerned a student named Leah who suffered from bipolar disorder. In the eighth grade, Leah’s condition began to escalate. She overturned school furniture, insulted teachers, used profane language, and left class on a number of occasions to engage in sexual activities with other students in the bathroom. Leah’s psychiatrist recommended that Leah’s parents admit her to a psychiatric facility, which they did. While at the facility, Leah attended an on-site public charter school. After leaving the facility, Leah’s public school developed an updated IEP for her and believed that it could meet Leah’s needs in a district school. Leah’s parents believed that the IEP did not adequately address Leah’s aggressive behavior and risk of regression. They filed a request for a due process hearing to seek reimbursement for Leah’s residential placement. The hearing officer and the district court found for Leah’s parents, and the school district appealed to the Fifth Circuit.

The Fifth Circuit looked unfavorably at the inextricably intertwined test, finding it difficult to imagine a child whose medical and educational needs were not inextricably intertwined. The court believed that the inextricably intertwined test expanded a school district’s liability beyond what the IDEA intended. Instead, the Fifth Circuit created a new, placement-focused test: a residential placement is appropriate under the IDEA when it is essential for the student to receive an education and the placement is “primarily oriented” towards providing that education. While the court affirmed the district court’s opinion that Leah’s placement was essential for her to receive an educational benefit, it remanded for findings of fact on whether it was primarily oriented toward enabling her to receive an education.

IV. ANALYSIS

Both the “inextricably intertwined” and “primarily oriented” tests operate under the understanding that a student must qualify for “special education” in

100. Id.
101. Id.
102. Id.
103. Id.
104. Id.
105. Michael Z., 580 F.3d at 291.
106. Id.
107. Id.
108. Id. at 299.
109. Id.
110. Id.
111. Michael Z., 580 F.3d at 300.
order receive “related services.”¹¹² Where the tests differ is in determining what constitutes “special education” sufficient to open the door to related services.¹¹³ In Kruelle, the Third Circuit acknowledged that the IDEA conveyed “an undeniably broad statutory intent,” and simply did not contemplate that there are uneducable children.¹¹⁴ With that in mind, the court held that, for some students, even basic skills such as toilet training may constitute “special education.”¹¹⁵

The Fifth Circuit expressed concern that the Third Circuit’s test would open up school districts to too much liability, and limited it by asking whether the student’s placement was primarily oriented toward enabling the child to obtain an education, (which, presumably, would not include skills like toilet training).¹¹⁶ When the Third Circuit revisited its “inextricably intertwined” test, it too showed signs of backing off its earlier determination that the IDEA demonstrated a broad statutory intent and found that the student’s disability was not “inextricably intertwined” with her medical needs.¹¹⁷ The court made that decision primarily because, in that case, the residential placement did not provide “educational” services.¹¹⁸ The court’s decision is troubling for two reasons: (1) the Third Circuit had previously held that the concept of “special education” is broad when it comes to students with severe disabilities¹¹⁹—if, for Paul Kruelle, toilet training constituted special education, it is not clear why, for Courtney, training in avoiding self-harm did not, and (2) the court’s focus on what Courtney’s placement offered, as opposed to what her disability demanded, is more akin to the Fifth Circuit’s more restrictive test.¹²⁰

When it comes to the question of residential placements for mentally ill students, most circuits have followed the Third Circuit.¹²¹ The Third Circuit’s more conservative application of the “inextricably intertwined” test may encourage a movement towards more conservative applications generally. The Supreme Court recently declined an opportunity to settle the circuit split on this issue.¹²² The Supreme Court should agree to settle this split in favor of the Third Circuit’s original iteration of the “inextricably intertwined test,” because it is supported by public policy considerations and a straightforward application of the language of the IDEA. The Court should also take the opportunity to address

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112. See Kruelle v. New Castle Cnty. Sch. Dist., 642 F.2d 687, 693 (3d Cir. 1981) and Michael Z., 580 F.3d at 300.
113. Kruelle, 642 F.2d at 695-96.
114. Id. at 693-95.
115. Id. at 693.
118. Id.
120. See Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 299 (5th Cir. 2009).
121. Id. at 298 n. 8.
its more conservative IDEA jurisprudence to clarify that the Fifth Circuit’s concerns over burdening school districts are misplaced.

A. The “Inextricably Intertwined” test is supported by a straightforward application of the IDEA.

At its broadest level, the IDEA requires states to provide disabled children an education that is tailored to the individual student’s needs. FAPE is made up of special education and related services. Congress defined special education to include specially-designed instruction provided in classrooms, the home, or in hospitals and institutions. Without question, the IDEA allows for residential placements for some mentally-ill students.

The question the courts continue to struggle with is: when? The Third Circuit and others have defined “education” broadly for students with severe disabilities. The Fifth Circuit, on the other hand, has said the IDEA only guarantees students an education in the traditional sense. In 2012, the Tenth Circuit, frustrated with both the “inextricably intertwined” and “primarily oriented” tests, developed its own “statutory” test. The plain language of the IDEA, it held, supports the conclusion that a residential placement is reimbursable under the IDEA when: (1) it provides special education (if it provides no “instruction,” it is not reimbursable), and (2) the additional services provided beyond instruction can reasonably be characterized as “related services” as the IDEA defines that term. However, this test presents the same problems presented by the “primarily oriented” test—unless the placement provides strict instruction (education as it is most traditionally understood), it is not reimbursable under the IDEA. Like the Fifth Circuit, the Tenth Circuit unjustifiably narrowed the “special education” door.

Congress did not intend for “education” to be interpreted so narrowly. Notably, the Department of Education, using language similar to that of the

124. 20 U.S.C. § 1401(9).
129. Jefferson Cnty. Sch. Dist. v. Elizabeth E., 702 F.3d 1227, 1237 (10th Cir. 2012) (“Because this appeal can be resolved by a straightforward application of the statutory text, it is unnecessary to adopt either the so-called ‘inextricably intertwined’ approach of the Third Circuit or the ‘primarily oriented’ standard of the Fifth and Seventh Circuits. This permits us to avoid some of the interpretive difficulties presented by the approaches of the other circuits. To begin, the case law is frequently imprecise as to what portion of the Act is being interpreted when a determination is made that a residential placement is reimbursable. For example, the so-called ‘inextricably intertwined test’ originally addressed only the scope of the term ‘special education’...and was silent as to the scope of the term ‘related services’...both courts which purport to adopt and courts which purport to break from the Third Circuit approach frequently conflate the two statutory provisions.”).
Kruelle court, interprets the IDEA to require a school district to pay for a residential placement when the child’s educational needs “are inseparable from the child’s emotional needs.”\textsuperscript{131} Congress clearly desired to provide some students with mental health treatment through the IDEA. It defined “related services” to include, among other things, psychological, social work, counseling, and rehabilitation services.\textsuperscript{132} It defined “special education” as specially designed instruction and related services to meet the unique needs of the child.\textsuperscript{133} The IDEA, as written by Congress, does not justify the Fifth and Tenth Circuits’ narrow readings.

When faced with a residential placement, schools typically argue that the placement is more medical than educational. To be sure, the IDEA is an educational statute and not a medical one—the IDEA’s implementing regulations state that if placement in a residential program is necessary to provide a student with FAPE, the program, including non-medical care and room and board, must be made available at no cost to the student’s parents.\textsuperscript{134} But the line between medical and non-medical care is not always clear. The Department of Education interprets the IDEA to require the school district to fund therapeutic care in residential placements, and the Supreme Court has interpreted it even more broadly.\textsuperscript{135} In Cedar Rapids Community School District v. Garret F., the Court required a school district to provide catheterization to a student because it was necessary for him to remain in school during the day.\textsuperscript{136} In Irving Independent School District v. Tatro, the Court noted that the IDEA’s implementing regulations define “medical services” as “services provided by a licensed physician.”\textsuperscript{137} Therefore, the Court reasoned that the IDEA excludes only services provided by a licensed physician.

While the law does not require school districts to cure children of ailments, it certainly requires them to provide an education to address disabilities, plus any related services necessary to allow the child to access that education.\textsuperscript{138} Congress contemplated that some students would require placement in mental health facilities and explicitly included mental health treatment in the statute.\textsuperscript{139} Although Congress excluded medical treatment from the IDEA, it defined

\textsuperscript{133} 20 U.S.C. § 1401(29) (emphasis added).
\textsuperscript{134} 34 C.F.R. § 300.104 (2013).
\textsuperscript{135} See Brief for United States as Amicus Curiae, supra note 132, at 19.
\textsuperscript{136} Cedar Rapids Comm. Sch. Dist. v. Garret F., 526 U.S. 66, 79 (1999) (“Under the statute, our precedent, and the purposes of the IDEA, the District must fund such “related services” in order to help guarantee that students like Garret are integrated into the public schools.”).
\textsuperscript{139} Id.
medical care narrowly to mean only care provided by a licensed physician. The statute’s language, taken together with Department of Education and Supreme Court interpretations, support the Third Circuit’s “inextricably intertwined” analysis, which leaves more room for mentally ill students to receive the education they need.

B. Public Policy Considerations Support The Application of the “Inextricably Intertwined” Test.

As the Fifth Circuit noted, the “inextricably intertwined” test exposes school districts to increased liability. However it also expands student access to mental health services. The school system’s persistent failure to identify and serve mentally ill students has “resulted in a school-to-prison pipeline.” The best option for reducing the number of juveniles in the criminal justice system is to provide better mental health services in schools.

Twenty-one years following the Supreme Court’s decision in Brown v. Board of Education, Congress found that, of the eight million disabled children in the United States, more than half were not receiving appropriate special education services. Children with emotional and behavioral disabilities were disproportionately affected—nearly 82% of such children did not have their educational needs met. When Congress revisited the problem twenty years later, it found that children with severe emotional disturbances were persistently underserved. Mentally ill children are at risk for a host of other difficulties. The Centers for Disease Control, based upon a nationwide survey of ninth through twelfth graders in public and private schools in the United States, reported that 16% of students seriously considered suicide, 13% created a plan to do so, and 8% actually tried to take their own life in the year preceding the survey. Research shows that over 90% of young people who commit suicide suffered from a diagnosable mental disorder. Students with emotional or behavioral disorders are more likely to be retained a grade level, to drop out of school, and to be arrested within one year of leaving school. Mentally ill

141. See Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 299 (5th Cir. 2009).
142. See id.
143. Hicks, supra note 12, at 983.
145. Honig, 585 U.S. at 309.
146. See Brief for United States as Amicus Curiae, supra note 132, at 13.
149. Weithorn, supra note 11, at 1358 (“[Mentally ill students are] more likely than are other disabled children generally to drop out of high school (54.8% versus 36.4%), to be retained at grade
juveniles are certainly more likely to commit serious crimes than other youth.\textsuperscript{150} However, mentally-ill students are also more susceptible to being labeled “delinquent” by adults, even when such behavior is a manifestation of the child’s illness.\textsuperscript{151} The delinquency system is forced to absorb and become a “surrogate” for a non-functional mental health treatment system.\textsuperscript{152} In the words of a juvenile detention administrator:

To put it simply we are the dumping grounds for the juvenile system. Understand this and understand it well: when the system is unable to get youth placed in a treatment facility or a mental health facility, they will be placed in a detention facility. If a youth needs to be detained in a mental health facility it will not happen; they will be placed in a detention center.\textsuperscript{153}

Incarceration leaves a stain that taints a child’s future prospects. As many as 50\% of incarcerated youth do not return to school after their release.\textsuperscript{154} Students with a drug-related offense on their record may not be eligible for federal college

\textsuperscript{150} Shum, \textit{supra} note 149, at 255 (“[I]n population-based studies of youth violence, serious violent offenders were more likely than either non-serious offenders or non-offenders to have mental health problems. In one study, twenty-eight percent of serious offenders aged eleven to seventeen were classified as having mental health problems, compared to thirteen to fourteen percent of non-serious delinquent youths and nine percent of non-offenders.”); Weithorn, \textit{supra} note 11, at 1349-51 (“In a more recent federally-funded study, 1,829 youths in juvenile detention were assessed to determine the prevalence of diagnosable mental disorders during the prior six months. The study found that, even after excluding conduct disorders, 60.9\% of males and 70.0\% of females met diagnostic criteria for one or more psychiatric disorders. Other disorders diagnosed in fairly substantial proportions are anxiety disorders (21.3\% of males; 30.8\% of females); affective/mood disorders such as depression (18.7\% of males; 27.6\% of females); and attention deficit disorder (16.6\% of males; 21.4\% of females). Finally, in another very recent study which examined a juvenile justice sample within several weeks of admission to a juvenile justice facility, and focused on functioning and behavior within the prior one month, Gail Wasserman and colleagues reported that 67.2\% of the sample met the criteria for at least one mental disorder. While 31.7\% of the sample met the criteria for a conduct disorder, most of those children met the criteria for other conditions as well.”).


\textsuperscript{152} Hicks, \textit{supra} note 12, at 981 (“The juvenile justice system has become a ‘surrogate’ mental health hospital for minority youth who are unable to access care through the formal mental health system. Rather than addressing mental health issues early on in the school system, society acknowledges them when it is often too late, i.e., in the juvenile justice system.”).

\textsuperscript{153} \textit{Id.} at 985 (citing H. COMM. ON GOV’T REF.: MINORITY STAFF SPECIAL \textsc{Investigations Div.}, 108TH CONG., \textsc{Incarceration of Youth Who Are Waiting for Community Mental Health Services in the U. S. 4-7} (2004)).

\textsuperscript{154} \textit{Id.} at 993 (2011).
loans. An arrest record alone renders a juvenile less able to acquire schooling, employment, and professional licensure.

Schools have an important role to play in solving these problems. The IDEA guarantees services and protections for students who have a mental, emotional, or behavioral disability. But students who are entitled to this protection often do not receive it. Children “are being criminalized instead of receiving the services mandated by the IDEA.”

Though some courts are persuaded by school district arguments that residential placements are too financially burdensome, the alternative to providing these services at the school level is even bleaker, and far more burdensome on society. Mental health treatment costs taxpayers at least $150 billion a year, over $10 billion of which is spent on youth incarceration. Narrowing the doorway to services in schools may save taxpayer dollars in the short term, but those savings lead to a “costly adult-sized problem.” Rather than sending the problems down the school-to-prison pipeline, mental health services should be more accessible to youth at the school level through the IDEA.

C. The Supreme Court Should Resolve this Circuit Split in favor of the “Inextricably Intertwined” Test.

The IDEA is beset by rampant non-enforcement and non-compliance. In 1997, while re-authorizing and strengthening the law, Congress noted that “the promise of the law has not been fulfilled for too many children with disabilities.” Notably, during the re-authorization process, many parent advocates called not for an improvement of the law, but for the Department of Education to fully implement and enforce it. In 2000, every state was noncompliant with the IDEA to some degree. Too often, the burden of enforcing the law falls on parents, and due process hearings are expensive and time-consuming. While the Department of Education has the authority to
enforce sanctions such as withholding state funds under the IDEA, it has failed to make use of that authority.\textsuperscript{166}

The Supreme Court’s IDEA jurisprudence has contributed to this culture of noncompliance. Parents who have the resources to challenge a school district will run up against a 1982 Supreme Court decision, \textit{Board of Education of Hendrick Hudson Central School District v. Rowley}, which remains a landmark case in special education law primarily for the ways that it has handicapped the IDEA.\textsuperscript{167} \textit{Rowley} concerned a deaf student whose parents requested that the school provide their child with a sign language interpreter.\textsuperscript{168} The Supreme Court held that the IDEA did not obligate the school to do so.\textsuperscript{169} It concluded that the IDEA “imposes no clear obligation…beyond the requirement that handicapped children receive some form of specialized education,” nor did it require schools to “maximize the potential of handicapped children.”\textsuperscript{170} The Court further held that, in providing a free, appropriate, public education, it is “sufficient to confer some educational benefit upon the handicapped child.”\textsuperscript{171} Though the Court cautioned that it was not attempting to establish a singular test, “the phrase ‘some educational benefit’ has become a term of art used to describe the \textit{Rowley} holding.”\textsuperscript{172} This phrase enables school districts to successfully argue that they have complied with the IDEA if a child makes even minimal educational progress.\textsuperscript{173} A few lower courts have rejected \textit{Rowley}, but most lower courts have adopted it.\textsuperscript{174} In those circuits, IEPs are rarely overturned.\textsuperscript{175}

The Fifth Circuit’s “primarily oriented” test was created out of the court’s fear that the “inextricably intertwined” test expanded school districts’ financial liability.\textsuperscript{176} In so doing, the court echoed \textit{Rowley} and said that school districts are not required to maximize student potential.\textsuperscript{177} Clearly, \textit{Rowley} continues to erroneously persuade courts that its primary goal in IDEA cases should be to alleviate the “burden” the statute places on the school district.

These concerns over inflated financial responsibility are misplaced. The child who requires residential placement as a result of his or her mental illness is

\textsuperscript{166} Id.
\textsuperscript{167} Bd. of Educ. v. Rowley, 458 U.S. 176, 187 (1982) (“This is the first case in which this Court has been called upon to interpret any provision of the Act.”) In 1982, the IDEA was still known as the Education for All Handicapped Children Act. For a full exploration of the ways \textit{Rowley} thwarted Congressional intent and hindered the IDEA from reaching its full potential, see generally Quade, \textit{supra} note 27.
\textsuperscript{168} \textit{Rowley}, 458 U.S. at 184-85.
\textsuperscript{169} \textit{Id.} at 210.
\textsuperscript{170} \textit{Id.} at 189, 195.
\textsuperscript{171} \textit{Id.} at 200.
\textsuperscript{172} Callegary, \textit{supra} note 9, at 174-75.
\textsuperscript{173} \textit{See id.} at 175.
\textsuperscript{174} \textit{See Quade, supra} note 27, at 57-58.
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 299 (5th Cir. 2009).
\textsuperscript{177} \textit{Id.} at 292.
Before a child can receive the protection of the IDEA, the child must be identified as one who has a disability and who, as a result of that disability, requires specially designed instruction and related services in order to access an education. Additionally, any student seeking a residential placement will have to overcome the IDEA’s “least restrictive environment” provision. The IDEA recognizes that not all students can successfully access an education in a traditional school building and requires school districts to provide a continuum of alternative placements, including regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. At the same time, the IDEA mandates that, “to the maximum extent appropriate, children with disabilities...[must be] educated with children who are not disabled.” A student should only be educated outside the mainstream classroom when his disability prohibits him from accessing an education in that environment. Congress expressed a strong preference for mainstreaming in the IDEA—a preference which “rises to the level of a rebuttable presumption.” School districts must fund residential placements only in the rare instances where residential placement is appropriate because the child cannot access an education elsewhere.

The IDEA is a federally-funded grant program to the states. States are not entitled to the funds; they accept the funds on the terms set by Congress. Congress’s directive to states which accept IDEA funding is clear: provide a free, appropriate, public education to all children, regardless of the nature or severity of their disability. States and school districts can avoid costly reimbursement claims by following Congress’s mandates and providing FAPE to students who require it. The Third Circuit held that when a student lacks basic self-help skills, education begins with those skills. Similarly, where a student’s mental illness prevents him from interacting with teachers and peers, from behaving appropriately in a classroom environment, and from avoiding self-harm, education ought to begin at that point. To say otherwise is to say that a student is uneducable as a result of his or her mental illness. The IDEA, which clearly

178. Brief for United States as Amicus Curiae, supra note 132, at 30.
181. 34 C.F.R. § 300.115 (2013).
183. Id.
185. Brief for United States as Amicus Curiae, supra note 132, at 30.
188. See 34 C.F.R. § 104.33 (2013).
guarantees a free education, uniquely tailored to the student’s unique needs, regardless of the severity of his or her disability, simply does not allow for that possibility.\footnote{Kruelle, 642 F.2d at 695.}

One of Congress’s stated intentions in passing the IDEA was to ensure “equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”\footnote{20 U.S.C. § 1400(c)(1) (2012).} The Court’s holding in \textit{Rowley}, that the IDEA was intended to “open the door” rather than guarantee any certain outcome, is clearly in conflict with Congressional intent to create fully-included, fully-participating, and economically self-sufficient individuals.\footnote{Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982).} And the Fifth Circuit’s narrow reading of the IDEA, which reduces rather than expands access to mental health services in schools, is an offshoot of the Supreme Court’s narrow reading of the IDEA in \textit{Rowley}. Earlier this year, the Supreme Court declined to hear a case that would have allowed it to resolve the circuit split over residential placements.\footnote{See generally Jefferson Cnty. Sch. Dist. v. Elizabeth E., 702 F.3d 1227 (10th Cir. 2012), cert. denied, ___ U.S. ___, 133 S. Ct. 2857 (2013).} The Supreme Court should agree to hear a case on this issue, resolve definitively in favor of the “inextricably linked” test, and use that opportunity to right the wrongs and misinterpretations the \textit{Rowley} court created. The \textit{Rowley} legacy has impeded the educational rights of children for three decades. The judiciary “can no longer be complacent with merely ‘opening the door’ to an educational opportunity for children with disabilities.”\footnote{Quade, supra note 26, at 71.}

\section*{VI. Conclusion}

The Fifth Circuit created the “primarily oriented” test to limit school liability under the IDEA. Nothing in the IDEA itself, however, indicates that cost is a defense against providing a student with a free appropriate public education. Furthermore, the Fifth Circuit’s concern is short sighted. Reducing mental health services at the school level merely pushes those expenses down the line, sacrificing many young people’s chance at a healthy, productive life. The IDEA is already best by rampant noncompliance, in part due to the Supreme Court’s decision in \textit{Rowley}. The Supreme Court should take its next opportunity to settle the circuit split over residential treatment facilities in favor of the Third Circuit’s “inextricably intertwined” test. This is the only test supported by the IDEA’s clear mandate to ensure “equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”\footnote{20 U.S.C. § 1400(c)(1).}
WITH INADEQUATE PROTECTION UNDER THE LAW, TRANSGENDER STUDENTS FIGHT TO ACCESS RESTROOMS IN PUBLIC SCHOOLS BASED ON THEIR GENDER IDENTITY

Lindsay Hart*

I. INTRODUCTION

Coy Mathis appeared to be a typical a six-year-old girl with long blonde hair and a big smile.¹ Coy wore dresses, played with stereotypically girls’ toys, and had predominately female playmates.² What could not be observed was that Coy was born a boy.³ But, independently and at an early age, Coy became distraught when treated as a boy and refused to wear traditional boy clothing.⁴ Moreover, Coy identified as and changed her appearance to that of a female; completely living her life as a girl.⁵ That is, until Coy was in first grade and the Fountain Fort Carson School District ("FFCSD") informed Coy she could no longer use the girls’ restroom; she would be required to use a staff or boys’ restroom.⁶ The FFCSD believed that other students may become uncomfortable with Coy using the girls’ restroom, especially as she grew older and developed physically.⁷

Comparably, Nicole Maines was classified as a male at the time of birth, but as early as first grade, began to identify as a female.⁸ Nicole played with Barbie dolls, wore tutus and pink shoes, and would put on a dress when she came home from school.⁹ By third grade, Nicole was addressed as a female by her friends and teachers.¹⁰ Nicole lived her life as a female in nearly all aspects.¹¹ Additionally, during Nicole’s third and fourth grade years, she used the girls’

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3. Id. at 3.
4. See id.
5. See id.
6. Id. at 5.
9. Id. at 2–3.
10. Id. at 3.
11. See id. at 4.
restroom with no complaints from other female students. The possibility of Nicole using the boys’ restroom was never considered an option, as it was likely unsafe. But soon, a male classmate caused two disruptions during Nicole’s fifth grade year by following her into the girls’ restroom. As a result, school administrators prevented Nicole from using the girls’ restroom and required her to use a staff-only bathroom.

Following Nicole’s segregation from the girls’ restroom, Nicole’s mother reported to the school that Nicole was struggling with depression and negative thoughts about herself. Still, the school continued to exclude Nicole from the girls’ restroom during her sixth grade year. Eventually, Nicole left the school in order to find acceptance at a school district more willing to accommodate her gender identity.

Both Nicole and Coy filed lawsuits against their respective school districts. Colorado’s Division of Civil Rights held that the FFCSD wrongfully denied Coy access to the girls’ restroom. The decision pointed out that Coy’s family, teachers, and friends had accepted her identity as a girl; FFCSD was the only party who had not.

Things did not initially go as well for Nicole Maines. The Maine Human Rights Commission (“MHRC”) and Nicole’s parents filed suit against Nicole’s school district, Orono School District (“OSD”), in Maine’s Superior Court. Shockingly, the Superior Court Judge found in favor of the OSD’s decision to prevent Nicole from accessing the girls’ restroom. However, the Supreme Court of Maine later overturned this decision and held that where “it has been clearly established that a student’s psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the [Maine Human Rights Act].”

12. See id.
13. See id. at 8.
15. Id. at 7–9.
16. Id. at 9.
17. Id. at 10.
18. Id.
21. See id. at 4-5.
23. See generally id. at 1.
24. Id. at 25.
case demonstrates the challenges that transgender students continue to face in finding acceptance and equality in the United States’ school systems.

The issue of transgender bathroom access was heralded as the “next frontier of civil rights” as early as six years ago. But just recently, transgender students’ right to access the restroom that corresponds with their gender identity in public schools has taken center stage. Assurance of that right is vital for transgender students’ integration into society as members of their chosen gender. If transgender students are denied access to restrooms based on their gender identity, they are being asked to live their lives as one gender but shed that identity when they are performing one of the most basic human functions.

The purpose of this article is to analyze current litigation surrounding transgender students’ bathroom access based on their gender identity in order to determine what legislation is necessary to provide full protection to transgender students. While some authors believe that federal action is not realistic, in light of recent advances, including media attention, state legislative action, and favorable legal precedent; federal reform is not only plausible, but it also provides the most favorable outcome for transgender students and school districts. Although federal reform may take years, federal reform is the only way to ensure that all transgender students are afforded adequate protection under the law.

Part II of this article provides an overview of recent transgender students’ cases that have gained national media attention. The first section focuses on transgender protection under Title IX. It examines recent transgender students’ cases and litigation history under a Title IX theory. The second section examines cases where transgender students sought protection under state antidiscrimination laws. The third section analyzes a case where both of these theories fail. Then, an analysis of the success of transgender students under the two theories, Title IX and state antidiscrimination law, completes Part II.

Part III examines the legal theories that have been presented in recent transgender students’ cases and whether they have proved successful in the courtroom. Finally, Part IV, explains why the best approach to avoid continued, costly litigation and continued discrimination against transgender students is Congressional action amending the Education Amendments. The first section discusses state legislative trends, and the inadequacy of this legislation in


27. Brief of Appellants Doe, supra note 8, at 6.


29. See Elkind, supra note 26, at 1 (arguing that calling for federal reform as not realistic).
II. TRANSGENDER STUDENTS IN THE MEDIA

Recent cases concerning transgender students have been adjudicated on two different stages. Coy Mathis sued the FFCSD under state antidiscrimination laws.\(^{30}\) Other transgender students have chosen instead to seek protection under Title IX of the Education Amendments.

A. Protection Under Title IX: John Doe

Title IX states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”\(^{31}\)

The Department of Education, Office of Civil Rights Division, has the right to administratively enforce Title IX against recipients of Federal funding; specifically, public schools.\(^{32}\) Congress grants federal funds to public schools under its spending power and as a condition of receiving the funds a school must enforce Title IX and the accompanying regulations.\(^{33}\) Accompanying regulations specifically state that a school may not “on the basis of sex . . . [p]rovide different aid, benefits, or services or provide aid, benefits, or services in a different manner.”\(^{34}\)

The U.S Supreme Court interpreted Title IX as providing a private cause of action in two landmark cases. In *Gebser v. Lago Vista Independent School District*, the Court held that a school district is liable for monetary damages for teacher-on-student sexual harassment if the school was on notice and was deliberately indifferent to the harassment.\(^{35}\) In 1999, the Court extended this liability in *Davis v. Monroe County Board of Education* to include peer-on-peer

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30. See Mathis, Charge No. P20130034X at 14.
32. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001), available at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (stating, “Title IX applies to all public and private educational institutions that receive Federal funds, i.e., recipients, including, but not limited to, elementary and secondary schools, school districts, proprietary schools, colleges, and universities.”) [hereinafter Revised Sexual Harassment Guidance].
33. Id. at 3 (explaining “[a]s a condition of receiving funds from the Department, a school is required to comply with Title IX and the Department’s Title IX regulations, which spell out prohibitions against sex discrimination.”).
34. 34 C.F.R. § 106.31(b)(2) (West 2013).
sexual harassment.\textsuperscript{36} Furthermore, even when sexual harassment does not rise to the level necessary to bring a private action under \textit{Gebser}, the Department of Education and other federal agencies have the power to “promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate.”\textsuperscript{37}

Recently, a transgender student ("John Doe") filed suit against the Arcadia Unified School District ("AUSD") under Title IX of the Education Amendments of 1972 (42 U.S.C. 1681) and Title IV of the Civil Rights Act of 1964 (42 U.S.C. 2000(c)).\textsuperscript{38} Doe is a twelve-year-old transgender, who, at the age of six, told his parents that he prayed God would give him the male body that he was meant to have.\textsuperscript{39} While Doe began school as a female, he began to transition to living as a male by fifth grade.\textsuperscript{40} Problems occurred during an overnight school trip when the school insisted that Doe sleep in the girls’ cabin with his mother, instead of the boys’ cabin.\textsuperscript{41} This resulted in relentless teasing and humiliation for Doe.\textsuperscript{42} While sixth grade proved easier, Doe again encountered difficulty with another overnight field trip.\textsuperscript{43} This time, the AUSD insisted that Doe’s father chaperone the trip and stay with Doe in a cabin separate from both boys and girls.\textsuperscript{44}

Doe filed separate complaints with the U.S. Department of Education, Office for Civil Rights ("OCR") and the U.S. Department of Justice, Civil Rights Division ("DOJ").\textsuperscript{45} Doe alleged that the school district’s treatment constituted discrimination on the basis of sex in violation of Title IX.\textsuperscript{46} The AUSD defended its decision by relying on a California Education Code provision that allows schools to maintain sex-segregated facilities.\textsuperscript{47}

\begin{thebibliography}{99}
\bibitem{Gebser} Revised Sexual Harassment Guidance, \textit{supra} note 32, at ii (quoting \textit{Gebser}, 524 U.S. at 292) (internal quotation marks omitted).
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\bibitem{Id} \textit{Id}.
\bibitem{Letter} See Letter from Asaf Orr, \textit{supra} note 39, at 1.
\end{thebibliography}
The case was settled in a Resolution Agreement entered into between the OCR, the DOJ, and the AUSD. As a result of this agreement, the AUSD avoided admitting any unlawful conduct. Because the agreement requires the AUSD to allow Doe to access the boys’ restroom consistent with his gender identity, the result is considered a win for transgender students. Furthermore, the AUSD must take multiple, district-wide steps to further protect transgender students’ rights, including providing training for employees and revising its policies and procedures regarding transgender bathroom access.

1. Title VII and Title IX

In Doe’s complaint against the AUSD, he referenced federal cases where courts have applied the holdings of Title VII cases to claims under Title IX. Those identifying as transgender who seek protection under Title IX frequently rely on Title VII litigation for favorable precedent. This is because Title VII and Title IX contain similar language and Title VII has been more frequently litigated regarding transgender rights.

a. Legislative History

The battle, then and now, focuses on the word “sex” within the statutes and if that word does, or was meant to, protect transgender people. Initially, transgender people struggled to find protection under both Title VII and Title IX. In 1984, the Seventh Circuit concluded that Title VII did not protect Kenneth Ulane from discrimination as a transsexual, although he would have been protected if he was discriminated against as a man or woman. The Seventh Circuit characterized Congress’s failure to prohibit discrimination based on sexual orientation as an

49. Id. at 1.
50. Id. at 3.
51. See id. at 1, 4-6 (discussing the implementation of district-wide policies, procedures, and regulations).
52. See Letter from Asaf Orr, supra note 39, at 4.
53. See, e.g., Miles v. New York Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (“Title VII, and hence Title IX, does not prohibit expressing disapproval of conduct involved in the transformation from one gender to another.”).
55. See Katherine Kraschel, Trans-Cending Space in Women’s Only Spaces: Title IX Cannot be the Basis for Exclusion, 35 HARV. J.L. & GENDER 463, 470 (2012) (“[S]everal cases that help define the scope of Title IX protection of transgender individuals were litigated under Title VII of the Civil Rights Act.”).
indication that Title VII was not intended to protect transgender people.\(^{57}\) Similarly, the Eighth Circuit held the word “sex” should be given its plain meaning and Title VII does not prohibit discrimination against a transsexual.\(^{58}\)

In 1989, the U.S. Supreme Court laid the foundation for a more expansive reading of the word “sex.”\(^{59}\) The case of Price Waterhouse v. Hopkins centered on Ann Hopkins; Ann was not a transgender, but a “macho” female that did not conform to typical gender stereotypes.\(^{60}\) Because the Supreme Court recognized that Title VII includes gender discrimination, commentators argue that this decision provides greater protection for transgender people.\(^{61}\)

After Price Waterhouse, transgender people have found more protection under Title VII. In Schwenk v. Hartford, the Ninth Circuit held that “sex” meant both “sex” and “gender” under Title VII.\(^{62}\) In Smith v. City of Salem, the Sixth Circuit applied Price Waterhouse and held that Title VII prohibited discrimination on the basis of transsexual status.\(^{63}\) Finally, in Glenn v. Brumbly, the Eleventh Circuit found in favor of a transsexual, who was fired after dressing as a woman in accordance with her gender identity.\(^{64}\) The court found that the employer’s actions were gender stereotyping.\(^{65}\)

However, circuit courts are split regarding whether there should be a broad reading of the word “sex.”\(^{66}\) For example, in Etsitty v. Utah Transit Authority, Etsitty alleged that her employer discriminated against her when she was terminated as a result of her non-conforming gender.\(^{57}\) The Tenth Circuit held that Etsitty’s employer stated a legitimate reason for firing her, thus precluding it from liability under Title VII.\(^{68}\) Notably, Etsitty was fired because of her intent to use the women’s restroom while in her work uniform despite having male

\(^{57}\) Id. at 1085.
\(^{58}\) Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982).
\(^{59}\) See Kraschel, supra note 55, at 470 (“[I]n Price Waterhouse v. Hopkins, the Supreme Court held that workplace discrimination against a woman based on sexual stereotyping, such as statements that she was too masculine or did not dress in a sufficiently feminine manner, constituted actionable sexual harassment under Title VII.”); see also Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).
\(^{60}\) Price Waterhouse, 490 U.S. at 235.
\(^{61}\) See Brief of Appellants Doe, supra note 8, at 29 (arguing the Superior Court Judge should have applied the reasoning of Price Waterhouse to Nicole’s case); see also Emily Q. Shults, Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender, 12 CARDOZO J.L. & GENDER 337, 345-46 (2005) (“Oncale and Price Waterhouse may be used to hold employers and by analogy, schools, liable for sexual harassment because employees or students fail to conform to expected gender stereotypes.”); Kraschel, supra note 55, at 47 (“Waterhouse has subsequently been ‘interpreted to prohibit discrimination against people whose gender expression does not conform to typical societal expectations.’”).
\(^{62}\) See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).
\(^{63}\) See Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004).
\(^{64}\) See Glenn v. Brumbly, 663 F.3d 1312, 1320-21 (11th Cir. 2011).
\(^{65}\) Id. at 1320.
\(^{66}\) See, e.g., Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007).
\(^{67}\) See id. at 1218.
\(^{68}\) Id. at 1224.
The court added, “[t]here is nothing in the record to support the conclusion that the plain meaning of ‘sex’ encompasses anything more than the male and female.” The court limited *Price Waterhouse* as merely protecting individuals who fail to conform to sex stereotypes and refused to require that employers allow biological males to use women’s restrooms. 

While the split between circuits remains, legal writers remain hopeful that transgender people will find protection under Title IX. While many believe that *Price Waterhouse* aligned the meanings of the words “sex” and “gender,” they also recognize that courts may interpret this case differently. As transgender students fight for their right to access bathrooms based on their gender identity, the meaning of these terms is critical.

b. Recent Developments concerning Title VII and Title IX

Today, the fight wages on regarding the applicability of Title VII to Title IX cases. Federal agencies’ actions have indicated their favorable outlook on transgender people’s rights to access bathrooms based on their gender identity. The Department of Education has maintained that Title VII and Title IX relate, finding support in the U.S. Supreme Court’s decision in *Davis*. The *Davis* Court referenced Title VII case law in its holding, signifying that Title VII was relevant when examining claims of a hostile environment under Title IX.

Additionally, in response to Doe’s complaint against the AUSD, the DOJ and OCR issued a letter summarizing findings from their investigation. The letter, in bold language, states, “all students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX.” The DOJ and OCR cited seven different cases concerning Title VII and stated “courts rely on Title VII precedent to analysis discrimination ‘on the basis of sex’ under Title IX.”

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69. Id.
70. Id. at 1222.
71. Id. at 1224.
72. See Shults, *supra* note 61, at 338 (discussing Title IX and Title VII jurisprudence in relation to transsexuals); see also Kraschel, *supra* note 55, at 47 (“Given the encouraging direction this doctrine has taken, it appears that Title IX protection on the basis of sex as interpreted by federal courts includes transgender individuals”); Elkind, *supra* note 26, at 895 (discussing the constitutional challenges and protections to bathroom access based on gender identity).
73. See, e.g., *Decision and Order on Defendant’s Motion for Summary Judgment, supra* note 22, at 22 (finding that Title VII was not applicable in Title IX claim because it would be unfair to hold a school to the same standard as an employer.).
75. *Davis*, 526 U.S. at 647.
76. See generally *Letter from Anurima Bhargava, supra* note 48.
77. Id. at 2.
78. Id. at 2 n. 3 (“In the employment context, federal courts and administrative agencies have applied Title VII of the Civil Rights Act of 1964, the federal law prohibiting sex discrimination, to
If courts or agencies acknowledge protection of transgender people under Title VII, a recent decision by the Equal Employment Opportunity Commission (“EEOC”) will prove beneficial in Title IX litigation concerning transgender students.79 In 2012, the EEOC held that “intentional discrimination against a transgender individual because that person is a transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”80

Similar to the Department of Education’s administrative process for discrimination under Title IX, the EEOC enforces federal statutes that prohibit discrimination in employment, including discrimination on the basis of sex under Title VII.81 The EEOC investigates complaints regarding discrimination by employers and occasionally files suit in federal court for discrimination.82 In 2011, Mia Macy - a transgender woman who believed the Bureau of Alcohol, Tobacco, Firearms and Explosives Agency denied her a position because of her transgender status - filed an appeal with the EEOC.83 Masen Davis, executive director of the Transgender Law Center in San Francisco, called this decision, a “game-changer for transgender people in the U.S.”84

Mia Macy applied for a position at a crime laboratory in San Francisco, a position she was fully qualified for.85 At the beginning of her application, Mia was male and was still presenting herself as such.86 Twice, the hiring manager asserted to Mia that she would receive the job pending completion of a background check.87 Subsequently, Mia informed the hiring manager that she was undergoing a sex change to become a female.88 Five days later, Mia received an email indicating that the position was no longer available due to budget reductions; however, Mia learned that another applicant filled the position and she believed that the decision was discriminatory on the basis of her transgender status.89

Initially, the EEOC accepted Mia’s complaint, but informed her that it was reclassifying her claims.90 The EEOC modified her complaint as one complaint
of discrimination “based on sex (female) under Title VII” and a second complaint of discrimination based on “gender identity stereotyping.”

The EEOC deferred the claim for gender identity stereotyping to the Department of Justice. Mia appealed the EEOC’s decision to reclassify her claims, arguing it was essentially a dismissal. Eventually, Mia asked the EEOC to drop her complaint based on sex under Title VII and to simply consider her complaint based on gender identity stereotyping.

The EEOC clarified that Mia’s claim was simply a claim for discrimination “based on sex” due to her transgender status and the agency erred when it separated her complaint. The EEOC’s decision boldly stated that “sex” under Title VII includes both biological sex and gender. The EEOC adopted the Supreme Court’s reasoning in *Price Waterhouse* and further emphasized that the Court used the terms “sex” and “gender” interchangeably. Furthermore, the EEOC held that employer discrimination against a transgender person is discrimination “related to the sex of the victim.”

The EEOC relied on three cases to showcase that, since *Price Waterhouse*, federal courts recognized protection for transgender people under Title VII. The EEOC explained that providing protection to transgender people under Title VII does not create a new “class” of protected individuals. The EEOC viewed protecting transgender people under the term “sex” as similar to protecting Muslims or Christians under the term “religion.” According to the EEOC, it is not necessary for a victim of sex discrimination to show sex stereotypical discrimination, a victim merely needs to show transgender status and discrimination based on that status to fall under the protection of Title VII.

**B. State Antidiscrimination Laws: Coy Mathis**

Other students seek protection under state antidiscrimination laws. As early as 18 months old, Coy began identifying herself as a female through her likes and

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92. Id. at *3.
93. Id.
94. Id. at *4.
95. Id. at *5.
96. Id. (citing Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000)).
98. Id. at *7.
99. Id. at *7-9 (relying on Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000)).
100. Id. at *5.
101. Id. at *11.
102. Id.
dislikes.\textsuperscript{104} By the time Coy was four, she began expressing her desire to be a

girl.\textsuperscript{105} When Coy began kindergarten, she enrolled as a male and was identified

as such by school administrators, teachers, and friends.\textsuperscript{106} But soon, Coy became

extremely upset when she was treated as a male; and she not only experienced
depression and anxiety, but she also refused to leave her home unless she was
dressed as a girl.\textsuperscript{107} After Coy became distraught when a teacher forced her to

stand in “the boys’ line,” her parents and the FFCSD jointly decided that Coy

would be treated as a female.\textsuperscript{108}

Initially, restroom use was not an issue because Coy’s kindergarten class had

only one gender-neutral restroom, which all students used individually.\textsuperscript{109} In first

grade, Coy initially used the girls’ restroom with no complaints or
disturbances.\textsuperscript{110} However, in November 2012, the FFCSD told Coy’s parents that

Coy was not permitted to use the girls’ restroom.\textsuperscript{111}

The FFCSD argued that Coy was not discriminated against based on sex

because, according to Coy’s birth certificate, Coy’s “sex” is male.\textsuperscript{112} The FFCSD

further argued that gender refers to social and cultural traits while sex refers to

reproductive organs.\textsuperscript{113} Finally, the FFCSD reasoned that because it is

responsible for protecting students, it has authority to prevent Coy from using the
girls’ restroom for reasons of safety.\textsuperscript{114}

The Colorado Division of Civil Rights determined that the FFCSD’s

reasoning was merely a pretextual attempt to disguise its unlawful discrimination

against Coy.\textsuperscript{115} The agency found that the FFCSD violated the law when it
discriminated against Coy based on her “sex” and her “transgender” status as

well as when it denied Coy access to a public accommodation because of her sex

or sexual orientation.\textsuperscript{116}

C. When both Title IX and State Antidiscrimination Laws Fail: The Initial

\textsuperscript{104} Mathis v. Fountain Fort Carson Sch. Dist. 8, Charge No. P20130034X at 3 (Co. Dep’t of


\textsuperscript{105} See id.

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} Id. (It is notable that nothing was decided regarding Coy’s bathroom use at this meeting.).

\textsuperscript{109} Id. at 4.

\textsuperscript{110} See Mathis v. Fountain Fort Carson Sch. Dist. 8, Charge No. P20130034X at 4 (Co. Dep’t


\textsuperscript{111} Id. at 5.

\textsuperscript{112} Id.

\textsuperscript{113} Id. at 5-6.

\textsuperscript{114} Id. at 7.

\textsuperscript{115} See id. at 13-14.

\textsuperscript{116} See generally Mathis v. Fountain Fort Carson Sch. Dist. 8, Charge No. P20130034X at 13-14


Decision for Nicole Maines

Nicole Maines’s experience was similar to Coy’s. Nicole, a transgender female, was enrolled in the OSD from first to fifth grade. 117 Beginning in fifth grade, the OSD and Nicole’s parents jointly decided that Nicole would use the girls’ restroom; however, if issues arose, she would use the staff restroom instead. 118 On two occasions, a male student followed Nicole into the girls’ restroom to protest Nicole’s use of the girls’ restroom. 119 The male student’s grandfather instructed him to follow Nicole into the girls’ restroom because he believed that if Nicole was permitted to use the girls’ restroom, other male students should have the same right. 120 As a result, the OSD told Nicole to use the staff bathroom. 121 Although Nicole used the staff restroom for a period of time, she eventually returned to using the girls’ restroom; however, she continued to receive unwanted attention, questions, and harassment as a result of attention from the bathroom issue. 122

Nicole’s parents and the MHRC filed suit in the Maine Superior Court alleging that the OSD discriminated against Nicole in education on the basis of her sexual orientation. 123 Unfortunately for Nicole, the court ruled in the OSD’s favor. 124 Nicole appealed this decision to the Supreme Judicial Court of Maine. 125

Nicole argued that the OSD violated the Maine Human Rights Act (“MHRA”) when it discriminated against her in “public accommodation and education.” 126 Like the law in Colorado, the MHRA includes sexual orientation as a protected class; thus it appears to prohibit discrimination based on transgender students’ gender identity. 127 However, the lower court relied on Maine Human Rights Commission Regulation section 4.13, which states that “an educational institution may provide separate toilet, locker room, and shower facilities on the basis of sex” as long as the facilities are comparable. 128 The lower court decided that the OSD could prohibit Nicole from using the girls’ restroom under this regulation, because Nicole was biologically male. 129

118. See id. at 3.
119. Id. at 4-5.
120. Id. at 4.
121. Id. at 5.
122. See id. at 5-7.
124. Id.
125. See generally Brief of Appellants Doe, supra note 8.
127. Brief of Appellants Doe, supra note 8, at 18 (explaining that sexual orientation encompasses a person’s gender identity under MHRA.)
128. Id. at 24.
129. See id.
Nicole argued on appeal that the MRSA and section 4.13 “provide a coherent result” and the lower court’s decision set section 4.13 “on a collision course with an important legislative commitment that transgender girls be treated as girls.” Nicole further argued that this interpretation resulted an unreasonable consequence that the legislature did not intend, one where a transgender can live consistently with her gender identity in all aspects of her life, except when using the restroom.

Nicole also argued she suffered peer on peer sexual harassment when attention was brought to her transgender status because she was prevented from using the girls restroom. Although the lower court refused to apply the Title VII standard to Nicole’s claim and held that the OSD was not deliberately indifferent to student-on-student sexual harassment, Nicole ultimately won on appeal when the court held that denying Nicole access to use the girls’ was discrimination in violation of the MHRA because it was clearly established that Nicole’s well-being and academic success were dependent on her ability to use the bathroom consistent with her gender identity.

D. Putting the Pieces Together

Seemingly, federal agencies have been more willing to provide protection for transgender students than federal and state courts. The question could be asked, if transgender students are finding protection under the Department of Education’s enforcement of Title IX, why is federal reform needed?

The modern administrative state has arguably created an environment that lends itself to Presidential control of federal agencies. Congress can delegate power to administrative agencies so they may adjudicate disputes and engage in rule-making, but the President, as head of the executive branch, possesses removal power over agency leadership. As a result, the President may unilaterally remove officers of the Department of Education, as it is part of the executive branch. While agencies are characterized as independent, how

130. Id. at 25.
131. Id. at 26.
132. Id. at 35.
134. See id. at 22-23.
139. See id. (“[P]residential oversight requires the capacity to remove subordinate officers. The President cannot fully oversee subordinate officers if he cannot remove them from office when they fail to faithfully execute the law.”).
independent can they be when the President has the authority to remove their leadership? Moreover, what will happen to federal agencies’ policies if the White House is no longer run by a Democrat? But, officers are protected from the President’s removal power if they offer adequate reasoning for their decisions.140 Additionally, legal precedent has backed the agency decisions discussed herein, thereby complicating future administrations’ ability to discredit these decisions.

Another issue relates to formalists’ disagreement with the delegation of judicial power to the executive branch.141 Formalists’ view of power is contrary to the structure of the current administrative state. Based on the preceding discussion, the policies of administrative agencies appear supportive of transgender students’ right to access restrooms based on their gender identity. But, this issue has had minimal coverage in state and federal courts. Many of these federal agency decisions have been recent, and we are yet to see what effect, if any, they will have in federal or state court.

Court decisions based on state antidiscrimination laws provide ineffective protection for transgender students. Thus far, state and federal courts have applied different standards and arrived at disparate results. Accordingly, transgender students have limited protection from discrimination in today’s legal system.

III. ANALYSIS OF LEGAL THEORIES PRESENTED AGAINST TRANSGENDER BATHROOM ACCESS BASED ON GENDER IDENTITY

Transgender students do not have adequate protection from discrimination. Despite state legislative protections for transgender students, school districts remain unclear on whether they are required to allow transgender students to access bathrooms based on their gender identity.143 By analyzing the different legal theories that were presented in the cases above, federal and state legislatures can enact laws that better protect transgender students. The federal legislature should enact laws to provide transgender students with the right to access bathrooms based on their gender identity.

140. See Coglianese, supra note 136, at 648.
141. See Peter B. McCuchen, Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory, 80 CORNELL L. REV. 1, 9 (1994) (explaining that formalists believe in a more complete division of the three branches of government and disagree with Congress’s delegation of authority to administrative agencies).
142. See id. 9, 11 (“Under a pure formalist approach, most, if not all, of the administrative state is unconstitutional.”).
A. Sex-Segregated Restrooms

In the foregoing cases, the school districts defended their decisions to deny transgender students bathroom access based on their gender identity by relying on laws that provide for the segregation of public restrooms. In John Doe's case, the AUSD argued that it had authority to provide Doe with gender-neutral facilities because the facilities were comparable to those offered to other students and it could maintain separate facilities for boys and girls. Moreover, the AUSD quoted section 231 of the California Education Code, which states, "[n]othing herein shall be construed to prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes, so long as comparable facilities are provided." Despite offering this justification, the AUSD allowed John Doe to access the boys' bathroom before it entered into the Resolution Agreement.

Similarly, the lower court decision that denied Nicole Maines access to the bathroom based on her gender identity also cited a state law that allows schools to maintain sex-segregated restrooms. This decision quoted section 4.13 of Maine Human Rights Commission Regulation as providing: "An educational institutional may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." According to the lower court's decision, it would be "an absurd result" for any student covered by the term "sexual orientation" under Maine law to use the bathroom of his or her choice. Further, it stated that if transgender students were able to use the restroom of their choice, then section 4.13 would serve no purpose.

The lower court cited decisions from other states that found the practice of providing sex-segregated restrooms undermined sexual orientation discrimination claims. It cited the Minnesota Supreme Court holding in Goins v. West Group that offering a transgender employee a single restroom instead of a restroom based on his or her gender identity did not constitute discrimination based on sexual orientation; it was simply designation of restroom use based on gender. Notably, Goins addressed the distinction between sex and sexual orientation

144. See generally id.; Letter from Attorney for AUSD, supra note 47.
145. Letter from Attorney for AUSD, supra note 47.
146. Id.
147. Letter from Anurima Bhargava, supra note 38, at 6.
149. Id. at 11.
150. Id. at 15, n.14.
151. See id.
152. Id. at 13-14 (citing Goins v. West Group, 635 N.W.2d 717 (Minn. 2001); Hispanic Aids Forum v. Estate of Bruno, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005)).
153. Goins v. West Group, 635 N.W.2d 717, 726 (Minn. 2001)).
under a Minnesota statute that was similar to Maine law prohibiting sexual orientation.154 The lower court also relied on Hispanic Aids Forum v. Estate of Bruno, a New York case that adopted the rationale in Goins.155 In Hispanic Aids Forum, a policy prohibiting transgender people from using the restroom based on their gender identity was not discrimination; it was simply requiring people to use the bathroom based on their biological sexual assignment.156

These arguments ignore the reality of a transgender student’s everyday life. According to the Colorado Civil Rights Division, telling a transgender student “she must disregard her identity while performing one of the most essential human functions constitutes severe and pervasive treatment, and creates an environment that is objectively and subjectively hostile, intimidating or offensive.”157 Yet, the court overruled the FFCSD’s argument that state law allows it to segregate restrooms based on sex and to prohibit a transgender student from accessing the restroom associated with her gender identity on the basis of safety.158 Notably, Colorado has an unambiguous directive regarding transgender bathroom access;159 “[A]ll covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity.”160 This law seemingly leaves little room for confusion regarding what bathroom transgender students should be able to access.

When a court interprets laws in a way that limits protections for transgender students, it furthers the negative educational environment the transgender student already suffers.161 When transgender students are prohibited from using the sex-segregated facilities associated with their gender identity, it is often stressful for them to find an easily accessible restroom.162 Because gender-neutral restrooms typically are farther from classrooms and have only one stall, they cannot be accessed in the same amount of time as the sex-segregated facilities.163 This stress often leads to the student missing classes and avoiding restroom use while at school.164 Even if a state lacks a clear provision regarding the right to access to sex-segregated facilities based on gender identity, discrimination on the basis of

155. Id. at 14 (citing Hispanic Aids Forum v. Estate of Bruno, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005)).
158. Id. at 7.
159. See id.
160. Id.
162. See id. at 74-75.
163. See id. at 75.
164. See id. at 74-75.
gender identity should clearly be prohibited if gender identity is a protected class. A law that simply adopts the societal norm of providing separate restrooms should not be interpreted to exclude transgender students from using sex-segregated restrooms based on their gender identity.

B. Privacy

1. Privacy Rights of Non-Transgender Students

The question has to be asked, what are non-transgender students’ rights in school restrooms? Did Coy’s or Nicole’s actions intrude upon other students’ rights? Do female students have the right to use school restrooms that are free of children with male genitalia? In 2008, the California Education Committee filed suit against the California Superintendent in his official capacity because it felt school administrators and teachers were unable to adequately protect students’ privacy when transgender students were permitted to enter restrooms consistent with their gender identity. The suit came after California Senate Bill 777 amended California’s Education Code to state that gender included a “person’s gender identity and gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” The complaint additionally alleged that the amendment made it impossible for teachers to avoid discrimination of students who identified with another sex because they were unable to “read those students minds.”

The plaintiff argued that the newly amended code was “in contravention to the rights of safety and privacy and amount to a serious invasion of those interests.” Additionally, it argued that non-transgender children have a legally protected right of privacy as well as a reasonable expectation to change their clothes without observation from children of the opposite sex. Because the complaint did not allege that the student was aware of any transgender student’s presence in the locker room, the pleading was inadequate to claim an invasion of privacy.

2. Privacy Rights of Transgender Students

In order for school districts to protect themselves from liability, they must understand that transgender students’ privacy interests are potentially violated.

166. Id. at 1.
167. See id.
168. Id.
169. Id. at 3.
170. Id.
when they are subjected to discriminatory situations. Moreover, federal law protects the privacy interests of all students.\textsuperscript{171}

Under the Family Educational Rights and Privacy Act (“FERPA”), students have the right to prohibit disclosure of their education record.\textsuperscript{172} The Department of Education interprets FERPA as applicable to the enforcement of Title IX with any conflicts favoring Title IX.\textsuperscript{173} Furthermore, courts have recognized that transgender people have a right to keep their transgender status private.\textsuperscript{174} In California, a transsexual woman brought a valid tort claim against a newspaper for revealing her transgender status.\textsuperscript{175} Additionally, a transgender inmate’s right to privacy was violated when officials revealed her transsexual status to other inmates.\textsuperscript{176}

When schools enact policies that prevent transgender students from using restrooms associated with their gender identity, schools simply draw attention to the students’ transgender status. When Nicole Maines was forced to use a gender-neutral restroom, other students followed her down the hall and watched her enter the gender-neutral restroom.\textsuperscript{177} When the AUSD required John Doe to sleep with his parent in a separate cabin, he received relentless teasing based on his transgender status.\textsuperscript{178} The school’s accommodation “called unwanted attention to [Doe’s] situation with other classmates.”\textsuperscript{179} When transgender students live their lives with one gender identity, but are forced to use a restroom that is inconsistent with their gender identity, it not only undermines their gender identity, but it also exposes their transgender status to the community.\textsuperscript{180} School districts may be liable for violating transgender students’ right to privacy if their actions expose students’ transgender status.

IV. STEPS TO REFORM

The federal legislature should reference these cases when drafting future legislation. Not only do the foregoing legal theories and cases demonstrate the inadequacy of current law, but they also provide a foundation for invalidating future legislation. Until the federal legislature provides more explicit guidance to schools concerning transgender students’ rights, discrimination against transgender students will continue and their legal remedies will remain insufficient.

\textsuperscript{171} Revised Sexual Harassment Guidance, \textit{supra} note 32, at vi.
\textsuperscript{172} \textit{See id.}\ at viii; 20 U.S.C. § 1232g.
\textsuperscript{173} Revised Sexual Harassment Guidance, \textit{supra} note 32, at vii.
\textsuperscript{175} \textit{Diaz}, 188 Cal. App. 3d. at 124-25, 137.
\textsuperscript{176} Powell v. Shriner, 175 F.3d 107, 111-12 (2d Cir. 1999).
\textsuperscript{177} Decision and Order on Defendant’s Motion for Summary Judgment, \textit{supra} note 22, at 5.
\textsuperscript{178} Letter from Asaf Orr, \textit{supra} note 39, at 2.
\textsuperscript{179} \textit{See Letter from Anurima Bhargava, \textit{supra} note 38, at 4.}
\textsuperscript{180} \textit{See Brief of Appellants Doe, \textit{supra} note 8, at 35-36.}
A. The Bathroom Bills: California vs. Arizona

Throughout the U.S., cities and states are beginning to enact legislation that protects transgender students’ right to use the bathroom corresponding with their gender identity.181 California is currently leading the way in this effort.182 In February 2013, Assembly Bill 1266 was introduced to amend section 221.5 of California’s Education Code.183 This bill was signed into law on August 12, 2013.184 Under this new law, California schools must allow transgender students to use sex-segregated facilities based on their gender identity - not their sex assigned at birth.185 It also requires schools to permit transgender students to participate in sex-segregated athletic teams and school programs based on their gender identity.186 The two issues, bathrooms and sports, coincide as most athletic teams are assigned sex-segregated locker rooms.187 If transgender students are not permitted to use the locker rooms associated with their gender identity, this could lead to their exclusion from participation in sports as a result of gender identity.188

Conversely, a bill was recently introduced in Arizona that reduced protections for transgender people.189 Although this bill did not become law, it may be proposed again in a future legislative session.190 While this bill did not focus on transgender students’ issues, if enacted, it would have broadly affected all transgender people.191 The bill viewed access to public facilities based on gender identity as a statewide concern and not a matter for local government regulation.192 While the bill would have allowed businesses and people to decide whether to allow restroom access based on gender identity, it would have also created criminal and civil immunity for anyone who denied a transgender person

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181. 3 COLO. CODE REGS. § 708-1:81.11(B) (2013) (“All covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity.”).
182. See ASSOC. PRESS, Calif. Lawmakers Pass K-12 Transgender- Rights Bill., CBSNEWS.COM (July 3, 2013, 8:57 PM), http://www.cbsnews.com/8301-201_162-57592278/calif-lawmakers-pass-k-12-transgender-rights-bill/ (“Some school districts around the country have implemented similar policies, but the bill’s author says AB1266 would mark the first time a state has mandated such treatment by statute.”).
186. Id.
187. See id.
188. See id.
191. Id.
bathroom access based on his or her gender identity. Furthermore, it would have voided any Arizona policy or ordinance that concerned facility access based on gender identity. Transgender rights activists viewed the bill as fostering hate for transgender people. This bill demonstrates the lack of acceptance that transgender students and individuals fight on a daily basis.

B. Two Steps to Reform

There are many hurdles that stand in the way of developing adequate federal legislation to fully protect transgender students. The first and largest hurdle is transgender individuals’ recognition as a suspect class. In Macy v. Holder, the EEOC held that, under Title VII, transgender people and those with a gender identity different than their sex at birth were already protected by current federal legislation. Since Price Waterhouse, people have argued that the word “sex” protects transgender people when they make a valid claim of gender stereotyping. But, as the EEOC explained, sex stereotyping is only one way to evidence sex discrimination - it is not an independent claim. Under the EEOC’s interpretation, if an individual is a transgender and is discriminated against based on his or her transgender status, the individual qualifies for protection from discrimination under the word “sex” and does not no need to include a separate claim of discrimination based on sex stereotyping. The EEOC explained that different formulations of discrimination based on sex are no different than discrimination based on different religions, including Christians or Muslims.

The EEOC further explains that it is not creating a new protected class by finding Title VII protects transgender people. For example, if it were to create a new protected class, it would also need an analogous class to provide protection to those who convert from Islam to Christianity or from Muslim to Islam. Finally, the EEOC explains discrimination against a transgender person is simply a “practical situation[] in which . . . characteristics are unlawfully taken into account.”

193. Id.
194. Id.
195. See Brynn Tannehill, Why Arizona’s Bathroom Bill Is Unconstitutional, HUFFPOST GAY VOICES (Mar. 28, 2013, 12:56 PM), http://www.huffingtonpost.com/brynn-tannehill/arizona-bathroom-bill_b_2970936.html (arguing if the bill were to become law in Arizona, it would ultimately be found unconstitutional under the precedent of Romer v. Evans).
197. Id. at *5.
198. Id. at *10.
199. See id.
200. Id. at *11.
201. Id.
203. Id.
The EEOC’s reasoning could easily be considered the most favorable legal theory for a transgender student currently encountering discrimination. But, the lower court’s decision in Nicole Maines’s case and other cases denied transgender people protection under Title IX, thus indicating that this is not widely accepted position. The Ninth Circuit made it clear in *Etsitty* that it does not consider transgender people to be a suspect class because they do not fit narrowly into a “plain language” meaning of the word “sex.” Consequently, adding gender identity as a suspect class under the Education Amendments would provide an initial foundation for providing transgender students access to bathrooms based on their gender identity.

Diana Elkind argued that transgender people should qualify as a suspect class based on the historical discrimination. Transgender people are discriminated against in employment and school settings, as evidenced by the cases discussed above. The lack of legislation to protect transgender people’s rights also exemplifies the discrimination they endure. Additionally, commentators argue that gender identity is an immutable trait—a trait given at birth that cannot be altered.

Legislators must ask themselves: is it enough to simply add gender identity as a suspect class? Many of the cases above took place in states with legislation that considers gender identity to be a suspect class. Furthermore, the Education Amendments contain a provision that provides for sex-segregated facilities that are separate but comparable. In the cases above, school districts relied on state laws that allow for sex-segregated facilities to justify denying transgender students access to sex-segregated facilities based on their gender identity. In order to remedy this issue, Congress should enact federal legislation and model it after Colorado Code Regulation section 708-1:81.1. Specifically, federal legislation should provide transgender students with the right to access sex-segregated facilities based on their gender identity. Congress should also review California Assembly Bill 1266, which creates a right for transgender students to access sex-segregated facilities based on their gender identity, and it includes locker rooms. Failure to consider the impact of locker rooms and athletic activities could allow for continued discrimination due to confusion regarding the law.

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204. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-23 (10th Cir. 2007).
205. *See Elkind, supra* note 26, at 902.
206. *See id.* at 903-04.
207. *See id.*
208. *E.g.*, *Etsitty*, 502 F.3d at 1227-28; Brief of Appellants Doc, *supra* note 8, at 18 (explaining sexual orientation is defined to encompass a person’s gender identity under MRSA).
209. 34 C.F.R. § 106.33 (West 2013).
C. Implementation by School Districts

As a practical matter, the school districts’ policies greatly affect the treatment of transgender students, regardless of applicable state and federal law. If the school district does not have a policy that correctly interprets and implements measures to protect transgender students, transgender students still risk discrimination.\(^{212}\) Considering the time that it would probably take for federal action to occur, effective school district policies are the most effective route to provide transgender students with bathroom access based on their gender identity.

The National Center for Transgender Equality and the Gay, Lesbian & Straight Education Network (“GLSEN”) recently released the Model District Policy on Transgender and Gender Nonconforming Students.\(^{213}\) The model policy provides school districts with a plan to ensure the protection of transgender students’ rights while attending school. The stated purpose is “to foster an educational environment that is safe and free from discrimination for all students, regardless of sex, sexual orientation, gender identity, or gender expression, and to facilitate compliance with local, state and federal laws concerning bullying, harassment and discrimination.”\(^{214}\)

Connecticut, Massachusetts, and Washington have issued school guidance in relation to gender identity.\(^{215}\) Connecticut provides guidance that permits schools to maintain sex-segregated facilities, but also states that students should be able to use the restroom based on their gender identity and not merely their sex.\(^{216}\) Washington’s and Massachusetts’s school guidance also states that students may access facilities based on their gender identity.\(^{217}\)

\(^{212}\) See generally Letter from Asaf Orr, supra note 39 (Although the school district was in California, where gender identity is protected class in the Education Code, the school district prevented a transgender student from accessing facilities consistent with his gender identity).


\(^{214}\) Id.


\(^{216}\) C O N N. S A F E S C H. C O A L I T I O N, supra note 215, at 8.

V. CONCLUSION

Transgender children deserve to attend public schools that are free from stress related to their gender identity. A positive school environment not only includes being free from harassment, but it also includes being free from worries regarding which restroom to use. Current legislation does not adequately protect the rights of transgender students. Until Congress enacts adequate federal legislation, transgender students will continue to struggle. Instead of receiving protection from educators, these children struggle based on a characteristic that they cannot control or escape.

It is time for federal legislation to lead the way to provide protection to transgender students. Congress cannot continue to lag behind the states. States are already enacting legislation to protect transgender students. If Congress reviews recent litigation from these states, it should be able to enact comprehensive legislation that creates and protects the right for transgender students to access bathrooms based on their gender identity.