

# CONTEMPT, STATUS, AND THE CRIMINALIZATION OF NON-CONFORMING GIRLS

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## INTRODUCTION

[W]e have had a strong heritage of being protective toward females in this country . . . [and it is against] our sensibility and values to have a fourteen-year-old girl engage in sexually promiscuous activity; *it's not the way we like to think about females in this country.*<sup>1</sup>

The number of girls arrested and incarcerated is growing at significantly greater rates than that of boys.<sup>2</sup> While boys and girls have

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<sup>1</sup> MEDA CHESNEY-LIND & RANDALL G. SHELDEN, GIRLS, DELINQUENCY, AND JUVENILE JUSTICE 175 (Sabra Horne et al. eds., 3d ed. 2004) (emphasis added) (quoting Hunter Hurst, Director, Nat'l Ctr. of Juvenile Justice (1975)) (internal quotation marks omitted).

<sup>2</sup> See, e.g., CHARLES PUZZANCHERA & SARAH HOCKENBERRY, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2010, at 11–12 (June 2013), available at <http://www.ncjj.org/pdf/jcsreports/jcs2010.pdf> (reporting that between 1985 and 2010, the number of delinquency cases involving girls increased 69% while those involving boys increased only 5%); Charles Puzzanchera & Benjamin Adams, *Juvenile Arrests 2009*, JUV. OFFENDERS & VICTIMS: NAT'L REP. SERIES BULL. (Office of Juvenile Justice & Delinquency Prevention), Dec. 2011, at 4, available at <http://www.ojjdp.gov/pubs/236477.pdf> (between 1985

very different pathways into the juvenile justice system, the system has been designed and implemented with only boys in mind. Girls' unique profiles and needs continue to be neglected.<sup>3</sup> The risk factors for girls diverge sharply from those for boys. For instance, the majority of girls in the system have suffered abuse and family trauma.<sup>4</sup> Most girls are arrested and detained for non-violent offenses.<sup>5</sup> They comprise the majority of minors arrested for only two offenses—running away and prostitution.<sup>6</sup> Indeed, a high percentage of girls come into the system for status offenses, conduct that is not criminal, such as truancy or running away.<sup>7</sup> Girls are punished more severely for these non-criminal acts than boys, and even than some girls and boys who commit actual criminal offenses.<sup>8</sup>

A discussion of meaningful systemic justice for adolescents, the subject of this Symposium, must include an examination of justice for girls.<sup>9</sup> Issues to consider include: Why does this “high needs, low risk” population continue to be prosecuted and incarcerated in large numbers? Does criminal action effectively address the victimization that often brings girls into the system? The status offense framework, and its disproportionate use against girls, can offer some insight. Specifically,

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and 2009 girls increased from 19% to 28% of the delinquency caseload); Liz Watson & Peter Edelman, *Improving the Juvenile Justice System for Girls: Lessons from the States*, 20 GEO. J. ON POVERTY L. & POL'Y 215, 216 (2013) (reporting that between 1991 and 2003, girls' rate of incarceration increased at a rate of 88% to 98% while boys increased only 23%). Although the juvenile justice system uses different terminology, I use the term incarceration here to refer to locked confinement. Minors can be incarcerated either pre-trial, generally referred to as “detention,” or post-adjudication, generally referred to as “placement.”

<sup>3</sup> Regarding the lack of services for girls in the juvenile justice system, see Watson & Edelman, *supra* note 2. The same is true for adult women; numerous scholars have noted the differential treatment of female and male adult defendants and victims. This trend, however, is even more pronounced in the case of adolescent girls because of their historic value as paternal or spousal property, and their related desirability for marriage. See Cynthia Godsoe, *Punishment as Protection* (2013) (unpublished manuscript) (on file with author).

<sup>4</sup> Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584, 1586, 1601–02 (2012).

<sup>5</sup> Although most boys also enter the system for minor offenses, they continue to comprise the vast majority of those minors arrested for violent and more serious offenses. Margaret A. Zahn et al., *Causes and Correlates of Girls' Delinquency*, GIRLS STUDY GROUP (Office of Juvenile Justice & Delinquency Prevention), Apr. 2010, at 2, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/226358.pdf> (noting that, overall, girls' delinquent acts tend to be “less chronic and often less serious than those of boys”).

<sup>6</sup> HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT* 191 (2006), available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

<sup>7</sup> *Id.* (noting that “[a] major difference between delinquency and status offense cases is the large proportion of status cases that involve females”). Status offenses are acts that are not criminal offenses, but for which minors may still be arrested and enter juvenile court. See statutory definitions, *infra* notes 43–50.

<sup>8</sup> See *infra* notes 70–74.

<sup>9</sup> Although the symposium focused on New York, this Article will discuss issues for girls more broadly.

the malleability of status offense definitions and the related “bootstrapped” incarceration of girls for violating court orders suggest the juvenile justice system is regularly used to regulate girls’ conformity to societal norms, rather than to address crime.

This Article will first outline the status offense system and its gendered nature, both historic and current.<sup>10</sup> It will then unpack status offenses, examining what harms and behaviors they are intended to address, and describing how they frequently operate to transform victimized girls into offenders. The Article will conclude by considering a recent illustration of the use of status offenses to regulate sexual behavior and obedience—New York State’s treatment of commercially sexually exploited children (CSEC).<sup>11</sup> New York and a few other states have decriminalized prostitution for some minors based on their inability to consent to sex under the law.<sup>12</sup> Nonetheless, exploited girls continue to be arrested and detained as status offenders. Failure to comply with the status offender system results in increasingly punitive interventions, rendering decriminalization illusory for many girls.

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<sup>10</sup> Different states refer to status offenders differently. New York State refers to them as Persons in Need of Supervision (PINS). Although most states now mandate different treatment for status offenders than for delinquents, the majority of states continue to process status offenders through the delinquency system, rather than the child protective or another system. See COAL. FOR JUVENILE JUSTICE, NATIONAL STANDARDS FOR THE CARE OF YOUTH CHARGED WITH STATUS OFFENSES 22 (2013), available at [http://www.juvjustice.org/sites/default/files/resource-files/National%20Standards%20for%20the%20Care%20of%20Youth%20Charged%20with%20Status%20Offenses%20FINAL\\_0.pdf](http://www.juvjustice.org/sites/default/files/resource-files/National%20Standards%20for%20the%20Care%20of%20Youth%20Charged%20with%20Status%20Offenses%20FINAL_0.pdf). Moreover, the consequences for the child of a status offense can often be very similar to those of a delinquency: e.g., institutionalization (in a group home, non-secure detention, mental health institution, or secure detention via bootstrapping); explicit governing of behavior by probation, the court, and others; and stigma (including for future delinquency and criminal proceedings). See *infra* note 50.

<sup>11</sup> The terminology used to refer to minors in the commercial sex industry is complicated. The Department of Justice has recommended they be referred to as CSEC to reflect their victimization. See William Adams et al., *Effects of Federal Legislation on the Commercial Sexual Exploitation of Children*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention), July 2010, at 8, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/228631.pdf>. Nonetheless, many police, prosecutors, and media continue to refer to them as juvenile prostitutes. See e.g., Letter from Rachel Lloyd, Chief Executive Officer, Girls Educ. & Mentoring Servs., ‘Prostitute’ Label Ignores Victimhood, available at [http://www.lohud.com/article/20121204/OPINION/312040024/-Prostitute-label-ignores-victimhood?odyssey=nav%7Chead&nclck\\_check=1](http://www.lohud.com/article/20121204/OPINION/312040024/-Prostitute-label-ignores-victimhood?odyssey=nav%7Chead&nclck_check=1).

<sup>12</sup> Every state has an age of consent, the average being sixteen years old. Adults who have sex with minors below the age of consent can be prosecuted for statutory rape. See Godsoe, *supra* note 3, at 6–7 nn.30–40.

## I. THE FEMINIZATION OF STATUS OFFENSES

A. *Creation and Purpose of the Juvenile Court System*

The use of the status offense system to control girls' behavior began with creation of the juvenile court itself. The first juvenile court, precursor to the current juvenile justice and child protective systems, was founded in Chicago in 1899.<sup>13</sup> By 1928 there was a juvenile court in virtually every state.<sup>14</sup> Designed to treat and rehabilitate rather than punish "wayward youth," these courts were to be guided by children's best interests and staffed by fatherly judges and a new profession of probation officers employing positivist criminology.<sup>15</sup> Yet these courts also had a darker side, acting as a mechanism of social control over those at risk for deviance but still young enough to be malleable.<sup>16</sup> Aimed in large part at "Americanizing" the exploding population of immigrant and low-income urban youth, the court focused on instilling middle class moral values and curbing street begging and prostitution.<sup>17</sup>

Merging the principles of child protection and crime control under the doctrine of *parens patriae*, judges were granted maximum discretion to order a broad range of outcomes for any child under its jurisdiction, including services, probation supervision of the child's home, and placement in a reformatory or a training school.<sup>18</sup> Accordingly, the

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<sup>13</sup> ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 139 (2d ed. 1969).

<sup>14</sup> The juvenile court movement spread very rapidly; for instance, twenty three facilities for girls opened between 1910 and 1920, in contrast to the average of five per decade between 1850 and 1910. CHESNEY-LIND & SHELDEN, *supra* note 1, at 167.

<sup>15</sup> The juvenile court and juvenile justice system were a product of the Progressive movement. The Progressive reform platform was broad, but many of the proposed reforms centered on children and adolescents as the nation's future: "The child was the carrier of tomorrow's hope whose innocence and freedom made him singularly receptive to education in rational, humane behavior. Protect him, nurture him, and in his manhood he would create that bright new world of the progressives' vision." ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, at 169 (1967). For more history, see, e.g., DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* xxvii-xxix (2006).

<sup>16</sup> PLATT, *supra* note 13; see also MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920*, at 158 (1995) (noting that the juvenile justice system was part of a middle class reform agenda "to control and reform the socially unacceptable habits of working-class youths and their parents"); MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* xxviii (2003) (noting that Chicago's juvenile court "aimed not merely to punish offenders but to assist and discipline entire urban populations"). In addition to focusing on lower-income families, interventions also focused on families of racial minorities. See Godsoe, *supra* note 3, at 34.

<sup>17</sup> PLATT, *supra* note 13, at 36-39.

<sup>18</sup> As one of the court's most ardent proponents opined: "Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities?" Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909); see also Franklin E. Zimring, *The*

court made no distinction between children who were neglected or abused, those who committed crimes (delinquents), and those who engaged in undesirable, but non-criminal, acts, such as running away from home (now termed “status offenders”).<sup>19</sup> Children of all types were frequently placed in “training schools” that were far more punitive than educational.<sup>20</sup> In fact, these placements were akin to criminal incarceration, with locked facilities, little to no rehabilitative services, and frequent corporal punishment and abuse.<sup>21</sup>

The new court was highly gendered from its inception.<sup>22</sup> Reformers were concerned about the exposure of working class and immigrant girls to sexual and material “temptations” due to their increasing entry into the workforce and the decline of strict parental control.<sup>23</sup> Girls’ parents also played a role, sometimes seeking out court intervention and teaming up with “protective officers” (otherwise known as “morals police”), juvenile court judges, and social workers to enforce sex role conformity in “immoral or wayward” girls.<sup>24</sup> Unlike boys, girls and

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*Common Thread: Diversion in Juvenile Justice*, 88 CALIF. L. REV. 2477, 2480 (2000) (“Broad and vague definitions of delinquency were favored so that all youth who needed help would fall within the new court’s jurisdiction. Large powers could be exercised in all cases so that help could be delivered to the deserving.” (footnote omitted)).

<sup>19</sup> Lee Teitelbaum, *Status Offenses and Status Offenders*, in *A CENTURY OF JUVENILE JUSTICE* 158, 159 (Rosenheim et al. eds., 2002) (noting that the court’s treatment of status offenders represents the juvenile court’s philosophy in its “pure[st] theory”).

<sup>20</sup> For an in-depth critique of the training schools, see PLATT, *supra* note 13, at 105; *see also* CHESNEY-LIND & SHELDEN, *supra* note 1, at 163 (documenting the widespread abuse in such facilities, the frequent use of solitary confinement, the drudgery work, and the lack of education).

<sup>21</sup> Incarceration for youth today, despite rhetoric around rehabilitation, remains similarly punitive.

<sup>22</sup> As criminologist Meda Chesney-Lind points out, an “obsession” with adolescent female sexuality was a significant impetus for creating the court and accompanying training schools. *See* CHESNEY-LIND & SHELDEN, *supra* note 1, at 165, 167, 172; *see also* RUTH M. ALEXANDER, *THE “GIRL PROBLEM”: FEMALE SEXUAL DELINQUENCY IN NEW YORK, 1900–1930* (1955); WILLRICH, *supra* note 16, at 209 (noting that juvenile courts often had jurisdiction over girls until an older age than they did over boys).

<sup>23</sup> Increased urbanization and a changing economy meant that working class girls no longer passed directly from the control of fathers to that of husbands; instead, many had contact with men through employment, school, and other interactions. These structural societal reforms were compounded by the decline of more informal community controls, heightening the “deep social anxiety” about the behavior of working class girls. ODEM, *supra* note 16, at 3–4, 20, 24, 45.

<sup>24</sup> Meda Chesney-Lind, *Judicial Enforcement of the Female Sex Role: The Family Court and the Female Delinquent*, 8 ISSUES CRIMINOLOGY 51, 55 (1973); *see also* ODEM, *supra* note 16, at 123 (noting that these police officers were tasked with arresting and detaining morally suspect girls). As to parents, 60% of parental complaints about girls centered on sexual misconduct versus only 8% of the complaints about boys. *Id.* at 176–78. The few boys reported by their parents for sexual misconduct usually were accused of “deviant” sexual behaviors such as molesting younger siblings or homosexuality. ALEXANDER, *supra* note 22, at 150.

young women overwhelmingly entered juvenile court for premarital sexual conduct or other “morals” violations.<sup>25</sup>

Two historical studies from Los Angeles and New York bear out this pattern.<sup>26</sup> In the early days of the Los Angeles juvenile court, 81% of girls were arrested for “moral or sexual offenses,” as compared to only 5% of boys.<sup>27</sup> Similarly, the majority of girls housed in a New York state reformatory in the early twentieth century were placed there on morals charges.<sup>28</sup> Most of this behavior was non-criminal, and instead consisted of violations of the prevailing gender norms such as dressing “provocatively,” wearing makeup, “flirting” in public places, going to dance halls unchaperoned, “coming home late at night,” “using obscene language,” “riding at night in automobiles without a chaperon,” masturbating, and “strutting about in a lascivious manner.”<sup>29</sup> Even girls who were clearly victims in cases of forcible or statutory rape were often subject to the same treatment, themselves blamed for the loss of their sexual purity.<sup>30</sup> Reclassified as moral offenders, their victimhood was erased.<sup>31</sup> The entire treatment of girls, no matter why they came under

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<sup>25</sup> John M. MacDonald & Meda Chesney-Lind, *Gender Bias and Juvenile Justice Revisited: A Multiyear Analysis*, 47 CRIME & DELINQ. 173, 174 (2001) (reporting that actual criminal offenses, such as theft or assault, triggered most boys' entrance into the system).

<sup>26</sup> ALEXANDER, *supra* note 22 (discussing New York); ODEM, *supra* note 16 (discussing Los Angeles).

<sup>27</sup> ODEM, *supra* note 16, at 136, 155–56 (noting that 63% of girls were arrested for “sex delinquency,” usually meaning premarital sex, and 18% for other “moral offenses”).

<sup>28</sup> ALEXANDER, *supra* note 22, at 30. Although a slight majority of the women in Alexander's study came into juvenile court on prostitution or solicitation charges, Alexander noted that many of these cases were not really prostitution cases but rather ones where working class girls engaged in voluntary sexual relationships with men. Refusing to believe that girls would voluntarily be sexually active, reformers, police, and judges “found rebellious working girls [to be] virtually indistinguishable from prostitutes.” *Id.* at 2, 4. This was further complicated by the fact that at the same time New York state widened the legal definition of prostitution to include both casual and commercial sex and gave great discretion to seek out immoral women. These vague and sweeping statutory definitions were in place until the wholesale revision of the state penal codes in 1967. *Id.* at 34, 54.

<sup>29</sup> ODEM, *supra* note 16, at 136; *see also* CHESNEY-LIND & SHELDEN, *supra* note 1, at 182 n.3 (summarizing research from juvenile court records in four cities); Steven Schlossman & Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARVARD EDUC. REV. 65 (1978).

<sup>30</sup> *See* CHESNEY-LIND & SHELDEN, *supra* note 1, at 167 (noting that “the concern about male sexuality more or less disappeared from sight, and the delinquent girl herself became the problem”). There were also serious enforcement problems on the part of male police and probation officers, who would often arrest the underage girl and release the man when coming upon an unmarried sexually active couple, particularly if the man was white. ODEM, *supra* note 16, at 64–65, 76, 155. ODEM detailed how even the purported victims of statutory rape were often detained in delinquent homes pending court proceedings, subjected to mandatory pelvic exams, interrogated about their sexual history, and blamed if they did not forcibly resist, despite their legal inability to consent. *Id.* at 67.

<sup>31</sup> This is also true of girls who came into the system as sexual offenders. Many of them displayed victim-like characteristics; for instance, 20% of female delinquents in the Los Angeles study were runaways, often from abusive family situations. *Id.* at 49, 61, 138 (noting that these girls often engaged in what is now termed “survival sex” for shelter or food).

the court's jurisdiction, was sexualized. Accordingly, girls detained for theft, running away, or disobeying their parents underwent mandatory pelvic exams and were tested for sexually transmitted infections to determine if they were sexually active.<sup>32</sup>

Girls accused of morals offenses were punished much more severely than boys, even though the latter were mostly arrested for actual criminal acts. Studies from across the country found that girls were less likely to be awarded a sentence of probation and more likely to be institutionalized, often for several years, in a reformatory or training school.<sup>33</sup> These reformatories aimed to direct girls back onto a virtuous and productive path by segregating them from men and other "temptations," training them for marriage and motherhood, and placing them as domestic servants or "mother's helpers" in private homes before they were finally released to their parents.<sup>34</sup> These harsh measures were believed to be warranted both for the girls' own sake, and for the greater social good.<sup>35</sup>

### B. *The Status Offender System*

This history sheds considerable light on the treatment of girls in the status offender system today. Although status offenses were distinguished from criminal acts and found unconstitutional as applied to adults in 1962, they continue to be robustly applied in the juvenile context.<sup>36</sup> Status offense cases petitioned to court increased slightly

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<sup>32</sup> *Id.* at 113, 136. This focus on sexuality placed all girls coming into court on the "whore" side of the Madonna/whore divide. See Godsoe, *supra* note 3, at 33 nn.237-43.

<sup>33</sup> ODEM, *supra* note 16, at 146, 156 (detailing that only 26% of girls received a sentence of probation versus 44% of boys, 47% of girls were removed from their homes and placed as domestics or institutionalized, and 33% of girls in her study of Los Angeles faced long term institutionalization versus only 21% of boys); see also CHESNEY-LIND & SHELDEN, *supra* note 1, at 167 (noting that in Chicago 50% of girls were sent to reformatories versus only 20% of boys).

<sup>34</sup> See, e.g., Sherman, *supra* note 4, at 1586.

<sup>35</sup> ALEXANDER, *supra* note 22, at 40, 42 (discussing the reformers' belief that "[t]ragically, most young working women failed to recognize how short was the distance between 'moral lapse' and prostitution; at once headstrong and naive, they did not realize that 'the girl who falls finds it almost impossible to regain her self-respect in communities where she is known.' . . . [and] every act of flirtation was a step 'on the road to destruction'").

<sup>36</sup> *Robinson v. California*, 370 U.S. 660 (1962). Indicating their ongoing salience for parents and state authority figures, a number of jurisdictions, including New York State, have recently raised the age of status offender jurisdiction. Like many increases in the powers of courts in status offenses, the New York change was largely driven by parents. Jane Spinak, *Can't We Do Something About These Kids?* 44 (unpublished manuscript) (on file with the author) (citing legislative history). It is difficult to determine the exact scope of status offense interventions; complete data about status offenders is difficult to find as many jurisdictions do not track this information or handle a portion of these cases informally. See ANTHONY SIMONES & SANDRA S. STONE, STATUS OFFENDERS IN GEORGIA'S JUVENILE JUSTICE SYSTEM 3 (Jan. 2012), available at <http://www.gahsc.org/nm/2012/181115927-Status-Offenders-in-Georgia-Juvenile-Justice->

between 1995 and 2010, with 137,000 cases filed in 2010.<sup>37</sup> In 2009, the most recent year for which comprehensive FBI statistics are available, there were 316,300 arrests of minors for just three categories of status offenses—running away, curfew violations, and liquor law violations.<sup>38</sup> Many children are removed from their homes for status offenses and placed into foster or group homes, psychiatric hospitals, or secure detention facilities, the latter being incarceration.<sup>39</sup> Although most state laws allow for the last option only after specific findings—for instance, that the youth will not appear in court<sup>40</sup>—in reality many judges place status offenders out of their homes when children are “defiant,” or when their parents refuse to take them home.<sup>41</sup>

There is still considerable use of the status offender systems in New York State. In 2001, the New York State Legislature raised the maximum age of eligibility from fifteen to seventeen, thus widening the scope of young people who could be potential status offenders. New York City implemented a successful diversion program in 2002. This resulted in an 80% decrease in court status offense filings in the first few years of the program.<sup>42</sup> Nonetheless, the percentage of young people placed in a juvenile justice facility who are status offenders in New York State as a whole is twice the national percentage.<sup>43</sup>

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System.pdf (noting this problem in Georgia). Thus, any reported numbers are very likely to be an underestimate.

<sup>37</sup> PUZZANCHERA & HOCKENBERRY, *supra* note 2, at 65 (also reporting that status offense cases involving girls increased 7% and boys 6%). The percentage of accused status offenders detained pending adjudication also increased by 54% between 1995 and 2008, although the percentage of those incarcerated post-adjudication decreased slightly during the same period. CHARLES PUZZANCHERA, BENJAMIN ADAMS & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2008, at 86 (July 2011), available at <http://www.ncjj.org/pdf/jcsreports/jcs2008.pdf>.

<sup>38</sup> Puzzanchera & Adams, *supra* note 2. The trend in recent years has been large increases in the number of cases brought to court for truancy and ungovernability, with a leveling off of runaway cases. PUZZANCHERA & HOCKENBERRY, *supra* note 2, at 68–69.

<sup>39</sup> For instance, in 2003, 20% of all minors (about 19,000 people) in juvenile justice facilities (non-secure and secure) were there on status offenses and technical violations. James Austin et al., *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention), Sept. 2005, at 1–3, available at <https://www.ncjrs.gov/pdffiles1/ojdp/208804.pdf>.

<sup>40</sup> See, e.g., N.Y. FAM. CT. ACT § 728(b) (McKinney 2013).

<sup>41</sup> This was my practice experience and is also reflected in the LEGAL AID SOCIETY JUVENILE RIGHTS PRACTICE MANUAL ON PINS REPRESENTATION 54–55 (on file with author).

<sup>42</sup> *The Family Assessment Program*, N.Y.C. ADMIN. FOR CHILD. SERVICES, [http://www.nyc.gov/html/acs/html/support\\_families/family\\_assessment\\_program.shtml](http://www.nyc.gov/html/acs/html/support_families/family_assessment_program.shtml) (last visited Nov. 10, 2013) (reporting data between 2002 and 2005).

<sup>43</sup> For instance, in 2010, there were 79,165 juveniles in residential placement; 3016 or 4% were status offenders. Sarah Hockenberry, *Juveniles in Residential Placement, 2010*, JUV. OFFENDERS & VICTIMS: NAT'L REP. SERIES BULL. (Office of Juvenile Justice & Delinquency Prevention), June 2013, at 3, available at <http://www.ncjj.org/pdf/CJRP/CJRP%202010.pdf>. In the same year in New York State, however, 9% of all detained juveniles and 13% of all committed juveniles were status offenders. *Id.* at 7, 10. Some of these young people may have been placed in non-secure detention, that is, a juvenile justice facility that is not locked. *But see*



The language in status offense statutes varies state by state, but most commonly focuses on “chronic or persistent truancy, running away, being ungovernable or incorrigible, violating curfew laws, or possessing alcohol or tobacco.”<sup>44</sup> Some statutory definitions have changed remarkably little over the last century, and many continue to specify morals offenses.<sup>45</sup> Rhode Island, for instance, defines a status offender in part as a minor “[w]ho habitually associates with dissolute, vicious, or immoral persons; [or w]ho is leading an immoral or vicious life.”<sup>46</sup> Similarly, New Hampshire includes a child “who engages in . . . sexualized behaviors that pose a danger to the child or others.”<sup>47</sup> Connecticut recently amended its status offender statute to identify adolescents who are sexually active with other adolescents as a class of children in need of services, as well as children who more generally “ha[ve] engaged in indecent or immoral conduct.”<sup>48</sup> Even those statutes not explicitly including sexual or moral violations, are broad and vague enough to capture virtually any adolescent (mis)behavior.<sup>49</sup> This is reflected in the New York statute which defines “person in need of supervision” (PINS) as “[a] person less than eighteen years of age who does not attend school . . . or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or

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Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. FOR SOC. JUST. 555, 561 (2009) (noting that during a 2006 “snapshot census” of youth in placement/incarceration, New York had the highest number of status offenders in locked facilities of any state).

<sup>44</sup> AM. BAR. ASS’N, CTR. FOR CHILDREN & THE LAW, JUVENILE STATUS OFFENSES FACT SHEET (2007), available at [http://act4jj.org/sites/default/files/ckfinder/files/factsheet\\_17.pdf](http://act4jj.org/sites/default/files/ckfinder/files/factsheet_17.pdf).

<sup>45</sup> Compare for instance the historical definition in the Tennessee juvenile code granting the court jurisdiction over young people “in danger of being brought up to lead an idle or immoral life,” CHESNEY-LIND & SHELDEN, *supra* note 1, at 165, with the current Ohio law defining a status offender in part as an “unruly child . . . who behaves in a manner as to injure or endanger the child’s own health or morals or the health or morals of others,” OHIO REV. CODE ANN. § 2151.022 (LexisNexis 2013). See also D.C. CODE § 16-2305.01 (2013) (citing the District of Columbia’s legislative findings as to status offenders that “[j]uveniles who are not under proper supervision and control or who are arrested for certain nonviolent offenses are likely to endanger their own health, morals, and welfare and the health, morals, and welfare of others”).

<sup>46</sup> R.I. GEN. LAWS § 14-1-3 (2013).

<sup>47</sup> N.H. REV. STAT. ANN. § 169-D:2 (2013).

<sup>48</sup> CONN. GEN. STAT. ANN. § 46b-120(5) (West 2013) (The statute was amended in 2007 to define a status offender in part to include a child who “is thirteen years of age or older and has engaged in sexual intercourse with another person and such other person is thirteen years of age or older and not more than two years older or younger than such child or youth”).

<sup>49</sup> For instance, in Illinois, a “minor requiring authoritative intervention” includes a minor under 18 years of age “who is (a) absent from home without consent of parent, guardian or custodian, or (b) beyond the control of his or her parent, guardian or custodian, in circumstances which constitute a substantial or immediate danger to the minor’s physical safety.” 705 ILL. COMP. STAT. 405/3-3 (2013). In Alabama, status offenses include, but are not limited to, the following: “(a) Truancy[;] (b) [v]iolations of municipal ordinances applicable only to children[;] (c) [r]unaway[;] (d) [b]eyond control.” ALA. CODE § 12-15-201 (2013).

other person legally responsible for such child's care, or other lawful authority . . . ."<sup>50</sup>

From the inception of juvenile courts until the mid-1970s, status offenders were essentially treated as delinquents, with courts often incarcerating them alongside minors who had committed crimes.<sup>51</sup> Growing concern about the mingling of status offenders with delinquent youth led Congress to prohibit the incarceration of status offenders in 1974.<sup>52</sup> This resulted in outcry from parents, police, and courts. These groups argued incarceration was needed to protect young people, particularly girls, from their own non-criminal bad behavior.<sup>53</sup> For instance, one juvenile court judge testified before a Congressional committee that courts needed the power to lock up status offenders, and wide discretion generally, to protect girls from sex and other harms: "Horror stories of chronic runaways who have been abused, raped, prostituted, and sometimes murdered should underscore the imperative of some ultimate, bottom-line authority over such youth."<sup>54</sup>

After considerable lobbying efforts, Congress amended the Juvenile Justice and Delinquency Prevention Act (JJDA) in 1980, adding the "valid court order" (VCO) exception.<sup>55</sup> Put simply, the VCO allows courts to incarcerate status offenders who violate a court order in locked facilities. Judges have the authority to, and often do, order status offenders to comply with certain conditions after adjudication. Common conditions include attending school, obeying one's parents, meeting curfews, and not running away, but courts can impose almost anything deemed to be within the very broad standard of the best

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<sup>50</sup> N.Y. FAM. CT. ACT § 712 (McKinney 2013).

<sup>51</sup> Cheryl Dalby, *Gender Bias Toward Status Offenders: A Paternalistic Agenda Carried Out Through the JJDA*, 12 LAW & INEQ. 429, 440 (1994).

<sup>52</sup> Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601–5792a (2012). The JJDA mandated states receiving federal funding to incarcerate status offenders and delinquents in separate facilities and to detain the former only in unlocked/nonsecure facilities.

<sup>53</sup> See, e.g., H.R. REP. NO. 96-946, at 76–77 (1980), *reprinted in* 1980 U.S.C.A.N. 6098 (court opinion read into the House debate wherein a juvenile court judge expressed frustration at his inability under the JJDA to detain a girl status offender who had repeatedly run away from group homes and treatment facilities that were unlocked).

<sup>54</sup> *Id.* at 30, 298–97.

<sup>55</sup> *Id.* These same groups, along with many parents' groups, also protested and continue to protest the deinstitutionalization of status offenders. However, there is increasingly a counter movement advocating the reform or dismantling of the status offender system. See *infra* notes 141–44. For instance, the National Council of Juvenile and Family Court Judges has called upon Congress to abolish it, as has the Department of Justice. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOLUTION REGARDING EFFORTS TO ENSURE AVAILABILITY OF EVIDENCE-BASED SERVICES TO MEET THE NEEDS OF STATUS OFFENDERS AND THEIR FAMILIES (July 20, 2010), available at [http://www.ncjfcj.org/sites/default/files/evidence-based%2520services.7.10.final\\_.pdf](http://www.ncjfcj.org/sites/default/files/evidence-based%2520services.7.10.final_.pdf); Letter from Ronald Welch, Assistant Att'y Gen. to Patrick J. Leahy, Senator (Apr. 15, 2010), available at <http://www.judiciary.senate.gov/resources/documents>.

interests of the child.<sup>56</sup> When a child violates the order, for instance by staying out past her curfew, the judge incarcerates her for violation of a court order, although she could not be incarcerated for the underlying status offense.

A recent study demonstrates that many of the ordered conditions are not realistic for these young people.<sup>57</sup> Indeed, the court orders are often a set-up for failure.<sup>58</sup> Nonetheless, judges have made considerable use of this “bootstrapping” jurisdiction, and have incarcerated many status offenders, particularly girls, for underlying charges that are not crimes.<sup>59</sup> For instance, between 1995 and 2010, the number of status offense cases where a child was incarcerated pending adjudication increased by 54.5%.<sup>60</sup> The largest relative increase was in runaway cases.<sup>61</sup> Mechanisms other than the VCO can also lead to incarceration, pending or post adjudication. These include the court’s inherent contempt powers, “crisis” or psychiatric holds particularly for runaways, reframing of running away as “escape” or another crime, or simply state laws or practices that violate the JJDPA.<sup>62</sup> Weak oversight by the Office

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<sup>56</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 205.66(a) (2013) (outlining possible terms and conditions of a suspended judgment dispositional order for a status offender, including but not limited to “attend school regularly and obey all rules and regulations of the school; obey all reasonable commands of the parent . . . ; avoid injurious or vicious activities; abstain from associating with named individuals; abstain from visiting designated places; . . . abstain from disruptive behavior in the home and in the community; . . . comply with such other reasonable terms and conditions as the court shall determine to be necessary or appropriate to ameliorate the [status offender] conduct.” (internal numerals omitted)).

<sup>57</sup> Pat Arthur, Senior Attorney, Nat’l Ctr. for Youth Law, *The Incarceration of Status Offenders Under the Valid Court Order Exception to the Juvenile Justice and Delinquency Prevention Act*, Presentation Before the First National Conference on Homeless Youth and the Law (June 18, 2008), available at [http://www.youthlaw.org/fileadmin/ncyl/youthlaw/juv\\_justice/Homeless\\_Youth\\_Presentation\\_2\\_.pdf](http://www.youthlaw.org/fileadmin/ncyl/youthlaw/juv_justice/Homeless_Youth_Presentation_2_.pdf).

<sup>58</sup> See Claire Shubik, *What Social Science Tells Us About Youth Who Commit Status Offenses: Practice Tips for Attorneys*, JUV. JUST. UPDATE (Am. Bar Ass’n Child Law Practice), Nov. 2010, at 139, available at [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/clp/artcollections/juvjust/status\\_offenses\\_research.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/clp/artcollections/juvjust/status_offenses_research.authcheckdam.pdf) (noting that unless court orders address the underlying reasons for minors’ behaviors, minors will be at great risk for violating orders and consequent punitive measures including incarceration).

<sup>59</sup> For instance, OJJDP reports about 12,000 annual uses of the VCO. COAL. FOR JUVENILE JUSTICE, *supra* note 10, at 12.

<sup>60</sup> PUZZANCHERA & HOCKENBERRY, *supra* note 2, at 77. *But see* COAL. FOR JUVENILE JUSTICE, *supra* note 10, at 6 (reporting that, according to “unofficial data” from the OJJDP, “the vast majority” of states are in compliance with the deinstitutionalization of status offenders).

<sup>61</sup> PUZZANCHERA & HOCKENBERRY, *supra* note 2, at 77.

<sup>62</sup> See *In re* Dependency of A.K., 174 P.3d 11 (Wash. 2007) (en banc) (inherent contempt powers); *In re* Bryan JJ, 572 N.Y.S.2d 106 (App. Div. 1991) (finding an escape delinquency charge where a status offender escaped from police custody). Numerous states allow the incarceration of status offenders beyond the VCO. See, e.g., STATE OF GEORGIA, REPORT OF THE SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS (Dec. 2012), available at <http://www.georgiacourts.org/files/Report%20of%20the%20Special%20Council%20on%20Criminal%20Justice%20Reform%20for%20Georgians%202012%20-%20FINAL.pdf> (reporting that Georgia law allows the secure detention of runaways and of adolescents previously adjudicated status offenders, regardless of risk, and for lengthy periods of thirty days). The cost and

of Juvenile Justice and Delinquency Prevention (OJJDP) compounds this problem, as experts report that states that violate the JJDPA by incarcerating status offenders are frequently not sanctioned.<sup>63</sup> Although incarceration is a quite frequent end result of status offense cases, status offenders often do not receive the procedural protections afforded to youth in the criminal system, such as appointment of a lawyer.<sup>64</sup> The myriad paths to the incarceration of status offenders help to explain New York's record in this regard. Although New York does not allow incarceration pursuant to a VCO, a 2006 national study of incarcerated status offenders found New York State had the highest number of status offenders in locked facilities—606 during a one-day census.<sup>65</sup>

The status offense system continues to be highly gendered. Girls comprise a much greater proportion of status offenders than of delinquency or criminal offenders,<sup>66</sup> with over half of all girls arrested for a non-crime, running away from home.<sup>67</sup> Girls consistently have

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unfairness of this practice very recently led Georgia to revise its statute to prohibit incarceration and “begin to limit the use of secure detention equivalent to jail” for status offenders. See Alessandra Meyer & Vidhya Ananthakrishnan, *Georgia's Step Forward: Transforming a Status Offense System to Help Children, Families, and Communities*, VERA INST. JUST. (May 30, 2013), <http://www.vera.org/blog/georgias-step-forward-transforming-status-offense-system>.

<sup>63</sup> Sanctions for non-compliance has been criticized as weak. See, e.g., *State Compliance with JJDP Act Core Requirements*, OFF. JUV. JUST. & DELINQ. PREVENTION, <http://www.ojjdp.gov/compliance/compliancedata.html> (last visited Dec. 7, 2013) (listing only three states sanctioned for non-compliance with the deinstitutionalization of status offenders in FY 2012, despite the widespread practice of institutionalizing them, as noted *supra*); see also John Kelly, *Would JJDPA Reforms Put Too Much Work on States?*, YOUTH TODAY (Aug. 6, 2010), [http://www.youthtoday.org/view\\_blog.cfm?blog\\_id=384](http://www.youthtoday.org/view_blog.cfm?blog_id=384) (reporting on the “fairly sobering view” juvenile justice experts presented about “the reality of state compliance with the [JJDPA]”). Compounding this problem is the fact that Reauthorization of the JJDPA is almost six years overdue. See Liz Ryan, *The Juvenile Justice Act Needs an Overhaul*, CRIME REP. (May 30, 2013, 10:00 AM), <http://www.thecrimereport.org/viewpoints/2013-05-time-to-reauthorize-the-juvenile-justice--delinquenc>.

<sup>64</sup> See Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [to] Education*, 3 DUKE F. FOR L. & SOC. CHANGE 139, 141 (2011) (noting that “[t]he rule of law . . . is often abused” in status offender proceedings).

<sup>65</sup> Arthur & Waugh, *supra* note 43 (outlining 2006 study).

<sup>66</sup> See Watson & Edelman, *supra* note 2, at 217 (“There is a significant body of literature chronicling girls’ pathways into the juvenile justice system. It describes the disproportionate detention and adjudication of girls for status offenses and technical violations of probation. Despite growing consensus about the need for alternatives to detention for status-offending youth, many of whom are girls, many status offenders, including girls, continue to receive inappropriately harsh treatment.” (footnote omitted)). Historically, girls have been ten times more likely than boys to be arrested for running away from home and 30.9 times more likely to be arrested for “incurability.” CHESNEY-LIND & SHELDEN, *supra* note 1, at 3, 190.

<sup>67</sup> Puzzanchera & Adams, *supra* note 2 (reporting that in 2009, girls were 55% of those arrested for running away from home and most other girls were arrested for non-violent property crimes); Watson & Edelman, *supra* note 2, at 228 (A recent study of Connecticut revealed that “[a]lmost half of the girls referred to the court system were first referred for status offenses. Eighty-eight percent of girls who were adjudicated delinquent and placed at the state’s only secure facility for adjudicated juveniles were status offenders.” (footnote omitted)). Girls comprise the majority of children who run away from home. *Homeless and Runaway Youth*,

comprised the majority of children brought to court for running away, and about half of those processed on truancy or ungovernability charges—far higher than their proportions among the delinquency population.<sup>68</sup> Girls are also disproportionately brought to court on a status offense for sexual conduct. For instance, in Connecticut, where sex between young adolescents is a status offense, almost double the number of cases were brought against girls than against boys in a one-year study.<sup>69</sup>

As they were historically, female status offenders continue to be more severely punished than boys. They are consistently more frequently incarcerated and more severely sanctioned for status offenses and related contempt charges.<sup>70</sup> For instance, the most recent OJJDP nationwide study found that girls comprised 40% of incarcerated status offenders and only 14% of incarcerated delinquents, and that girls served twice the amount of time incarcerated pre-trial for status offenses as boys did.<sup>71</sup> The most frequently incarcerated status offenders have until very recently been runaways, the majority of whom are girls.<sup>72</sup>

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NAT'L CONF. ST. LEGISLATURES (Oct. 1, 2013), <http://www.ncsl.org/issues-research/human-services/homeless-and-runaway-youth.aspx> (reporting that 75% of runaways are female).

<sup>68</sup> SNYDER & SICKMUND, *supra* note 6 (reporting that in cases between 1985 and 2002, girls made up 61% of runaway cases, 46% of truancy cases, and 46% of ungovernability cases). Runaway cases were less likely to be adjudicated status offenders than other types of cases, but were more likely to be severely sanctioned when they were adjudicated. *Id.* Girls also make up a rapidly increasing proportion of those petitioned as status offenders for curfew violations. PUZZANCHERA, ADAMS & SICKMUND, *supra* note 37, at 88 (noting the increase in girls of 42% versus boys of 22%).

<sup>69</sup> See FAMILIES WITH SERV. NEEDS ADVISORY BD., REPORT TO THE CONNECTICUT GENERAL ASSEMBLY 88 (Feb. 2008), available at <http://www.ctjja.org/resources/pdf/FWSN-advisorybd-report.pdf> (reporting 2007 data, 309 versus 165). Recently, numerous states are choosing to address “sexting,” or sending sexually explicit pictures by cell phone or social media, through the status offense system. For example, in 2001, Rhode Island enacted legislation which provides that “any violation of this act is deemed to be a status offense and shall be referred to the family court.” 2011 R.I. H.B. 5094 (2012) (codified at R.I. GEN. LAWS § 11-9-1.4 (2013)).

<sup>70</sup> See AM. BAR ASS'N & NAT'L BAR ASS'N, JUSTICE BY GENDER: THE LACK OF APPROPRIATE PREVENTION, DIVERSION AND TREATMENT ALTERNATIVES FOR GIRLS IN THE JUSTICE SYSTEM 17–18 (May 1, 2001), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_juvjus\\_justicebygenderweb.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_justicebygenderweb.authcheckdam.pdf) (finding that “[g]irls are more likely [than boys] to be detained for minor offenses . . . [especially] for technical violations of [court orders]”); Hockenberry, *supra* note 43 (noting that 12% of detained girls are status offenders in contrast to only 3% of boys); Watson & Edelman, *supra* note 2 (documenting that 88% of girls incarcerated in Connecticut were status offenders). The discrepancies were even larger historically. See Donna M. Bishop & Charles E. Frazier, *Gender Bias in Juvenile Justice Processing: Implications of the JJDP Act*, 82 J. CRIM. L. & CRIMINOLOGY 1162, 1163, 1181–83 (1992) (reporting results of a study indicating that female status offenders had a 63% probability of incarceration versus the 1.8% likelihood of other female minor offenders, and that female status offenders were more likely than males both to be placed in pre-adjudicatory detention and incarcerated after adjudication).

<sup>71</sup> SNYDER & SICKMUND, *supra* note 6, at 191–92, 208, 210.

<sup>72</sup> *Id.* (noting that runaway cases were the most likely category of status offense case to be incarcerated post-disposition between 1985 to 2002). Until recently, runaway cases comprised the majority of status offenders who were incarcerated pre-adjudication, but now liquor law

Female status offenders are not only punished more severely than male status offenders, but sometimes even more so than girls and boys who commit actual crimes.<sup>73</sup> Repeat status offenders, particularly runaways, are treated the most harshly—they are incarcerated more frequently and for longer periods than girls accused of other criminal offenses and boys accused of status offenses and contempt.<sup>74</sup>

## II. CONTEMPT FOR HIGH NEEDS, LOW RISK GIRLS

The longevity and widespread application of status offenses, despite repeated critiques, demonstrate that they fulfill a significant function for state actors. They represent perhaps the broadest state power over children and families.<sup>75</sup> Status offenses are quasi-criminal in most jurisdictions, with offenders subject to arrest on warrants, often processed through probation, and many ultimately incarcerated.<sup>76</sup> Criminalization is usually only deemed appropriate where there is harmful conduct which society wishes to deter and/or where punishment is deemed to be deserved.<sup>77</sup> Accordingly, the criminal and

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violations and truancy cases have surpassed them. David Finkelhor & Richard Ormrod, *Prostitution of Juveniles: Patterns from NIBRS*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention), June 2004, at 2, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/203946.pdf> (detailing data from 1997 to 2004).

<sup>73</sup> See, e.g., Watson & Edelman, *supra* note 2 (noting that “girls are far more likely than boys to be detained for non-serious offenses. In 2006, technical probation violations and status offenses accounted for 25% of boys’ detentions, but 35% of girls” (footnote omitted)). A 2001 ABA report noted that despite their lower recidivism rates, girls were more likely than boys to return to detention on a contempt or violation of probation charge. AM. BAR ASS’N & NAT’L BAR ASS’N, *supra* note 70, at 20.

<sup>74</sup> See Spinak, *supra* note 36, at 41 (outlining studies documenting the harsh treatment of runaways); *supra* note 73.

<sup>75</sup> Spinak, *supra* note 36, at 8, 21 (noting that “[t]he extraordinary power of the [juvenile] court to use its discretion to control behavior of both children and adults . . . is nowhere more starkly apparent than in status offense cases”).

<sup>76</sup> See *supra* note 10 (outlining the use of status offense history in criminal sentencing and bail procedures). Most jurisdictions continue to approach status offenders in a more punitive way. The term status offender is itself illustrative, and although many jurisdictions use terms like child or person “in need of protection,” the youth are processed through juvenile court as offenders not victims. Status offenses also bring considerable stigma. See, e.g., AM. BAR ASS’N, COMM’N ON YOUTH AT RISK, COMM’N ON HOMELESSNESS AND POVERTY, JUDICIAL DIV., REPORT TO HOUSE OF DELEGATES (2001), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/docs/109a.authcheckdam.doc>. Several jurisdictions, however, have recently reformed their status offense systems to divert cases from court and focus more on the provision of social services. The results thus far have been promising. See, e.g., VERA INST. OF JUSTICE, CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE (Dec. 2009), available at <http://www.vera.org/sites/default/files/resources/downloads/Charting-a-new-course-A-blueprint-for-transforming-juvenile-justice-in-New-York-State.pdf>.

<sup>77</sup> See Michael T. Cahill, *Punishment Pluralism*, in RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 25 (Mark D. White ed., 2010).

juvenile justice systems are organized according to harm or risk of harm to others. For instance, sentences take into account the seriousness of a particular crime, including level of violence, amount of property involved, and other relevant factors. The status offense system, however, turns these guiding principles upside down— status-offending girls who have committed no crimes, the adolescents who are least likely to harm others—often experience harsher punishment than their peers who have committed crimes.

These girls not only pose a very low risk to others, but also are very vulnerable, often presenting with a high level of specialized needs.<sup>78</sup> As noted above, many girls enter the system after running away from home.<sup>79</sup> Girls run away more frequently than boys for two reasons: their higher rates of sexual abuse by family members and parents' stricter regulation of girls, which results in greater family discord.<sup>80</sup> Even those who are not specifically identified as runaways often have a history of abuse or family discord.<sup>81</sup> Tellingly, whereas most male status offenders are reported by school officials or law enforcement, the majority of girl status offenders have historically been reported by their own parents.<sup>82</sup>

Even if authorities recognize that a child's behavior may not be her fault alone, the status offender system in most states continues to focus on blaming and pathologizing the child rather than addressing the problems of the family as a whole. This leads to extremely punitive results. For instance, as a Legal Aid attorney in the early 2000s, I represented a thirteen-year-old girl whose mother brought a petition against her because she was not obeying her mother and was "hanging out" with older boys. The mother had three other daughters, all of whom had been brought to court as status offenders; three of the four were placed out of their home. Such a case is about family dysfunction rather than one disobedient child. Nonetheless, in this and other cases, the system ignores the reasons why girls disobey their parents, or leave

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<sup>78</sup> Judges and other system actors sometimes recognize this. *See, e.g.*, Spinak, *supra* note 36, at 52 (citing a judge from Denver, Colorado acknowledging that most status offenders who were incarcerated "were at risk to no one but themselves").

<sup>79</sup> *See supra* notes 5–6.

<sup>80</sup> Regarding their reasons for running away, see HEATHER HAMMER, DAVID FINKELHOR & ANDREA J. SEDLAK, RUNAWAY/THROWN AWAY CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS (Oct. 2002), available at <https://www.ncjrs.gov/html/ojjdp/nismart/04> (the most recent in-depth study of runaway children). The parental "double standard" in disciplining sons and daughters also explains in large part the greater parental use of status offenses against girls. Barry C. Feld, *Violent Girls or Relabeled Status Offenders?: An Alternative Interpretation of the Data*, 55 CRIME & DELINQ. 241 (2009).

<sup>81</sup> LAURIE SCHAFFNER, GIRLS IN TROUBLE WITH THE LAW 2 (2006) (noting that the majority of girls in the juvenile justice system have a history of physical or sexual abuse); SNYDER & SICKMUND, *supra* note 6 (noting different risk factors for boys and girls).

<sup>82</sup> CHESNEY-LIND & SHELDEN, *supra* note 1, at 188. Recent data does not break down the source of reports by gender of the minor.

their homes for the streets.<sup>83</sup> Instead, it focuses on girls' defiance to parental and court authority, transforming them from victims to offenders.<sup>84</sup>

This trend has not decreased with the prohibition on incarcerating status offenders. Professor Barry Feld has persuasively demonstrated how the desire to incarcerate runaway and other misbehaving girls has led to the widespread relabeling of girls' behavior in delinquency terms.<sup>85</sup> One common illustration of this is the substitution of assault charges for incorrigibility charges when a girl has a physical altercation with a family member.<sup>86</sup> As the girl is brought in on delinquency rather than status offender charges, she can be incarcerated with no need to bootstrap via the VCO exception or to violate the JJDPA. Even status offender diversion programs have had the likely unintended consequence of increasing the regulation of girls' behavior.<sup>87</sup> Girls who could not otherwise have been brought on a status offense charge may end up in court if they, and/or their families, do not comply with the diversion program's informal interventions.<sup>88</sup> Both the relabeling of status offenses as delinquent acts, and the increased use of the status offender system generally, have disproportionately affected girls of color.<sup>89</sup>

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<sup>83</sup> In New York, and in some other states, courts may convert a status offense proceeding to a neglect proceeding when appropriate. *See, e.g.*, N.Y. FAM. CT. ACT § 716 (McKinney 2013). This did not, however, occur in the case I described above, nor does it occur as frequently as it should.

<sup>84</sup> As one expert describes it: "Status offenders test judge's limits and their failure to comply with court orders may be perceived as an affront to judicial power." JESSICA R. KENDALL, ABA CTR. ON CHILDREN & THE LAW, FAMILIES IN NEED OF CRITICAL ASSISTANCE 12 n.37 (2007), available at [http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/2007\\_families\\_in\\_need\\_book.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/2007_families_in_need_book.authcheckdam.pdf). The system can, however, be harmful to parents as well. Parents frequently access the system when directed to do so by authorities. In a "race to the courthouse," parents are advised to report their child as a disobedient runaway or truant before the parents are themselves reported for neglect. Parents who access the system for help often unknowingly cede the power to direct their children's lives, what Professor Jane Spinak terms the "double edged sword" of status offense jurisdiction. Spinak, *supra* note 36, at 3, 43.

<sup>85</sup> This is particularly true pre-trial. *See supra* notes 70-71 and accompanying text (documenting the greater proportion of female status offenders who are detained in locked facilities pretrial).

<sup>86</sup> Feld, *supra* note 80, at 241.

<sup>87</sup> Barry C. Feld, *Girls in the Juvenile Justice System*, in THE DELINQUENT GIRL 225, 239 (Margaret A. Zahn, ed., 2009).

<sup>88</sup> SHARON LERNER & BARBARA SOLOW, "THERE'S NO SUCH PLACE": THE FAMILY ASSESSMENT PROGRAM, PINS AND THE LIMITS OF SUPPORT SERVICES FOR FAMILIES WITH TEENS IN NEW YORK CITY (Jan. 2007), available at [http://www.newschool.edu/milano/nyc affairs/documents/PINS\\_Report.pdf](http://www.newschool.edu/milano/nyc affairs/documents/PINS_Report.pdf); *see also In re Sharon D.*, 710 N.Y.S.2d 205, 206 (App. Div. 2000) (upholding a PINS petition against Sharon for truancy where "[the girl] and her mother demonstrated an unwillingness to cooperate with a voluntary diversion program as they twice failed to appear for an initial screening").

<sup>89</sup> Feld, *supra* note 87, at 244-45.



What underlies this widespread use of the status offense system and bootstrapped incarceration to address these high needs, low risk girls? Most official sources offer a protectionist rationale.<sup>90</sup> Girls, particularly runaways, are more at risk of harm than boys. This risk is real,<sup>91</sup> and the use of the status offense system often increases after a well publicized tragedy involving a troubled girl. For example, after the murder of a thirteen-year-old girl named Becca who had repeatedly run away from her home and from foster care, Washington State enacted “Becca’s Bill.” The bill reinstated a harsh status offense system in the state and allowed police and courts to impose secure, i.e. locked, “crisis holds” for up to five days.<sup>92</sup> In the two years after Becca’s Bill was enacted, the number of status offense petitions filed in Washington State increased 600%, and detention of status offenders increased eight fold.<sup>93</sup>

Many system actors, including police and judges, are genuinely concerned about these adolescents. Nonetheless, the status offense system, with its lack of services and harsh consequences, is neither an effective nor just intervention.<sup>94</sup> Clinical studies have repeatedly shown that secure confinement is particularly ineffective at deterring minor criminal offenses, and that the most successful interventions for status offenses are community-based and rehabilitative.<sup>95</sup> Relatedly, studies show that interventions into troubled families are more successful when they do not entail court involvement.<sup>96</sup>

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<sup>90</sup> See, e.g., *In re Dependency of A.K.*, 174 P.3d 11, 14–15 (Wash. 2007) (en banc) (quoting a trial court discussion of one status offender, a runaway girl: “The stakes are high at this point [Y.H.] appears headed for a very dangerous life style which includes gangs, drugs and sex to the exclusion of stability, safety and education. . . . We are risking a catastrophe with her future if we are unable to formulate an adequate response to her bad choices.” (alterations in original)).

<sup>91</sup> COVENANT HOUSE, HOMELESSNESS, SURVIVAL SEX AND HUMAN TRAFFICKING: AS EXPERIENCED BY THE YOUTH OF COVENANT HOUSE NEW YORK (May 2013).

<sup>92</sup> Tiffany Zwicker Eggers, *The “Becca Bill” Would Not Have Saved Becca: Washington State’s Treatment of Young Female Offenders*, 16 LAW & INEQ. 219, 222–23 (1998); see also Alison G. Ivey, Comment, *Washington’s Becca Bill: The Costs of Empowering Parents*, 20 SEATTLE U. L. REV. 125 (1996) (noting that the legislature later passed the “Becca Too” bill, allowing for additional sanctions against status offenders for contempt). Washington had previously been the first state in the country to largely dismantle its status offender system.

<sup>93</sup> Feld, *supra* note 87; see also Eggers, *supra* note 92.

<sup>94</sup> See CHESNEY-LIND & SHELDEN, *supra* note 1, at 177–78 (quoting a New York City police officer lamenting that the prohibition on incarcerating status offenders has made “[t]he job of getting runaways off the street . . . ‘almost impossible’” and noting his concern about the “danger” runaways may be in).

<sup>95</sup> See KENDALL, *supra* note 84, at 8 (collecting studies and reporting that youth held in large incarcerated settings have the highest recidivism rates). The status offender system, and related incarceration, is similarly ineffective at addressing the underlying causes of runaway behavior. COAL. FOR JUVENILE JUSTICE, *supra* note 10, at 84; CLAIRE SHUBIK & AJAY KHASHU, VERA INST. OF JUSTICE, A STUDY OF NEW YORK CITY’S FAMILY ASSESSMENT PROGRAM (Dec. 2005), available at [http://www.vera.org/sites/default/files/resources/downloads/323\\_595.pdf](http://www.vera.org/sites/default/files/resources/downloads/323_595.pdf).

<sup>96</sup> See SHUBIK & KHASHU, *supra* note 95.

The protective purpose of status offenses is also belied by the lack of services, particularly safe housing with support programs.<sup>97</sup> The lack of meaningful services for high-needs youth and their families channels non-criminal but troubled youth, mostly girls, into the status offender system. Indeed, the system operates largely as a one-way ratchet to involvement in the juvenile justice system, particularly for repeat offenders such as chronic runaways. As one probation officer described it: “if you arrest the parents, then you have to shelter the kids. . . . So . . . the police just make the kids go away and . . . the numbers [of status offenders] have just been increasing tremendously . . . .”<sup>98</sup> Judges also frequently conclude that incarceration is “justified, primarily because of a dearth of viable alternatives.”<sup>99</sup>

Involvement in this punitive system fails to address the underlying social issues, such as sexual or physical abuse, substance abuse, and family discord. It is counterproductive, as it retraumatizes and further stigmatizes these girls.<sup>100</sup> This is particularly true of runaways. As one court concluded in critiquing the incarceration of status offenders on

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<sup>97</sup> The shortage of appropriate services for girls in the juvenile justice system, particularly those who have been sexually abused and/or otherwise traumatized, is well documented. See, e.g., Watson & Edelman, *supra* note 2 (observing that the large increase in girls’ institutionalization in the last decade “may . . . signal the lack of appropriate community-based alternatives to detention and residential facilities for girls”); see also ALIDA V. MERLO & JOYCELYN M. POLLOCK, WOMEN, LAW, AND SOCIAL CONTROL 281 (2006) (noting “consistent reports of inadequate community-based programs to meet these needs”). There is also a documented lack of services for status offenders, or more broadly adolescents and their families, even in jurisdictions attempting to reform their status offender systems. See, e.g., LERNER & SOLOW, *supra* note 88, at 17–18 (detailing the lack of services and the concomitant “limits of reform” of the NYC status offender diversion program).

<sup>98</sup> Feld, *supra* note 87, at 272 n.4 (first alteration in original).

<sup>99</sup> STATE OF GEORGIA, *supra* note 62, at 8. This is particularly true as to runaways, who urgently need safe shelter and “protection from predatory adults.” *Id.* at 9 (detailing the lack of safe houses or therapeutic living placement for children, and how this frustrates judges, often compelling them to incarcerate status offenders).

<sup>100</sup> Incarceration of youth, particularly of status offenders who have not committed a crime, likely worsens their behavior, through contact with more serious offenders, lack of psychological and other therapeutic services, and the youths’ anger at authorities who have intervened in such a punitive way. Accordingly, it likely has an anti-rehabilitative effect. See ANNIE SALSICH & JENNIFER TRONE, FROM COURTS TO COMMUNITIES: THE RIGHT RESPONSE TO TRUANCY, RUNNING AWAY, AND OTHER STATUS OFFENSES 4 (Dec. 2013) (summarizing research). Moreover, deterrence by incarceration is particularly ineffective for low-risk, low-level offenders. THE ANNIE E. CASEY FOUND., NO PLACE FOR KIDS (2011), available at [http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ\\_NoPlaceForKids\\_Full.pdf](http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf); see also AM. BAR ASS’N, REPORT: ABA YOUTH AT RISK INITIATIVE AND RELEVANT ABA POLICY 8–9 (Aug. 2007), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2007/annual/docs/hundredfourc.doc> (“Research shows that punitive approaches, such as secure detention, are ineffective at reducing recidivism, stigmatize youth, and cost significantly more than pre-court diversion services, the latter of which results in better outcomes for youth and families.”). Moreover, girls are at risk of particular harms when incarcerated. For instance, they are at higher risk of sexual assault. SNYDER & SICKMUND, *supra* note 6, at 231 (reporting that girls are 34% of the reported victims of sexual assault in prison, whereas they comprise only 11% of the minors in custody).

contempt and other grounds, “detention does not have an ameliorative effect on runaway behavior, and, in fact, often exacerbates the problem. The record in [the instant] case bears this out: repeated detention of these [girls] did not stop them from running away.”<sup>101</sup> In fact, a harsh status offense system allowing for incarceration, as in Washington State after Becca’s Bill, likely would not have prevented Becca’s tragic end. Like many runaway children, Becca was a victim of sexual abuse who had run away from home.<sup>102</sup> She had bounced from placement to placement, engaging at times in prostitution and drug abuse, and had never been offered appropriate services.<sup>103</sup>

The status offender system, however, is not merely used to warehouse troubled adolescent girls. It also attempts to reform them into “appropriate” young women. This social control function of status offenses has become more pronounced in recent decades.<sup>104</sup> The malleability and breadth of status offense definitions include almost any adolescent behavior. Yet tellingly, the girls who end up in the system are not a random sample of teenage girls. Instead, they are frequently those who violate gender norms of obedience and sexual purity.<sup>105</sup>

This pattern is borne out in New York State and New York City. For instance, a recent study of the N.Y.C. status offense system found that parents sought assistance from the status offender diversion program for boys most often for truancy, and for girls for other behaviors, such as staying out late at night.<sup>106</sup> Typical are these cases from around the state:<sup>107</sup> (1) Jennifer was adjudicated a status offender

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<sup>101</sup> *In re* Dependency of A.K., 174 P.3d 11, 22 (Wash. 2007) (en banc) (Madsen, J., concurring) (footnote omitted) (citing amicus brief by American Academy of Child and Adolescent Psychiatry).

<sup>102</sup> Eggers, *supra* note 92, at 219–25.

<sup>103</sup> *Id.*

<sup>104</sup> Teitelbaum, *supra* 19, at 171 (noting that status offense jurisdiction serves “as an adjunct to police control of minors more than as a vehicle for parental support”).

<sup>105</sup> See *infra* notes 108–13. They are also disproportionately girls of color. PUZZANCHERA, ADAMS & SICKMUND, *supra* note 37, at 81 (reporting that every category of status offender reflects racial disproportionality). Also demonstrating this dynamic, lesbian, gay, transgender, and bisexual youth are disproportionately represented in the status offender system. Shubik, *supra* note 58.

<sup>106</sup> ROOHI CHOUDHRY, VERA INST. OF JUSTICE, THE FAMILY ASSESSMENT PROGRAM: TRAJECTORIES AND EFFECTS 13–14 (Dec. 2007), available at [http://www.vera.org/sites/default/files/resources/downloads/FAP\\_II\\_Tracking\\_Study\\_FINAL.pdf](http://www.vera.org/sites/default/files/resources/downloads/FAP_II_Tracking_Study_FINAL.pdf) (noting 47% of girls said they were brought in for late nights, whereas only 16% of males were); see also JESSE SOUWEINE & AJAY KHASHU, VERA INST. OF JUSTICE, CHANGING THE PINS SYSTEM IN NEW YORK: A STUDY OF THE IMPLICATIONS OF RAISING THE AGE LIMIT FOR PERSONS IN NEED OF SUPERVISION (PINS) 8 (July 2, 2001), available at [http://www.vera.org/sites/default/files/resources/downloads/pins\\_report.pdf](http://www.vera.org/sites/default/files/resources/downloads/pins_report.pdf) (noting that girls comprise the majority of runaways in NYC); ERIC WEINGARTNER ET AL., VERA INST. OF JUSTICE, A STUDY OF THE PINS SYSTEM IN NEW YORK CITY: RESULTS AND IMPLICATIONS (March 2002), available at [http://www.vera.org/sites/default/files/resources/downloads/159\\_243.pdf](http://www.vera.org/sites/default/files/resources/downloads/159_243.pdf).

<sup>107</sup> The majority of published status offender cases involve girls, usually brought into the system because of runaway, disobedient, and/or sexual behaviors.

and placed out of her home because she “was in serious need of immediate intervention and treatment to address her multifaceted problems and risky behaviors ranging from chronic truancy and drug use to acts of self-injury and inappropriate sexual conduct;”<sup>108</sup> (2) Giselle, who was “about 13 or 14 years old,” was incarcerated for the night under the New York “runaway statute,” and later adjudicated delinquent, because a police officer had probable cause to believe she was a runaway given that she was observed late at night with “a substantially older man whose appearance and odor indicated marijuana use;”<sup>109</sup> (3) Jessie was adjudicated a status offender and placed out of her home for, among other things, running away, being out of the control of her parents and having “unprotected sexual relations, causing her to become pregnant;”<sup>110</sup> (4) Ashlie was adjudicated a status offender and placed out of her home for being “truant, ungovernable, habitually disobedient and l[y]ing to her mother about her whereabouts.”<sup>111</sup> She ran away from home repeatedly “and often took up residence with a potentially dangerous boyfriend.”<sup>112</sup> Similarly, (5) Shana was adjudicated a status offender after she ran away from her placement in a foster care group home after being told that she could not leave to spend time with her boyfriend.<sup>113</sup>

As it did historically, the status offender system grants parents the power of the state to “control their ‘unruly’ daughters.”<sup>114</sup> Police, probation officers, and judges find dealing with non-violent girls more difficult than working with boys. Not surprisingly then, they usually support parents’ punitive view of their troubled daughters, deeming these girls partially responsible for their own abuse, and accusing them of “making inappropriate lifestyle choices,” and “whining too much.”<sup>115</sup> In short, most girls enter the system as punishment for their sexual and/or defiant behavior, rather than as a result of harm they have caused to others. The vague definitions of status offenses, lack of procedural protections, and tremendous built-in discretion, allow police and courts

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<sup>108</sup> *In re Jennifer QQ.*, 880 N.Y.S.2d 219, 221 (App. Div. 2009).

<sup>109</sup> *In re Giselle F.*, 707 N.Y.S.2d 103, 104–05 (App. Div. 2000). The “runaway statute” is N.Y. FAM. CT. ACT § 718 (McKinney 2013).

<sup>110</sup> *In re Jessie EE.*, 938 N.Y.S.2d 218, 219 (App. Div. 2012).

<sup>111</sup> *In re Ashlie B.*, 830 N.Y.S.2d 809, 810 (App. Div. 2007).

<sup>112</sup> *Id.* at 811.

<sup>113</sup> *In re Shana R.*, No. S-02531-03, 2003 WL 21212586 (N.Y. Fam. Ct. May 7, 2003); *see also In re Sonya LL.*, 861 N.Y.S.2d 463, 465 (App. Div. 2008) (stating that Sonya was adjudicated a PIN and placed in residential treatment after she “disobeyed and verbally abused her mother, physically attacked her mother or acted violently by screaming and throwing things,” and a month of unspecified diversion services failed).

<sup>114</sup> Feld, *supra* note 87, at 235.

<sup>115</sup> *Id.* at 244 (describing studies of probation officers who find girls “manipulative” and uncooperative”); *see also* Shubik, *supra* note 58, at 140 (noting that minors who runaway often “frustrate” judges and others).

to facilitate this widespread regulation of non-conforming girls in a “low visibility” manner “without any accountability.”<sup>116</sup>

### III. THE REGULATION OF COMMERCIALY SEXUALLY EXPLOITED GIRLS

The treatment of commercially sexually exploited children (CSEC) in some states provides a current example of the status offense system as norms-enforcer. Until very recently, CSEC in every state were criminally liable for prostitution, despite being below the age of consent and being considered victims under anti-trafficking laws.<sup>117</sup> Boys, and in larger number, girls, continue to be routinely arrested and prosecuted for prostitution across the country.<sup>118</sup> Beginning in 2008, however, a handful of states have partially decriminalized juvenile prostitution.<sup>119</sup> New York was the first state to pass a “Safe Harbor” statute and, as of June 2013, ten other states had enacted similar legislation.<sup>120</sup> A number of these states, including New York, are diverting some exploited children from the delinquency/criminal system directly to the status offender system.<sup>121</sup> All but one state use the status offender system to

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<sup>116</sup> Feld, *supra* note 87. A related trend is the largely hidden pathologization of adolescent responses to trauma or disobedience. This includes parents “voluntarily” admitting their children to private facilities for non-criminal offenses. *See id.* at 260–62 (reporting that of the 89% of girls in private facilities being held for non-criminal offenses, over 25% were voluntarily committed by their parents, whereas under 15% of boys in private facilities were voluntarily admitted by their parents). There is, however, recent increased attention to the status offender system, as evidenced by a comprehensive recent report, *see* COAL. FOR JUVENILE JUSTICE, *supra* note 10, and the development of a Status Offense Reform Center at the Vera Institute for Justice, *see* STATUS OFFENSE REFORM CENTER, <http://www.statusoffensereform.org> (last visited Jan. 11, 2014).

<sup>117</sup> Godsoe, *supra* note 3, at 9–11 (outlining data indicating that at least a hundred thousand minors are estimated to be exploited nationwide and that thousands are arrested and incarcerated for prostitution each year).

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

<sup>119</sup> Arguments underlying this movement include the discrepancy between trafficking and statutory rape laws and prostitution prosecutions of minors and these minors’ histories of trauma and abuse. *See id.*

<sup>120</sup> CONN. GEN. STAT. § 53a-82 (2013); FLORIDA SAFE HARBOR ACT, 2012 Fla. Sess. Law Serv. Ch. 2012-105 (codified at FLA. STAT. §§ 39.001, 39.401, 409.1678, 800.04 (2013)); 720 ILL. COMP. STAT. 5/11-14(d) (2013); MASS. GEN. LAWS ch. 119, § 39L (2013); MICH. COMP. LAWS § 750.448 (2013); MINN. STAT. § 260B.007(6)(c) (2013) (effective Aug. 1, 2014); N.J. STAT. ANN. § 2A:4A-71(b) (West 2013); N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2013); TENN. CODE ANN. § 39-13-513(d) (2013); VT. STAT. ANN. tit. 13, § 2652(c)(1)(B) (2013); WASH. REV. CODE § 13.40.070(7) (2013).

<sup>121</sup> FAM. CT. § 311.4(3). I say divert “some” exploited minors from the criminal system because only two states, Illinois and Tennessee, have fully decriminalized prostitution for all minors. 720 ILL. COMP. STAT. 5/11-14(d); TENN. CODE ANN. § 39-13-513(d). A few states provide immunity from prosecution for all children under a certain age, for instance sixteen years old. *See, e.g.*, CONN. GEN. STAT. § 53a-82; MICH. COMP. LAWS § 750.448; MINN. STAT. § 260B.007(6)(c). Half the safe harbor laws, however, retain discretion to prosecute children of any age for prostitution, under certain circumstances. This discretion is often broad and linked to obedience of court orders and other mandates. *See, e.g.*, MASS. GEN. LAWS ch. 119, § 39L(c)

gain jurisdiction over CSEC, although their statutes do not explicitly designate the status offense system as the appropriate route for these children.<sup>122</sup>

Decriminalization, even if partial, is undoubtedly a positive step in the treatment of exploited girls. The status offender system allows courts to retain jurisdiction over minors to mandate or encourage them to receive social services, while bringing less stigma and collateral consequences than a criminal adjudication. It sends a message to the community, and most importantly to prostituted children themselves, that they are not criminal offenders.

There are, however, numerous drawbacks to using the status offender system to address the needs of CSEC including: the still largely punitive nature of the system; the breadth of discretion for police, courts, and others to selectively enforce and punish girls; the failure of this system to provide appropriate services and help troubled girls on to a more stable path; and the obscuration of the systemic social problems giving rise to this population. These flaws are outlined further below.

The status offender system in most jurisdictions remains largely punitive in nature. Incarceration is bootstrapped for these non-criminal acts, particularly for runaway girls, a population which overlaps significantly with exploited children. Incarceration contains few to no therapeutic services, particularly for girls, and girls are sometimes subject to abuse by staff and other juveniles.<sup>123</sup> The consequences of a status offense finding can have many ramifications including limiting access to educational opportunities and increasing punishment for future offenses.

The tremendous discretion built into the system raises the problem of selective enforcement. Because virtually any adolescent can meet the vague definition of a status offender, and because the options for disposition of such cases are so broad, the system operates to punish girls already marginalized.<sup>124</sup> This discretion can be, and is, used to punish exploited girls who do not act in an appropriately "victim-like"

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(granting the court discretion to restore delinquency or criminal proceedings against a prostituted child "[i]f the child fails to substantially comply with the conditions of probation or if the child's welfare or safety so requires"); N.Y. FAM. CT. ACT § 311.4(3) (allowing the court discretion to continue criminal or delinquency proceedings against prostituted girls if they have previously been found delinquent for prostitution or if the girl "expresses a current unwillingness to cooperate with specialized services for sexually exploited youth . . . [or at any time] is not in substantial compliance with a lawful order of the court").

<sup>122</sup> Only Illinois appears to give the child protection system exclusive jurisdiction over CSEC.

<sup>123</sup> Leslie Acoca, *Outside/Inside: The Violation of American Girls at Home, on the Streets, and in the Juvenile Justice System*, 44 CRIME & DELINQ. 561, 561, 576-79 (1998) (noting patterns of abuse by staff in youth facilities, including physical abuse and referring to girls as "bitch," "tramp," or "ho").

<sup>124</sup> To cite just one example, female status offenders are disproportionately from racial minorities. See *supra* note 105.

manner.<sup>125</sup> The stigma attached to status offenses continues to send the message that not all prostituted girls are worthy of the status or protection of victimhood.

The stigmatizing nature of the status offender system is compounded by its lack of appropriate services. While most girls in the system have a high level of needs, girls who are commercially sexually exploited are particularly vulnerable. As one expert observed, “[p]rostitution is a continuation of the victim’s sexual exploitation, not the beginning.”<sup>126</sup> They are young, entering “the life” on average between the ages of eleven and fourteen.<sup>127</sup> They are disproportionately from racial minorities and low-income backgrounds.<sup>128</sup> Most have experienced sexual or physical abuse or family trauma before entering the commercial sex industry.<sup>129</sup> Prostitution is closely connected to running away, with about 60% of prostituted children nationwide having a runaway history.<sup>130</sup> Similarly, a recent New York State study reported that 61% of runaway girls had engaged in survival sex and estimated that 30% to 70% of shelter and street youth in the state are involved in prostitution.<sup>131</sup> Girls often run away because of past abuse and, once away from home, are particularly vulnerable to pimps and

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<sup>125</sup> Godsoe, *supra* note 3, at 37 n.281, 42–43 nn.324–28 (reporting on studies detailing police officers’ propensity to designate as offenders exploited minors who behave in less “victim-like” ways).

<sup>126</sup> Chris Swecker, Assistant Dir., Criminal Investigative Div., Fed. Bureau of Investigation, Testimony Before the Commission on Security and Cooperation in Europe, United States Helsinki Comm’n (June 7, 2005), available at <http://www.fbi.gov/news/testimony/exploiting-americans-on-american-soil-domestic-trafficking-exposed>; see also CBS Investigates, *Child Prostitutes Rescued By FBI, Police*, CBSNEWS (Feb. 23, 2009, 2:09 PM), [http://www.cbsnews.com/2100-201\\_162-4821772.html](http://www.cbsnews.com/2100-201_162-4821772.html) (quoting Daniel Roberts, an FBI Assistant Director: “Many of them are what they call ‘throwaway children’—they’re children that really nobody wants. They have no family structures, they have no viable friends.”).

<sup>127</sup> See Swecker, *supra* note 126 (listing average age of entry as eleven to fourteen, with some children entering as young as nine years old); see also FRANCES GRAGG ET AL., NEW YORK PREVALENCE STUDY OF COMMERCIAL SEXUALLY EXPLOITED CHILDREN: FINAL REPORT ii (Apr. 18, 2007), available at <http://ocfs.ny.gov/main/reports/csec-2007.pdf> (reporting that 28% of children engaged in prostitution in upstate New York counties were thirteen or younger); Finkelhor & Ormrod, *supra* note 72, at 6 (detailing that between 41% and 46% of girls arrested in prostitution offenses in one study were fifteen years old or younger, and 8% were under twelve).

<sup>128</sup> The New York state study, for instance, found that 67% of prostituted children in New York were black. GRAGG ET AL., *supra* note 127, at 86. Thirty-seven percent of the children identified in NYC were immigrant. *Id.* at 29.

<sup>129</sup> See Godsoe, *supra* note 3, at 11–12 nn.70–74 (collecting research and reporting that up to 70% to 90% of exploited girls have a history of sexual abuse, and the majority have also experienced physical abuse and/or extreme family dysfunction).

<sup>130</sup> See Ian Urbina, *Running in the Shadows—For Runaways, Sex Buys Survival*, N.Y. TIMES, Oct. 26, 2009, at A1 (describing how many runaway youth enter prostitution as the only way to feed and house themselves).

<sup>131</sup> See GRAGG ET AL., *supra* note 127; see also COVENANT HOUSE, *supra* note 91 (finding that one in four homeless youth in NYC either was a victim of trafficking or had engaged in survival sex at some point in her life). Half of these children traded sex for shelter. *Id.*

others who wish to exploit them.<sup>132</sup> These adults frequently wait outside homeless shelters or troll bus stations, knowing there are not enough safe places for young people to sleep.<sup>133</sup>

Yet the status offense system in most, if not all, states does not include any supports for girls attempting to exit the commercial sex industry.<sup>134</sup> The recovery from exploitation is neither direct nor quick, and necessitates secure housing, as well as specialized psychological and other services.<sup>135</sup> Housing remains the key barrier to exit, and yet there are scant resources across the country.<sup>136</sup> In fact, most of these children have previously been involved in state systems, systems which have failed to help them. For instance, a recent New York State study found that about 85% of prostituted children had prior child protection involvement, with 75% having been in foster care.<sup>137</sup> Many have also previously been in the status offender system. Although national statistics are unavailable, New York data indicates that 45% of CSEC had previously been placed out of their homes on a status offense

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<sup>132</sup> Between 1.6 and 2.8 million children run away each year in the United States, with the majority being girls. *Homeless and Runaway Youth*, *supra* note 67 (reporting that 75% of runaways are female). Experts estimate that a runaway will be approached in an attempt to lure her into prostitution within forty-eight to seventy-two hours of leaving home. See HEATHER J. CLAWSON ET AL., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE (Aug. 2009), available at <http://aspe.hhs.gov/hsp/07/humantrafficking/litrev/#Minor>.

<sup>133</sup> Pimps and johns prey on youth outside of homeless shelters, knowing that some youth will be turned away due to a lack of space. COVENANT HOUSE, *supra* note 91. Similarly, when I represented youth in status offense proceedings, pimps would recruit girls outside of the group home for status offenders in Brooklyn, New York.

<sup>134</sup> See *supra* notes 3, 98 (outlining the lack of services for girls in the status offender system). Many state Safe Harbor Acts make services and safe housing contingent on funding, which is often not available. See, e.g., FLA. STAT. § 409.1678 (2013).

<sup>135</sup> See, e.g., CAL. CHILD WELFARE COUNCIL, ENDING THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA (2013), available at <http://www.chhs.ca.gov/CWCDOC/Ending%20CSEC%20-%20A%20Call%20for%20Multi-System%20Collaboration%20in%20CA%20-%20February%202013.pdf> (outlining essential services including short- and long-term safe housing, trauma-informed mental health and other services). Girls are not only traumatized going into the commercial sex industry, see *supra* notes 126–33 and accompanying text, but many suffer additional physical and psychological trauma from being prostituted. RICHARD J. ESTES & NEIL ALAN WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO 63 (Feb. 20, 2002), available at [http://www.sp2.upenn.edu/restes/CSEC\\_Files/Complete\\_CSEC\\_020220.pdf](http://www.sp2.upenn.edu/restes/CSEC_Files/Complete_CSEC_020220.pdf) (reporting high rates of mental illness and substance abuse for CSEC); Finkelhor & Ormrod, *supra* note 72, at 8–9 (reporting that almost three quarters of girls involved in prostitution also suffered other crimes against them, mostly violent crimes). The Safe Harbor Act in New York, for instance, continues to lack the requisite funding for safe housing.

<sup>136</sup> See, e.g., KRISTIN M. FINKLEA ET AL., CONG. RESEARCH SERV., R41878, SEX TRAFFICKING OF CHILDREN IN THE UNITED STATES: OVERVIEW AND ISSUES FOR CONGRESS 25 (2011), available at <http://www.fas.org/sgp/crs/misc/R41878.pdf> (2010 Senate Committee testimony reporting that only twelve organizations throughout the country provide specialized services for prostituted children, with only fifty beds among them); see also COVENANT HOUSE, *supra* note 91 (documenting shortages of beds in the NYC youth shelter system).

<sup>137</sup> GRAGG ET AL., *supra* note 127, at 31, 42, 86.



petition.<sup>138</sup> Since specialized services and safe housing are not available, the status offender system is often a set-up for failure. Consequently, well-meaning police and courts, frustrated with the lack of safe places to refer girls, will likely continue to use their discretion to channel girls onto the more punitive delinquency track.<sup>139</sup>

Finally, addressing the complex social problem of child sexual exploitation via a status offense against these adolescents obscures the issue's systemic causes. Blame is placed on individual girls or their families, rather than more broadly. Poverty and a lack of social supports for parents of adolescents, however, contribute greatly to this problem. Notably, the very strong correlation between a history of abuse and juvenile prostitution has led experts to conclude that the societal failure to effectively respond to child maltreatment contributes to CSEC.<sup>140</sup> Ignoring these societal causes of commercial sexual exploitation makes effectively addressing the problem virtually impossible.

#### CONCLUSION

It is clear that the status offender system is broken. Its myriad problems have led numerous commentators to recommend reform of the status offender system, or even its complete dismantling.<sup>141</sup> There are promising signs to this end: Some jurisdictions are changing their systems to make them less formal and punitive, and the calls for change

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<sup>138</sup> *Id.* at 86. Many also had previous involvement, including detention or incarceration, with the juvenile justice system. *Id.*

<sup>139</sup> Godsoe, *supra* note 3; see also Tamar R. Birkhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1085 (2011) (noting that CSEC are prosecuted and incarcerated because the lack of services and safe housing leads authorities to believe it is their "only option").

<sup>140</sup> See e.g., Kimberly J. Mitchell et al., *Conceptualizing Juvenile Prostitution as Child Maltreatment: Findings from the National Juvenile Prostitution Study*, 15 CHILD MALTREATMENT 18, 19 (2010).

<sup>141</sup> See, e.g., COAL. FOR JUVENILE JUSTICE, *supra* note 10 (outlining principles for reforming the status offender system including a ban on any incarceration for status offenses or related violations of court orders). These debates are not new. For instance, Judge Bazelon called for the removal of status offenses from juvenile court in 1975. See Gordon Bazemore, Leslie A. Leip & Jeanne Stinchcomb, *Boundary Changes and the Nexus Between Formal and Informal Social Control: Truancy Intervention as a Case Study in Criminal Justice Expansionism*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 521, 527 (2004). For more recent commentators, see, for example, KENDALL, *supra* note 84, at 15 (outlining calls for change and some reform efforts); Rivkin, *supra* note 64, at 145 (arguing that the status offense of truancy should be decriminalized). Reforms to remove status offenders from court and incarceration can also result in great cost savings. For example, Florida's shift to diversion in handling of status offenders saved the state an estimated \$160 million in one year from out-of-home placement costs alone. SALSICH & TRONE, *supra* note 100, at 5.

now come from the very top.<sup>142</sup> Nonetheless, only a handful of states are engaged in large-scale reforms and the JJDP A remains underfunded.

The shortcomings of the traditional status offender system render it an inappropriate framework for addressing the complex social problem of the commercial sexual exploitation of children. A full outline of possible frameworks for addressing CSEC is beyond the scope of this Article, but I do want to briefly note two alternatives. Either a child protection approach or a public health framework could bring better services to exploited children, without the stigma and “slippery slope” into punishment of the status offense system.<sup>143</sup> These alternative frameworks also would convey the valuable message to exploited children and the public that these children are not culpable for their exploitation, that they are instead victims.

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<sup>142</sup> Robert Listenbee, the newly appointed head of the OJJDP has unequivocally stated his agency’s position:

We believe firmly that children should be kept in school and out of courts. We don’t think that kids who are truant, kids who are runaways, kids who engage in various sort of violations of the code of conduct that aren’t criminal offenses—we don’t think they belong in the juvenile justice system.

Carrie Johnson, *Justice Department Pushes New Thinking on Kids and Crime*, NPR (Sept. 26, 2013, 12:01 AM), <http://www.npr.org/blogs/thetwo-way/2013/09/26/226227416/justice-department-pushes-new-thinking-on-kids-and-crime>.

<sup>143</sup> See Godsoe, *supra* note 3 (outlining other approaches); see also Mary P. Alexander et al., *Community and Mental Health Support of Juvenile Victims of Prostitution*, in 1 MEDICAL, LEGAL, AND SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 397 (Sharon W. Cooper et al. eds., 2005).