# CHINS Procedural Reform Analysis

**for**

## Senator Karen Spilka


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## Executive Summary

The Massachusetts CHINS (Children in Need of Services) statute was enacted in 1973 in the wake of a nation-wide reevaluation of the juvenile justice system. The statute was designed, among other things, to create a non-punitive proceeding to deal with status offenders, in addition to providing services that would hopefully keep children from continuing negative behaviors. These goals, however, are not being met by the current statute. The aim of this report is to assist State Senator Karen Spilka in her efforts to redraft the statute and resolve the current problems. It is our hope that the reformed statute will feature a less adversarial and more holistic proceeding while simultaneously allowing the state to protect both the best interests of the children and the fundamental rights of their parents.

This law office began by examining the system as it exists today and identifying the concrete problems which could be addressed by the Senator's reform. Our effort was hampered by a lack of statistical data, but the numbers which we were able to obtain revealed that 54 percent of children adjudicated as needing services are arraigned in either adult or juvenile court within three years. This leads to the inevitable conclusion that the CHINS system is failing in its goal of diverting youth from the criminal system. The numbers indicate that the failures of the CHINS system are felt most readily by underprivileged youth and youth of color in this state since both groups are much more likely to be adjudicated as status offenders than those youth who are white or affluent. Over the last ten years, there has been a 168 percent increase in the amount of CHINS petitions issued for female status offenders. Yet, despite this remarkable increase, there have been no subsequent changes made to the system in an effort to respond to the unique needs of girls and young women.

In an effort to respond to these problems, we looked to various jurisdictions, both

international and domestic, for both philosophical guidance and empirical evidence. We examined the United Nations' Convention on the Rights of the Child (CRC) and determined that its emphasis on the child's best interest, as well as on the child's interest in self-determination, are very relevant to the issue of CHINS reform. We also believe that the CHINS system could benefit from reform which stresses the importance of parents and the family in the lives of children, as espoused by the Preamble to the CRC. We then examined the juvenile justice systems of New Zealand, Scotland, and the Scandinavian countries and found that they all shared a commitment to non-adversarial proceedings, while encouraging the full participation of the child's family in crafting a solution to the child's problem.

We looked to the status offender programs from various states to assess how they were handling their problems. We found that New York State utilizes short-term crisis intervention teams to divert cases away from their court system; in addition, they make sure that parents are well informed before they make the decision to file for a petition. We discovered that Oregon State, in an effort to reduce the disparate impact of its status offender system on minority youth, implemented a system of rigorous data collection and analysis. We also looked at the truancy program in the state of Ohio which features mediation as an alternative to a formal judicial proceeding . Finally we looked at the system in Alaska which is currently experimenting with youth courts.

Based on our research, we put together a model for CHINS reform in Massachusetts. Our model incorporates features drawn from other status offender systems nationwide, and is informed by the rights afforded children and their parents by the CRC. It utilizes methods proven successful in other jurisdictions, while also incorporating cutting-edge techniques drawn from other areas of the law, such as collaborative lawyering.

Our CHINS model refashions the process by which a child is deemed to be in need of services. We have added an initial intervention during which the State will move swiftly to assess the situation and screen the child for abuse. In an effort to keep the system as non-adversarial as possible, we have provided the option of informal and voluntary proceedings that would take place at a child's home and would involve discussions between the parents, the State and a neutral third party in an effort to find a solution to the child's problem. We propose that family group conferences be made available to some families. If no resolution is reached at the informal level, the parties have the option of utilizing a collaborative lawyering approach as opposed to a traditional judicial proceeding.

Senator Spilka also asked this law office to address four specific procedural questions. We first addressed the question of standing to file a CHINS petition and settled on a multi-tiered approach which would accord different levels of standing to different parties at different levels of the proceedings. The police, schools, and probation officers retain standing to file petitions and present evidence, but they would not be as involved as the parents. We recommend that children retain standing so that their opinions are heard and taken into consideration. Finally, parents should have standing at every stage of the proceedings, given their fundamental role within the family and the importance of their participation in working out a solution to the child's problem.

We were asked whether the State should grant indigent parents a statutory right to counsel and we concluded that it should. Since both the United States Supreme Court and the Supreme Judicial Court of Massachusetts have recognized that parents' interest in their relationship with their children is a fundamental right, it is essential that this right be safeguarded during CHINS proceedings. Given the burden placed on indigent parents by court

proceedings, and society's interest in preserving parent's fundamental liberty interest in their children, the presumption against statutory counsel should be overcome.

We were asked to comment on the due process requirements surrounding loss of custody and the issue of 72 hour respites. We are firm in our belief that due process requires that a hearing occur before any loss of custody.

Finally, we were asked who should prosecute a CHINS petition. It is our position that the petitioner should not be asked to prosecute a case since it pits them against the child. If the petitioner were the parent this would sow family division; if the petitioner were the State, it would too closely mirror a criminal proceeding. We feel that the prosecution of a CHINS petition should be placed in the hands of a court-appointed third party who can ensure that the interests of both the petitioner and the child are served.

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# Introduction

When children and youths commit status offenses, their actions are often the result of deeper and more complex problems at home. In order to more effectively aid status offenders, the CHINS system needs to look beyond the surface symptoms and instead approach the situation in a holistic manner. Parents, schools, and communities need to work together and communicate effectively so that a more complete view of the child or young adult is produced. No problem is isolated. With a greater understanding of the status offender, and his or her own personal struggles, the CHINS program will have greater success.

The parent/child relationship has evolved in this country from an almost absolute property right to a court recognized status.[1] This status is one which may be altered or abrogated by the state in furtherance of legitimate societal concerns for the protection of the child's best interests.[2] However, the state may not take action without due process and it must comply with any relevant statutes.[3] While the community in which the family resides can contribute to the problems that affect a child and his or her family, communities may also be a source of support for families of status offenders through diversionary programs such as youth courts. In the end, however, it is the state that is ultimately responsible for ensuring that children, families, and communities are healthy and functional, while not sacrificing substantive rights to achieve those goals.

Internationally, countries which have signed and implemented the United Nations Convention on the Rights of the Child (CRC) view the "best interests of the child" standard as

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[1] *Anguis v. Superior Court In and For Maricopa County*, 429 P.2d 702 (Ariz. 1967); *Elliott v. Elliott*, 69 S.E.2d 224 (N.C. 1952); *Looper v. McManus*, 581 P.2d 487 (Okla. 1978); *Com. ex rel. Berg v. Catholic Bureau*, 76 A.2d 427 (Penn. 1950); *Com. ex rel. Teitelbaum v. Teitelbaum*, 50 A.2d 713 (Penn. 1947).

[2] *In re N.M.*, 233 A.2d 188 (NJ. 1967). *Davis v. Smith*, 583 S.W.2d 37 (Ark. 1979).

[3] *Anguis*, 429 P.2d 702; *Davis*, 583 S.W.2d 37.

paramount in a juvenile justice context. According to the CRC, children are not considered their parents' property, but are individuals entitled to certain basic rights.[4] The family's role is to protect these basic rights. Parties to the CRC have implemented the principles of the Convention differently, however, with various interpretations of the state and community's role in helping ensure children's rights.

The CHINS system was established to help the youth of Massachusetts who have been classified as status offenders. However, the current system is largely unsuccessful in its dual goals of assisting youth and diverting them from entering the criminal justice system. Most concerning is the sad reality that rather than strengthening families that are already in crisis, CHINS may deepen familial fractures. A more holistic system, based upon national and international models and theory, might serve to ameliorate the problems (problems that are only exacerbated by the ubiquitous issues of race, gender, and class).

When diversionary programs, which are preferred, do not work to address the problems in a status offender's home environment, the state needs to ensure that the procedure focuses on addressing the needs of all the various players. National and international models demonstrate that ideally CHINS cases should end up in juvenile court only as a last resort. Currently, the court in a CHINS proceeding has access to the most oppressive of enforcement mechanisms: the power to remove a child from the custody of his or her parents. Such drastic results are all the more reason to create a family centric model for CHINS.

Perhaps the most troubling aspect of the CHINS system is that the majority of status offenders who reach the final stages of the CHINS process and appear before a judge are generally poor and of color. Increasingly, this population is also female, as girls have seen a

[4] Cris R. Revaz, *An Introduction to the U.N. Convention on the Rights of the Child* in The U.N. Convention on the Rights of the Child 9, 10 (Transnational Publishers ed., 2006).

steep rise in CHINS petitions over the past number of years. Wealthy parents and communities have more resources to invest in youths before a crisis occurs. Therefore, it is a small and specific segment of the population that reaches the trial stage, a segment that is the most universally disenfranchised. Parents from lower socioeconomic backgrounds do not have the resources to help their children without state intervention. These parents are also at the greatest risk of losing the right and ability to raise their children if custody is taken away at a CHINS proceeding. In order to empower families, it is important to provide procedural protection which shield the most vulnerable and contribute to achieving the goals of CHINS.

In Lois Weithorn's 2005 Hofstra Law Review article, *Envisioning Second-Order Change in America's Response to Troubled and Troublesome Youth*,[5] the author contends that the traditional strategies for changing our response to troubled and troublesome youth are flawed and that more of the same is unlikely to bring us closer to reaching our goals.[6] Weithorn distinguished first-order change, a change that occurs within a given system which itself remains unchanged, from second-order-change, which changes the system itself. The purpose of this paper is to examine strategies for implementing both first order and second order changes which would ensure that the goals of the CHINS program are more fully realized.

## Historical Roots of the Juvenile Justice System

Since the colonial era, the United States has struggled to create a system that deals with juveniles in an appropriate and just manner. All too often, the systems in place have served to criminalize difference and separate families, and Massachusetts juvenile law is still heavily

[5] Lois A. Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 Hofstra L. Rev. 1305 (Summer 2005).
[6] *Id*. at 313.

influenced by that history. For example, in 1971, the Supreme Judicial Court cited the stubborn child laws of the colonial era in *Commonwealth v. Brasher*.[7] Despite the many advances and legal innovations of the last four hundred years, the Puritan conception of a stubborn child still forms the basis for the modern vision of that child.

In order to create a new conception of children and families and the rights that they should have, it is necessary to begin with an understanding of what has come before and the values that informed the past's vision.

## *The Juvenile Justice System: A Broad Perspective*

Most social scientists believe the idea of children being objects different from adults originated in the early 1600s.[8] A noted and influential study entitled *Centuries of Childhood: A Social History of Family Life* (1962), states that before that time, "the awareness of the particular nature of childhood . . . which distinguishes the child from the adult . . . was lacking." [9] Before the 18th century, parents had almost complete control over their children. This notion of parents having almost absolute power over their children is explained by the noted legal theorist Blackstone:

> The *power* of parents over their children is derived from . . . their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it[10]

The idea that a child needed to compensate his or her parents for taking care of them was based on the fact that the parents owned their children as a form of property and were entitled to

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[7] *Commonwealth v. Brasher*, 359 Mass. 550, 552 (1971).
[8] John Seymour, *An Uncontrollable' Child*, in *Children's Rights and the Law* 109 (Alston, Phillip, Parker, Stephen, Seymour, John, Clarendon, eds., 1992).
[9] Philippe Aries, *Centuries of Childhood: A Social History of Family Life* 128 (1962).
[10] Seymour, *supra* note 8, at 109.

any money earned by their children. Blackstone was also referring to a child's legal responsibility to care for his or her parents when they became elderly which was formally required by the Poor Law of 1601.[11] The English Poor Law was incredibly influential in the United States for almost three centuries. Poor laws were influenced by the medieval doctrine of *parens patriae*.[12] This was the concept used as justification by the state in order to remove children from their homes and it eventually became the basis for the creation of the juvenile court system.[13] Under the Poor Laws, the state could intervene to remove a child if the parents were unable to care for her due to poverty. In England and the United States, intervention in the lives of poor families was often encouraged because it was seen as an important way of preventing the poor from becoming a drain on community resources.[14]

## *Parens Patriae and Puritanism*

The Massachusetts Bay Colony was also influenced by the doctrine of *parens patriae*. The Puritans used this concept as the basis for the laws they developed that mandated removing children from their homes if the parents were not raising them properly.[15] The community empowered the selectmen of each town to ensure that parents were fulfilling their obligations to their children by providing spiritual, educational and vocational training.[16] If parents were

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[11] *Id*.

[12] Hollis R. Peterson, In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation, 13 Geo. Mason L. Rev. 1083, 1087 (2006). This medieval doctrine was developed by King Edward as a way to intervene to protect the property interests of wealthy orphans. As it was originally applied, the King only intervened to protect children with property; certainly not all children. As the English Court system developed, the Chancery Court began to apply the doctrine more broadly to include children who were suffering from poverty, neglect or abuse.

[13] Naomi Cahn, *State Representation of Children's Interests*, 40 Fam. L.Q. 109, 112 (2006).

[14] Kay P. Kindred, Of Child Welfare and Welfare Reform: The Implications for Children when Contradictory Policies Collide, 9 Wm. & Mary J. Women & L. 413, 441-2 n.154 (2006).

[15] Joyce London Alexander, Aligning the Goals of Juvenile Justice with the Needs of Young Women Offenders: A Proposed Praxis for Transformational Justice, 32 Suffolk U. L. Rev. 555, 558 (1999).

[16] Law of 1646, ch.22, § 1, Mass. Bay Colonial Records.

neglectful, the selectmen, acting on the Colony's behalf, could remove the children from the home and apprentice them until they reached adulthood.[17]

Aside from the intervention of the state in the lives of poor citizens, children were under the exclusive dominion of their parents.[18] Puritan society was deeply hierarchical, with the father at the head of the family. Absolute obedience was expected of all children, as with servants and slaves.[19] In 1646, the first stubborn child law was passed in the Massachusetts Bay Colony.[20] This law gave parents the right to kill rebellious children.[21]

The significance of this law is debated by scholars. Some scholars argue that economic interests played a large role in the creation of the law.[22] In colonial Massachusetts, families were an economic as well as a social unit and children were an important source of labor.[23] Many of the laws that applied to children also applied to servants.[24] By establishing laws that maintained parental control over children and servants, the community ensured that there was a stable and reliable labor force.[25]

Other scholars analyze Puritan society and child rearing practices differently. They argue that the family unit was the heart of the Massachusetts Bay Colony community and the framework for governance.[26] Puritan society depended on each member of the society fulfilling their roles and responsibilities. It was the duty of children to obey their parents just as it was the

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[17] *Id*.
[18] John R. Sutton, Stubborn *Children, Controlling Delinquency in the United States, 1640-1981* 13 (University of California Press) (1988).
[19] *Id*.
[20] Alexander, *supra* note 15, at 558.
[21] *Id*.
[22] Sutton, *supra* note 18, at 13.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*. at 26.

duty of the community to obey their leaders.[27] The stubborn child law was enacted as part of a larger social contract among community members that emphasized conformity and order.[28]

In addition, the stubborn child law was rooted in religious beliefs. Biblical principles from the book of Deuteronomy formed the basis for the law.[29] The Puritans believed that constant vigilance was needed in order to root out sin wherever it was found; otherwise, their community was in danger of destruction.[30] They believed in the doctrine of original sin which stated that children were born riddled with sin. Consequently, they used harsh parenting tactics to prevent children from being tempted into engaging in sinful behavior and also to maintain social order.[31]

Although Puritan law appears incredibly harsh and rigid, the Puritans did believe in redemption.[32] Punishments in Puritan society were less severe if the law breaker expressed remorse and repentance.[33] In addition, the stubborn child law made an exception for children who had been abused or neglected by their parents.[34] In these aspects, Puritan law served as a pre-cursor to later juvenile reform efforts which focused on rehabilitation rather than punishment and recognized that children were often victims of circumstances beyond their control.

## *Reforms and Rehabilitation*

The first reform movement aimed at children took place in the 19th Century.[35] The reforms during this period reflected changing attitudes and beliefs about children. People began

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[27] *Id*.
[28] *Id*. at 26-7.
[29] Law of 1646, ch. 18, § 13, Mass. Bay Colonial Records.
[30] Sutton *supra* note 18, at 37-8.
[31] *Id*. at 38.
[32] *Id*. at 36.
[33] *Id*. at 30.
[34] Law of 1646, ch. 18 § 14, Mass. Bay Colonial Records.
[35] Sutton *supra* note 18, at 43-4.

to understand that childhood was a separate period in a person's life, that it was a time for learning and growing, and that children were seen as being in need of added protections.

> They had also become a vulnerable class in need of protection, a class inclined toward neither good nor evil, but essentially malleable. The malleability of children was a critical feature which contributed to the dramatic social reconstruction of the image of children.[36]

At this time, there was also a growing belief that children were a product of their environment and that those children exposed to crime, poverty and abuse were more likely to turn to a life of crime.[37] This change in perception differed from the Colonial era when people believed children were born bad rather than made bad.[38] One response to this new understanding of children and childhood was the Refuge House Movement.

In the 1820's Boston, New York, and Philadelphia created Houses of Refuge for juveniles.[39] The Boston House of Reformation was created in 1826.[40] The refuge house movement sprang from a desire to address the root causes of social problems.[41] The reformers believed that confining deviants, including children, imposed social order on society.[42] These efforts at reform were largely focused on rehabilitation rather than punishment because of a growing belief that children could be saved from criminality.[43]

The belief that nurture rather than nature made children bad did not mean, however, that all children were welcome to a second chance at the House of Refuge. The reformers did not seek to provide a refuge for all neglected or delinquent children, focusing their efforts, instead,

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[36] Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 Cal. W. Int'l L.J. 193, 199 (1994).
[37] Sutton *supra* note 18, at 43-4.
[38] *Id.* at 65.
[39] *Id.* at 43.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*at 43-4.

on the children they felt could be saved.[44] Children who the reformers believed were incapable of redemption were excluded from the Houses of Refuge out of fear that they would serve as a corrupting influence.[45] As a result, many of the children who were housed were not guilty of any criminal act.[46]

The refuge house movement occurred long before the creation of the juvenile justice system, and over a century before society recognized that status offenders should be separated from juvenile delinquents. Nonetheless, there are some surprising similarities between the Refuge Houses and status offender programs like CHINS. Both programs were motivated by a growing understanding that intervening in children's lives to provide education, medical and social services was better than letting them grow up into criminals. In addition, both systems recognized that placing children who had not yet committed crimes with either adult or child criminals would likely result in these children being corrupted, thus creating more criminals.

However, none of the procedural protections given to children under the status offender system were given to children in the Refuge House era.[47] In addition, unlike the status offender systems which targeted children engaged in certain kinds of behaviors, children in the Houses of Refuge were often targeted because of their social status.[48] Many of the children were simply poor, homeless, or immigrants.[49] As a result, by 1829, 58 percent of children housed in New York were the children of immigrants.[50]

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[44] Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan.L.Rev 1187, 1192 (1970).
[45] *Id.*
[46] *Id.*
[47] Sutton *supra* note 18, at 43-4.
[48] It must be added, however, that although status offender systems do not target children *specifically* because of their social class, a program like CHINS does have a disparate impact on children coming from non-white and non-middle class homes; this report hopes to be but one small step in the direction of a system which remedies this problem. S*ee*, *infra*, "Problems Facing the Massachusetts CHINS System."
[49] Alexander, *supra* note 15, at 559.
[50] Fox *supra* note 44, at 1201.

In this era, the doctrine of *parens patriae* was once again used to remove children from their parents on the basis of poverty. In 1838, Mary Ann Crous, the daughter of a working class household, was placed in the Philadelphia House of Refuge simply because "she appeared to be in danger of growing up to become a pauper."[51] The Pennsylvania Supreme Court held that the state could remove children from their parents' homes on the basis of poverty alone.[52] The Court reasoned that the House of Refuge was designed to help children and invoked the doctrine of *parens patriae* once again to justify removing children in order to save them.[53]

The Refuge House Reform Movement resulted in three new important legal policies.[54] First, it created a legal distinction between children and adults in the criminal system.[55] Previously, children who engaged in criminal behavior had been treated as adults.[56] Second, the movement created the indeterminate sentence.[57] Because the reformers were focused on rehabilitating children rather than punishing them, children could be detained for as long as the refuge house managers thought was necessary.[58] Finally, the movement served to broaden the category of deviant children to include those who were neglected, incorrigible or living in poverty.[59]

The next major period of reform occurred between 1850 and 1900, the result of the combined forces of industrialization, urbanization and immigration.[60] Many types of social

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[51] Solomon J. Greene, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 Yale J.L. & Human. 135, 140-1 (2003).
[52] *Id*.
[53] *Id*. at 141.
[54] Sutton *supra* note 18, at 45.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] Joyce Alexander, *supra* note 15, at 559.
[60] Kari Hong, *Parens Patriarchy: Adoption, Eugenics and Same-Sex Couples*, 40 Cal. W. L. Rev. 1, 17-18 (2003). The development of industry in the cities resulted in thousands of rural teenagers leaving their families to seek work in the city. Many reformers viewed this development as contributing to the breakdown of the family.

reform movements blossomed in this period, led by wealthy, white Protestants who feared that the influx of "racially inferior" immigrants would result in a breakdown of the family and traditional American values. Immigrants who did not speak English and often practiced different religions were seen as incapable of providing the kind of family life children needed.[61] Catholicism, poverty, and immigrant status were enough for the reformers to believe that the parents were unfit.[62] As a consequence, reformers engaged in a variety of tactics to remove children from their parents' homes.[63]

Private reform agencies would also remove children based on parental "immorality."[64] Immoral parents included unmarried mothers, the poor and Catholic parents.[65] The courts relied on the private agency's testimony in determining who was immoral and often transferred custody to the agencies without even giving notice to the parents.[66] This amount of judicial discretion, coupled with a lack of transparency, resulted in many children being taken from their parents because their family structure was not in line with the dominant, white middle-class model.[67]

Despite the profound prejudices of the reformers at this time, there were some positive developments for children. The idea that children were capable of being positively molded led to child protection reforms, such as laws that limited the number of hours children could be

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[61] *Id*.
[62] *Id*.
[63] *Id*. In this era, private agencies used a technique known as "street sweeping" which involved picking up children off the street in slums in order to take them from families they deemed "unfit" and placing them in institutions or sending them on the orphan trains to farm families in the Mid-West. Over 100,000 children were taken from New York alone.
[64] *Id*. at 19.
[65] *Id*.
[66] *Id*.
[67] Joyce Joyce Alexander, *supra* note 15, at 560-61. During this period, U.S. society was dominated by the notion of separate spheres for men and women. While women were expected to stay at home and nurture the family, men were supposed to engage with the larger world. Girls who failed to follow this model were considered "wayward" and in need of rehabilitation. Sexually active girls, neglected girls, "defiant" girls and runaways were all classified as "wayward." Based on this definition, the State felt justified in essentially attempting to police women's sexuality through the juvenile court system.

required to work, the requirement of compulsory school attendance, and eventually the creation the juvenile justice system.[68] Reformers became more aware of child abuse and were troubled by the lack of safeguards in place to protect children.[69]

## *Adolescence and the Creation of the Juvenile Court System*

The treatment and status of children changed in the 20th Century after the "creation," eventual recognition of adolescence. Middle-class families began to extend childhood longer than ever before, in light of new theories of child development. Before the idea of adolescence took hold, "adolescents" were given the same freedoms, and held to the same standards, as adults.

> This new status meant that adolescents, like children, were assumed to be vulnerable, malleable and in need of adult guidance, control and training. Although restrictive of adolescents, the enforced prolongation of childhood status into the adolescent period was instrumental in leading to the recognition of younger children's personhood.[70]

However, poor and working-class children, as well as children of color, were not given the luxury of adolescence because their parents needed them to help support the family. Consequently, these children were once again viewed as deviants in need of state intervention, as perceived against the norm of the white middle-class.[71]

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[68] Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 Cal. W. Int'l L.J. 193,199-200 (1994).

[69] Robert L Geiser, *The Rights of Children*, 28 Hastings L.J. 1028-1030 (1977). One example of the lack of safeguards for children, before these reforms were enacted, was an 1874 case which involved the physical abuse of a foster child. Since there were no child protection laws to deal with the abusive situation, a "charitable lady" enlisted the assistance of the Society for the Prevention of Cruelty to Animals (SPCA). The SPCA intervened and won the case by arguing that the foster child was a member of the animal kingdom and therefore entitled to protection under the animal cruelty statutes that existed at the time.

[70] Levesque, *supra* note 68, at 200-201.

[71] Solomon Greene, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 Yale J.L. & Human. 135, 144.

The positioning of many working-class youth as deviants in need of help from the state was a major influence in the juvenile court movement.[72] Supporters of the movement thought that the law could be used to redeem these deviant children. In 1899, the Illinois Juvenile Court Act was passed,[73] and the idea of a separate juvenile court spread rapidly. By 1925, 46 states and the District of Columbia had established juvenile courts.[74] The juvenile court movement was the impetus for major innovations in both the law and law enforcement, such as the requirement of specific legal definitions for delinquency, dependency, and neglect; separate pre-trial detention facilities; separate trials; and specialized probation officers.[75]

Problems persisted, however. Many of the volunteer probation officers and judges believed that working-class and immigrant families were inferior and felt that children were better off as wards of the state than living with their families.[76] Although many of the "child-savers" believed in the sanctity of the family in theory, in reality, families were only protected if they comported with white middle-class standard.[77] In this era, *parens patriae* was expanded and the state was transformed into an entity with the power to act as parent to all of the children within its borders.[78] The judges on the juvenile courts viewed themselves as benign father figures, while the predominantly female probation workers thought of themselves as providing motherly love.[79] During this period, procedural protections were seen as inhibiting the courts ability to act as loving parents to the children who appeared before them.[80]

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[72] *Id*.
[73] Thomas Jacobs, *Children and the Law: Rights and Obligations*, CALRO S 1:1, (2006).
[74] Robert E. Shephard, *The Child Grows Up: The Juvenile Justice System Enters Its Second Century*, 33 Fam. L. Q. 589, 589-90 (2000).
[75] Sutton *supra* note 18, at 161.
[76] Greene, *supra* note 71, at 145.
[77] *Id*.
[78] *Id*.
[79] *Id*. at 144-6.
[80] *Id*. at 144-5.

Although there were some attempts to formalize the system, and the behaviors that led children into juvenile court proceedings, between 1925 and 1966 the juvenile court system operated with almost no oversight.[81] The legal definitions were still very vague and judges were granted a tremendous amount of discretion in determining which children were delinquents.[82] Some critics also argue that the juvenile courts in this period did not even resemble real courts because of the lack of legal protections given to juveniles and their parents.[83] This led to the unequal treatment of juveniles of particular races or socio-economic backgrounds, depending upon the court officials' personal opinions and biases.[84]

American history demonstrates that communities and the courts have consistently penalized children and families who were seen as deviating from societal norms. Poverty, religion, race, gender, social status and ethnicity have all served as justifications for state intervention into family relationships. Currently, poor families and families of color are still overrepresented in both the juvenile justice system and CHINS, perhaps in part because society still unconsciously views these families as deviant.

## *Juvenile Justice Reform and the Creation of Status Offenders*

Although children's rights have increased exponentially, these rights continue to be viewed by the United States justice system in relation to the rights of their parents and the state.[85] In the last fifty years, the fight to increase the rights of children has been consistently defeated by the courts' reluctance to interfere with the family unit. There is still the presumption that the best

[81] Joyce Joyce Alexander, *supra* note 15, at 560.
[82] Sutton *supra* note 18, at 162.
[83] Thomas Jacobs, *Children and the Law: Rights and Obligations*, CALRO S 1:1, (2006).
[84] Joyce Joyce Alexander, *supra* note 15, at 560.
[85] Levesque, *supra* note 68, at 202.

place for a child is within his or her family, and that parents and not the courts know what is best for their children.[86]

In cases such as *Meyer v. Nebraska*[87] and *Pierce v. Society of Sisters*,[88] the U.S. Supreme Court found that parents had almost absolute control over their children's lives, and that children only had constitutional rights via their parents:

> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[89]

The importance of children not having constitutional rights independent of their parents was reinforced by the case of *Wisconson v. Yoder*, 406 U.S. 205 (1972), where the court refused to overturn a parent's wish to keep their child out of high school, even though the court acknowledged that doing so was not in the best interest of the child. On the other hand, in *Prince v. Massachusetts*, 321 U.S. 158 (1944), the U.S. Supreme Court was willing to protect children if it felt that the parents' wishes ran contrary to the child's best interest. The *Prince* decision was not an expansion of children's rights, however, rather it was an expansion of the state's right to intervene. The U.S. Supreme Court case, *In re Gault*, 387 U.S. 1 (1967), disproves any theory that *Prince* was a validation of children's independent rights.[90] Overall the court has been reluctant to dramatically alter the relationship between a parent and child.

The idea that children have no rights independent of their parents or the state is still the dominant view in society today. If this theory is correct, and parents are responsible for ensuring

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[86] *Id.* at 202-203.
[87] *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[88] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).
[89] *Id.* at 535.
[90] *In re Gault*, 387 U.S. 1, 17 (1967). The *Gault* Court stated that: If his parents default in effectively performing their custodial functions - that is, if the child is delinquent - the state may intervene. In so doing, it does not deprive the child of any rights because he has none.

their child's best interest, it seems logical that parents should play a more involved role in the CHINS process.

## The Advent of Status Offender Systems and Their Critics

During the 1960s, the rise of juvenile crime and the plight of children who had been abused — a common factor in both juvenile delinquency and status offender cases — led to the criticism of the juvenile justice system as it then existed.[91] Reforms ensued that were, in large part, prompted by U.S. Supreme Court cases, which established a minimum standard of due process for juveniles. The most important such case was *In re Gault* from 1967.

The Court in *Gault* determined that a number of rights, considered formerly only for adults, were applicable to minors in the juvenile justice system: among these the right to counsel,[92] the right to an appeal[93] and the right not to incriminate oneself.[94] However, as author Alecia Humphrey points out, the reforms initiated by the Court in *Gault* created a great distinction between status offenders and other juvenile offenders: juvenile offenders were the beneficiaries of the *Gault* decision,[95] while status offenders received none of the benefits and their proceedings were still, for the most part, at the court's discretion.[96] This created a tension in the juvenile systems charged with adjudicating status offenders[97] — said offenders were being

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[91] Christine Rinik, *Juvenile Status Offenders: A Comparative Analysis*, 5 Harv. J.L. & Pub. Pol'y 151, 159 (1982).
[92] *In re Gault*, 387 U.S. at 41.
[93] *Id*. at 58.
[94] *Id*. at 54.
[95] It must be added that this was not an unmitigated improvement as the treatment of adults in the justice system is itself fraught with complications.
[96] Alecia Humphrey, The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders, 15 Hastings Women's L.J. 165, 168 (2004).
[97] A good illustration of the disparity of treatment between status offenders and juvenile offenders is *In re Spalding*, 332 A. 2d 246 (Md. 1975). The *Spalding* court refused to grant a minor charged with being a child in need of supervision the privilege against self-incrimination since she "was not charged with an act which, in the circumstances of this case, would constitute a crime if committed by an adult." *Spalding* at 257. The *Spalding*

deprived of their liberties like adults, but denied the same due process protections because the courts viewed them as children.[98]

Congress reacted to some of the criticisms being leveled at the juvenile justice system by enacting the Juvenile Justice and Delinquency Protection Act (JJDPA) in 1974. The purported aim of the JJDPA was the segregation of adult and juvenile offenders[99] and the complete deinstitutionalization of status offenders.[100] The JJDPA required that states which received federal funds for juvenile delinquency prevention begin to divert status offenders into community-based programs or services, thus providing the states with the firm notion that status offenders should be de-institutionalized.[101] Humphrey notes that the reforms initiated by the JJDPA were especially felt by young girls who were previously being detained for running away or engaging in sexually inappropriate behavior; they were largely released and diverted away from detention.[102]

The JJDPA was no panacea, however. Juvenile judges adjudicating status offender cases found themselves powerless to stop runaways, for instance, from continuing to run away after they were placed in "unlocked facilities."[103] Perhaps as a response to judicial frustration, Congress passed a 1980 Amendment to the Act which allowed jurisdictions to incarcerate status offenders for violating court orders.[104]

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court, however, did find the authority to order the young offender to live in a foster home. Thus, it can be seen how status offenders could be deprived of their liberties, but not benefit from the constitutional due process guarantees which the Supreme Court had extended to juveniles in *Gault*.

[98] Humphrey, *supra* note 96, at 169.

[99] Juvenile offenders had, until then, often been put into the general prison population. Cheryl Dalby, *Gender Bias Towards Status Offenders*: *A Paternalistic Agenda Carried Out Through the JJDPA*, 12 Law and Ineq. 429, 440 (1994).

[100] *Id*.

[101] Humphrey, *supra* note 96, at 169.

[102] *Id.* at 170.

[103] Dalby, *supra* note 99, at 441.

[104] The Massachusetts CHINS system is an exception in this regard. It does not allow for the incarceration of status offenders, except under the circumstances delineated by the statute. In addition, the Supreme Judicial Court

## *Criticisms of Status Offender Systems*

The wave of legal reform, which led to the development of CHINS-like systems in the 1970s was generally viewed as a positive step, but such reforms were not universally accepted. Many critics considered the newly implemented status offender statutes to be too vague, leaving the courts to interpret the meaning of such words as "reasonable" in the sentence "refuses to obey the lawful and *reasonable* commands of said parent."[105] But the vagueness of the statutes' language is not the only problem. The status offender's gender, for one, comes into play when the courts (or in some cases, the parents) determine the meaning of the phrase "reasonable command."

Author Cheryl Dalby argues that parents and judges use the status offender systems adopted in the 1970s and the JJDPA to "police teenage female sexuality" and "perpetuate the paternalistic agenda begun with adultery and statutory rape laws."[106] A minor child can, under most status offender statutes, be forced to enter the juvenile justice system as a result of disobeying a "reasonable command." However, the way parents and judges interpret "reasonable" varies depending on the sex of the status offender. Dalby's research indicates that juvenile judges are more likely to order the incarceration of female status offenders in "secure detention facilities."[107] This fact alone does not "prove" that judges are biased against female status offenders, but combined with some evidence that "judges retain sexist, paternalistic attitudes toward female juveniles,"[108] one may draw such a conclusion.

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held in *Commonwealth v. Florence F.* that juvenile courts did not have the power to issue contempt citations to children in a CHINS proceeding since this was not provided for in the text of the statute. *Commonwealth v. Florence F.*, 709 N.E. 2d 418, 420-21 (Mass. 1999). Rayna Hardee Bomar, *The Incarceration of the Status Offender*, 18 Mem. St. U. L. Rev. 713, 732 (1988).

[105] M.G.L.A. 119 §39E (2003).

[106] Dalby, *supra* note 99, at 447.

[107] *Id*. at 446.

[108] This statement encapsulates the findings of the Minnesota Supreme Court Gender Fairness Task Force, created in

Author Laurie Schaffner contends that minor girls attract the attention of the juvenile authorities through what she calls "acting in": emotional behaviors such as "dropping out of school due to 'family problems,' trouble involving emotional, romantic or sexual relationships, self-mutilation . . . eating disorders and suicide attempts."[109] Many girls enter the status offender system through "offenses" which are definitely gender-specific, such as "having an older boyfriend . . . behaving in a promiscuous or sexually precocious manner . . . ."[110] If these facts hold true for even a large minority of girls in the system, it becomes clear that what is needed is more attention to girls' emotional support systems and home lives, with less state policing of the symptoms of said problems.[111]

Parents themselves also contribute to the unequal treatment shown to girls in the status offender system. Dalby points to the work of some scholars which suggests that "parents report their daughters to juvenile courts as runaways when they become sexually active . . . [f]earing that they will lose control of their daughter's sexuality."[112] Naturally, if the reasonableness of a parent's command is contingent upon the gender of the status offender, boys and girls will no doubt be subject to unequal treatment.

According to statistics provided by Alecia Humphrey in the *Hastings Women's Law Journal*, girls are more often referred to status offender programs by their parents than boys.[113]

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1987 to "identify and document gender bias" in the MN state court system. *See Id*.

[109] Laurie Schaffner, *Female Juvenile Delinquency: Sexual Solutions, Gender Bias and Juvenile Justice*, 9 Hastings Women's L.J. 1, 25 Footnote 14 (1998).

[110] *Id*. at 4.

[111] It follows that if the authorities were to focus their attention on improving the girl's relationships with her parents and any emotional/psychological problems which may be contributing to status offenses, the problem of the State policing girls' sexuality would all but disappear since there would no longer be a need for it.

[112] Dalby, *supra* note 99, at 447. For this notion, Dalby refers primarily to the work of Meda Chesney-Lind. Chesney-Lind suggests that "from their sons, parents expect achievement, aggressiveness, independence, but from their daughters obedience, passivity, and implicitly, chastity. " Meda Chesney-Lind, "Guilty by Reason of Sex: Young Women and the Juvenile Justice System," in *The Criminal Justice System and Women* (Barbara Raffel Price and Natalie J. Sokoloff eds., 1982), 90-91.

[113] Humphrey, *supra* note 96, at 173.

In addition, though juvenile males commit an equal number of status offenses, juvenile girls are more likely to be arrested for status offenses (27.5 percent of girls were arrested for status offenses in 1995 compared to only 10.5 percent of boys).[114] Though the author draws no concrete conclusions from this data, one may speculate that often boys detained for status offenses are viewed by the court through the lens of "boys will be boys" while girls are viewed as persons whom society has a duty to protect.

Humphrey argues that this data is indicative of the biased nature of the juvenile justice system, and the paternalistic need of the juvenile justice system to "protect girls," in particular.[115] Humphrey cites the case of Bonnie W., a sixteen year old runaway who was placed in a non-secure facility[116] on the condition that she cease communicating with a twenty-one year old male friend, identified by the girl as her fiancé.[117] Humphrey views this as an instance where the juvenile court made moral and sexuality-based judgments about the young girl.[118] Ultimately however, determining if this was a case of gender bias would be difficult. Where does the judge (and society) draw the line? Should the state use its police power to prevent a minor girl from engaging in a relationship with an adult man? Perhaps a better question would be: can the state craft a status offender statute which would enable minor girls to be protected from predatory advances without also enabling either their parents or judges to police their sexuality in a way which subjects them to unfair treatment in relation to boys?

Other critics of status offender systems took a different approach, attacking the notion of status offenses themselves, based on the justly influential case *Robinson v. California* from 1962. The *Robinson* Court struck down a California statute which imposed criminal sanctions on

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[114] *Id*.
[115] *Id*.
[116] As opposed to a formal juvenile detention or "lock-up."
[117] *Matter of Bonnie Michelle W.* 429 N.Y.S. 2d 638, 640 (New York 1980).
[118] Humphrey, *supra* note 96, at 173.

persons whose only offense was their "status" as drug addicts. The Court held that such statutes violated the prohibition against cruel and unusual punishment found in the Eighth Amendment (and imposed on the states by the Fourteenth Amendment).[119] Generally, however, such criticisms have fallen on the deaf ears of the judiciary. Most courts have followed the approach of the Washington Supreme Court whose holding in *Blondheim v. State* affirmed the constitutionality of status offenses against challenges of vagueness and inconsistency with the U.S. Supreme Court's conclusions in *Robinson*. Basically, the *Blondheim* court held "[that although] incorrigibility is a condition or state of being, one acquires such a 'status' only by reason of one's conduct or a pattern of behavior proscribed by the statute."[120]

### *The CHINS System in Massachusetts*

The CHINS legislation in Massachusetts was designed to separate the status offender from the juvenile delinquent by decriminalizing status offenses, diverting status offenders into the care and custody of the Department of Public Welfare, and providing informal services to CHINS children outside of a formal courtroom setting.[121] Prior to the adoption of the CHINS statute, "stubborn" children were subject to criminal penalties for disobeying the "lawful and reasonable commands" of a parent or other adult in a position of authority.[122] This was certainly the fate of Dianne Brasher whose conviction[123] — for failing to heed the commands of the staff at the group home where she was living — was upheld by the Supreme Judicial Court of

[119] *Robinson v. California*, 370 U.S. 660, 667 (1962).
[120] *Blondheim v. State*, 529 P. 2d 1096, 1101 (Wash. 1975).
[121] Rinik, *supra* note 91, at 161.
[122] *Commonwealth v. Brasher*, 270 N.E. 2d 389, 393 (Mass. 1971).
[123] The juvenile court originally ordered that Brasher be committed to the custody of the Dept. of Youth Services. *Id.* at 391. The SJC subsequently upheld this order. *Commonwealth v. Brasher*, 270 N.E. 2d 389, 395 (Mass. 1971).

Massachusetts.[124] The opinion, by Justice Quirico, made mention of the fact that Miss Brasher was "probably talking with the boys" when she should have been at home.[125] The Justice's comment in this case leads one to wonder whether this was an instance of a judge incarcerating a young woman for the "crime" of being a typical teenage girl.[126]

Though the new approach towards status offenders taken by Massachusetts provided "stubborn children" with assistance rather than detention, criticisms of the new system were registered almost immediately. Some critics believed that the CHINS system did not sufficiently decriminalize status offenses (since the statute still provided for the arrest and detention of status offenders under certain circumstances). Others criticized the system for not providing enough enforcement tools to judges who must deal with kids who ignore court orders.[127]

### *Problems Facing the Massachusetts CHINS System*

As discussed above, the CHINS system in Massachusetts was enacted in the early 1970s in an effort to curb and decriminalize status offenses committed by youth. If the CHINS system were meeting its initial goals, only a small minority of the youths who entered the program would end up in the juvenile justice system. As it currently stands, however, 54 percent of children classified by the court as "children in need of services" are arraigned in the adult or juvenile court within three years of the granting of a CHINS petition.[128] It is possible that even

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[124] *Brasher* 270 N.E.2d.
[125] *Id*. at 395.
[126] Cheryl Dalby, for one, is of the opinion that there is an attitude among judges "that society ought to prevent females from being sexually active." Dalby, *supra* note 99, at 456 n.108. Though it is quite possible, even probable, that such societal tendencies have changed, they may have been the dominant views when the CHINS statute in Massachusetts was conceived, written and passed.
[127] Rinik, *supra* note 91, at 162.
[128] Citizens for Juvenile Justice, *Issue Briefing: DSS Gateway to Juvenile Crime*, 3 (Jan. 2000), *available at* http://www.cfjj.org/Pdf/DSS.pdf.

more children go on to commit offenses after this short tracking period. The following chart breaks down this statistic by type of offense:

| Number and Type of CHINS in Massachusetts[129] | | | | |
|---|---|---|---|---|
| % Prior Delinquency and % Subsequent Arraignment* | | | | |
| Type of CHINS | # of CHINS in this Category | % of CHINS in this Category | % Prior Delinquency | **% Subsequent Arraignment** |
| Runaway | 2750 | 39.7 | 24.6 | **53.9** |
| Stubborn | 1977 | 28.5 | 24.1 | **58.7** |
| Truant | 1870 | 27 | 20.5 | **47.1** |
| School | 332 | 4.8 | 33.4 | **72.3** |
| Total | 6929 | 100 | 23.8 | **54.3** |
| *Data collected from petitions in 1994, Subsequent Arraignment rates based on three years of tracking. | | | | |

If one of the major goals of the CHINS system is to prevent children who are committing status offenses from going on to commit greater offenses and crimes, the current system is not working for more than half of the youth involved and should be regarded as a failure.

Within the Department of Youth Services (DYS) population,[130] which includes children who are classified as CHINS, the most utilized service is the Commissioner of Probation, with more than 74 percent of these youth involved.[131] The use of health, mental health, and educational services lag far behind. Not even one percent of the DYS population receives mental health care, and only slightly more then eleven percent receive services from the Department of

[129] *Id.* at 6.
[130] Throughout this report there are references to statistics from the Department of Youth Services, Department of Social Services, and Juvenile Justice because of the lack of CHINS specific data.
[131] Citizens for Juvenile Justice, *supra* note 128, at 5.

Education.[132] These troubling statistics lead to the conclusion that the Commonwealth has failed to "properly direct services *prior* to delinquency."[133]

While the criteria for detaining children under CHINS is substantially limited, this is still an area of great concern. Youth detention exacerbates many of the very problems that the CHINS system seeks to mitigate. For example detention often causes the youth to miss school, which is especially significant since most of the youth "are likely to already be behind academically and/or struggling with learning disabilities."[134] Additionally "separation from families and communities is a stressful and traumatizing experience," and "younger, non-serious offenders learn crime-related skills . . . by being confined with older, more serious offenders."[135] Finally, high rates of detention may increase, rather than alleviate, the risk to the public because "youth held in detention are much more likely to recidivate than youth who are not."[136] This increased risk of recidivism has many possible causes. One is that the youth who are detained are more likely to have mental health issues, which may cause them to adjust poorly to their new surroundings.[137] This could have the negative effect of hindering them from participating in mental health services, as well as other services, thereby increasing their chance for recidivism.[138] It should be noted that the passage of the CHINS statute was motivated by factors including keeping children from learning additional "criminal skills" and reducing their exposure to the justice system.[139]

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[132] *Id*.
[133] *Id*.
[134] Citizens for Juvenile Justice, *Detention Fact Sheet*, (2006), *available at* http://www.cfjj.org/Pdf/detention fact sheet 11_29_06 v.2.pdf.
[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] Commonwealth of Massachusetts Executive Office of Public Safety Programs Division, *Massachusetts Juvenile Justice Data and Information*, 48 (Dec. 2004), *available at* http://burnsinstitute.org/dmc/ma/massdata.pdf.
[139] Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 Cal. L. Rev. 2477, 2479 (Dec. 2000).

In those situations where the parent or the child may want to remain outside of the CHINS system, the options vary widely across the state. As of now, there are no uniform diversionary programs. Some jurisdictions have developed programs while others still have not.[140] Currently, some groups in Massachusetts are trying to develop a stronger diversionary model with community based initiatives such as youth courts.[141] If these initiatives are successful on a small scale, these new diversionary methods have the possibility of being implemented more uniformly throughout the Commonwealth.

Once in DYS custody, a CHINS youth has no way to earn his or her release. This serves, once again, to criminalize their behavior, which is contrary to the entire basis for having status offenses. As the *Report Card of CHINS in Massachusetts* points out, "of particular concern is the indefinite period of time youth may be held in DYS (even up to age 21) without judicial review for the original non-delinquent behavior."[142]

The above mentioned are overarching problems within the CHINS system in Massachusetts. However, the problems become more acute if viewed through the lens of race, gender, and class. Youth of color made up 26 percent of the Massachusetts population in 2000, but accounted for 73 percent of the youthful offenders and 77 percent of the youth in secure residential facilities (these statistics are also strongly influenced by the fact that youth of color are more likely than white youths to be living in poverty).[143] Put another way, while whites make up more then 70 percent of the Massachusetts youth population, the percentage of youth

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[140] Citizens for Juvenile Justice, *A Report Card on CHINS in Massachusetts*, 16 (2000), *available at* http://www.cfjj.org/Pdf/CHINS.pdf.

[141] Please see the report "Peer Justice System: An Alternative Model for School Discipline At the Social Justice Academy," created by Northeastern University School of Law, Law Office No. 4, 2006-2007 for the details of one such attempt.

[142] Citizens for Juvenile Justice, *supra* note 140, at 26.

[143] Citizens for Juvenile Justice, *Recent Trends in Massachusetts' Juvenile Justice System*, 2 (2004), available at http://www.cfjj.org (follow "Publications" hyperlink; then follow "*Recent Trends in Massachusetts' Juvenile Justice System"* hyperlink*).*

offenders who are white is just below 30 percent.[144] Black and Hispanic youth combined make up slightly less then 20 percent of the youth population of the state, but account for just below 60 percent of the offender population.[145] In essence, the percentages flip for white and minority youth when looking at their representations in society as a whole compared to their representation as youth offenders.

Several observers are concerned that this disparity reflects the differing perceptions regarding white youth and youth of color. CHINS Task Force member, Joshua Dohan, director of Youth Advocacy of the Committee for Public Counsel Services, argues that although white youth have a higher rate of self-reporting drug use than youth of color that does not translate into a higher rate of punishment because:

> When white kids from wealthier (often white) neighborhoods get in trouble, generally the police officer who is involved and the probation department look at the kids and say, 'Well, this kid could go to college, could be a doctor or lawyer. We might mess that up if we pull him out of home or school and give him a record.' When kids of color are involved, we tend to see only the bad behavior and how we need to punish him.[146]

Such conscious and unconscious perceptions about youth of color are a dangerous influence in the trend of overrepresentation of youth of color that must be addressed proactively by any system that wishes to help kids avoid both the juvenile justice system and the adult justice system. Also, contributing to the overrepresentation of minority youth in Massachusetts detention is the fact that youths of color make up 40 percent of school dropouts, 52 percent of children in foster care, and 61 percent of students who are excluded from school.[147] In regards to girls of color in the juvenile justice system, "African-American girls are represented at rates

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[144] *Id*.
[145] Commonwealth of Massachusetts Executive Office of Public Safety Programs Division, *Massachusetts Juvenile Justice Data and Information*, 14, 40, 127 (Dec. 2004), *available at* http://burnsinstitute.org/dmc/ma/massdata.pdf.
[146] Carol Rose, *Racism's Role in the State's Juvenile Justice System*, Boston Globe, June 7, 2003, at A13.
[147] *Supra* note 145, at 23, 72-3.

more than three times their representation in the general population; Hispanic girls are represented at rates two times their representation in the general population."[148] Girls of color make up 54 percent of the total female detention population.[149]

Massachusetts receives federal funding pursuant to the Juvenile Justice and Delinquency Prevention Act; this creates a state obligation to lessen racial disparities within the juvenile justice system.[150] From 1999 through 2003, Massachusetts spent less than $600,000 of the $35 million received for youth-related programs on initiatives specifically designed to study and minimize racial disparities.[151] Concerns in this area, highlighted by an American Civil Liberties Union (ACLU) report, include no centralized leadership on this issue; a lack of statistics; a lack of uniformity among those statistics that do exist; no assessment of the causes of the disparity; and no implementation of those plans that exist. The ACLU's recommendations which seems parallel to the work and subcommittee structure of the CHINS Task Force include tying funding to accurate data collection, expanding access to alternative programs, and a review of the adequacy of the representation received by youths who use state appointed counsel.[152]

Another emerging concern is how the CHINS system can more effectively respond to the 52 percent of CHINS petitions issued for female status offenders. Although 52 percent does not initially seem alarming, it represents a 168 percent increase for the female population over the course of ten years.[153] While the number of girls involved in the juvenile justice system has increased, the theories and practices behind the juvenile justice system were largely developed

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[148] Citizens for Juvenile Justice, *Girls in the Massachusetts Juvenile Justice System*, 2 (2005), *available at* http://www.cfjj.org/Pdf/GirlsFactSheet6_9_05.pdf.
[149] *Supra* note 145, at 124.
[150] Robin Dahlberg, ACLU, *Disproportionate Minority Confinement in Massachusetts, Failures in Assessing and Addressing the Overrepresentation of Minorities in the Massachusetts Juvenile Justice System,* 5 (May 2003), *available at* www.aclu.org/FilesPDFs/dmc_report.pdf.
[151] Anonymous, *Juvenile Injustice*, Boston Globe, June 3, 2003, at A14.
[152] Dahlberg, *supra* note 150, at 5.
[153] CHINS data from the Administrative Office of the Trial Court as cited *Supra* note 145, at 20-21.

when the population was overwhelmingly male.[154] Many of those same practices are reflected in the current CHINS system. Girls have needs that are different from boys with respect to emotional, mental, physical, and social health.[155] This is evident first and foremost by the fact that at least 70 percent of girls involved in the juvenile justice system report a history of physical and sexual abuse.[156] The female youth who enter the system are also at a higher risk for pregnancy and sexually transmitted diseases.[157] Nature ensures, however, that a boy in the juvenile justice system will not have to contend with the possibility of becoming pregnant and with the physical and emotional complications that follow.

Again, there is a serious lack of statistics regarding the socio-economic background of the children being adjudicated as CHINS. However, there is a general consensus that many of these children are from families facing economic hardship. This connection is observed in several state service systems. For example, there is a strong correlation between a child's socio economic status and the child's chances of being committed to DYS. "As poverty increases in a city or town, the rate of individuals committed to DYS also increases. In 2004, a child living in the poorest quintile is approximately 20-25 times more likely to be part of the DYS committed population than a child living in the riches quintile."[158] Those children who are most at risk of being poor, and thereby the most at risk for being committed, are likewise youth of color. If

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[154] While male offenders are still the majority outside of CHINS, "girls are the fastest growing segment of the juvenile justice population – nationally and locally." American Bar Association and National Bar Association, *Justice by Gender: The Lack of Appropriate Prevention, Diversion, and Treatment Alternatives for Girls in the Justice System* (May, 2001) as cited *supra* note 145, at 20-21.
The problem of how to deal with girls in the justice system is increasingly pressing. In Massachusetts between 1995 and 2005 girls have increased in numbers by 168% with respect to being in the custody of the DYS. Citizens for Juvenile Justice, *supra* note 148.
However, in January 2004 84% of the DYS Committed Population was male. Office of Juvenile Justice and Delinquency, *Audit Report* as cited *supra* note 145, at 20-21.
[155] Citizens for Juvenile Justice, *supra* note 148.
[156] *Id*.
[157] *Id*.
[158] Commonwealth of Massachusetts Executive Office of Public Safety Programs Division, *supra* note 145, at 159.

CHINS statistics are parallel to those of DYS, one might conclude that the majority of parents who are being disenfranchised in current CHINS proceedings are therefore also poor parents of color. Race, gender, and class all appear to be tightly interwoven, with the web formed by these threads placing poor and minority children at risk. CHINS should be specifically targeted to address this risk as well as the more generalized risks posed to children committing status offenses.

The CHINS system, in general, suffers from a lack of statistics.[159] Most agencies do not collect data on race, gender, and class; those that do fail to analyze it. Going forward, agencies must become more accountable for tracking the youth who enter the CHINS system, thus ensuring that the system can be modified to accommodate the needs of the children involved.

The CHINS system is based on the idea that children who commit status offenses should be treated differently from those children who commit criminal offenses. The theory behind CHINS is that the state should provide status offenders with the necessary services, rather than punishing them. Despite this admirable mission, the CHINS system has been largely unsuccessful in helping children and youth obtain the services or treatment they need; as a result status offenders are going on to commit more serious offenses. The CHINS system suffers from a lack of resources and a shortage of reliable information; procedural problems also abound.

The new proposed model for CHINS seeks to address all of these issues. Broadening American attitudes in regards to children may be the most daunting obstacle standing in the way of CHINS reform. An international perspective on the rights of children and their families may aid Americans in altering their views.

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[159] Citizens for Juvenile Justice, *supra* note 148, at 16.

# The Rights of the Child: An International Perspective

International child law developed tremendously over the latter part of the 20th Century, particularly in the wake of the international human rights movement following World War II. To better appreciate the progress made in the field of children's rights by the international community, it is important to understand how children have historically been perceived.

## *Pre-Twentieth Century History in Western Europe*

Prior to the 16th Century, adults were at best indifferent to children. Very often, children were abandoned or killed at birth because of handicap, gender, or simply because "they were crying too much."[160] Many were raised by wet nurses and subjected to extreme "educational practices" such as "burning them with hot irons to protect them against epilepsy, submerging them in icy water or rolling them in snow to harden or baptize them."[161] Until the 17th Century, living conditions were such that up to two-thirds of children died before the age of twenty. According to many historians, children below the age of seven were not perceived as significant persons because of the high mortality rate.[162] Children that survived past the age of seven were treated as adults. Most of them were placed in apprenticeship and had to take part in the production process. In short, there was no difference between adults and children. Children shared all aspects of life with adults, including work and sexuality.[163]

It is only with the 18th Century Enlightenment that children started to be viewed as a separate group with separate characteristics, and to be perceived as "the future" and "tomorrow's

[160] Eugeen Verhellen, Convention on the Rights of the Child 12 (Garant ed., E. Verhellen and Garant Publishers N.V. 1997).
[161] *Id*.
[162] *Id*.
[163] *Id*. at 13.

richness and prosperity."[164] At first only male children of the upper-class were included in this category. It took some time before lower-class boys were admitted into the category of children, and it took an even longer time for girls.[165]

At the end of the 19th Century, a few legislative measures to protect children, such as compulsory schooling, were passed in western countries.[166] The 20th Century was declared the "century of the child."[167] A new image of children, as a separate group with its own rights, was born.

## *International Law in the 20th Century*

The first international instrument which attempted to frame children's rights was the Declaration of the Rights of the Child ("the Declaration") adopted by the League of Nations in 1924.[168] Although the Declaration was non-binding, it demonstrated the League of Nations' interest in protecting and providing welfare services to children, especially those displaced and orphaned in the wake of World War I.[169] The Declaration was, in fact, the first human rights document adopted by an inter-governmental organization.[170] The Declaration contained five paragraphs covering a wide variety of concerns, such as food, health care, delinquency, shelter, emergency relief, work, and exploitation.[171] The main purpose of the Declaration was not to create rights for children, but to provide general guidelines for those working in the field of

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[164] *Id*.
[165] *Id*. at 14.
[166] *Id*. at 15. In France, for instance, the Ferry law made school compulsory and free for all children aged 6-13 in 1882. *See* French Foreign Ministry website, The French Republican School Model, http://www.diplomatie.gouv.fr/label_France/54/gb/02.html (last visited March 22, 2007).
[167] Eugeen Verhellen, *Convention on the Rights of the Child* 15 (Garant ed., E. Verhellen and Garant Publishers N.V. 1997).
[168] Trevor Buck, *International Child Law* 47-48 (Cavendish Publishing ed., 2005).
[169] *Id*. at 12.
[170] *Id*. at 47-48.
[171] Mark Ensalaco, *The Right of the Child to Development* in Children's Human Rights: Progress and Challenges for Children Worldwide 7, 10 (Mark Ensalaco & Linda C. Majka eds., 2005).

children welfare.[172] According to Trevor Buck in *International Child Law*, "[t]he Declaration reflect[ed] a paternalistic view of child welfare where adults [were] clearly in total control of children's destinies."[173] The Declaration focused on the protection of children and lacked any notion of "encouraging children's participation in decision making or other aspects of children's self-determination."[174]

In the wake of World War II, the international community established the United Nations, one of its goals being the promotion of human rights and fundamental freedoms: "The survival, protection, and development of children would be an integral part of that effort."[175] Moving toward those ends, the United Nations created in 1946 the United Nations International Children's Emergency Fund, later renamed UNICEF. It was followed by the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR specifically referred to children and the family, reflecting the principles earlier enunciated by the League of Nations. Article 16.3 of the UDHR recognized that "the family is the natural and fundamental group unit of society and is entitled to protection by the society and the State."[176] Though the UDHR was a mere declaration of intention, and therefore not binding on member states, many international law scholars feel that it progressively became part of international customary law because its principles and rights have been widely observed by the international community. It took another 18 years, however, for the international community to formalize the rights proclaimed in the UDHR in two fundamental international Conventions: the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), signed but not ratified by the United States.

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[172] Buck, *supra* note 168, at 48.
[173] *Id*. at 12.
[174] *Id*.
[175] Ensalaco, *supra* note 171, at 10.
[176] *Id*. at 11.

The ICCPR proclaims the right of the child to be protected from discrimination, and the right to a name and nationality.[177] The ICESCR notably provides protection to children against economic and social exploitation (Article 10.3), rights to health (Article 12) and education (Article 13). Together with the UDHR, the two covenants are referred to as the *International Bill of Human Rights*.

Meanwhile, the United Nations, in 1959, adopted its own Declaration on the Rights of the Child in which it stated that "mankind owes the child the best that it can give."[178] The 1924 League of Nations Declaration and the United Nations' 1959 Declaration share a fundamental similarity: in both, "the notion of the child's development figures as the moral foundation of the rights of the child."[179] Principle 2 of the 1959 Declaration provides that:

> [T]he child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner in conditions of freedom and dignity.[180]

Delinquency, an area of concern in the 1924 Declaration, is not addressed in the 1959 Declaration, but said Declaration introduces new protections, such as the "protection from practices promoting racial, religious, or other discrimination" (principles 1 and 10). Moreover, the 1959 Declaration goes further than the mere protection of children and introduces the notion of "rights,"[181] as well as new concepts such as the "best interests of the child" (principles 2 and 7).[182]

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[177] Buck, *supra* note 168, at 12.
[178] Ensalaco, *supra* note 171, at 11.
[179] *Id*. at 12.
[180] Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959), at princ. 2.
[181] For instance, principle 4 of the U.N. Declaration on the Rights of the Child provides that "(t)he child shall have the right to adequate nutrition, housing, recreation and medical services."
[182] Principle 2 provides that "the best interests of the child shall be the paramount consideration" and Principle 7 states that "[t]he best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents."

The 1959 Declaration does not provide any clear definition for the "best interests of the child" concept. Each country is left to refine this concept and there is no universally accepted legal definition of the term. Its definition varies depending on culture, geographic location, and prevailing legal and political systems.[183] Linda J. Olsen summarizes the "best interests of the child" notion in the 1959 Declaration as follows:

> Principles of the 1959 Declaration of the Rights of the Child indicate that the best interests of children are achieved not only when their tangible needs are met, but also when their needs for love and understanding are met. Wherever possible, according to the 1959 Declaration, those tangible and intangible needs of children should be met as they grow up in the care and responsibility of their parents.[184]

In 1979, the UN's International Year of the Child marked the beginning of a lengthy process, culminating a decade later with the United Nations General Assembly's adoption of a historical treaty on children's rights: the United Nations Convention on the Rights of the Child (CRC). This treaty is historic because its drafting included the participation of non-governmental organizations and because it was signed by a record sixty-one countries on the first day it was open for signatures.[185]

## *Convention on the Rights of the Child (CRC), 1989*

The Convention on the Rights of the Child was adopted in November 1989 by the General Assembly of the United Nations and came into force on September 2, 1990, after its ratification by 20 countries. With the exception of the United States and Somalia, all United Nations countries have ratified this Convention which provides for a wide array of rights for

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[183] Linda J. Olsen, Comments, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 Penn St. Int'l L. Rev. 483, 487-488 (Winter 2004).
[184] *Id*.
[185] Buck, *supra* note 168, at 47.

children, including the right to freedom of expression; the right to freedom of thought, conscience, and religion; the right to freedom of association; and the right of the child to be protected from economic exploitation, and from sexual exploitation.[186] The treaty also provides that "States Parties shall take all appropriate measures to prevent the abduction, the sale of or traffic in children for any purpose or in any form."[187]

Relevant to the context of CHINS reform, the Convention regularly refers to the "best interests of the child." For instance, Article 9 provides that "a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine . . . that such separation is necessary for the best interests in the child."[188] Pursuant to this article, "all interested parties shall be given an opportunity to participate in the proceedings and make their views known."[189] The same article provides that a child separated from one or both parents shall have "the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."[190] Articles 20 and 21 respectively contain provisions regarding foster care and adoption. And Article 37 and 40 contain important provisions regarding imprisonment, capital punishment, and procedural rights for children accused of having infringed the penal law. It is perhaps Article 12 that is the most influential on establishing a framework for children's rights.

Article 12 provides that the States Parties shall "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of

[186] United Nations Convention of the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.
[187] *Id*. at art. 19.
[188] *Id*. at art. 35.
[189] *Id.* at art. 35.
[190] *Id*.

the child."[191] Article 12 relies on the Rights-based social policy and the Welfarist policy, the two leading social policies regarding the participation of children in society today.[192] The Welfarist policy views children as vulnerable members of society, needing guidance. Under the Welfarist model, "the role of parents, schools, social services and the state is to protect, nurture and provide fulfilling opportunities for children's development."[193] The Rights-based policy, in contrast, allows for children to play a much more active role in their lives. This policy is centered on the idea that "children have distinct rights that can be asserted morally and legally."[194] This article could be used as a basis for a graduated CHINS procedural framework that would take into account the age and maturity of the child.

Each state's progress in implementing the rights recognized by the Convention is monitored by a Committee on the Rights of the Child, consisting of ten elected experts, which reviews reports submitted on a regular basis by States Parties.[195] While the rights of the child have evolved in the United States — with the gradual recognition that a child should be considered "a person" entitled to constitutional rights — there is a wide consensus that the restriction of autonomy rights afforded to children makes sense because children do not possess the same cognitive abilities as adults. Their abilities thus evolve gradually from infancy through adolescence.

The Convention on the Rights of the Child is in line with this concept. As Barbara Woodhouse explains:

> Parents are seen as natural guardians of the child's rights, and have both the right and the responsibility to provide guidance and direction . . . The CRC recognizes that children are entitled to basic human rights, and the exercise of those rights

[191] *Id*. at art. 35.
[192] Buck, *supra* note 168, at 9.
[193] *Id*.
[194] *Id*.
[195] United Nations Convention of the Rights of the Child, *supra* note 186.

> will be protected by the parents and gradually turned over to the child as it becomes appropriate, consistent with their growth and development.[196]

Additionally, "[t]he CRC broadly reflects the view that a child is not a chattel, but a human being in his or her own right. As such, the child is entitled to be recognized as a person under the law, which U.S. courts have so ruled"[197] in cases such as *Tinker v. Des Moines Independent Community School District*. The *Tinker* Court held that "[s]tudents in school as well as out of school are 'persons' under the Constitution. They are possessed of fundamental rights under which the State must respect, just as they themselves must respect their obligations to the State."[198]

The CRC also seems to emphasize the role of parents and the importance of the family in the development of the child. The preamble of the Convention states that the family is "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children."[199] The preamble also provides that the family "should be afforded the necessary protection and assistance" and that children "should grow up in a family environment."[200] Further, the "[n]ineteen articles of the CRC expressly acknowledge the importance of parents and the family in the lives of children. Many of these provisions could have been drafted without reference to parents, legal guardians, or families, but the drafters of the CRC intended to build into it the recognition of the valuable role played by parents and families in the development of children."[201]

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[196] Barbara Bennett Woodhouse, *The Family-Supportive Nature of the U.N. Convention on the Rights of the Child, in* The U.N. Convention on the Rights of the Child 37, 43 (Transnational Publishers ed., 2006).
[197] Cris R. Revaz, *An Introduction to the U.N. Convention on the Rights of the Child, in* The U.N. Convention on the Rights of the Child 9, 10 (Transnational Publishers ed., 2006).
[198] *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 511 (1969).
[199] United Nations Convention of the Rights of the Child, *supra* note 186, 1577.
[200] *Id*.
[201] Jonathan Todres, *Analyzing the Opposition to U.S. Ratification of the U.N. Convention on the Rights of the Child, in* The U.N. Convention on the Rights of the Child 19, 21 (Transnational Publishers ed., 2006).

As mentioned earlier, the United States signed, but failed to ratify the Convention, despite the key role it played in its negotiation. Two main arguments have been raised to justify the refusal by the U.S. Congress to ratify the Convention.[202] First, there is a fear that the ratification of this treaty would "federalize" family law, an area of law that is governed by the individual states, as opposed to the federal government.[203] Under Article IV of the U.S. Constitution, an international treaty ratified by the United States becomes the "law of the land."[204] Were the Convention ratified, the CRC provisions would then become binding both in federal and state courts. However, Congress has always attached a declaration of non-self execution to the human rights treaties it has ratified,[205] and it could do the same with the CRC. Such a declaration would mean, in practice, that the provisions would not be self-executing, and therefore litigants in federal or state courts could not directly rely on these provisions as binding authority until they were enacted respectively through some federal or state legislation.[206] While the technicalities surrounding the incorporation of international law into U.S. domestic law are important to consider, it should be pointed out that, under international law, a state which has signed a treaty, but failed to ratify it, is still obligated to refrain from violating the "object and purpose of that treaty."[207]

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[202] Article II, Section 2, of the Constitution states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

[203] Buck, *supra* note 168, at 77.

[204] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, § 1, cl. 2.

[205] Congress has ratified the following human rights treaties: Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination.

[206] Trevor Buck points out that this Senate practice and the deference given to it by courts is controversial. It remains unclear how a declaration of non-self execution can constitutionally acquire the force of law. Buck, *supra* note 168, at 78.

[207] Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331.

Secondly, the opponents of the CRC argue that its ratification would create rights for children which would threaten parental rights.[208] The conservative religious right is among the groups most worried about that aspect of the Convention.[209] These groups' opposition to the CRC stems primarily from the belief that "passage of the Convention will threaten U.S. sovereignty, interfere with parental rights, and grant permission for children to disobey their parents, join gangs, have abortions, etc."[210] Further, some opponents argue that it is not up to the government to guarantee the social and economic rights[211] laid out in the Convention.[212] The current administration of President George Bush has explicitly stated its opposition to the treaty:

> The Convention on the Rights of the Child may be a positive tool for promoting child welfare for those countries that have adopted it. But we believe the text goes too far when it asserts entitlements based on economic, social and cultural rights. . . . The human rights-based approach . . . poses significant problems as used in this text.[213]

## *Other Important International Developments in the Field of Juvenile Justice*

While the CRC was being drafted, the United Nations, in 1985, adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules (hereafter "the Rules"), regarding children's rights and the need for separate systems of juvenile justice.[214] The Rules are unique in that they are the first international legal

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[208] Buck, *supra* note 168, at 78.
[209] *Id*.
[210] Campaign for U.S. Ratification of the Convention on the Rights of the Child, http://childrightscampaign.org/crcsummit.htm (last visited March 10, 2007).
[211] For instance, the right to health and health services (Article 24) or the right to an adequate standard of living (Article 27(1)-(3)). United Nations Convention of the Rights of the Child, *supra* note 186, 1577.
[212] Buck, *supra* note 168, at 78.
[213] WorldNetDaily, *Bush team signals new U.N. direction*, http://wnd.com/news/article.asp?ARTICLE_ID=21590 (last visited March 22, 2007).
[214] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53, (Nov. 29, 1985).

standards to approach juvenile justice from the perspective of children's rights and development.[215] Section 7.1 of the Rules states that, in all stages of juvenile justice proceedings:

> Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed.[216]

Besides the right to have a parent or guardian present, the Rules also stress diversionary programs to avoid criminal adjudication. Section 11.4 states that "efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims."[217] These diversionary programs, under section 11.3 of the Beijing Rules, require the consent of either the child or the parent or guardian.[218]

The Rules advise that institutionalization should only be implemented as a last resort, and that juveniles should be institutionalized for the minimum period of time.[219] The Rules also stress the need for training in section 22.1, which states that "professional education, in-service training, refresher courses and other appropriate modes of instruction shall be utilized to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases."[220] According to Section 22.2 of the Rules, the personnel must also "reflect the diversity of juveniles who come into contact with the juvenile justice system."[221]

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[215] Geraldine Van Bueren & Anne-Marie Tootell, The Background of the Beijing Rules,http://child-abuse.com/childhouse/childrens_rights/dci_bei1.html (last visited Mar. 21, 2007).
[216] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, *supra* note 214, at Rule 11.3.
[217] *Id*.
[218] *Id*.
[219] Geraldine Van Bueren and Anne-Marie Tootell, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, http://child-abuse.com/childhouse/childrens_rights/dci_be29.html (last visited Mar. 21, 2007).
[220] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, *supra* note 214, at Rule 22.1.
[221] *Id*. at Rule 22.2

### *Juvenile Delinquency Prevention and the Riyadh Guidelines*

The UN adopted the United Nations Guidelines for the Prevention of Juvenile Delinquency (also known as the Riyadh Guidelines) in 1990.[222] Unlike the Beijing Rules, which dealt mainly with children once they come into contact with the juvenile justice system, the Riyadh Guidelines focus on prevention, particularly for youth who are at "social risk."[223] The Guidelines seek to address the root causes of juvenile delinquency by calling for social programs that benefit entire families, not just children. Geraldine Van Bueren writes that the Riyadh Guidelines "encourage the development of policies applying to the population as a whole by recommending the development of social welfare programmes, particularly in education, labour and health."[224] The Riyadh Guidelines recommend that these social programs not be based on ideology alone. Article 5, Section 48 states that, "[p]rogrammes to prevent delinquency should be planned and developed on the basis of reliable, scientific research findings, and periodically monitored, evaluated and adjusted accordingly."[225]

As we have seen, international child law progressed throughout the 20th century, culminating with the quasi-universal adoption of the CRC. While it emphasizes the role of parents and families, the CRC has become an authoritative text in terms of children's rights worldwide. The CRC provides a guiding human rights framework for state agencies implementing policies relating to children. The rights and principles it lays out inspire and shape countless holistic programs and policies around the world, which take into account the interests of the child, the parents, and the community at large (see the International section *infra*).

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[222] Geraldine Van Bueren, The International Law on the Rights of the Child 195 (1995).
[223] *Id*.
[224] *Id*.
[225] Office of the High Commissioner for Human Rights, *United Nations Guidelines for the Prevention of Juvenile Delinquency* (1990), http://www.unhchr.ch/html/menu3/b/h_comp47.htm (last visited Mar. 21, 2007).

The United States has only ratified three of the six international human rights treaties it has signed, lagging far behind the other industrialized nations. However, states throughout the country have incorporated the language of these international treaties into their constitutions or statutes. Organizations, such as the Massachusetts CEDAW Project,[226] have successfully helped state legislators across the country incorporate international human rights treaty language and standards in their policies and legislations.[227] Massachusetts could incorporate the standards and principles laid out in the CRC in its reform of the CHINS legislation.

## A Different Perspective and a New CHINS Model

Our model for the new CHINS process, as well as the procedural questions we address at the end of the paper, were influenced by our research in several areas. On a conceptual level, our analysis was strongly informed by the goal of providing second-order change by looking at the theories of youth development, the concept of collaborative lawyering, and programs in family group conferencing and respite care. Although these ideas seem broad, as we discuss below, they framed the way that we envision our new model for CHINS. Though these conceptual ideas were important, a large part of research was focused on models used to deal with status offenders in other states and other countries. The third section of our paper describes and analyzes those systems in order to provide an informational background that one may find useful in evaluating the ideas presented in our model. The conceptual theories we relied on are provided below as a background to our model.

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[226] For more information, visit http://www.suffolk.edu/research/6727.html (last visited on Mar. 10, 2007). "CEDAW" stands for The Convention on the Elimination of All Forms of Discrimination Against Women.

[227] See case studies in NUSL Law Office #15 Report regarding the incorporation of human rights language in various state legislations pertaining to education, prisoners' rights, public health, same-sex marriage, and women's rights.

## *Youth Development*

Dealing with youth is not the same as dealing with adults. Children and adolescents in many cases, do not have the ability to respond to commands, instruction, or information the same way as adults. Although this idea is — on a common sense level — well understood, the section below provides an overview of some of the relevant research, particularly with respect to teenagers.

Minors are going to face several difficulties in the system, different from those faced by the average adult. Developmental psychologists continue to present evidence that adolescent behavioral choices and "their decisions as defendants in the legal process reflect cognitive and psychological immaturity."[228] The idea that juveniles should be treated differently from adults is certainly not new. In 1909, Julian Mack argued that "the child offender should receive at the hands of the law a treatment differentiated to suit his special needs."[229] However, in dealing with adolescents charged with crimes, the juvenile justice system seems to be increasingly willing to treat juveniles in the same way as adults. Forty-one states, for example, changed their laws to make it easier to prosecute minors as adults between 1992 and 1995.[230] In order for the CHINS system to avoid following this trend, there needs to be an increasing recognition that the persons being adjudicated are *non-criminal* minors.

Adolescents develop the ability to think hypothetically and build their cognitive performance as they become more familiar with different areas of knowledge and as they

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[228] Elizabeth S. Scott and Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J.Crim. L. & Criminology 139 (Autumn 1997).
[229] Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 115 (1909).
[230] Melissa Sickmund, Howard N. Snyder, and Eileen Poe-Yamagata, "Juvenile Offenders and Victims: 1997 Update on Violence: Statistics Summary," National Center for Juvenile Justice, (1997).

reinforce earlier knowledge.[231] Adolescents do not have the same ability, on average, as adults to make decisions about what would be in their long-term best interest.[232] This is demonstrated in many areas, including adolescent participation in anti-social, criminal, or risky behavior. The rate of delinquent behavior climbs from about age 12 and peaks at between 15 and 18. After age 18 there is a "marked decrease in illegal activity . . . so well documented that all credible theories of delinquency must account for it."[233] This is also evidenced by the level of adolescent participation in risky behaviors. Fifty percent of adolescents reportedly engage in two or more of the following risk-taking behaviors: drug and alcohol abuse, unsafe sex, school underachievement (failure and dropout), and delinquency (crime and violence).[234]

Despite some studies focused on informed consent (for medical decisions), that found that past the age of 14 children are able to make competent decisions, developmental psychologists suggest that the decision-making capacities of teenagers are not the same as those of adults because of (a) peer pressure and a desire to conform; (b) a blindness to potential risks or a focus on the negative impacts of not doing a risky activity; (c) an interest in the short-term rather than long-term consequences of an action; and (d) a temporal perspective that is not fully developed.[235]

This inability to make well thought out decisions about their future also means that teenagers are "at risk of being less competent participants in their defense than are adults, and

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[231] Scott and Grisso, *supra* note 228, at 157-58.
[232] Emily Buss, *The Role of Lawyers*, in Youth *on Trial: A Developmental Perspective on Juvenile Justice*, 257-258 (Grisso and Schwartz eds., 2000).
[233] Thomas Grisso, Society's *Retributive Response to Juvenile Violence: A Developmental Perspective*, Law and Human Behavior 233 Vol. 20, No. 3 (1996).
[234] Richard M. Lerner & Nancy L. Galambos, *Adolescent Development: Challenges and Opportunities for Research, Programs, and Policies*, 49 Ann. Rev. Psychol. 413, 436 (1998).
[235] Carrie Fried & N. Dickon Reppucci, *Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability, Law and Human Behavior*, 46 Vol. 25, No. 1 (February 2001). *See also* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, J.Crim. L. & Criminology, 160-164 (1997).

that this risk is especially great for youths under the age of fourteen."[236] Problems cited include a lack of understanding regarding the legal process and its basic purpose. Today in Massachusetts, there is a lack of data about the type of children entering CHINS. However, if the CHINS population is similar to the juvenile delinquency population, there may be an additional, but hidden, problem that further impedes children from fully participating. Delinquent youths have a higher than average occurrence of disabilities such as emotional disturbances, attention deficit disorders, or learning problems which make their ability to understand and participate more delayed than the average adolescent.[237]

There are also questions as to how much adolescents are willing to trust their attorneys.[238] They do not have the same expectations of trust about their lawyer that adults typically possess. In many cases, adolescents do not distinguish their lawyer from any of the other "adults" in the system and do not necessarily have the impression that their lawyer is on their side.[239]

The perceptions of the youth combined with their sometimes lessened capacity to make decisions because of their age, impacts every part of this process and its success. In addition to the developmental process of children in general, we should constantly be reminded that throughout a child's life, and well prior to any contact with CHINS, the family is one of the most important factors, if not the most important factor, in determining how a child is socialized. This socialization shapes a child's attitudes, behavior and personality.[240] Reaching a child necessarily will involve reaching that child's family.

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[236] Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, Psych., Pub. Pol'y & L., (1998).
[237] *Id*.
[238] Scott and Grisso, *supra* note 228, at 172.
[239] Buss, *supra* note 232, at 254-57.
[240] Albert R. Roberts, *Juvenile Justice: Policies, Programs, and Services* 222 (1989).

### *Collaborative Law*

The current CHINS system utilizes an adversarial model that is not ideally suited for families. Treating parents and children like opposing parties in a law suit will not bring families closer together, rather it will drive them farther apart. The adversarial system is based on competing interests and rights, but if the goal of a court proceeding is to preserve and strengthen families, establishing a system that places the parent and child on opposing sides cannot succeed. In *Rights Myopia in Child Welfare,* Clare Huntington examines the way that competing rights affect child-welfare cases.[241] She argues that the current family law system places too much emphasis on parental rights and children's rights and by doing so sacrifices an ability to help families. This problem may be further exacerbated by attorneys who are ethically bound to fight for their client's interests, rather than focusing on what is in the best interests of the family.[242] If each lawyer is focused solely on their individual client's rights, the best interests of the child, and of the family, may be lost in the process.[243]

Although due process guarantees are important for children and parents, focusing solely on these rights will not adequately help families. A rights-based framework assumes that people within the framework are autonomous individuals who can take care of themselves, and often rights are asserted to prevent the state or an individual from interfering with one's individual autonomy.[244] This presumption of autonomy does not work when a child is involved because children by definition are not autonomous.

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[241] Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L.Rev. 637, 664 (2006).
[242] Gregory Firestone, Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 Fam. Ct. Rev. 203, 204 (2004).
[243] *Id*.
[244] Huntington, *supra* note 241, at 664.

In addition, parents may not be autonomous either. In the child welfare system that Huntington analyzes, parents who appear in court may be in need of extensive services that only the state can provide.[245] If the state focuses simply on parents' and children's rights, without also examining the ways in which those rights are inhibited by attendant circumstances such as poverty, homelessness, mental illness and cognitive disabilities, they fail to address the root cause of the problem. "Although a parent may wish the state to leave her alone and let her raise her child," Huntington writes, "if she is unable to do so because of poverty, then to truly exercise the right to the care and custody of her child, she may need the assistance of the state."[246]

This problem Huntington describes is apparent in the CHINS system. Children and parents appear in court because they are in need of help from the state in the form of various medical, educational and psychological services. The problem with focusing exclusively on the rights of parents and children is that far too often the rights are seen as competing and conflicting, thus creating an adversarial relationship between family members.[247] CHINS reform should be focused on bringing families closer and providing the services necessary to facilitate this goal. Pitting parent against child in a battle of rights undermines this goal since, as Huntington argues, the current legal system turns the state and the parents into adversaries rather than creating the collaborative relationship necessary in order to truly address a family's needs.[248]

While the current adversarial model may perpetuate conflict among family members, it does offer some important procedural protections. It is feared that getting rid of lawyers and judges will hinder the goal of making sure that children are protected and that their best interests

[245] *Id*. at 663.
[246] *Id*. at 670.
[247] *Id*. at 670-71.
[248] *Id*. at 664.

are being served. To address those concerns within a non-adversarial setting, we looked at collaborative law as a possible compromise for the CHINS system.

Collaborative law is typically used in divorce cases as a way of avoiding costly legal battles and the emotional turmoil they create. Under this model, each party has an attorney who agrees to represent them only for negotiations and who will withdraw if litigation becomes necessary. Collaborative law experts view this aspect as incredibly important because it creates an important incentive to work through disagreements and come to a settlement.[249] In addition, both parties agree to full-disclosure while the negotiations are being conducted. Each lawyer is still bound to represent the interests of their client, but all agree to share information and negotiate in good faith.[250] The attorneys use their analytical, advocacy, and negotiating skills to help the parties find a solution, and at the same time protect parties from creating unworkable or unwise agreements.

The collaborative law process begins with an initial private meeting between each party and their attorney. At this meeting, the client shares their perspective about the case, as well as their hopes regarding the ultimate outcome.[251] This meeting is an important step because it allows the lawyer and client to determine if collaborative law is the best option before the process can begin. In a divorce proceeding where there was a history of domestic violence, for instance, a lawyer may advise the victim that collaborative law is not appropriate given the history of coercion, intimidation and violence between the parties.

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[249] Elisabeth Strickland, *Putting Counselor Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. Rev. 979, 983-984 (2006).
[250] *Id*. at 985.
[251] The Collaborative Law Institute of Minnesota, http://www.collaborativelaw.org/index.cfm/hurl/obj=aboutCollaborativeLaw/aboutCollaborativeLaw.cfm.

One potential problem with the collaborative law model in the CHINS context occurs if the child's lawyer suspects or knows the client has been or is being abused by their parent. When this is the case, the power imbalance and the danger of further abuse would make it impossible to create a truly collaborative atmosphere. This danger, however, is not inherent in the collaborative law model, but the fault of a system that does not adequately screen incoming CHINS cases for potential abuse and neglect. Ideally, the crisis intervention program proposed by the draft legislation will identify the abused children and file care and protection claims before they get to CHINS.

Once both parties with the help of their attorneys have decided that collaborative law is a workable approach, the lawyers meet to design a process or outline for the negotiations and make each other aware of particular "hot spots" that might make negotiation difficult.[252] After the lawyers iron out the details, everyone signs the collaborative agreement which states that the parties will attempt to negotiate in good faith, that they commit to settling out of court, that they will share information freely and work to create a cooperative environment.[253]

In the agreement, both parties and their attorneys agree to keep all information confidential, except as it relates to child abuse and neglect or risk of serious harm to another individual.[254] Should the negotiations fail, both parties agree not to use any information that

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[252] Sherri Gorin Slovin, *The Basics of Collaborative Family Law-A Divorce Paradigm Shift*, The American Journal of Family Law, Volume 18, Number 2 (2004), *available at* http://www.mediate.com/articles/slovinS2.cfm.

[253] Massachusetts Collaborative Law Council, Principles and Guidelines, http://www.massclc.org/principles.htm (last visited Apr. 20, 2007).

[254] Boston Law Collaborative, Collaborative Family Law Process Agreement, http://www.bostonlawcollaborative.com/documents/Collaborative_Law_Agreement_Children.doc (last visited Apr. 20, 2007).

came out of the process in subsequent court proceedings.[255] Essentially, if the collaborative lawyering fails, it is as if it never happened and the parties simply go to court.

The advantages of collaborative lawyering are that the parties themselves can craft a solution rather than depending on a judge who knows nothing about the family except what he or she hears in the course of the divorce proceedings. Although the model is so new that there is no empirical evidence, practitioners say that in the vast majority of cases, a settlement is reached. In addition, collaborative law is generally cheaper than traditional court proceedings because it eliminates all of the costs associated with formal discovery and document preparation.[256]

Another advantage of the collaborative law model is that it is flexible enough to take future problems into account. In traditional divorce cases, for example, lawyers are often focused on immediate problems such as allocating child support, dividing assets, etc. It is rare for long-term family issues and needs, particularly emotional ones, to be taken into account.[257] This is a problem in CHINS as well. Under the current model, the court and the lawyers may be so focused on addressing the issue that brought the child before the court that other equally important areas may be neglected. Under the collaborative law model, there is more time to flesh out all the issues and address the short and long-term needs of the family.[258]

One interesting variation on the collaborative law model is called team or multi-disciplinary collaborative law. In this model, in addition to the clients and their lawyers, parties may ask financial and child specialists to help them come up with the best solutions. These individuals are specially trained and can help the parties fully appreciate the ramifications of

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[255] *Id*.
[256] Collaborative Law Institute of Minnesota, http://www.collaborativelaw.org/index.cfm/hurl/obj=faq/faq.cfm#17.
[257] Elisabeth Strickland, *Putting Counselor Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. Rev. 979, 986 (2006).
[258] *Id*.

their decisions. Although this method may appear more costly, the specialists generally charge far less than the lawyers and their work can help the parties find resolution in a timely manner.[259] The idea of a child specialist is particularly relevant to CHINS reform. The child specialist is trained in social work and psychology with an understanding of child development. The specialist interviews each party separately and also interviews any children the parties have. During the collaboration, the specialist will help the parties focus on the children's needs when creating a solution.[260] The lawyers need not be present during discussions with specialists but the parties should feel free to consult them if need be.[261]

### *Family Group Conferencing*

The idea that the system should move toward a more non-adversarial approach and the use of mediation and family group conferencing is supported by the model of family group conferencing in Clare Huntington's article *Rights Myopia in Child Welfare* discussed above. Huntington sees the adversarial model as an outgrowth of a focus on rights. She suggests a new model that is not based on where to draw the line on the preservation of family and protection of rights, but rather on how to best help families address the serious underlying problems that are the root causes of the child's behavior.[262] This new model is focused on the child welfare system, but it is useful to consider adopting measures like this in the CHINS system. It also provides another perspective on the question of whether parents should be afforded the right to legal counsel in proceedings.

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[259] The Collaborative Law Institute of Minnesota, *supra* note 251.
[260] Norma Levine Trusch, *Multi-Disciplinary Collaborative Law*, The Collaborative Law Institute of Texas, http://www.collablawtexas.com/article_multidisciplinary_collaborative_law.cfm, (2006).
[261] *Id*.
[262] Huntington, *supra* note 241.

According to Huntington, the new family group conferencing model would acknowledge a parent's need for assistance, which would foster collaboration between the child, the state, and the family. She describes it as the "problem-solving" model. In these conferences, a social worker would conduct an initial investigation to determine any underlying family problems and would refer the case to a conference coordinator who would convene the conference. These conferences, which New Zealand has required in its processes, would force the family, child, and community to look for the solutions, fostering a collaborative process.[263] This moves away from the adversarial system, and would eliminate the need for legal representation in these kinds of procedures. The community would be used to support the family, as well as the social workers and coordinators.[264] Instead of relying on a lawyer to advocate for the best interests of the parents and children, family group conferences would use the parents, extended family members, and community representatives to advocate for the interests of the child and family.

Although Huntington's argument is based on the United States child welfare model, this "problem-solving" model may be appropriate for CHINS. If a problem solving or non-adversarial model was adopted, legal representation would only be a factor in a few cases. Ideally, social workers, coordinators, extended family, and the community would be used to advocate for the best interests of the child and the family, and addresses the underlying causes of the child's problems in an unbiased manner.

### *Respite Programs*

Traditionally, respite care involved situations where families needed a break or "respite" from caring for a family member who was ill. However, there are also respite programs that

[263] *See* Section, "New Zealand's Law Enforcement System," *supra* for further explanation of the implementation of family group conferencing in New Zealand.
[264] Huntington, *supra* note 241.

specifically deal with status offenders and their families. These programs create an opportunity for status offenders and their parents or guardians to remove themselves from whatever crisis they are experiencing. In the current CHINS program, the only way to separate a child from his or her guardian is for the state to take custody of the youth. However, it would be wise to consider respite programs as a "viable alternative to non-secure detention and other 'custodial placements' for status offenders."[265]

There is no standard model for respite programs. The majority of programs are run by non-profit organizations, but there are state or county run facilities.[266] Some programs, such as the Huckleberry House in San Francisco, California, provide beds for status offenders and other at-risk youth at their actual facility.[267] Other programs utilize a network of host families that provide the youth with a safe place to sleep at night, while a center provides counseling during the day.[268] While this type of program may resemble systems of foster care, the crucial difference is the intensive commitment to providing the child with the necessary services. Status offenders placed in foster care are often unable to access the services they require.[269] A study done by the Vera Institute of Justice found that status offenders that were sent to foster care stayed for an average of four months before being sent home without receiving the necessary services.[270] Respite programs would help to ameliorate this deficiency in the treatment of status offenders and their families.

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[265] Fiza Quraishi et al., *Respite Care: A Promising Response to Status Offenders at Risk of Court Ordered Placements*, Vera Institute of Justice 2002, 2.
[266] *See* PowerPoint created by Connecticut General Assembly http://www.cga.ct.gov/kid/FWSN/hartford100406.ppt
[267] Huckleberry Youth Programs. http://huckleberryyouth.org/huckhouse.html. (Last visited March 2, 2007)
[268] This system is used by the respite program Bridge Over Troubled Waters in Boston, MA.
[269] Quraishi et al., *supra* note 265, at 4.
[270] *Id.*

There are different avenues which can lead a child and his or her family to respite programs. For example, half the children who participate in the respite program Youth-Family-Adult (YFA) Connections in Spokane, Washington, are referred by child welfare agencies, while the other half consists of walk-ins and school and probation referrals.[271] Once a youth has either been referred to the program or has come in on their own, an intake counselor conducts an in-depth assessment of that child's particular needs and problems.[272] That information will then be used to determine what services are necessary. Although there may be some variation in the services programs choose to focus on, all respite facilities provide the same basic services. Typical of the services available at a respite program are those at the Youth Crisis Center (YCC) in Jacksonville, Florida. The YCC provides: "individual, group and family counseling, educational enhancement and youth development programming, supervised recreational activities, life management and social skill activities, aftercare support, referrals to other community agencies (when necessary)."[273] In providing treatment for a young person, respites strive to positively impact all aspects of the youth's life. The holistic approach taken by respite programs should be prevalent in all aspects of the reformed CHINS system.

A status offender and his or her family may opt for a respite program at two points in the proposed model. A child can be placed in a respite program as part of the informal voluntary services process. In addition, our model requires a hearing when either the parent or the child has refused to participate in the informal services. If at that time a judge feels that the child should be removed from his or her home, the judge has limited options as far as placing the

[271] *Id*. at 2.
[272] *Id*. at 3.
[273] Youth Crisis Center http://youthcrisiscenter.org/index.php?option=com_content&task=view&id=25&Itemid=40. (Last visited March 3, 2007).

child.[274] Traditionally, the child would be placed in a foster home or state facility. The article, *How Children's Foster Care Experiences Affect Their Education*, contends that "research shows that putting adolescents in foster care and non-secure detention can actually exacerbate some of the problems that cause family conflict."[275] For example, children who may already have truancy issues are likely to miss additional school when they are placed in a foster home or state facility.[276]

Another benefit to respite programs is that they are often less expensive than traditional programs.[277] Children are held in foster homes and juvenile facilities until there is a hearing or the judge makes a decision, both of which can take months.[278] In comparison, a child in a respite program only has to stay for as long as he or she needs services. Therefore, the State's resources would be used more efficiently in a respite program.

Choosing to participate in a respite program instead of a more traditional housing option is largely voluntary.[279] The potential for a parent to feel that custody has been taken away should not exist in a respite situation. Before joining a respite program, parents or guardians and their children may be asked to sign contracts promising to follow the rules of the program.[280] However, by agreeing to participate in the program, guardians are not relinquishing custody. Guardians still have the ability to remove their child from the program. In the program, Bridge Over Troubled Waters, the child is allowed to leave with his or her guardian unless the staff feels that the child is being abused. However, Tracey Barton, a counselor for Bridge Over Troubled

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[274] Quraishi et al., *supra* note 265, at 1.
[275] Dylan Conger and Alison Rebeck, *How Children's Foster Care Experiences Affect Their Education* (New York: Vera Institute of Justice, 2001), 21.
[276] Timothy Ross et al., The Experiences of Early Adolescents in Foster Care in New York: Analysis of the 1994 Cohort (New York: Vera Institute of Justice, 2001), 19.
[277] Quraishi et al., *supra* note 265, at 2.
[278] *Id*. at 2.
[279] *Id*. at 4.
[280] *Id*. at 3.

Waters, believes that their program has never experienced a parent wanting to remove their child.[281] In reality, the program struggles with getting parents more involved in the process.[282] If the child is not allowed to go with their parent because of abuse issues, a hearing is held.[283] It is then that custody can officially be taken away from the parent and transferred to the state.

Respite programs provide a valuable alternative to more traditional treatment options for status offenders. Respites give the youth better access to services and provide more in-depth treatment options. Respite programs are less expensive than foster care or juvenile facilities because of their flexibility. They are not as constrained by the court system which enables them to provide services for as long as they are appropriate and not have to wait for the next court date. Respites also tend to focus more on treating the entire family and not just the status offender helping to prevent recidivism. "Unlike traditional detention and other out-of-home placements for runaways and lockouts, respite care promotes better educational outcomes and better interaction among family members at a fraction of the cost."[284] By incorporating respite programs, CHINS will be more effective in serving the youth of Massachusetts.

## A New CHINS Model

After looking at systems across the country and around the world, we propose the following set of procedures as a new model for CHINS legislation. Building upon the ideals set forth in the draft legislation, we have intended to put the best interests of the child at the

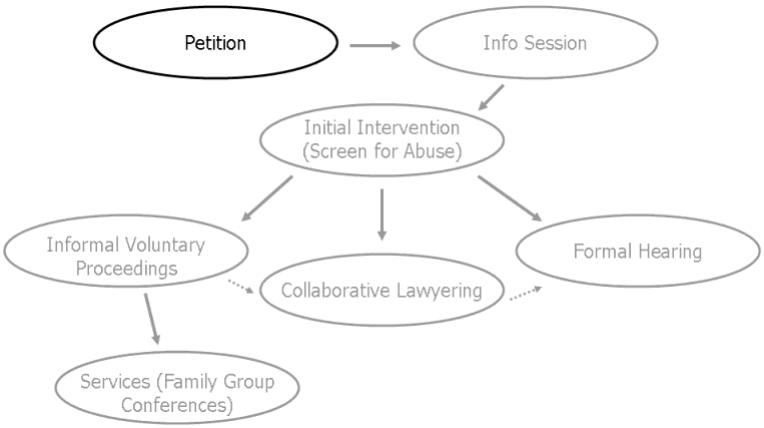
[281] Telephone Interview with Tracey Barton, Counselor, Bridge Over Troubled Waters (Apr. 20, 2007).
[282] *Id*.
[283] *Id*.
[284] Quraishi et al., *supra* note 265, at 8.

forefront, while taking steps to preserve the integrity of the family. The model is focused on informal proceedings and the collaborative involvement of all impacted parties.

The proposed model includes (1) the filing of a petition; (2) informational sessions for parents who file; (3) an initial intervention that includes a screening for abuse; (4) an opportunity for informal voluntary proceedings; (5) an opportunity to participate in collaborative lawyering; and finally, (6) a formal hearing. We describe each of these steps in much greater detail below.

## *Filing the Petition*

The proposed model begins with the filing of the petition. However, under this model (and the draft legislation), before a petition is filed, the child will have participated in diversionary proceedings in an attempt to solve the problem before a formal petition becomes necessary. These services are intended to be provided through both the Community-Based Crisis Center and the child's school. We agree with the draft legislation that truancy petitions should only be accepted after the schools have completed an in-school intervention to try to ameliorate the problem without having to come to court.[285]




[285] Law office #4 has written an extensive report for a pilot program to give youth at the Social Justice Academy an opportunity to engage in restorative justice, community healing, and peer-based remedies for behavior that impacts the child and the community. Many of their ideas would be extremely useful in developing these pre-filing diversionary processes; their report has been provided for that purpose. Additionally the collaborative framework of many of their techniques is in line with our goals for the CHINS process after a petition is filed.

We recommend that petitions be accepted from school administrators, police officers, parents (or legal guardians), and probation officers. Schools, police, and parents already have the ability to seek assistance for a child through CHINS; their participation is not new and is based on their relationship with the child.[286] CHINS is designed to address truancy and unreasonable behavior in school, thus petitions filed by schools are appropriate. Running away is another major status offense and police officers are responsible for investigating and attempting to locate runaways. Therefore, it is appropriate that they have the ability to file a petition as well.

The parent's ability to petition should also be maintained. They are likely to be the party with the most information about the different facets of a child's behavior and can give insight on the child's home environment. We do, however, suggest one change with regard to parent filers. We are concerned that parents may not understand the process they are initiating when they file a CHINS petition. For this reason we recommend that there be some type of informational session as a prerequisite for a parent to file a petition. Were money no object, we would recommend that the parent be given a lawyer to explain their rights and the potential consequences of the petition before filing. However, in other states, budgetary constraints have led them to convey this information through other means. Orange County in New York, for example, requires a 2-hour video presentation in order to file a PINS petition.[287]

The only new party being given the right to file under our model is probation officers. We believe that probation officers have a role analogous to school officials and the police. They are all parties that are responsible for the care and protection of children in the community and they all have daily contact with those children that are likely to need assistance from CHINS. As

[286] M.G.L.A. 119 § 39E (2006).
[287] See discussion of Orange County NY *supra*.

pointed out by a task force member at the Steering Committee Meeting in March, probation officers may indeed know a child better than a school. Many children are repeatedly filtered through the juvenile justice system and a probation officer may be aware of a child who would benefit from the services provided by CHINS and may want to redirect a child into the CHINS system if the criminal behavior in question is very minor, or should not be classified as criminal.

We have also considered the question — should children be allowed to file a petition? There are strong arguments on both sides, and we have not come to a definitive conclusion on this issue. Arguably, a child should be allowed to file a petition since (1) that child may require services that they feel they cannot get outside of the CHINS process, but none of the other parties want to file a petition on that child's behalf, whether it is because they are disengaged with the child, or fearful of state intervention in their lives; (2) there is a strong philosophical argument that children need to be empowered in their own life. It undermines a child's autonomy to hold them responsible for their behavior while simultaneously saying that they do not have the right to seek out assistance for themselves; and (3) it reinforces the idea that the system is non-punitive if a child can attempt to enroll themselves.

The arguments against allowing a child to file are that (1) a child should not have to file a CHINS petition in order to get the services and assistance that they need; (2) many children lack the ability to make an informed decision about whether the petition would be in their best interest, and may be convinced by others to file; and (3) very few children would even utilize this option.

In the short-term, if CHINS petitions are the only way to get certain state services, the child may have a compelling reason to seek this right. However, in the long-term, this is not an acceptable way of getting a child the services they need. Services need to be provided for

children outside of the CHINS process, services that the child can access for themselves, or with the help of a parent or guardian or other member of the community.

### *Initial Intervention*

Following the filing of a petition, the next step would be the initial intervention. The initial intervention would be a rapid response system, charged with immediately assessing the situation and determining what steps ought to be taken. The initial intervention requires that a social worker or case manager trained in psychological assessment speak with the members of the family, the petitioners, and any necessary community members (e.g., the school, teachers or coaches that are familiar with the child, the child's clergy). This process should include a screening for abuse. If abuse is uncovered, the CHINS system is not appropriate, and those children should be diverted to Child Protective Services. This process, including a presentation of findings by the case worker, should be completed within 72 hours in every situation where it is possible.[288] The swiftness of the state's response is one of the keys to it being successful. Problems should be dealt with immediately before they have the chance to get out of hand. If services or assessments to provide services take months, the system is not providing what children need.

### *Informal Voluntary Proceedings*

After the initial interviews with the family, and if the parents and child agree, the process would move on to informal voluntary proceedings. After speaking with the interested parties, the social worker or case manager will sit down with the family, discuss the problem and what

[288] Although our research did not focus on data collection we highly recommend that these reports be kept electronically in order to facilitate data collection. The CHINS systems is extremely lacking in data, and therefore extremely lacking in accountability.

the family wants to do in order to rectify the situation. Hopefully they will be able to agree on what types of services the child and the family need, and those services will be provided without having to seek a judicial determination on whether the child is in need of services. This step is modeled after the informal procedures of the Scottish Hearing System, the mediation used in Scandinavia, and the family group conferencing dominant in New Zealand. (If the child *or* the parents choose not proceed with these informal procedures, the child would move down to the collaborative lawyering step.)


After the caseworker or social worker assesses the situation, all of the relevant parties would come together to openly communicate regarding the problems which led to the filing of a petition and decide on a best course of action for the family. While we recommend that the initial meeting be required to take place in 72 hours, subsequent meetings may be required in order to meet the needs of both the family and the state.

The purpose of these proceedings is to foster communication and to assist CHINS in tailoring its services to each individual family. These proceedings should be conducted outside of the courthouse in a private atmosphere. It is recommended that they occur in the family's home, as is done in Scotland, or in another familiar, comfortable setting for the family, such as a community center. Courtrooms are a significant factor in the intimidation that is prevalent in the CHINS proceedings now. Hopefully that would be mitigated by moving the conversation.

At these informal proceedings, the parent and child would be present, along with a neutral third party, such as a social worker or a trained caseworker from the umbrella agency to be created by the draft legislation, and the party that filed the petition. Relevant parties, such as members of the extended family or community would be permitted; they could also submit testimonials if they are unable to attend in person. Scheduling for these meetings should be designed to allow parental attendance.[289] No lawyers would be permitted. The family, the community, and a neutral third party are seen as support for the child and the parents during the voluntary informal proceedings.

The participation of non-parental adults in proceedings can certainly change the way a court sees the child. Different adults, such as extended family members, clergy, coaches, and employers, may be able to shed some light on what is happening in a child's life by offering their distinct perspectives. The draft legislation begins to address the goal of community participation through its use of a panel for crisis intervention services. The team that is convened once a child is adjudicated a CHINS is made up of case manager, a probation officer, a school representative and the parents who make recommendations as to what kind of disposition the court should order. It is a great step towards creating a more balanced and fair process. We also encourage the participation of other parties of interest in the child and the family's life, and that those parties be given the opportunity to be heard.

Systems in use by other states involve more than just the child's parents. In New York child protection proceedings, for instance:

[289] Children should not be forced into a formal hearing simply because their parents were legitimately unable to attend an informal session; the state must schedule such sessions around the parents' other responsibilities, such as jobs.

> The child's adult sibling, grandparent, aunt or uncle not named as respondent in the petition, may, upon consent of the child's parent appearing in the proceeding, or where such parent has not appeared then without such consent, move to intervene in the proceeding as an interested party intervenor.[290]

This allowance for non-parents to become involved shows a movement towards including more of the family in the proceedings, whenever the court deems it necessary. The New York Legislature has removed the bar for such extended family to get involved by expressly providing that "such motions for intervention shall be liberally granted."[291] The New York judiciary, as well as the New York Legislature, has realized that parents are not the only important people in a child's life and they have begun to make accommodations to include these other significant people in court proceedings.

The weight of these other opinions needs to be carefully considered, however. While additional voices can be of value to a judge making a determination at a CHINS proceeding, the rights of the parents or guardians must outweigh them. The Supreme Court, in *Troxel v. Granville*,[292] faced a situation in which paternal grandparents sought a court order to allow them to visit their grandchildren, and noted that giving rights to other parties "comes with an obvious cost . . . [and] can place a substantial burden on the traditional parent-child relationship."[293] Even when adults other than the parents are allowed to speak in court and during voluntary hearings, their rights should never surpass or even be equal to the rights of the parents.

The goal of these informal voluntary proceedings would be to determine which services are best suited to the interests of the child and preserve the structure of the family. The

[290] N.Y. Fam. Ct. Act. 1035 (f) (McKinney 2007).
[291] *Id.*
[292] *Troxel v. Granville*, 530 US 57 (2000).
[293] *Id.* at 64.

proceedings would include the services that CHINS provides currently, such as mental health services, along with the additional option of family group conferencing.

### *Family Group Conferencing*

Family group conferencing is a service used in New Zealand that we are proposing be made available to some families. It allows the family and child to communicate with each other through a third party mediator. The structure of family group conferencing can depend on the family. No lawyers would be present at these conferences, but the extended family and community would be permitted to attend to support the family members. The result of these conferences would be a youth contract, modeled after the practices in Denmark (see, *infra*). When the mediator thinks the family is ready, the group will create a contract to be signed by the child, the parents, and the case worker or social worker. The hope underlying these youth contracts is that all the parties will feel committed to each other in remedying the underlying problems that are causing the child's behaviors. The contents of the contract are individualized, but all should include the parties' commitment to putting the child and family back on the right track.

If informal proceedings are not successful, there are two possible options. In order for the parties to make an informed decision as to which option would better suit them, a lawyer would be appointed at this time. If the parent, the child, and the appropriate state agency are willing to engage in collaborative lawyering, they would be given that opportunity. If one of the parties does not want to participate the next step would be a formal hearing.

### *Collaborative Lawyering*

As discussed above, collaborative lawyering begins with each party meeting privately with their attorney to discuss what they hope will be the solution to the situation and what they are willing to do to create that solution. This step allows participants to confirm that they do wish to participate in collaborative lawyering. In situations of abuse, collaborative lawyering is not an effective tool. Earlier steps in the process are designed to prevent these cases from reaching this stage. However, if the prior screening fails, the initial private attorney/client meeting could serve as an additional screening device. When the lawyer hears the circumstances and the problems involved, she could then advise her client as to whether the process could work in their situation. This meeting would occur prior to the parties signing the collaborative law agreement in which case each party could continue to be represented by their attorney should they choose not to engage in collaborative law.

Despite the distinct advantages collaborative law provides to families in divorce proceedings, it could pose some potential challenges in some CHINS proceedings. Collaborative law in divorce cases involves two adult clients who presumably are competent to make decisions and can understand the ramifications of their decisions in a way that a child may not be able to. The requirement of full disclosure and the agreement to keep all information confidential should the matter go to court may be hard for children because they may not be willing to share relevant information during the collaborative process or they may share confidential information with their new lawyer at trial. Some of these issues can be resolved during the initial lawyer/client meeting. If the lawyer at the meeting feels that the client will not be able to participate in aspects of the collaborative process because of diminished capacity, mental health issues or because the

parent and child relationship is too tense, the lawyer can guide the party away from collaborative law and towards a more formal court proceeding.

If the problems facing the family stem from conflicts with service providers over access to services, the collaborative model could be very helpful. This roundtable discussion would allow the service agencies to engage in an interactive process with families to determine what services are needed and what they can provide. If a representative from the appropriate service agency and his or her attorney were part of a collaborative process with the parent and child, they could create a workable solution and the child would receive the services they desperately need. This is infinitely preferable to a top-down decision imposed by a judge who may be unfamiliar with the family.

The draft legislation already contains a collaborative process which takes place after the fact finding hearing. If a child is adjudicated in need of services, the court would convene a meeting of the probation officer, a case manager from a community-based intervention program, the school, the petitioner and the child's parents or legal guardian to make recommendations on an appropriate disposition.[294] Under the model of collaborative lawyering we suggest, a similar meeting could occur prior to going to court in situations where the parties were willing and their attorneys feel it would be helpful. If the parents, child, and petitioner all agree to the need for services, it doesn't make sense to force them all to go to court before they can discuss accessing services.

This paper discusses many international models that focus less on legal rights and procedural safeguards and more on informal consensus-building and problem-solving. These

[294] An Act Regarding Children and Families Requiring Assistance, Draft Legislation from Senator Spilka's Office, §39V, Line 505-12. (2007).

models are incredibly successful in the countries in which they are practiced. However, practitioners and advocates may be uncomfortable with these models because they lack the formal trappings of a courtroom setting. The collaborative law model bridges the gap between the protections afforded by a formal hearing and the benefits that informal processes can provide. Collaborative law is a very new field and the current family law model would need significant modification for use in the CHINS setting. Nevertheless, we are optimistic that the principles of collaborative law if used in the CHINS context, could help create a legal system that strengthens and empowers families and ensures access to necessary services in a timely manner.

### *The Formal Hearing*

If for any reason collaborative lawyering is not successful — if the three parties do not agree on the best solution, for instance, or because one of the parties feels they need to withdraw — the final step in the system would be a formal hearing. If that occurs, the information gleaned from the collaborative lawyering step is not transferred to the hearing process. This ensures that people can speak freely during the collaborative process. The formal hearing would otherwise be conducted as it is now. Hopefully, the non-adversarial nature of the earlier interactions will help temper the gladiatorial nature of the hearings. Our changes to the hearing process are discussed in detail in questions one, two, and three (see *infra*).

## International Models

Many useful lessons can be drawn from international models. These lessons could prove enormously instructive when it comes time to develop new ideas and strategies for the Massachusetts CHINS system. There are numerous principles, central to other nations'

successful juvenile justice programs that can be incorporated into the CHINS system. One such basic principle is the adherence to the rights given to children by the United Nation's Convention on the Rights of the Child (CRC), discussed *supra*. Many of these signatory countries chose to delegate rights to children in very similar ways. A common trend throughout these countries is the belief that juveniles in the justice system should be completely separated from adult offenders and treated in a less confrontational way.

In contrast to CHINS, other countries' programs focus more on holistic remedies and restorative justice than retribution. The use of mediation or conferences is the primary way this belief is reflected in practice, whether at the diversionary stage or as a replacement for a court room hearing. New Zealand, Scotland, and the Scandinavian countries have all implemented juvenile justice systems using the provisions of the CRC as their philosophical underpinnings. The systems vary slightly in practice but adhere to the same basic principles: involving the entire family group, preventing the repetition of negative behavior by the juvenile, and ultimately, fostering the development of the juvenile in more socially positive ways. The following section describes, in greater detail, how these systems are structured and how they function.

## *New Zealand's Juvenile Justice System*

In 1989, New Zealand passed the Children, Young Persons and Their Families Act (the Act), completely changing how the juvenile justice system operated in that country.[295] The Act takes a restorative justice approach, focusing on family group conferences that allow the families and children to actively participate in the decision making process.[296] The New Zealand system

[295] Cindy Kiro, Children's Commissioner at the Te Hokianga Mai, Coming Home: International Conference of Family Conference (Nov. 27, 2006) *(transcript available at* http://www.occ.org.nz/childcomm/media_and_speeches/presentations/child_rights_family_rights_and_the_family_group_conference_the_new_zealand_experience).

[296] *Id.*

is aimed at diverting the youth offenders from the courts and holding them accountable for their actions.[297] The Act requires that criminal proceedings be limited if there are alternate methods of dealing with an offense and bans criminal proceedings outright in cases where welfare assistance would be more appropriate. Furthermore, the Act recognizes that age is a mitigating factor by handling each case on an individual basis. Ultimately, incorporation of the principles contained in the Act should result in strengthened family and community units while ultimately fostering the development of the child.[298]

## *New Zealand's Law Enforcement System*

Each young offender takes a slightly different road within the system. The age of the young person is the first factor considered, and this consideration determines the severity of the remainder of the process. Children as young as 10 years old can participate since that is the age of criminal responsibility for all offenses in New Zealand (except for murder and manslaughter, which set the age of criminal responsibility at 14). The Youth Court, a division of the District Court, deals with offenders aged 14 to 16. At the age of 16, offenders are brought in to the District Court or to the High Court if it is a very serious offense. The Youth Court has the authority to refuse to hear serious cases or to transfer them to District Court.[299]

The first step is at the police's discretion. When an offense is committed, the police can issue a formal warning; arrange informal diversionary responses after consultation with victims, families, and the offender; refer all the involved parties to the Child Youth and Family Services for a group conference; or arrest and bring charges in the Youth Court.[300] Alternatively, they

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[297] Young People and the Youth Court - New Zealand, http://www.justice.govt.nz/youth/youngpeople (last visited Feb. 07, 2007).
[298] *Id.*
[299] *Id.*
[300] *Id.*

may be referred to the Department of Child, Youth, and Family services if it is apparent that there may be a reason why custody should be taken from the parents. These cases are handled by the Family Court.[301] As of 2002, about 83 percent of offenders were handled under alternative youth justice procedures controlled by the police.[302]

## *New Zealand's Youth Court*

If the offender is arrested, he or she must appear at Youth Court. In some ways, Youth Court in New Zealand is comparable to juvenile courts in the United States. Everyone who appears in Youth Court is required to have a lawyer and a free youth advocate is appointed if the offender does not have his or her own lawyer.[303] The court does not deal in terms of "guilty" or "not guilty," however, and there is a general attempt to refrain from labeling and chastising the youth. A large effort is made to help the youth understand his or her mistake and work towards rectifying his or her behavior in the future.

The court first asks if the offender denies the charge. If the youth denies the charge, a "defended hearing" is scheduled to determine what actually happened.[304] If the offender admits to the charge, a youth justice coordinator takes over and arranges a family group conference.[305] When an offender appears in Youth Court, family and other supportive individuals are encouraged to attend. The judge often interacts with the family allowing the judge to develop a more comprehensive understanding of the events surrounding the offence. This allows the judge to take the most appropriate action in regards to that individual child.

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[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] This hearing serves as a means of identifying relevant factual disputes.
[305] Young People and the Youth Court, *supra* note 297.

The parent, guardian, or caregiver must be notified if charges are brought. That person may then appear at any hearing and has the right to a lawyer.[306] In some situations, the parent, guardian, or caregiver may receive a summons to appear. When in court, the parent, guardian, or caregiver has the right to speak or to have a lawyer speak on his or her behalf.[307]

As an alternative to the Youth Court, the Family Group Conference was designed to engage those individuals intimately involved in the offender's life.[308] The system is centered around the concept that the offender and his or her family have a fundamental right and responsibility to participate actively in the decision making that directly affects them.[309] The conferences are not used as a diversionary method, but rather as a step in the juvenile justice system. The outcome of such a system is a more complete understanding of the child as an individual and the identification of whatever factors may be contributing to his or her behavior, all of which ultimately leads to the punishment or treatment that is most appropriate.[310]

Many parties are present at the conferences, which are run by the youth justice coordinator from the Department of Child Youth and Family. The parties include the offender, his or her family, the victim of the crime, a police youth aid officer, the offender's youth advocate or lawyer, and possibly a social worker.[311] Family, in such cases, is not limited to the immediate family or those in the household, but it instead includes all of the individuals who play a major role in the offender's life. It is believed that in order for the conferences to be effective, all of the major players in an individual's life have to become involved.

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[306] *Id*.
[307] *Id*.
[308] *Id*.
[309] Cindy Kiro, *supra* note 295.
[310] *See*, section entitled *Family Group Conferences*, *infra*, for a discussion of the theory behind family group conferencing.
[311] Young People and the Youth Court, *supra* note 297.

The conference culminates in a plan for action, whether it be a punishment, a lifestyle change, or even a custody change. The plan must ultimately be brought back to the courts and approved by the judge attached to the case.[312] If the family cannot come to an agreement during the conference, the judge makes the decision for them. After the conference, a social worker writes a report detailing the conference and the status of the offender. Another court hearing is scheduled for a later date in order to determine if the plan is being followed. The ultimate goal of the conference system is to reduce adversarial and confrontational acts that place blame and alienate the parties. Instead, they try to develop plans that are agreed to by all of those involved, often including the victim of the offense.[313] The idea of family group conferencing is also prevalent in the child welfare system in the United States and we recommend that the CHINS system adopt it.[314]

The objectives of the system utilized by New Zealand's youth courts are the promotion of the wellbeing of children and their families; the providing of appropriate and accessible services; and the assurance that while young offenders are held accountable for their actions, they are also dealt with in a way which fosters their development and considers their needs.[315] The predominant ideology used to fulfill these goals is the concept of involving all parties in all decision making. Allowing the youth to participate in the decisions that effect his or her life give him or her a greater interest in making good decisions even after leaving the justice system. The system also operates under the belief that the family members are the experts on their own families.[316] By intimately involving the families, relationships between the youth and his or her guardians and extended family can be fostered, ultimately leading to less negative behavior by

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[312] *Id*.
[313] *Id*.
[314] Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. Rev. 637, 643 (2006).
[315] Young People and the Youth Court, *supra* note 297.
[316] Cindy Kiro, *supra* note 295.

the youth. Finally, the presence of third parties provides support for the youth and the family. Any underlying issues, such as abuse, are more likely to be revealed in conferences due to their informal and personal nature than in a court room standing before a judge. These revelations are vital in order to determine the way the youth can be best aided by the system.

## *Problems with New Zealand's Juvenile Justice System*

While the New Zealand Criminal Juvenile System has been successful in implementing a restorative justice approach, primarily as a result of the Children, Young Persons and their Families Act of 1989, there are some problem areas worth examining:

- The Youth Court System has imposed restrictive sanctions when the public's safety was not necessarily at risk.[317] These sanctions included non-association, curfews, informal supervision, removal of driving privileges, fines, and transfer to adult courts.[318]
- Since 1989, there has been an increase in convictions in Youth Court for relatively minor charges.[319]
- There is a significant difference between the way that the Mäori (the indigenous people of New Zealand, a minority group) are treated by the criminal justice system and the way that the Päkehä majority (European ancestry) are treated. Mäori youth are more likely to be convicted of offenses than Päkehä youth when charged with similar offenses.[320] Additionally, Mäori youth, when compared to Päkehä youth, are more frequently referred directly to the Youth Court by police rather than a family group conference.[321] This is

[317] Gabrielle Maxwell et al., Achieving Effective Outcomes in Youth Justice Research Project: Final Report. 22 (Wellington: Ministry of Social Development 2003), *available at* http://www.msd.govt.nz/documents/publications/csre/achieving-effective-outcomes-youth-justice-overview.pdf.
[318] *Id*.
[319] *Id*. at 32.
[320] *Id*.
[321] *Id*.

particularly troublesome because outcomes are more severe for youth that are sent to the Youth Court as opposed to the family group conference.[322]

- Young offenders and victims are not always effectively included in the decision making process in the family group conferences.[323] There have been concerns that professionals have taken over the decision-making process, abandoning the consensus decision making model.[324] This may be the result of the Youth Justice Coordinators' (those that facilitate the family group conferences) inadequate training, support, and continuing education.[325]

## *Scotland's Juvenile Justice System*

The current system used in Scotland began in the late 1960s when Scottish lawmakers developed a new philosophy of juvenile justice and overhauled their juvenile justice system. The first major change occurred after the realization that the old system combined the "characteristics of criminal court with [the] agency making decisions on welfare."[326] Under the new system, courts retained the power to resolve factual disputes, but the power to make all decisions regarding the best interests of the child, including punishments, were passed on to a new system of children's hearings.

The new system took effect in 1971, and has most recently been laid out in Section 52(2) of the Children (Scotland) Act of 1995.[327] Children under the age of 16, or 18 depending on the circumstances, can enter the system for a variety of reasons: being beyond the control of parents or guardians; being at risk of moral danger; being the victim of an offense (including physical

[322] *Id*. at 35.
[323] *Id*. at 32.
[324] *Id*. at 24.
[325] *Id*. at 37.
[326] One Scotland: Children's Hearings, http://www.chscotland.gov.uk (last visited March 19, 2007).
[327] *Id*.

injury or sexual abuse); misusing drugs or alcohol; committing an offense; and truancy.[328] About two thirds of the children who participate in this system have been victims of offenses, as opposed to having committed an offense themselves.[329] Children under the age of 16 are not qualified for the system if they have committed a particularly serious offense, such as murder, extreme assault, or certain traffic offenses. In those cases, the decision is left to the Procurator Fiscal, the local public prosecutor, who has the ability to refer the child to a Reporter.

The Reporter, an employee of the Scottish Children's Reporter Administration, is the civil servant at the core of the Scottish juvenile justice system.[330] Referrals of children who may be in need of compulsory supervision are received by the Reporter. The majority of the referrals come from the police and social workers, but medical professionals, teachers/administrators, or anyone else in the child's life has the ability to submit a referral.[331] Roughly half of the cases brought to a Reporter are dismissed[332] for one of three reasons: (1) not enough evidence; (2) the problem has been addressed voluntarily; or (3) the Reporter deems that care is not necessary.[333] Those cases that do get referred to a children's hearing include criminal behavior, status offenses, neglect, and abuse.[334] If the Reporter decides that a case should go to a hearing (a children's panel), then the Reporter convenes and attends the hearing.[335]

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[328] *Id*.
[329] Scottish Executive: Youth Justice: Children's Hearings, http://www.youthjusticescotland.gov.uk (last visited March 19, 2007).
[330] One Scotland: Children's Hearings, *supra* note 326.
[331] William S. Geimer, *Ready to Take the High Road? The Case for Importing Scotland's Juvenile Justice System,* 35 Cath. U. L. Rev. 385, 400 (1986).
[332] The Reporter has the sole discretion to make one of three decisions: (1) he or she may decide that no action is required; (2) he or she may refer the child to the local authorities for voluntary services to be provided to the child; (3) he or she may arrange a mandatory children's hearing due to the necessity of further supervision by a social worker. *See* One Scotland: Children's Hearings, http://www.chscotland.gov.uk (last visited March 19, 2007).
[333] Geimer, *supra* note 331, at 407-8.
[334] *Id.* at 400.
[335] *Id.* at 408.

The children's panel members are community volunteers that run children's hearings and participate in the decision-making process. Each of the 2,500 volunteers across the country is appointed by a Scottish Minister and is supervised by a local Children's Panel Advisory Committee.[336] The volunteers serve three year terms that can be renewed at the discretion of the Advisory Committee. These panel members attend hearings every two to three weeks.[337]

The hearings are run by a three member children's panel that cannot be completely male or female and is generally balanced as far as age and experience. One of the members chairs the hearing that is attended by the child, the parents, and other "relevant persons" as explained in Section 93(2)(b) of the Children (Scotland) Act 1995.[338] The parents are required to attend and their absence can result in the imposition of fines. The child is allowed either a publicly funded Legal Representative or a private representative.[339] Generally a social worker may also attend. It is possible that a "safe guarder" will attend in situations where it is determined by the children's panel that the child needs another independent representative.

The goal of the hearing is to determine the best course of action for the child, a course of action which is more about social education than punishment.[340] Hearings are held only in cases where the child accepts the Reporter's referral for a hearing or in cases involving a factual dispute where it is determined that a hearing is the appropriate remedy.[341] The hearing attempts to take a big picture view of the situation in order to develop the best long-term solution for the child. Ultimately, the parties at the hearing decide whether a child needs a "compulsory

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[336] One Scotland: Children's Hearings, *supra* note 326.
[337] Rinik, *supra* note 91, at 198.
[338] One Scotland: Children's Hearings, *supra* note 326.
[339] *Id*.
[340] Scottish Executive: Youth Justice: Children's Hearings, *supra* 329.
[341] One Scotland: Children's Hearings, *supra* note 326.

measures of care." If so, the panel issues a supervision order.[342] Supervision orders may consist of: (1) Nonresidential Home Supervision, where a social worker visits the child in the family's home; (2) Nonresidential Intermediate Treatment, where a child is ordered to attend community-based counseling, an activity group, or day treatment; or (3) a Residential Placement outside the home. The residential option is the last resort, and includes foster care, children's homes, and "List D" schools, which at first resembled detention centers, but have evolved greatly in the past thirty years.[343]

Hearings are generally held at the child's home and consist of a roundtable discussion.[344] During the hearing, the parents or child may be asked to leave for a period of time so that the panel can get a full picture of the situation without undue influence from the other parties. In addition, speaking to the child or the parents without the other present will aid the panel in detecting more serious underlying issues, such as abuse or neglect, which could be manifested by negative behavior. Medical, psychiatric, and psychological reports may be considered and it is required that a copy of all reports be provided to the parents, and to the child if he or she is over the age of twelve.[345]

In circumstances where the child is considered to be in immediate danger, the Sheriff has the authority to grant a Child Protection Order.[346] This order can remove the child to a "place of safety" where he or she may remain for up to 22 days and it is renewable for up to 66 days. A "place of safety" can be a hospital, a police station, a center developed for the express purpose of being a "place of safety," a foster home, or other facility. The order is reviewed at a children's hearing.

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[342] Geimer, *supra* note 331, at 401.
[343] *Id*. at 402.
[344] One Scotland: Children's Hearings, *supra* note 326.
[345] *Id*.
[346] *Id*.

The juvenile justice system in Scotland tries to takes a holistic approach and focuses on making concrete, long-term changes. The system is dedicated towards assisting vulnerable and troubled children with the ultimate goal of giving each child a positive start to life.[347] The Children's Hearing approach accomplishes these goals while taking into account the feelings and desires of the child and his or her family.

## *Problems with Scotland's Juvenile Justice System*

There are a few problems with the Scottish System of juvenile justice that are worth examining:

- The apparent over reliance on the Reporter — because of the Reporters broad discretion, the referral to hearing rates vary widely from Reporter to Reporter, and from year to year.[348]
- The disproportionate severe supervision orders handed to poor and working class children[349]— there is a lack of working class representation on the panels themselves,[350] which may lead to the adverse treatment and lack of understanding of working class children. Some argue, though, that many middle class panel members were once working class, or come from working class families, and thus have a sense of cultural difference along class lines.[351]
- The dearth of resources to provide children with adequate care — currently Scotland faces a shortage of social workers. As of November, 2005 there were 4,915 social workers and 536

[347] *Id*.
[348] Rinik, *supra* note 91, at 196-197.
[349] Geimer, *supra* note 331, at 413.
[350] *Id*. at 414.
[351] Rinik, *supra* note 91, at 203.

unfilled social worker positions.[352] This shortage means that often children in home-based supervision programs are left without visits for up to a year at a time.[353]

- The lack of lawyers involved in a system that does retain a few remnants of the adversarial legal system in the children's hearings[354]— some critics have suggested that this lack of lawyers and the informal atmosphere of the children's hearings may lead to the erosion of children's rights.[355] There seems to be a trade-off between formal procedure, and community and family involvement in the system. Finally, the panel members mostly lack formal training, leading some to question the outcomes implemented by the panels.[356]

## *Scandinavia's Juvenile Justice System*

The juvenile justice programs utilized by the Scandinavian countries are based on the ideology behind the Convention on the Rights of the Child. All of the Scandinavian countries ratified the CRC in 1990, except they did not abolish imprisoning juvenile offenders with adults when considered necessary.[357] In the 1970s, these three countries relied on the theory of focusing on the offender instead of the offense, an approach that was changed because it led to inconsistency in punishments.[358] Although the approach has not made a return in practice, the theory behind it is beginning to resurface.

Scandinavia is making an effort to pay more attention to the individual offender, rather than sending him or her directly into a system that punishes harshly and sees high rates of

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[352] Europe Intelligence Wire, *Vulnerable Children at Risk Due to Lack of Social Workers, Says SNP*, Financial Times, Nov. 4, 2005.
[353] Rinik, *supra* note 91, at 200.
[354] *Id*. at 201.
[355] *Id*.
[356] *Id*.
[357] Anette Storgaard, *Juvenile Justice in Scandinavia*, 5 Journal of Scandinavian Studies in Criminology and Crime Prevention 188, 198 (2004). The age of criminal responsibility in all of the Scandinavian countries is 15, and those between the ages of 15 and 18 are considered juvenile offenders. *See* Anette Storgaard, *Juvenile Justice in Scandinavia*, 5 Journal of Scandinavian Studies in Criminology and Crime Prevention 188, 189 (2004).
[358] *Id*. at 191.

recidivism. Namely, they are focusing on diverting juvenile offenders from prison to welfare authorities and social institutions. Sweden and Denmark applied these ideals by developing social institutions as alternatives to prisons for juvenile offenders, while Norway focuses on a mediation process to supplement the adversarial courtroom hearings.[359] The primary drawback of such a system is that the multipurpose social institutions house offenders guilty of only status offenses and those guilty of serious violent offenses side by side. Ultimate punishment in all cases can include removal from the home without the consent of the juvenile or the parents.[360] Although the three countries share a similar theory, their implementation of the ideas varies as discussed below.

### *Sweden's Approach*

Sweden has developed a program entitled "Our Collective Responsibility" to deal with juvenile offenders.[361] It is based on the principles that "crime must be attacked from an overall view with a broad crime policy approach launching initiatives in all areas of society and that efforts made must be made to attack the causes of criminal locally, where the problems are."[362] Responsibility for young offenders is given to social services who aim to provide the needed help and support. When a juvenile is placed into the program after committing an offense, his or her family is called in for questioning.[363] This process can involve both immediate family and the offender's extended family: grandparents, aunts, uncles, and anyone else who has played a role in raising the child. In addition, these same individuals are notified about the hearing's

[359] *Id*. at 188.
[360] *Id*. at 195.
[361] *Id*. at 190.
[362] *Id*. at 191.
[363] U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Third periodic report of States parties due in 2002: Sweden*, U.N. Doc. CRC/C/125/Add.1 (2004).

specifics so that they can make an effort to attend. In some cases, they can be compelled to attend.[364]

One of the fundamental beliefs of the Swedish system is that imprisonment reduces a young person's chance of leading a law-abiding life later on.[365] For this reason, youths are very rarely taken into custody. There are also provisions against allowing youths to be detained with individuals over the age of 18 unless it is in the young person's best interest.[366] A system of mediation was added in 2002. Mediations are voluntary meetings between the youth offender and the victim of the offence for the purpose of discussing the offense and coming to a decision on ways to repay the victim.

### *Denmark's Approach*

Denmark has developed a "SSP" system of systematic cooperation between schools (S), local social welfare (S) and local police (P); this collaboration is used successfully in 90 percent of municipalities.[367] In all cases of juvenile offenses, the three parties communicate openly about the offense and the offender, in order to determine how to get the offender the help that he or she needs. Denmark also began use of a "youth contract" in 1998.[368] In many cases where the charges are withdrawn, the judge can order the offender, his or her parents, and the social authorities to prepare and sign a contract that contains promises of future action.[369] Typically, it includes promises to refrain from repeating the same negative behavior and promises to attend school and a social training program.

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[364] *Id*.
[365] *Id*.
[366] *Id*.
[367] Storgaard, *supra* note 357, at 190.
[368] *Id*. at 196.
[369] *Id*.

Denmark has also used mediation for property crimes as well as crimes against individual, when the juvenile had admitted guilt. Mediation generally occurrs at the recommendation of the police and requires the permission of the offender and the victim.[370] Mediation can also be held at the request of the victim, although it is uncommon. The victim attends the mediation and participates in the decision making; often the outcome focuses on ameliorating the wrong. Mediators are local lay people who have completed training and are paid a flat rate for each mediation. The mediation takes place before the trial but is not diversionary. It does not replace the trial before a judge, but the judge often takes it into account. An agreement is reached in 80 percent of cases.[371]

### *Norway's Approach*

Norway has used a family preservation model based on the system utilized by South Carolina since 1991.[372] Although South Carolina's program only handles violent criminal offenders and is not comparable to the CHINS program, Norway's program handles both criminal and status offenders.[373] Norway uses a model that is predominantly based on a mediation system. Mediation is available to adults as well as juveniles and for both criminal and civil disputes.[374] While the age of criminality is 15, younger children can also utilize the system on a civil basis. Mediation is reserved for situations where there is an identifiable victim, at the

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[370] David Miers, "An International Review of Restorative Justice." *Crime Reduction Research Series, Home Office.* 21 (2001).
[371] *Id.* at 22.
[372] Storgaard, *supra* note 357, at 198.
[373] *For further information about South Carolina's use of MST in juvenile offender programs for violent offenses, see* List of Program Evaluations Conducted. http://www.swsolutionsinc.com/Decisions/examples/evalex.htm (last visited Feb. 12, 2006).
[374] Miers, *supra* note 370, at 44.

referral of the prosecuting attorney. The youth must accept responsibility for his or her actions to be admitted into the mediation system.[375]

The mediations are held in local authorities' offices and run by volunteer mediators.[376] The mediators receive a very small wage for each case and no intensive or uniform training.[377] Guardians, teachers, or even friends may attend to provide support for the youth, but no lawyers are present in the mediation.[378] Despite the informality of the system, agreements are reached in 93 percent of cases.[379]

## *Problems with Scandinavia's Juvenile Justice Systems*

The following are some areas of concern with the Scandinavian systems of juvenile justice:

- In order to address juvenile crimes that do not cause personal harm, Denmark relies on the "youth contract."[380] The child is asked to sign onto the contract with the cooperation of the parents and social authorities. This contract may include provisions that require the youth to attend school or go through various social training programs, and always contains the stipulation that the child does not commit another offense.[381] However, when the youth violates the contract, rarely does this violation lead to a new sanction or even reaction from the courts, except when the youth commits another crime.[382] The youth contract also has not met its expectations of reducing recidivism rates, as a recent study has not shown significant

[375] *Id*. at 45.
[376] *Id*.
[377] *Id*. at 47.
[378] *Id*.
[379] *Id*.
[380] Storgaard, *supra* note 357, at 196.
[381] *Id*.
[382] Britta Kyvsgaard, *Youth Justice in Denmark*, 31 Crime & Just. 349, 371 (2004).

evidence that youth who have signed a contract have reduced their recidivism rates compared to those youth whose charges were dismissed without a contract.[383]

- There is a trend in Denmark to treat youth offenders more like adults. This change may fail to take into consideration the differences in how youth respond to the criminal justice system. In the 1950's, only five percent of charges brought against youth resulted in convictions (rather than withdrawal of charges), in 2000 seventy-seven percent of all charges resulted in convictions.[384] This change may have arisen out of criticism of the "leniency" of the court system when dealing with youth.[385]
- In Sweden, there has been criticism of how the youth justice system treats girls and boys differently. Some people argue that the entire system is set up to deal with the crimes that boys commit in Sweden (pilfering, criminal damage, auto theft, assault, and burglary) rather than the crimes most often committed by girls (shoplifting and theft).[386] Additionally, the fact that Sweden does not have separate youth courts has caused concern—because of this, youth can be taken into criminal custody either by the adult criminal court, an administrative court, or by a social services board.[387] The many methods by which youth come into criminal custody are illustrative of the struggle in Swedish society between the social services and punitive approaches to juvenile justice.

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[383] Storgaard, *supra* note 357, at 196-7.
[384] Kyvsgaard, *supra* note 382, at 383.
[385] *Id*. at 383-84.
[386] Anna Hollander and Michael Tarnfalk, *Juvenile Crime and Justice System in Sweden, in* Youth Justice and Child Protection 90, 91 (Malcolm Hill, et al., ed., 2007).
[387] *Id*. at 96.

## American Models

Status offenses typically include running away, school truancy, curfew violations, and alcohol possession. Most states generally include catch-all offenses such as "unruly behavior," "incorrigibility," or "disobedience." Status offender processes vary from one state to another and sometimes different systems operate differently from one county to another in the same state. This section will look at four exemplary diversionary practices from the states of New York, Ohio, Alaska, and Oregon.

### *New York's Model*

One problem that has emerged time and again is the need to separate status offenses from other juvenile offenses. As a status offense is meant to be a way for the State to intervene early, before an at-risk youth truly gets involved in a life of criminal offenses, it needs to be clear that this initial appearance in the court system is not meant to be a form of punishment, but rather a form of prevention. States such as New York have moved the status offenses to family court rather than juvenile court to highlight the difference between offenses based on one's age and fully criminal offenses.[388]

> Subjecting a child to judicial sanction for a status offense ... helps neither the child nor society; instead, it often does considerable harm to both ... [it] serves no humanitarian or rehabilitative purpose. It is, instead, unwarranted punishment, unjust because it is disproportionate to the harm done by the child's noncriminal behavior. It cannot be justified under either a treatment or a punishment rationale.[389]

[388] The New York PINS statute was enacted through the N.Y. Family Court Act, Article 7: Proceedings Concerning Whether a Person is in Need of Supervision (2007).

[389] Randy Frances Kandel & Dr. Anne Griffiths, *Reconfiguring Personhood: From Ungovernability to Parent Adolescent Autonomy Conflict Actions*, 53 Syracuse L. Rev. 995, 1001-2 (2003).

Diversionary strategies are a central component of the status offender system in New York.[390] Most counties have developed diversionary programs intended to serve youth and families in their own communities without relying on family court interventions.[391] The New York State legislature, in response to parents seeking governmental assistance to deal with troubled teens, expanded the status offender program to include 16 and 17 years olds.[392] In anticipation of an influx of more youth into their status offender program, most counties reformed their Persons in Need of Services (PINS) systems.

In reforming the PINS systems, the effort was directed towards two central areas: "(1) Diverting more PINS youth from the court system and into supportive services in the community and (2) Developing community based alternatives to non-secure detention and placement."[393] Here the reformers sought to revamp the PINS system by improving diversionary services available to youths and addressing family needs immediately instead of letting them languish for months before a specialist sees them.[394] It was hoped that the improvements to diversionary services and prompt response to problems would reduce the number of PINS cases that are filed with the family court.[395] It is worth noting that these diversionary ideas were not new, most of the services were already in existence. They just needed to become more efficient in order to be successful at helping youths and families.[396] The idea behind the improvements is "a desire to strengthen families as a unit and to encourage positive youth development at home, at school,

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[390] Tina Chiu & Sara Mogulescu, Changing The Status Quo for Status Offenders: New York State's Efforts to Support Troubled Teens 3 (Vera Institute of Justice 2004), *available at* http://www.vera.org/publications (search "changing the status quo"; then click download now hyperlink), (last visited Mar 20, 2007).
[391] *Id*.
[392] *Id*.
[393] *Id*. at 2.
[394] *Id*. at 3.
[395] *Id*.
[396] *Id*. at 2.

and in the community."[397] This idea is in line with the purported goals of the Massachusetts CHINS reform committee.[398]

The Orange County New York Family Keys model (Family Keys) was presented at the New York State Youth Bureau Conference and the New York State Coordinated Children's Services Initiative Conference as a blueprint for success in diversionary programs.[399] The model was also touted as the best collaborative model for parent-filed PINS complaints by the VERA Institute.[400] The success of the diversionary strategy employed by Family Keys is worth emulating in Massachusetts CHINS. The focus of the Keys Program is keeping kids in their community and away from the court system. This is in line with the goal of Massachusetts CHINS reform, and is an example of a successful community-based intervention program.

Family Keys was launched in early 2003.[401] The probation department is the point of entry.[402] If there is ground for a PINS complaint, Family Keys is used instead of filing a PINS complaint.[403]

Family Keys dispatches counselors to assess the problem within 2 to 48 hours, depending on the situation.[404] It provides short-term crisis intervention to families and diverts PINS cases from the court system.[405] When more assessment is needed, the case is referred to an interagency team that operates through the Mental Health Department's Network Program.[406]

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[397] *Id*. at 3.
[398] An Act Regarding Children and Families Requiring Assistance, Draft Legislation from Senator Spilka's Office, §16H, Line 20-3. (2007).
[399] Orange County Department of Mental Health Annual Report (2003), *available at* http://www.co.orange.ny.us/orgmain.asp (last visited on March 10, 2007).
[400] *Id*.
[401] Chiu & Mogulescu, *supra* note 390, at 3.
[402] *Id*.
[403] *Id*.
[404] *Id*.
[405] *Id*.
[406] *Id*. at 4.

That team then "performs an in-depth assessment and serves as the gateway to the county's most high-end services, such as Multi-Systemic Therapy (MST)[407] or Family Functional Therapy."[408]

The outcome from this approach is promising. The number of PINS cases referred to court, as well as the number of PINS placements, has been sharply reduced. "In 2003, almost half of all PINS intakes, 396 in total, were diverted to Family Keys."[409] The families that are dealt with through the Family Keys program reported positive "improvements in family dynamics."[410] The youths that participated in the program reported that "contrary to their expectations, they [were] actually listened to" during their participation in the Family Keys diversionary process and "want[ed] to keep coming to" Family Keys services.[411]

Family Keys is one example of the techniques that various New York counties have used to dramatically improve the help provided to troubled teens and their families. These techniques shift focus away from law enforcement and toward strength-based community intervention, probation officers, social service workers, and other system players. This approach is making substantial differences in the lives of these youth and their families, and is allowing the counties to realize a significant cost savings.[412]

In addition to incorporating immediate crisis response into PINS diversion programming, counties are developing other approaches that enhance the effectiveness of diversion and reduce

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[407] Multi Systemic Therapy (MST) is an intensive family and community-based treatment that addresses the multiple determinants of serious social behavior in juveniles offenders. The MST approach views individuals as being nested within a complex network of interconnected systems that encompass individual, family, and the extra familial (peer, school, neighborhood) factors. Interventions may be necessary in any one or a combination of these systems. Definition available at http://www.mstservices.com, (last visited Mar 20, 2007).

[408] Family Functional Therapy is an empirically, well-documented and highly successful family intervention program for dysfunctional youth. Applied to youth aged 11 – 18 and their families. This treatment techniques identifies specific phases, which organize intervention in a coherent manner, thereby allowing clinicians to maintain a focus in the context of considerable family and individual disruption. Definition available at http://www.fftinc.com/whatis.php (last visited Apr. 11, 2007). Chiu & Mogulescu, *supra* note 390, at 4.

[409] *Id*.

[410] *Id*. at 5.

[411] *Id*.

[412] *Id*. at 8.

the flow of PINS cases to family court. In Steuben County, schools are now required to demonstrate that they have tried to resolve a student's problem before they refer the case to the PINS system.[413] Since the implementation of the new protocol, PINS referrals from schools in Steuben County have decreased significantly. In the 2002-2003 academic year, school referrals dropped by 33 percent, a total of 76 complaints, as compared to the 114 PINS complaints filed by Steuben County schools during the 2001-2002 school year.[414]

Erie County also launched a program requiring parents seeking to file a PINS complaint to participate in a two-hour group orientation.[415] Parents enrolled in the program "are offered insights on parenting and the phases of adolescent behavior."[416] They are also informed about three special programs—family group conferencing, mediation, and common sense parenting—and are given an opportunity to enroll at the end of the orientation session.[417] This early intervention program educates the parents on how the PINS process actually works. Parents then know what to expect when they file PINS complaints or when their kids are in the PINS system.[418]

Albany County diversionary programs work to keep families together. Seeking out points of agreement and keeping children in their known environment creates a foundation for intervention based approaches.[419] Taking children out of their homes perpetuates problems in the long term, because families are never able to develop the tools that they need to solve problems.[420] Research has shown that judges in New York frequently remove children from

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[413] *Id*. at 5.
[414] *Id*.
[415] *Id*.
[416] *Id*.
[417] *Id*.
[418] *Id*.
[419] Weithorn, *supra* note 5, at 1474.
[420] Kandel & Griffiths, *supra* note 389, at 1031.

their homes because they have no other choices, yet "this can lead to further negative outcomes: exacerbated family tension, reduced engagement in school, and an increased likelihood of deeper involvement in criminal behavior."[421]

Albany County sought to reduce the number of youths removed from their homes by implementing the Juvenile Release Under Supervision (JRUS) program.[422] The program allowed for eligible individuals to avoid being placed in detention by providing "intensive supervision and services"[423] by specialized probation officers on a daily basis.[424] Eighty-two percent of individuals enrolled in JRUS "completed the program without being remanded to detention."[425] The program also allowed the county to reduce costs by using diversionary programs such as "mediation, streamlining, and centralizing the intake process for youth services, and working across agencies to strengthen families in the community."[426]

The New York programs would not be possible without a number of agencies working together, suggesting that interagency cooperation has played a pivotal role in New York's PINS reform.[427] New York has been greatly improving their youth services policies with the goals of "decreasing the use of family court interventions for status offenders and their families and reducing local reliance on detention and placement for PINS kids."[428] If the stakeholders in CHINS want to make a real change, they must work together to build a system.

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[421] Chiu & Mogulescu, *supra* note 390, at 1.
[422] *Id*. at 6.
[423] *Id*.
[424] *Id*.
[425] *Id*. at 6-7.
[426] *Id*. at 7.
[427] *Id*. at 8.
[428] *Id*.

## *Ohio's Model*

Ohio's Truancy Prevention through Mediation program (Prevention Program) establishes a strong model of how early use of mediation can be effective before the courts get involved.[429] By using trained mediators who are truly neutral, truancy issues can be resolved before they become problems that require the court's involvement. By forging a direct connection between the child's teacher and his parent(s), a larger portion of the adults in the child's life become invested in resolving the problem before others arise. Although the Prevention Program has been used to address specific truancy problems, the model can be applied to other status offenses. The mediator's role is to facilitate conversation in order for the parties to come to a resolution. Using this pre-adjudication model for resolution, no one is treated as a wrongdoer. More of the community becomes involved in helping the child and the child's family before the issue becomes unmanageable, and has to be dealt with in the courts.

The Prevention Program was developed to deal with truancy problems at the community level, rather than in the court system.[430] The mediation process is geared towards developing solutions to the child's truancy problem through the collaborative efforts of the parents or guardians, caregivers, and the school.[431] The program requires that the parents or guardian, the teacher (K-6 level), and sometimes the principal participate in a directed mediation.[432] The mediators leading these conversations are employees or volunteers from non-profits.[433]

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[429] Truancy Prevention Through Mediation Program: An Overview, http://disputeresolution.ohio.gov/truancyoverview.htm (last visited March 11, 2007).
[430] Truancy Prevention Through Mediation Program The Model, http://disputeresolution.ohio.gov/themodel.html (last visited Mar. 21, 2007).
[431] *Id*.
[432] Email interview from Mr. Edward M. Krauss, The Ohio Commission on Dispute Resolution and Conflict Management (Mar. 9, 2007) (on file with author).
[433] *Id*.

Mediators are neutral arbiters and consider the child's parents or guardian "an equal partner in designing the prevention strategy."[434] Children in the K-6 level do not generally participate in the sessions, because truancy problems for children in the K-6 level are usually not related to the choices made by the child.[435]

The Prevention Program which focuses on keeping families together, offers a promising and cost effective model for truancy prevention in Massachusetts.[436] The program intervenes to prevent a child's truancy from reaching a level that would warrant court involvement. The mediation process is a private, confidential method of communication that does not focus on blame or fault. The process is strictly confidential; "[w]hat is said in mediation is confidential, unless the law requires reporting, as in cases of suspected child abuse, neglect, threats of violence or knowledge of crimes."[437] The Prevention Program is about giving parents or caregivers the opportunity to get more involved in finding a solution to their child's truancy problems.

The program uses a facilitated problem-solving session overseen by an impartial mediator. The goal is to identify family problems that often lead to poor attendance in a non-punitive, non-disciplinary way, and to then help the family reach a voluntary solution.[438] The administration of the Prevention Program sometimes varies from county to county.[439] Each county tailors the program in the way that will best address their respective truancy problems.[440]

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[434] Sara Mogulescu & Heidi J. Segal, Approaches to Truancy Prevention 5 (Vera Institute of Justice 2004), *available at* http://www.vera.org/publications (search "truancy prevention"; then click download now hyperlink), (last visited Mar 20, 2007).
[435] Email interview from Mr. Edward M. Krauss, *supra* note 432.
[436] An Act Regarding Children and Families Requiring Assistance, Draft Legislation from Senator Spilka's Office, §39N, Line 345-6. (2007).
[437] Truancy Prevention Through Mediation Program: The Model, http://disputeresolution.ohio.gov/Brochures/TM brochure.pdf (last visited Feb. 07, 2007).
[438] Truancy Prevention Through Mediation Program: The Model, *supra* note 430.
[439] Mogulescu & Segal, *supra* note 434, at 4-5.
[440] *Id*.

In order to ensure enforcement and encourage attendance, the court does get involved if the family fails to attend the Prevention Program. The court's participation is considered critical "because the community needs to know that mediation offers a positive, non-punitive opportunity to resolve the attendance concerns, but [that] if they don't take advantage of that opportunity then there will be consequences."[441] The court sometimes enters into a fast track agreement with the school district and will hear the case in two to three weeks when families fail to attend the Prevention Program.[442] The fast track approach has helped increase family participation because they are put on notice of potential court action if they fail to take advantage of the mediation program.[443]

The Prevention Program is cost effective and successful in Ohio. The program is low cost because the State only has to pay for mediators—unless they are volunteers—and for substitute teachers on those occasions that the mediation requires a teacher to be absent from the classroom.[444] The program has had an increase in the number of families that participated. About 3,000 mediation sessions were conducted during the 2003-2004 school year, and "[a]ll but one of the counties submitting post-mediation data reported a statistically significant reduction in the number of absences and tardiness by those students and families that participated in the program."[445]

One of the benefits of this model to the judiciary is that a child's problems are tackled at the school level, rather than using court time. Ed Krauss, with the Ohio Commission on Dispute Resolution and Conflict Management, believes that a growing number of judges "realize that it is

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[441] Email interview from Mr. Edward M. Krauss, The Ohio Commission on Dispute Resolution and Conflict Management (Mar. 9, 2007 ) (on file with author).
[442] *Id*.
[443] *Id*.
[444] Mogulescu & Segal, *supra* note 434, at 5.
[445] Tracy J. Simmons, *Mandatory Mediation: A Better Way To Address Status Offenses*, 21 Ohio St. J. on Disp. Resol. 1043, 1062 (2006).

a pay-me-now, pay-me-later situation; by having court employees leave the courthouse and go to the school buildings two or three days a month, easily ten, perhaps fifteen cases *a month* are resolved at the school building . . . never tying up the court docket."[446]

## *Alaska's Model*

The stated goal of the Alaska Children in Need of Aid (CINA) statutes is to provide "the care, guidance, treatment, and control that will promote the child's welfare and the parents' participation in the upbringing of the child to the fullest extent consistent with the child's best interests."[447] In addition, Alaska has also explicitly stated its desire to avoid completely splitting contact between children and their parents.[448]

In defining "children in need of aid," Alaska's statute focuses on the parent, instead of using language that blames the child (e.g. Alaska does not refer to participants as "stubborn children").[449] Of the twelve ways that a child can qualify as a CINA, only one, the provision addressing runaways, suggest wrong doing by the child.[450]

In Alaska, anyone can initiate a CINA action.[451] Once the court is made aware of a possible CINA case, the court will appoint a person or agency, a guardian *ad litem*, or more likely a social worker, to make a preliminary inquiry and report back to the court.[452] During the initial investigative stage of the CINA action, the court is specifically given the power to issue any orders to aid the investigation.[453] Once the assigned investigator has completed their work,

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[446] Email interview from Mr. Edward M. Krauss, *supra* note 432.
[447] AK ST § 47.10.005 (2006).
[448] AK ST § 47.05.065 (2006).
[449] AK ST § 47.10.011 (2006).
[450] *Id*.
[451] AK ST § 47.10.020 (2006).
[452] *Id*.
[453] *Id*.

the investigator or agency recommends to the court whether to file a petition. The court can decide to file the petition regardless of the recommendation.[454]

Once a petition is filed, notification must be given because parental rights are now subject to termination pending the outcome of the adjudication.[455] Alaska has different standards for notification, "when the child in custody is [a Native American], the state has an affirmative duty to make 'active efforts' to reunite the family.[456] When the child is a non-[Native American], the state must make 'reasonable efforts.'"[457] This is a consequence of the Indian Child Welfare Act (ICWH) and its affect can be seen on the CINA statutes most easily in terms of notification. Much like minorities in other states, Native Americans and Native Alaskans are greatly over represented in the juvenile justice system. Native Alaskans represent almost half of all CINA cases.[458] In most states, notification is only required for the parent or the guardian of the child. In Alaska, notification is required to go out to not only the parents but also the grandparents, tribe, guardian, guardian *ad litem*, and foster parents or out-of-home care providers.[459] In addition the CINA statutes also allow local tribal leaders to act as representation in the ensuing adjudication.[460]

Since the mid-1990's, Alaska has also had a strong movement toward youth courts. These youth courts have been highly successful and very affordable.[461] The recidivism rate is

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[454] *Id*.
[455] Mark Andrews, "Active" Versus "Reasonable" Efforts: The Duties To Reunify The Family Under The Indian Child Welfare Act And The Alaska Child In Need Of Aid Statutes, 19 Alaska L. Rev 85, 86 (2002).
[456] *Id*.
[457] *Id*.
[458] National Child Welfare Resource Center on Legal and Judicial Issues, http://www.abanet.org/abanet/child/statesum/state.cfm?state=AK (last visited Mar. 21 2007).
[459] AK ST § 47.10.030.
[460] *Id*.
[461] Alaska Youth Courts are different from the Youth courts in New Zealand, discussed supra. In the Alaska Youth courts, all of the traditional roles (judge, prosecutor, etc.) are filed by teenagers. For more information on a proposed youth court pilot program in Massachusetts please see the report "Peer Justice System: An Alternative Model for School Discipline At the Social Justice Academy created by Northeastern University School of Law,

only 6 percent, and the cost of adjudicating a child in the youth court is much less than the cost of housing the child in a secure facility.[462]

### *Oregon's Model*

In addition to the various status offender models discussed above, Multnomah County, Oregon is frequently cited as a successful example of an attempt to reduce disproportionate minority contact within the juvenile justice system. The County identified two goals: the reduction of disproportionate minority contact and the reduction of the amount of time that juveniles spend in detention overall. The Multnomah County program was one of several Juvenile Detention Alternatives Initiative (JDAI) programs which attempted to address problems in the juvenile justice system as a whole (rather than just those problems affecting status offenders).[463] However, the techniques and suggestions they implemented are also relevant to CHINS-specific reform. Traditionally, disproportionate minority contact was seen as relating specifically to persons being "detained or confined."[464] Yet, in the context of the juvenile justice system, that perception has expanded to include an awareness that the problem begins at much earlier points in the juvenile justice system.[465]

The initiative in Oregon (and the other JDAI programs) had four goals: reducing detention, improving conditions in secure facilities, minimizing delinquent behavior, and developing alternative strategies to deal with juvenile offenders.[466] The last two are clearly relevant when thinking about CHINS reform. Multnomah County was also demonstrative of a

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Law Office No. 4, 2006-2007.

[462] Anchorage Youth Court, http://www.ayc.ak.org/ (last visited Mar. 21 2007).

[463] Information on other sites *available at* http://www.aecf.org/initiatives/jdai/sites.htm.

[464] 42 U.S.C.A. § 5601 (2006).

[465] Office of Juvenile Justice and Delinquency Prevention (OJJDP), *Juvenile Justice Bulletin* 2 (December 1998).

[466] Deborah Busch, By the Numbers: the Role of Data and Information in Detention Reform. Pathways to Juvenile Detention Reform 7 (1999) *available at* http://www.aecf.org/publications/data/7_data.pdf.

situation where success in reducing minority contact was a key element in making the system more successful for both minority and non-minority children.

Several of the strategies recommended by the Multnomah reform, such as collaboration, have already been instituted. The Multnomah reformers found ways to bring together the stakeholders to "confer, share information, develop system-wide policies, and to promote accountability."[467] They also developed a consensus about the goal of the system, in their case, to keep kids at home. The second strategy was rigorous data collection and analysis. Their questions, listed below, are amazingly basic, but they cannot be easily answered about the CHINS system.[468] Although our research did not focus on the creation of a data collection system, the following chart gives a brief idea of what Oregon collected:

| Question Asked | Data Collected |
|---|---|
| Who is coming into the juvenile justice system?<br>How many referrals are entering the system?<br>Is that number changing?<br>How did that referral occur?<br>Why was the referral made? | Date of referral<br>Intake type/type of referral<br>Alleged offense |
| Who is in detention? | Number of days in detention in relation to each type of offense. |
| How long is it taking to be processed through the system? | Time for juvenile to be processed in relation to intake location, offense. |
| What happens to kids who enter the system? | Disposition in relation to other factors. |
| How are minorities and non-minorities treated? | Tracked decisions at each stage (at each decision making point) in relation to race and other factors. |

[467] *Id*.
[468] *Id*. at 8-25.

| | |
|---|---|
| What results can be expected from reform? | Data related to their specific strategies |
| Do the results match the expectations? | As the project was implemented they continued to look at the data to determine that it was having the desired affect of lowering detention for all youth. They required that they develop some expectations about changes in the data and monitor to see if they were met. |
| Are there new issues to address? | Post-reform reassessment. |
| Is public safety affected? | Recidivism rates. |

Although the questions that need to be answered about the CHINS system will not look like the county's questions above, their work suggests the need for diligence in regards to data collection. In Multnomah County, the new data collection system allowed all of the parties involved in any particular case to access any and all relevant information. Prior to data collection, several departments indicated their willingness to participate in attempting to make improvements.[469]

A third strategy used in Multnomah was to reassess how decisions about children were made so that they could be less subjective and less biased.[470] The program creators focused on trying to ensure that the objective factors did not favor certain segments of children.[471] Examples of these changes included children being allowed to verify that they had the support of a member of their extended family rather than the court only considering whether or not they had a parent's support.[472] Children are allowed to claim any type of productive activity including participation in community activities or job programs as a factor, rather than exclusively school

[469] *Id*. at 15-16.
[470] *Id*. at 7-8.
[471] Center on Juvenile and Criminal Justice, *Reducing Disproportionate Minority Confinement: The Multnomah County Oregon Success Story and Its Implications* 5 (2002).
[472] Ted Gest*, Oregon's Experiment to Reduce Juvenile Justice,* Forum on Crime and Justice, University of Pennsylvania 2 (October 2002).

attendance.[473] An assessment of whether the youth needed services and what types of services was conducted in less than a day in most cases. If there was an incident at night, or the child is a runaway picked up at night, the assessment was completed by the next afternoon.[474]

This reform process also demonstrated the need to develop accountability, i.e. the system kept track of what the outcomes were for individual kids. In Multnomah, they only began to see an impact from their reform strategies when the system had internal accountability. The development of alternative strategies and facilities for the impacted juveniles was another key to their success.[475]

## *Problems with the American Models*

We have seen models in other states that look promising as far as reforming CHINS. However, despite these optimistic programs, many states continue to have problems with their truancy related programs:

- The New York Orange County Family Keys program, for example, holds great promise for the future. Yet in 2004, over 5,000 youths were detained for status offenses[476] in non-secure detention facilities, representing over half (54 percent) of youths detained in the juvenile justice system.[477] This means that in spite of the progress made in some counties by diversionary tactics in PINS cases, children in the PINS system still represent the majority of youths in detention centers in New York State.

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[473] *Reducing Disproportionate Minority Confinement: The Multnomah County Oregon Success Story and Its Implications*, *supra* note 471, at 5.
[474] Gest, *supra* note 472, at 2.
[475] *Reducing Disproportionate Minority Confinement: The Multnomah County Oregon Success Story and Its Implications*, *supra* note 471, at 8.
[476] NY law limits detention of PINS children to non-secure detention; other juveniles that were detained had committed criminal acts and were considered "juvenile delinquents." The remaining 46% of youth detainees reported were juvenile delinquents in both secure and non-secure detention centers.
[477] New York State Task Force on Juvenile Justice Indicators, *Widening the Lens: A Panoramic View of Juvenile Justice in New York State*, 9, (February 2007) *Available at* http://www.vera.org/publication_pdf/381_734.pdf.

- Furthermore, Orange County in New York utilizes the Family Keys program to avoid court ordered placement of PINS children in psychiatric treatment centers, and yet in 2004 the state saw court ordered placements of PINS children rise by 43 percent over the previous year. This is problematic because juveniles represent the largest population in psychiatric hospitals in Orange County, and they are among the most expensive patients to treat.[478]
- Ohio has had success with preventing truancy through mediation, however, certain improvements could be made to program. For example, in the evaluation report on the Truancy Prevention Through Mediation program, it was suggested that the mediators receive training regarding the social services available to families, which would allow mediators to be familiar with available solutions to family issues that are often the causes of truancy.[479] Another problem cited by a member of The Ohio Commission on Dispute Resolution and Conflict Management is the fact that mediation is technically voluntary, which means that people who have the problems the mediation is suppose to solve are not required to attend. He noted that the only real nagging problem was lack of attendance, and reported that for the most part, attendance to mediation sessions increased as the program became known in the community. The major problems with attendance occur when the mediation program is first established in the community, with attendance sometimes being as low as 50 percent, but the number of no-shows decreases as time passes.[480]

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[478] Orange County Government Website. http://www.co.orange.ny.us, (Follow the Mental Health link, and go to the 'Forensic Services Department.') (Last Visited March 10, 2007).

[479] Ohio Commission on Dispute Resolution and Conflict Management, *Truancy Prevention Through Mediation Program, 2002-2003 Program Evaluation*, 2. (Luminescence Consulting, July 2003) *Available at* http://disputeresolution.ohio.gov/pdfs/exec.pdf. *See also* http://disputeresolution.ohio.gov/courtcommunity.htm for additional data.

[480] Email interview from Edward M. Krauss, *supra* note 432.

- A 2005 report documented several recurring problems in Alaska's CINA system. One of the biggest issues identified was a lack of services available in a timely manner.[481] Many regions in Alaska pointed out that CINA plans for family reunification included treatments of some kind, yet the treatment services were not readily available in the areas where they were prescribed, which led to delays for some families in crises.[482] In addition to a lack of available services, some Alaskan regions reported that the services were crisis driven, rather than preventative, with few service facilities capable of helping families help themselves.[483] An equal number of regions commented that confusion among participants in the CINA process (child protection workers, parents, and other involved community members) is a major weakness in the CINA system.[484] Parents often are unable to understand the CINA procedures, and many child service workers themselves lack court experience. This problem is exacerbated by the lack of education and training for agencies and community members on issues such as confidentiality and mandatory reporting of certain problems.[485] Furthermore, the Anchorage and Barrow regions cited a lack of funding and human resources as key weaknesses in the CINA system, acknowledging that inexperienced staff, lack of clerical support, and high staff turnover rates combined with limited financial resources had been problematic in the years past.[486]

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[481] Children's Justice Community Roundtables and Forums, *Children in Alaska's Courts: Community Conversations, Report on Regional Recommendations* 25 (State Justice Institute, April-November 2004). *Available at* http://state.ak.us/courts/outreach/children.pdf.
[482] *Id.*
[483] *Id.*
[484] *Id.*
[485] *Id.*
[486] *Id.* at 26.

## Reflections on the Models

Across the nation and around the world, reform has been implemented with regard to how the juvenile justice system views children. With the knowledge that children and adults are not the same, almost all legal systems handle these two groups of people differently.

Scandinavia, New Zealand, and Scotland offer models emphasizing proactive measures or diversionary programs, and the use of mediation instead of formal court proceedings. These programs focus on keeping children out of the court system in the first place. Denmark's SSP program, also focuses on allowing more open and free communication between those involved. This openness is something that the CHINS system might consider. Informing children of their rights and the repercussions of their actions, and informing parents of children's behavior before it gets out of hand, is important to increase the effectiveness of the system.

Sweden's attention to prevention is also very relevant to the reformation of the CHINS system. In order to help children, it is necessary to look at the root causes of their behavior and actions, which are ultimately derived at a local level. To establish a program that looks at behaviors specific to each locality, race, and class system is something that the legislature should consider, and is something that might ultimately bring less children into the CHINS system as a whole.

As suggested above, family group conferences from New Zealand and Scandinavia are appropriate for reforming the CHINS system. Family group conferences could help balance the best interests of the child, by addressing the specific needs of the child outside of court, while also centering on the preservation of the family and parental rights.

The programs implemented for children in New Zealand, Scandinavia, and Scotland, all embody the principles set forth by the UN Convention on the Rights of the Child. These UN

documents demand that all children are to be protected against humiliation and respected as human individuals. The countries discussed share an outlook which puts the "child's best interest" at the forefront. These countries, including Sweden, also recognize that the circumstances of children are in constant transition.[487] Child policies, therefore, must be adapted to emerging and changing conditions.

Protecting children's rights and considering their best interest can be achieved while also affording parents their rights and keeping family preservation in the forefront. The use of mediation and strengthening diversionary programs can have a positive effect and might ultimately bring less children into the formal court system, the purported goal of CHINS.

Whenever children are involved, especially young children, their families need to be included in the solution. Programs such as the Ohio's Truancy Prevention Through Mediation bring important people in the child's life together to get to the root of the problem in order to successfully resolve the situation. Since family involvement is relevant to more than just status offense proceedings, states such as Alaska have begun to include extended family in juvenile delinquency court proceedings as well.

Two major lessons also emerge from systems such as New York and Ohio: 1) children who have not committed criminal offenses should not be treated as if they have, and 2) helping such at-risk youth requires a broad and deep program aimed at treating the causes rather than the symptoms of their behavior. The system of treatment should attempt to keep the child in his or her home rather than automatically placing him or her in an out of home placement.

Massachusetts legislators have found that there are issues to be addressed in the current CHINS system; programmatic changes may need to reach further than the statute to initiate real

[487] *Supra* note 363.

change. The necessary changes will most likely require small scale, community-based involvement. In light of programs in the international and national spheres, Massachusetts should consider radical change to the CHINS system. The most radical change recommended would be taking these proceedings out of the court room and enforcing informal proceedings. This would incorporate mediation, conferences, and alternative dispute resolutions that are displayed by several countries and states. Incorporating mediation and informality could help the family, community, and state better understand the problems and needs of the child. This will allow a more holistic approach, and will strive to find a remedy for the problem as a whole rather than particular, isolated symptoms exhibited in the status offense. This solution would put the best interests of the child at the forefront while including the parents, extended family, and community. In addition, this program should be more localized and directed toward specific communities to address specific characteristics of diverse demographics.

# Procedural Questions

## *Who Should Have Standing to Participate in a Hearing on a Petition?*

In establishing who has standing in a CHINS proceeding, it is important to recognize that the parties now given standing by the courts are not equally affected by the outcome of the proceedings. Parents have a greater role in their children's lives than the school or the state, and the court should take this into account. There are fundamental differences in the relationship between parent and child and the relationship between the child and the state, via the police and the schools. While schools, social service agencies and the police can (and should) have a role in protecting and caring for children, their role is not as central to the well-being of the child as a

parent's role. The current CHINS statute fails to recognize that parents play a much larger role in their children's lives than the State.

Under our model, the question of standing would only emerge at the formal proceedings level. During the diversionary phase and the initial intervention phase, parents, children and service providers are given ample opportunities to meet and collaborate on workable solutions. Although we hope the combination of services available prior to the formal filing of a CHINS petition will serve to filter many families out of the system, we recognize that some families will unfortunately need to avail themselves of the more formal proceedings. Under our model, the issue of standing will emerge during the collaborative lawyering or formal hearing phases.

Currently in a CHINS proceeding, parents, schools and police departments may file CHINS petitions.[488] Each party presently recognized as having the right to petition arguably has legal standing, defined as a "party's right to make a legal claim or seek judicial enforcement of a duty or right."[489] By this definition, parents, schools, and the police should have the ability to go to court to enforce the duty they have to nurture, educate and protect children.

We advocate for a multi-tiered system in which different parties have different levels of standing at different points in the proceedings. Specifically, we recommend that the police continue to be given standing to file CHINS petitions and to present evidence, but that their involvement should end at that point, unless the court feels it is necessary to include them further. We recommend that the schools continue to be allowed to file petitions but only after they have shown they have completed the school diversionary program discussed in our model. We also recommend that probation officers be given the power to file petitions because, in some

[488] M.G.L.A. 119 § 39E (2006).
[489] *Black's Law Dictionary* 671 (3rd ed. 2006).

cases, they may know more about a child than the schools. All of these entities would have the power to file petitions and would be present at the fact-finding hearing. However further participation would be at the discretion of the court. For example, if a school files a petition because a child is truant and the court suspects that the child is missing school because of an undiagnosed learning disability, the court may deem that it be important to give the school standing so it can offer its opinions on an appropriate disposition.

There should be an intermediate level of standing that would be given to schools, police, probation, and the umbrella organization created in the draft legislation but not in every circumstance.[490] We recommend that a representative from the umbrella organization be given standing at the disposition phase. We do not advocate giving them standing to file petitions but recognize their importance in ensuring families are getting the appropriate services. Giving standing at the disposition stage to the umbrella service organization may help to ameliorate the current problem of the court mandating services that service providers are unwilling or unable to provide. Giving the agencies a voice in the proceedings will hopefully result in more services for more children and families.

This recommendation is in keeping with the draft legislation. Section 39V describes a team meeting with probation, a case manager, petition, the school, and the parent or legal guardian. This meeting occurs after a child has been adjudicated in need of services and the purpose is to create proposals for the court as to the appropriate disposition.[491] We endorse this process and suggest expanding it to include other members of the umbrella organization such as mental health agencies who might be helpful.

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[490] An Act Regarding Children and Families Requiring Assistance, Draft Legislation from Senator Spilka's Office, §39V, Line 505-512. (2007).

[491] *Id.*

In addition, we recommend giving children standing as well. Standing is determined by an examination of which parties have the biggest interests in the outcome of a case. Children have the most at stake and, therefore, should be heard by the court and potentially have the power to file a petition, with the help (as needed) of an adult. Article 12 of the United Nations Convention on the Rights of the Child (CRC) gives:

> the child who is capable of forming his or her own view, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.[492]

Giving children standing ensures that their opinions are heard and taken into consideration. While some may argue that children do not need the power to file a CHINS petition because their parents are presumed to be operating in their child's best interests, this may not always be true. There may be some situations where a parent may not be able to protect their child's best interests. If the parents do not speak English well enough to understand the process or if the parents have limited cognitive or educational abilities, they may have difficulty advocating for their child in court. While these circumstances may not prevent them from being good parents, they may be less qualified to act in ways that maximize the utility the CHINS system can provide for their children. Under the draft legislation, parents or children may seek services or terminate them at any time during the voluntary diversionary proceedings.[493] Children should not be denied services simply because their parents are unwilling to help them. In these circumstances, the child should have a judicial remedy and should be able to file with the help of a guardian.

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[492] United Nations Convention on the Rights of the Child, G.A. Res. 44/25, Article 12 (Nov.20, 1989).
[493] An Act Regarding Children and Families Requiring Assistance, Draft Legislation from Senator Spilka's Office, §1, Line 11. (2007).

Finally, we recommend that parents should be granted standing and should be heard by the court at every stage of the proceedings, regardless of who initially brings the petition. Historically, parents in this country have been marginalized and disempowered by juvenile court proceedings. Less than a century ago, the court had the power to remove a child from their parents' custody without even giving the parents notice.[494] Although the system has improved exponentially since then, the fact that the current CHINS statute does not give parents the right to be heard in court is an indication that parents are still in danger of being pushed out of a system that ostensibly exists to preserve families.

CHINS proceedings may be the first time that a family is forced to deal with the juvenile justice system. This first contact with the system is when many families are most receptive to participating in a program that involves the whole family.[495] Although families may be resistant to participating in therapy or other family treatment programs, their presence is essential because it "provides a means for helping the entire family to deal with its problems."[496] It would be contradictory and harmful to conclude that although the parents (and the rest of the family members) are essential to any attempts to assist the child through non-judicial means, but that they are not necessary or relevant if those attempts fail.

Under the current system, parents may initiate a CHINS proceeding but they do not have the right to be heard by the court or to stop the process. In 1994, the SJC held that parents do not have a right to withdraw their child from the CHINS system once the child has been adjudicated

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[494] Kari Hong, *Parens Patriarchy: Adoption, Eugenics, and Same-Sex Couples*, 40 Cal. W. L. Rev. 1, 17-18 (2003).
[495] Albert R. Roberts, *Juvenile Justice: Policies, Programs, and Services* 224 (1989).
[496] *Id.* at 226-228. Roberts also suggests that immediate contact with the therapist (i.e. the day that the child enters the system), as well as scheduling flexibility, are crucial to getting families to have a positive opinion of the therapy process.

as being in need of services.[497] The court in that case recognized that a child has a fundamental interest in a parent-child relationship, but found that being adjudicated a CHINS, with temporary custody granted to DSS, was permissible because it only resulted in a minimal infringement of the parents' interest in their relationship with their child.[498] Although the court recognized the parents' right to consent or refuse informal assistance, it found that once a petition has been issued, parental consent is no longer required. The court's opinion was based on the fact that nowhere in the CHINS statute does it specify that parents have the right to refuse consent. In addition, the court found that since a police officer or a supervisor of attendance can file a petition as well, parental consent is not even required in order to file the petition initially.[499] Any meaningful reform of the CHINS system will need to recognize the fundamental role of parents within the family and work to promote their involvement. Giving parents standing at every stage of the proceedings is critical.

The draft legislation begins to address the issue of parental standing, but does not go far enough. Under the draft legislation, parents are given a great deal of input into the process at the diversionary stage, including the creation of the family plan.[500] The draft legislation also recognizes that the parents and families are often in need of services as well and seeks to heal the entire family.[501] We applaud these developments because parental involvement is a key factor in successful outcomes. However, parents are not as empowered at the formal hearing stage. Under the draft legislation, at the fact finding hearing, the court will hear evidence from the

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[497] *In the Matter of Gail, 417 Mass. 321, 326 (Mass. 1994).*
[498] *Id.* at 327.
[499] *Id.* at 326.
[500] An Act Regarding Children and Families Requiring Assistance, Draft Legislation from Senator Spilka's Office, §5, Line 177. (2007).
[501] *Id*. at §5, Lines 178-187.

petitioner and the community-based crisis intervention services program case manager.[502] The probation officer is also present to make a recommendation, but the statute does not give parents an explicit right to be heard at the fact-finding hearing.[503] Although some parents will be allowed to speak because they are the petitioners, others may not be. We believe that all parents should have standing to participate at this level regardless of who is the petitioner. This is justified because parents may have important information that could help the judge determine whether the child should be adjudicated in need of services.

Our recommendation is in keeping with United States Supreme Court decisions that over time have recognized the right to raise one's own children as a fundamental right protected by the United States Constitution. Justices, throughout years of jurisprudence have,

> frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska,* 262 U.S. 390, 399 (U.S. 1923), 'basic civil rights of man,' *Skinner v. Oklahoma,* 316 U.S. 535, 541 (U.S. 1942), and '[r]ights far more precious . . . than property rights,' *May v. Anderson,* 345 U.S. 528, 533 (1953).[504]

Subsequent Supreme Court cases have followed this line of thinking, affirming the importance and sanctity of the familial unit through the confirmation of parents' constitutionally protected fundamental right to raise their children: "A natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference."[505] As CHINS petitions are purposely differentiated from care and protection proceedings, the court should operate under the rebuttable presumption that the parent

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[502] *Id*. at §39U, Line 470-2. (2007).
[503] *Id*.
[504] *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).
[505] *Hodgson v. Minnesota*, 497 U.S. 417, 447 (U.S. 1990). *See also Meyer v. Nebraska*, 262 U.S. 390 (U.S. 1923). *See also Pierce v. Society of Sisters*, 268 US 510 (U.S. 1925).

is capable and committed to caring for the child until the opposite is demonstrated.

Massachusetts case law has agreed that

> [p]arents have a fundamental liberty interest in maintaining custody of their children, which is protected by the due process clause of the Fourteenth Amendment to the United States Constitution. *Care & Protection of Robert,* 408 Mass. 52, 58, 60 (1990). However, that interest is not absolute and the State may intervene if a parent is unfit.[506]

As CHINS proceedings are not tantamount to care and protection cases, the parents are presumed to be fit, but in need of state assistance. Parents may need help to raise their children as they deem appropriate, and the child is best protected by assisting a fit parent to be able to provide for the child's needs.

The Supreme Court has repeatedly upheld the importance of families through a diverse range of Constitutional provisions:

> The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, *supra* at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra* at 541, and the Ninth Amendment, *Griswold v. Connecticut,* 381 U.S. 479, 496 (1965) (Goldberg, J., concurring). [507]

This integrity is best realized by placing the parents' rights at the forefront of court proceedings that concern any child-parent relationship. The Court recognizes both the privilege and the responsibility granted to parents by the Constitution. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[508] This laudable goal, of preserving the family unit through the protection of parents' rights, should be

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[506] *In re Erin*, 443 Mass. 567, 570 (Mass. 2005).
[507] *Stanley*, 405 U.S. at 651.
[508] *Prince v. Massachusetts*, 321 U.S. 158, 166 (U.S. 1944).

incorporated into the Massachusetts CHINS legislation. The best way to ensure this protection is to get parents involved in matters concerning their children, especially when the potential for the removal of custody is present.

In addition, this recommendation is supported by the language and principles contained in the CRC. In its preamble, the CRC states that families should be afforded special protection, and that children should grow up in a family environment in an atmosphere of "happiness, love and understanding."[509] Article Five stipulates that states should respect the right and responsibility of parents to provide direction and guidance for the child to be able to exercise their rights as recognized in the CRC. The CRC strongly emphasizes the importance of the home environment to children and the role that parents play in creating a nurturing home. The CRC also recognizes the important role parents play in helping their children to exercise their rights.[510] A parent is charged with helping the child express his or her views and opinions and the state is charged with supporting the parents in that role. Furthermore, the CRC recognizes that children have a right not to be taken from their parents.[511] Since children have the right under the CRC to remain with their parents and parents are responsible for ensuring that children are given their rights, parents must have standing in CHINS proceedings to protect their children's rights as well as their own.

In other areas of law concerning children, Massachusetts clearly recognizes the importance of parents and the child's need to have them involved in their lives, or in any court proceedings, in a meaningful way. There are many examples of this. First, in juvenile criminal

[509] United Nations Convention on the Rights of the Child, *supra* note 392 at Preamble.
[510] *Id.* at Article 5.
[511] *Id.* at Article 27.

matters a parent or guardian must be summoned;[512] and in those situations where a child does not have a guardian in the state, the court appoints someone.[513] Second, in situations in which the child is being interrogated, many states have a per se statute that if the parents are present, the child may waive his or her rights and many states consider parental presence strong evidence that the waiver is valid.[514] Third, in proceedings where the court determines if a parent should lose custody due to a care and protection action (51A) the parent is entitled to standing (and representation) based on the fundamental rights that the court attaches to that relationship and reaffirmed by the Massachusetts court in *Care & Protection of Robert*[515] and *Care & Protection of Stephen.*[516] Care and protection proceedings require that the parent be present and represented by counsel.

It should be noted that there are clear differences between a care and protection hearing and a CHINS hearing, most importantly the fact that in a CHINS hearing there is no determination of fault on the part of the parent[s]. However, the stakes in CHINS proceedings are still high, and the parents are still faced with an unfamiliar legal system. This unfamiliarity with the CHINS system, coupled with the fact that children often turn to their parents for advice and assistance, means that the parents and the child both need to understand what is going on. The child's need for quality advice and information from their parents is based on their development as an adolescent as discussed *supra*. A minor's parents or guardian need standing in court to address two specific developmental problems: First, that the child may not have the

[512] M.G.L.A. c. 119 §55 (2006).
[513] 30A MAPRAC § 2657.
[514] Buss, *supra* note 232 at 257-58.
[515] *Care & Protection of Robert,* 408 Mass. 52, (Mass. 1990).
[516] *Care & Protection of Stephen,* 401 Mass. 144, (Mass. 1987).

necessary decision making abilities; and, second, that the child may not be able to fully articulate what would be best for him or her because of a lack of understanding or trust.

In addition, adolescents may be overwhelmed by the process and unable to make critical decisions. Even in children who seem to have highly developed decision-making abilities, these abilities are compromised during emotional or high impact situations.[517] For some children, dealing with the juvenile justice system may provoke this type of response. Since juveniles lack the fully formed ability to make decisions for themselves, the juvenile justice system ought to presume (unless a care and protection proceeding has determined otherwise) that adolescents deserve the opportunity for their parent to be heard in court concerning matters which have a serious impact on the adolescents' relationships with their parents.

The child needs to have an engaged parent throughout the process. Giving parents standing encourages them to fulfill this role and communicates that the state recognizes the importance of their role. If the CHINS system is to best serve children, they need the full and active participation of the parents. As a practical matter, the success rate for children whose parents were involved and cooperated with the probation department and the courts is much higher than for those children whose parents were not involved. In a study conducted in 1981, researchers found that children whose parents were cooperating with court prescribed services were 60 percent more likely to succeed in having the CHINS petition dismissed.[518] In contrast, when the parents were not cooperative, only 11 percent of cases were successfully dismissed.[519] Although this study is over twenty years old, it points to the fact that cooperative parents are better able to assist their children in receiving needed services. Unfortunately, the same study

[517] Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective, Law and Human Behavior*, 234 (1996).
[518] Rinik, *supra* note 91, at 183.
[519] *Id.*

indicates that parents were only willing to cooperate in 25 percent of the CHINS cases.[520] Given the important role that parental cooperation plays in the CHINS system's success, it is critically important to get parents to invest in the process at every phase. If parents were given more of a role in the proceedings, parental cooperation rates might be higher.

Parents should also be given standing because they will have a huge role to play in ensuring that the court's plan is effectively carried out. They are the ones who will be responsible for ensuring their children attend school, that they attend counseling, or that they stay home at night. Because the parents will be the ones ensuring the court's orders are followed, it is important to give them a say in those orders. In addition, although the court has no power to enforce its orders on parents or children adjudicated as being in need of services, it can make custody conditional upon following the courts orders. If the orders are violated, the court can remove the child from the parent's custody. Because so much is at stake for the family, including the possibility of an extended separation, it is critical that parents have an opportunity to present their opinions as to the proper remedy to the court. Many parts of the CHINS system (under both the old legislation and the place holder legislation) are optional; however, many elements are not, and a loss of custody is a very real possibility. Although it can be argued that courts already have the ability to grant standing to parents (and appoint counsel for the parents) if custody is at stake, a rational approach would be to allow all parents standing because at some level any CHINS petition could potentially lead to a loss of custody.[521]

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[520] *Id*. at 180.

[521] On a finding that the child is in need of services, the statute provides the judge three alternatives for disposition, none of which requires parental approval or consent: (a) she may permit that the child remain in the custody of the parent or guardian, subject to certain conditions; (b) she may place the child in the custody of a relative, probation officer, other qualified adult, private charitable or childcare agency, or private organization, which the judge finds to be qualified to care for the child; or (c) she may commit the child to the department (*Matter of Gail*, 417 Mass. 321, 325, (Mass. 1994)). CHINS may also be renewed every six months without parental involvement or consent (*Matter of Gail*, 417 Mass. 321, 326, (Mass. 1994)).

It is important for the statute to explicitly grant parents a right to participate in CHINS hearings. If this right is omitted from the statutory language, there is a possibility that districts will not act uniformly in determining who is actually allowed to participate. At a New York PINS dispositional hearing, for example, parents (and their attorney) who file PINS petitions do not have the right to participate despite having the right to do so in delinquency hearings.[522] The omission of this statutory language has been interpreted as an indication that the New York legislature intended to limit who should be allowed to participate in the PINS hearings.[523]

Despite the lack of statutory authority to guarantee parents the right to participate, judges sitting in family court may exercise their judgment in allowing such participation. Courts have held that "[having established] that the petitioner and her counsel may properly [be excluded] from the dispositional hearing, the court must still decide whether to permit their participation or attendance as a matter of discretion (*Family Ct Act, §741*, subd [b])."[524] The judge presiding over *In the Matter of Kenneth J.* held that even though the parent was not able to participate directly,

> The court will permit the parents, either directly or through counsel, to submit to the probation department any recommendations or information they wish the court to consider on the issue of a suitable placement for Kenneth. [525]

In order to guarantee that parents are involved in the hearings to a further extent than other interested parties, the statute must grant the right of standing to the parents specifically.

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[522] *In the Matter of Kenneth J,* 423 NYS 2d 821, 824 (Family Court of Richmond County, 1980).
[523] "Clearly, it must be presumed that the Legislature intended to do that which it did and intended to omit that which it omitted. The latin maxim *expression unius est exclusion alterius* is an established principle of statutory construction." *Id.*
[524] *Id.* at 825.
[525] *Id.* at 826.

Under our model, parents, children, and an appropriate representative of the umbrella service organization would have standing during the collaborative lawyering phase. At this stage all three parties and their attorneys would work together in a non-adversarial manner that focuses on problem solving rather than on winning and losing. If this collaboration failed to bring about a workable solution or the parties were unwilling to engage in the process, the parties would go to court and engage in the formal process described in the draft legislation but with the changes recommended above and in our other answers.

In conclusion, we recommend that parents and children be given an explicit right to standing at all levels of the formal and informal proceedings, that schools and probation be given the power to file petitions and be part of the proceedings when necessary, and that representatives from the umbrella organization be given standing at the dispositional phase. These recommendations will empower children and families, will engage important social service agencies in the process and will ultimately result in more positive outcomes.

## *Should Indigent Parents be Appointed Counsel in CHINS Proceedings?*

Proposed changes to the current CHINS system would de-emphasize the need for hearings based on an adversarial model. However, in those cases where a hearing remains necessary, indigent parents should be provided with counsel. Counsel should be provided in order to protect the fundamental rights of the parent and child, as well as facilitate the parent in providing information to the judge.

The Supreme Court held in *Lassiter v. Department of Social Services of Durham County, North Carolina*, that there was a "presumption that an indigent litigant has a right to appointed

counsel only when, if he loses, he may be deprived of his physical liberty."[526] Therefore, it is not unconstitutional if the State fails to provide counsel for indigent parents who were at risk of losing custody of their children.[527] However, the *Lassiter* court, relying on *Stanley v. Illinois*,[528] also recognized that a parent's right to the custody and management of their children was an "important interest."[529] The Court further recognized that, as a matter of "wise public policy," it would make sense for higher standards to be adopted than those which were constitutionally required.

The majority of states have relied on *Lassiter* to deny indigent parents the right to counsel except in termination proceedings.[530] However, this presumption must be weighed against the three distinct balancing factors given in *Mathews v. Eldridge*.[531] The *Eldridge* court stated that the

> specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected… second, the risk of an erroneous deprivation of such interest through the procedures used, … and finally, the Government's interest, including the functions involved."[532]

These three distinct factors "must be balanced against each other and then weighed against the presumption."[533]

Sometimes, status offense proceedings like CHINS, can lead to parental loss of custody. The private interest at stake in these proceedings would be the parents' right to raise their child

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[526] *Lassiter v. Department of Social Services of Durham County, N. C.*, 452 U.S. 18, 26-7 (1981).
[527] *Id.* at 31.
[528] *Stanley*, 405 U.S. 645.
[529] *Lassiter* 452 U.S. at 27.
[530] William L. Dick, Jr., *The Right to Appointed Counsel For Indigent Civil Litigants: The Demand of Due Process*, 30 Wm. & Mary L. Rev 627, 632 (1989).
[531] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
[532] *Id.*
[533] *Lassiter* 452 U.S. at 18-9.

and maintain their family.[534] This would be balanced against the State's interest in making sure that the child's best interests are served. Since CHINS proceedings can lead to either a permanent or temporary parental loss of custody, the presumption against the appointment of counsel at every level of a CHINS proceeding should be overcome.

State courts across the nation that have considered the question of indigent parents' right to counsel have reached different answers.[535] Six states that failed to guarantee indigent parents' right to counsel prior to *Lassiter* are illustrative of the direction in which the states are moving on the issue of parental right to counsel.[536] In Florida, North Carolina, Texas, Vermont, Virginia, and West Virginia, whenever parents are at the risk of losing their parental rights, the judge must "explain that there is a right to counsel and that counsel will be appointed for those who cannot afford to retain representation."[537] Some of the states go as far as requiring that the courts provide records indicating that counsel was offered, and the courts are required to provide an explanation when a parent is not provided with counsel.[538]

When parents are not provided with counsel, there is an increased likelihood of erroneous decisions by the judge. "Given that attorneys and other advocates often determine what information a judge is presented with,"[539] in status offender proceedings, providing parents with counsel will ensure that their voice is heard by the Judges. When parents are not represented, the judges do not hear their opinions and the child's best interest is at risk.[540] Parents know their

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[534] *Shaw v. Shelby County Dep't of Pub. Welfare*, 584 N.E.2d 595, 601 (Ind.Ct.App.1992).
[535] William L. Dick, Jr., *The Right to Appointed Counsel For Indigent Civil Litigants: The Demand of Due Process*, 30 Wm. & Mary L. Rev 627, 632 (1989).
[536] Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The State's Response to Lassiter*, 14 Touro L. Rev. 247, 262 (1997).
[537] *Id.*
[538] *Id.*
[539] NCJFCJ Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice, Vol. II (Mar. 1998) 5. *Available at* http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/representation.pdf
[540] Judge Chris Melonakis, 57 Juv. & Fam. Court Jnl. 39 (2006).

children better than the caseworkers or probation officers who will likely be presenting the case to the judge. Providing parents with legal representation will ensure that judges get accurate information regarding the child, thus guarding against erroneous decisions by judges.

The need for legal representation for indigent parents in CHINS proceedings is dire as "[p]oor children are much more likely to be removed from their homes following allegations of neglect or abuse."[541] Most indigent parents are already burdened with other issues like providing food for their children; to add to that burden by denying them counsel would be more than cruel. Sandra Anderson Garcia, an attorney that advocates for parental representation in dependency hearings, believes "that the results of ninety percent of our cases would have been worse had we not been involved. A 'win' for me is how much of the parent's story is heard and their procedural rights are asserted."[542]

Section One of the Fourteenth Amendment explicitly states that no State shall "deprive any person of life, liberty, or property, without due process of law."[543] The Massachusetts Constitution has a similar provision.[544] In response to an inquiry from the State Senate, the Supreme Judicial Court (SJC) interpreted these provisions to mean that a person can only be deprived of "an interest in liberty" if they have been afforded the due process of law, as required by Section One.[545] Both the Supreme Court and the SJC have further "recognized that parents

[541] Young, *supra* note 536, at 257.
[542] Sandra Anderson Garcia, *The Roles of Counsel For the Parent in Child Dependency Proceedings*, 22 Ga. L. Rev. 1079, 1093 (1988).
[543] US Const. Amend. XVI, § 1.
[544] "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws." M.G.L.A. Const. Pt. 1, Art. 10 (1997).
[545] *Opinion of the Justices to the Senate*, 423 Mass. 1201, 1229 (Mass., 1996).

have a fundamental interest in their relationships with their children that are constitutionally protected."[546]

The Supreme Court in *Meyer v. State of Nebraska* found that parents have a fundamental interest regarding the language in which their children are educated. [547] If such an interest exists, then surely that interest extends outward to other central parts of a child's upbringing. According to the *Meyer* court, parents have "natural duties" toward their children.[548] Said duties, along with the liberties of parents, "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary."[549] Thus, the Supreme Court has recognized the right of parents to raise their children, free from arbitrary governmental interference, as essential to the theory of liberty.

The Supreme Court's recent holding in *Troxel v. Granville* established that "the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court."[550] CHINS proceedings involve this fundamental liberty, and the Commonwealth should recognize that this interest is at risk even when the child's immediate custody is not at issue before a court. In a CHINS proceeding, at least some dimensions of a child's life falls under the control of the State, and out of the hands of the parents. In many cases, this may be required by the State's fundamental interest in "properly act[ing] to protect children of tender years."[551] However, in light of the important interest at stake, the State should err on the side of fairness and provide counsel for parents whose authority over their children is being usurped, if only temporarily.

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[546] *Opinion of the Justices to the Senate*, 691 N.E.2d 911, 913 (1998).
[547] *Meyer v. State of Nebraska*, 262 U.S. 390 (1923).
[548] *Id.* at 400.
[549] *Id.* at 399-400.
[550] *Troxel v. Granville*, 530 U.S. 57, 65 (2000).
[551] *Custody of a Minor*, 389 N.E.2d 68, 72 (Mass. 1979).

Under Massachusetts law, parents of children involved in CHINS proceedings are entitled to state appointed counsel if, and only if, either DSS or a licensed child placement agency is also a party to the proceeding.[552] However, it can be argued that parents' interests in their relationships with their children are so fundamental as to advise that the State provide counsel in all CHINS cases, not just the ones in which the parents risk losing custody. The SJC of Massachusetts has explicitly stated that "[t]he interest of parents in their relationship with their children has been deemed fundamental, and is constitutionally protected."[553] In that opinion, the SJC reiterated the words of the US Supreme Court in *Stanley v. Illinois*: "'[t]he rights to conceive and to raise one's children' are 'essential . . . basic civil rights of man . . . far more precious . . . than property rights.'"[554]

The SJC in *In re Custody of Lori* further cemented the notion that parents in Massachusetts have a "fundamental liberty interest" in maintaining custody of their children.[555] The *Lori* court's opinion explicitly stated that "due process rights must be honored whenever a parent is deprived of the right to raise her child."[556] Although it is true that custody is not officially at issue in all CHINS cases, it can certainly be argued that almost all CHINS cases do involve the State infringement of a parent's right to raise their child as they see fit. One can easily conceive of a situation in which a CHINS petition— not initiated by a parent, but by a school official or a police officer— interferes with a parent's decision regarding their children. Parents should have the benefit of effective counsel to present their case and show that their fundamental interest in their child's upbringing is being unfairly infringed upon by the State.

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[552] M.G.L.A. 119 §29 (2003).
[553] *Dept. of Public Welfare v. J.K.B.*, 393 N.E.2d 406, 408 (Mass. 1979).
[554] *Stanley* 405 U.S. at 651.
[555] *In re Custody of Lori*, 827 N.E.2d 716, 720 (Mass. 2005).
[556] *Id.*

In most CHINS proceedings, the behavior of a parent is not in question. However, the issuance of a CHINS petition brings with it the distinct possibility of imposing rules that will affect the structure of an entire family. Even if the orders of the court are geared solely at the child, the fact that the court is imposing its own "parenting" onto the child should trigger a Due Process question under the paradigm that to raise one's children as one sees fit—within reasonable limits—is a fundamental liberty, protected from government interference. It would be possible for the State to argue that not providing counsel to parents during a CHINS proceeding is not a violation of Due Process Clause because the child is not being taken away from the parent, and if the child's custody were at stake, a parent would be entitled to counsel.

It is possible to draw some illustrative parallels between custody cases and the way in which the CHINS process should proceed with respect to parental involvement. The SJC in *Care and Protection of Robert* stated that "loss of a child may be as onerous a penalty [to the parents] as the deprivation of the parents' freedom."[557] If, unlike in a care and protection case, the State has no interest in protecting the child from his or her parents, a parent's rights should not be undermined because the parent poses no harm and should thereby not be deprived of their liberty.

Continuing along this path, we can further analogize CHINS proceedings to care and protection cases. The SJC has recognized the right of parents to counsel in such proceedings because of their fundamental right to the upbringing of their children, not just because the parent is accused of having acted improperly towards their child.[558] In many care and protection cases in Massachusetts— and even Supreme Court Cases— the fundamental right to family is unquestioned.

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[557] *Care and Protection of Robert*, 556 N.E.2d 993, 996 (1990).
[558] *Care and Protection of Erin*, 823 N.E.2d 356, 360 (2005).

There are multiple parties who may file a CHINS petition. Many times it is the parent, if only to get state funded services for their child.[559] This seems an unusual deal to strike whereby a parent can only receive help for their child if the parent abdicates their fundamental right to make decisions for his or her child. This is especially perplexing if one considers that parental involvement is "essential to rehabilitating these youngsters."[560] As one parent who was forced to relinquish custody of her son said, "the law should reflect not a 'child in need of services,' but a 'family in need of services.'"[561] CHINS proceedings should aim to bring parents into the process not only because they appear to have a constitutional due process right to be involved, but because parental involvement could stand to strengthen the system as a whole.

The SJC's holding in *Matter of Gail* is indicative of the importance of counsel in CHINS cases, even those which do not involve the immediate loss of custody. The SJC held that "the parent of a child adjudicated in need of services under G.L. c. 119, §§ 39E et seq., has no right or authority under the statute to withdraw the child from the proceedings or from the court-ordered disposition."[562] Thus, if a parent has significant and legitimate reasons for opposing the issuance of a CHINS petition, or for preferring a certain disposition over another, it is vital that these reasons be made clear to the court before it renders its verdict. A statutory right to counsel for indigent parents in CHINS cases would ensure that said parents' concerns are addressed and that their rights concerning their children's welfare are respected at all times.

The countries examined in this paper base their policies toward children on the CRC, discussed *supra*. Similarly, their definition of parents and parental rights are based on the principles of the CRC. Parents are seen by these countries as individuals who need to be

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[559] Patricia Wen, *Cruel Bargain: Parents Lose Custody to Aid Teens*, Boston Globe, December 19, 2004, at A1.
[560] *Id.*
[561] *Id.*
[562] *Matter of Gail*, 629 N.E.2d 1308, 1310 (Mass. 1994).

involved in their children's lives and in preventing criminal behavior. Adults have obligations to their children.[563] Scandinavia, New Zealand, and Scotland heavily involve the parents in youth crime prevention efforts as parents are seen as having certain fundamental rights toward their children at the same time as having certain duties and responsibilities toward their children. Between the areas of Scandinavia, Scotland, and New Zealand, we have seen a trend toward the use of mediation as the best way to balance the system between the best interests of the child and the rights of parents.[564]

In Scandinavia, formal court proceedings for juveniles are sparse. Sweden, especially, often provides a social welfare system to respond to youths' needs without any juvenile courts. The Care of Young Persons Act, which was promulgated in 1990, provides that measures for children within the social services are to be undertaken "on a basis of agreement with the young person concerned and his or her custodian."[565] The act provides that a care order should be filed if the child exposes himself to drugs, certain circumstances in the home, or criminal activity. In judicial and other proceedings concerning this provision of care act, public counsel is appointed to the child and to that child's guardian, "except where it is presumed that there is no need for counsel."[566] This is one example of a parent's right to legal counsel. However, this right in Sweden is afforded when the social welfare system responds to the child's behavior, unlike CHINS. In these proceedings in Sweden, custody could be at stake. Parents' rights are seen as fundamental enough for counsel to be appointed. This system seeks to put the best interest of child at the forefront while emphasizing the duties and rights of the parents.

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[563] U.N. Committee on the Right of the Child, *supra* note 363, at Par.560.
[564] Miers, *supra* note 370, at 51.
[565] "The Care of Young Persons Act." SFS 1990:52. Ministry of Health and Social Affairs, Sweden, 1990. Section 1.
[566] *Id.* at Section 39.

New Zealand's system is liberal in providing representation. After being arrested, the juvenile must appear in youth court and can have a lawyer by his or her side despite the fact that the court serves as a fact finder and the first step to remediation instead of a fact finder and punisher like the United States courts. The lawyer is there to provide support and guidance for the juvenile instead of representing him or her in an adversarial system. This slight variation in role from the attorneys in the United States is due to the different role that the court plays in the larger scheme of the juvenile justice system. New Zealand's system works to allow the offender to fully realize the gravity of his or her offense, why the type of behavior is negative, and how to better integrate into society and demonstrate socially beneficial behavior. The court's role is to determine the facts so that the parties can mentally move forward and focus on culpability and restoration. The juvenile's parents are encouraged or sometimes required to appear in court; with the belief that the family members are experts regarding their own families. The parents have a right to speak in court as well as a right to counsel.

In theory, New Zealand's youth court hearings are similar to CHINS hearings: they seek to find the facts surrounding the offense(s) and determine the proper steps to take to help the juvenile.[567] Along these lines, allowing the parents the right to speak in court and the right to have counsel helps the judge make more informed decisions. Further, the youths in the CHINS system are unique because many of them are in the system because of their parents' desire to help them through a CHINS petition. These parents have knowledge of their children and past behaviors that could be used by the judge to make decisions about proper services.

As in New Zealand, Scotland's courts act solely as a fact finder in juvenile cases. Once the facts have been determined, the juvenile participates in a children's hearing. These hearings

[567] Young People and the Youth Court, *supra* note 297.

are similar to a conference, although they are run by three panel members instead of one mediator as in most other systems.[568] Parents are required to attend and their absence can result in the imposition of fines.[569] Parents actively participate in the hearing, but do not have the right to counsel. The juvenile, on the other hand, may bring a private attorney or may be allowed a publicly funded Legal Representative.[570] In some cases, the children's panel may determine that the child needs another representative; in these cases, a "safe guarder," who is a social worker whose role is to protect the child, may attend.[571]

These countries, like Massachusetts, however, for the most part, do not afford a legal right to counsel for the parents in proceedings comparable to those of CHINS. However, in countries like Scandinavia, where youth court is barely present and juvenile crime is often dealt with by the social welfare system, mediation is seen as the better way to involve the parents, family, and community. Mediators and counselors are appointed in this type of proceeding, which seeks to eliminate the formal settings of court proceedings and create an environment focusing on the child's best interests as well as the interests, rights, and duties of the parents. For example, in Norway, mediation is seen as a means of preventing recidivism and is thought to be "particularly well suited to young and impressionable offenders, including repeat offenders."[572] In this mediation procedure, a volunteer mediator is appointed to each party for free. Denmark has parallel procedures and ideas for counsel in these procedures. It might be interesting to consider appointing mediators or counselors to the parents or families in order to eliminate an

[568] One Scotland: Children's Hearings, *supra* note 326.
[569] *Id.*
[570] Young People and the Youth Court, *supra* note 297.
[571] One Scotland: Children's Hearings, *supra* note 326.
[572] Miers, *supra* note 370 at 51.

adversarial system within the family and to further the goals of an informal setting and the use of mediation instead of formal court proceedings.

Bearing in mind that providing indigent parents right to counsel at every level of CHINS proceedings could be costly. We looked at some cost-effective models being used by some cities to provide counsels for their indigent populations. These models are used in different types of proceedings including CHINS like proceedings. Even though these models are not perfect, they will provide some guidance to the Massachusetts CHINS reform committee as they look into ways of providing indigents parents with legal representation.

1. Panel Attorney/Contract Attorney Programs

In this model, attorneys are pooled together by the city/county and are under contract pay. This model could be cost effective since the attorneys here will be under contract and costs would be predictable.

New York City has historically used this model,[573] though it has not been a great success due to low compensation for attorneys and high caseloads.[574] The statute mandates payment of court of appointed lawyers $40 per hour and $25 for work done outside of the courtroom.[575] This low pay has led to attorneys leaving; in effect, increasing the caseloads for those that stay.[576] New York State Chief Judge Judith S. Kaye believes "[t]he panels are getting smaller, appreciably smaller, because it is hard to pay the rent and feed a family [with the current compensation]. There are fewer lawyers to handle a growing caseload, and that means that the

[573] Astra Outley, *Representation For Children And Parents in Dependency Proceedings*, 9, *available at* http://pewfostercare.org/research/docs/Representation.pdf, (last visited Mar. 2, 2007).
[574] *Id.*
[575] Ann Moynihan, Mary Ann Forgery, & Debra Harris, *Fordham Interdisciplinary Conference Achieving Justice: Parents and the Child Welfare System*, 70 Fordham L. Rev. 287, 306 (2001).
[576] *Id.* at 306-7.

lawyers who are qualified have to take more cases."[577] The compensation problem would be one to take under advisement when considering this plan, particularly in the Boston area where the cost of living is high.

2. Institutional Programs

This model provides free legal representations to indigent parents in juvenile proceedings. It provides "attorneys to represent parents continuously from the point where the parents enter the dependency court system until either the child returns home or the parent's rights to his or her child are terminated."[578]

The Juvenile Court Project (JCP), a legal assistant program run by the Allegheny County Bar Foundation is an example of this model. The JCP project in Pittsburgh is used in proceedings for children who are "habitually truant," "disobey their parents," and are "deemed ungovernable."[579] According to the Allegheny Bar Association website, the project employs only twelve full-time attorneys and handles over 2,500 clients per year.[580]

3. Interdisciplinary Programs

This model is the "most comprehensive and holistic of the models."[581] In this model, different players in the system—including attorneys for the parents, social workers, mental health professionals—come together to work as a team to provide better representation. According to Martin Guggenheim, a child welfare expert, without a team of lawyers and other

[577] *Id.* at 307.
[578] Outley, *supra* note 573.
[579] Juvenile Court Project, Parent Advocates, http://www.acbfparentadvocates.org/ (last visited Mar. 3 2007).
[580] Allegheny County Bar Association, http://www.acba.org/acba/community_service/juvenile_ct_project.shtml (last visited Mar. 20, 2007).
[581] Outley, *supra* note 573.

professionals working as a team, "the task of successfully representing parents in these cases is exceedingly difficult and frequently doomed to failure."[582]

In New York City, the Brooklyn-based Center for Family Representation is starting a pilot project with a Community Advocacy Team.[583] The Community Advocacy Team includes an attorney and social worker. The Advocacy Team works with the parents from the beginning of the case until the end.[584] Cases are referred to the Advocacy Team through Child Welfare agency and other community groups when there are indicators that the parent is at a risk of having a child removal petition filed in court.[585]

### *What processes are required and/or available when custody is removed from the parent or guardian?*

One of the main goals of the new proposed CHINS system is to work towards keeping families together whenever possible. Encouraging all the members of a family to participate in the process is essential to treating a child more effectively. Currently, the parents or guardians of status offenders have very few opportunities to participate in the decision-making process. As discussed in the standing question, greater parental involvement may often give a more complete picture of a child and his or her problems. However, there are times when the State may feel that keeping a parent and child together is not in the best interest of the child. While custody removal may be necessary, there should be greater procedural protections for parents and guardians. This

[582] Katheleen A. Bailie, *Note: The Other "Neglected" Parents in Child Protective Proceedings: Parents in Poverty and Role of The Lawyers who Represent Them*, 66 Fordham L. Rev. 2285, 2328 (1998). *Citing* Testimony of Martin Guggenheim Before the Assembly Standing Committee on Children and Families Family Preservation: Preventative Services, Adoption and Foster Care (Dec. 1, 1993).
[583] Outley, *supra* note 573 at 10.
[584] *Id.*
[585] *Id.*

conclusion is supported by current DSS procedures, SJC holdings, and comparative state and international systems.

When custody removal occurs in the CHINS system, parents have very little recourse. Currently, parents who agree to CHINS petitions or initiate a petition are unable to participate in custody decisions.[586] Once custody is removed from the parent or guardian there is no procedural process for regaining custody. In contrast, parents of children in care and protection cases are automatically granted not only a hearing, but are also appointed an attorney if they cannot afford one.[587] In care and protection cases, parents are provided with an attorney and a hearing must be held within seventy-two hours on the decision to remove the child from parental custody.[588] The care and protection statute also allows for the 72 hour period to be extended by a hearing.[589] Due process requires that there be a hearing regarding these removals. The SJC of Massachusetts in *In re Custody of Lori*, held that "a parent has a fundamental liberty interest in maintaining custody of her child."[590] *Lori* was a case that dealt with a removal under G.L. c. 119, § 23(C), which states in part:

> The department may seek and shall accept on order of a probate court the responsibility for a child under 18 years of age who is without proper guardianship due to death, unavailability, incapacity or unfitness of the parent or guardian or on the consent of the parent or parents.[591]

Although, *Lori* dealt with a care and protection case and not a CHINS case,[592] the results of custody removal in both situations are analogous. Therefore the opinion should be considered when determining whether a hearing should be required in CHINS cases. Justice Ireland's

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[586] M.G.L.A. 119 § 39E (2003).
[587] *Id.* at § 29C.
[588] *Id.* at § 29C (2003); *see also Lori*, 827 N.E.2d 716, (Mass. 2005).
[589] *Id.* at § 24.
[590] *Lori* 827 N.E.2d at 717.
[591] M.G.L.A. 119, § 23(C) (2005).
[592] *Lori* 827 N.E.2d at 718.

language indicates that the parents' right to maintain custody is pervasive, and should be held in the highest regard. For example, in *Lori*, Judge Ireland states

> Parents and children face the same substantive due process deprivations regardless of the court ordering the removal… Furthermore, '[i]t is not to be lightly assumed that the Legislature would have intended to treat [parents and children facing removal of custody] differently depending upon which court [ordered the emergency removal of the child from the parents' custody][593]

This suggests that the SJC of Massachusetts would support the notion that children removed in CHINS proceedings[594] and their parents are entitled to the same due process rights that they are afforded in other removal proceedings.[595]

In another SJC case, *Care & Protection of Erin*, the court held that because parents have a fundamental liberty interest in maintaining custody of their children, their parental rights and custody of their children are protected by the due process clause of the Fourteenth Amendment of the United States Constitution.[596] A statute infringing this fundamental liberty interest should only be upheld if it serves a compelling state interest and if it is narrowly tailored to serve that

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[593] *Lori* 827 N.E.2d at 720; opinion quotes from *Adoption of Donald* 729 N.E.2d 638 (Mass App. Ct. 2000).

[594] M.G.L.A. 119 §39(G) part (c) reads:

> Upon making such adjudication the court, taking into consideration the physical and emotional welfare of the child, may make any of the following orders of disposition:] -subject to the provisions of sections 32 and 33 and with such conditions and limitations as the court may recommend, commit the child to the department of social services. At the same time, the court shall consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C. The department shall give due consideration to the recommendations of the court. The department may not refuse out-of-home placement of a child if the placement is recommended by the court provided that the court has made the written certification and determinations required by said section 29C. The department shall direct the type and length of such out-of-home placement. The department shall give due consideration to the requests of the child that the child be placed outside the home of a parent or guardian where there is a history of abuse and neglect in the home by the parent or guardian.

[595] For reference, compare G.L. c. 119, § 24, which specifically requires a hearing within 72 hours of removal in its text, with G.L. c. 119 § 23 (C), which was considered by the court in *Lori* and held to require the same hearing (though it does not mention such a hearing in its text), and G.L. c. 119 §39(G), which also does not specifically mention a hearing within 72 hours.

[596] *Care & Protection of Erin*, 443 Mass. 567, 570, 823 N.E.2d 356 (2005), citing *Care & Protection of Robert*, 408 Mass. 52, 58, 60, 556 N.E.2d 993 (1990).

interest.[597] Therefore parents of status offenders should be entitled to the same due process protections that are provided for parents involved in care and protection cases. The judge may remove custody before a formal hearing, if he or she feels that a child is unlikely to appear before the court.[598] Although the court has an interest in making sure that a child appears in court, there is no compelling state interest in not providing a hearing.

While it is unclear why parents are treated so drastically different in the two systems, there may be a reason for why due process is applied in such an inconsistent manner. It is possible that the CHINS system interprets parents signing or agreeing to a CHINS petition, as waiving their right to due process.[599] However this assumption is faulty in that many parents or guardians may be agreeing to CHINS petitions because they feel they have no other options. Parents are forced to choose between getting their child the services they desperately need or retaining custody. Additionally, the petition may have been filed by another party which means that the parents were not involved in the process at all, and therefore could not have waived their right to due process. However, the lack of due process is addressed in the new draft legislation by requiring a post-removal hearing seventy-two hours after any removal.[600]

The extension of the right to due process to parents in CHINS cases is similar to the procedures of other states. Both Alaska and New York in their CHINS equivalent statutes require a hearing immediately after a child is removed from his or her parents removal. In Alaska there must be a hearing within forty-eight hours[601] and in New York the requirement is seventy-two

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[597] *Ashcroft v. Free Speech Coalition* 535 U.S. 234, 262 (U.S.,2002)
[598] M.G.L.A. Ch. 119 §39H (2003).
[599] While not completely settled law, it has been upheld. *Peterson v. Peterson* 2002 WL 518481, 1 (Mass.App.Ct.) (Mass.App.Ct.,2002) ("Civil due process rights, like all rights, may be the subject of waiver"), see *D. H. Overmyer Co. Inc., of Ohio v. Frick Co.* 405 U.S. 174, 185-186 (1972).
[600] An Act Regarding Children and Families Requiring Assistance, Draft Legislation from Senator Spilka's Office, §39S, Line 452-3. (2007).
[601] "The court shall immediately, and in no event more than 48 hours after being notified unless prevented by lack of

hours.[602] Additionally, Alaska provides a voice to the parents by allowing them to respond. "[A] parent or guardian of the child may request a continuance of the hearing for the purpose of preparing a response to the allegation that the child is a child in need of aid."[603] The New York system also allows for parental involvement in the hearing.[604] Both Alaska and New York's systems create more opportunities for parents to assert their right to due process and participate in the status offense procedures. These two characteristics are necessary and valuable additions to the new proposed legislation. The new model also benefits from the incorporation of international practices and systems regarding due process.

Due process only requires an impartial forum to present evidence and come to a final decision about fundamental interests. However, one need not be limited to a formal court proceeding for this hearing. Possible alternatives to the current system are the Scottish hearings system, mediation, or collaborative lawyering, which may more effectively incorporate the child's best interest and include all members of the family in the decision-making process.

The Scottish hearing system, described earlier, deals with children who have committed both status and criminal offenses.[605] The hearings in Scotland, distinct from formal court proceedings, involve youth in discussions with counselors, members of their family, and their community.[606] While three-member volunteer panels ultimately decide the course of action, the cooperation of families is a key factor in the decision-making and parents are required to attend

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transportation, hold a temporary custody hearing." AK ST § 47.10.142(d).

[602] "No person may be detained under this article for more than seventy-two hours or the next day the court is in session, whichever is sooner." N.Y. Family Court Act, Article 7 §729: Proceedings Concerning Whether a Person is in Need of Supervision: Duration of detention before filing of petition or hearing. (2007).

[603] AK ST § 47.10.142(d).

[604] N.Y. Family Court Act, Article 7 §728: Proceedings Concerning Whether a Person is in Need of Supervision: Discharge, release or detention by judge after hearing and before filing of petition in custody cases (2007).

[605] *Children's Hearings:* The Foundation of the Children's Hearing System (2005), http://www.chscotland.gov.uk/background.asp (last visited Mar. 21, 2007).

[606] *Id.*

these hearings.[607] One of the advantages of the hearing system is that, unlike the CHINS system, there is a mandatory yearly follow-up for each child that attends a hearing, regardless of whether that child follows through with the decision of the panel members.[608] This review, which can be and often is conducted more frequently that once per year, may result in a change of the course of action for the child, leading to a system of justice that is tailored to the individual child.[609]

Mediation has also been used effectively internationally instead of hearings in status offense cases. In Denmark, eighty percent of CHINS-like cases are resolved by mediation[610] and in Norway agreements are reached ninety-three percent of the time.[611] The success of meditation systems in Denmark and Norway suggests that similar systems could be adopted successfully by the CHINS program. An advantage of switching to a mediation type model instead of a hearing is the reduced cost to the state. In addition, by replacing hearings with informal meetings, parents and their children can be more open and better able to explain the problems they are having, which can only help to discover what types of services the child is in need of. Once a decision is reached in mediation it can be signed off on by a judge. If, despite their approval at the time, the agreement is later found by the parent to be unsatisfactory, it can still be appealed. These approaches will be less divisive and confrontational than a traditional hearing and therefore will be much more beneficial to all the participants. In the end, it is important to encourage family participation and accountability because these are the family traits that are likely to effectuate long term positive change.

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[607] "Social Work Research Findings, No.25. Deciding in Children's Interests." The Scottish Office, 1998 *available at* http://www.scotland.gov.uk/cru/documents/rf25-00.htm.
[608] Geimer, *supra* note 331, at 387.
[609] *Id.* at 408.
[610] Miers, *supra* note 370, at 22.
[611] *Id.* at 47.

In Sweden, there is no legislation that allows for the permanent termination of parental rights, meaning that a child cannot be put under a permanent care order or permanent transfer of guardianship without the parent's consent.[612] With parental consent, children may be placed in a treatment center under the 1980 Social Services Act.[613] In emergency situations, however, the Care of Young Persons Act transfers power to the social welfare committee to remove children from their homes who are "vulnerable to health and developmental risks that result from defective home conditions or their own behavior."[614] In all cases where the child has been removed from the home, the Swedish Board of Social Welfare focuses on treatment of the child for the shortest possible period of time, with the ultimate goal of reunification with the family.[615]

## Suggestions for Custody Removal in Respite Situations

There are three different scenarios in which a status offender could benefit from a respite program and a fourth scenario where a respite program is not appropriate. In the first scenario (and least controversial), the parent or guardian, the child, and the caseworkers agree that a short-term respite program is appropriate. In this situation because the parent does not challenge the state's decision there is no need for a custody hearing. Another possible scenario is if the caseworker and the parent want the child to enter the respite program, and the child does not want to. Despite the need to take into account a child's feelings and opinions, especially if the child is older, the child should be entered into the program. "The child's preference will not always coincide with the best interest of the child, but is a circumstance to consider among others."[616] The third possible scenario is when the child and caseworker want to enter the

[612] One Scotland: Children's Hearings, *supra* note 326.
[613] *Id.*
[614] Carl-Gunnar Janson, *Youth Justice in Sweden*, 31 Crime & Just. 391, 411 (2004).
[615] *Id.*
[616] Eva Ryrstedt, *Custody of Children in Sweeden*, 39 FAMLQ 393, 399 (2005).

program, but the parent or guardian desires the child to stay with him or her. In this situation, there is a conflict with a parent or guardians' interest in maintaining their right to custody. However there are numerous factors that still support this violation of due process.

It should be taken into consideration that in the third situation the removal of custody is temporary and can be appealed after seventy-two hours. Also the benefits of placing the child in the program outweigh the possible damage to the parent's interest in preserving custody, therefore, for safety reasons, a child who asks to be placed in a short term respite program, should be allowed to participate without the consent of their parent or guardian. There could be many reasons why a child may want to go into a program, and why his or her parent or guardian disagrees. It is in the best interest of the child to err on the side of caution and place them in respite care. Once they are in custody, the staff will have a better opportunity to discover the possible underlying causes of the child's behavior. The final scenario, where any kind of respite program would be ineffective, is one in which neither the child nor the parent wish to participate. Because respite programs are based on the idea that status offenders and their families participate willingly, such programs are inappropriate in such a situation. In this case, if the state feels services are necessary, the child would have to be placed in a more traditional venue.

Although separating a child from his or her family is not the most desirable solution for defusing family conflict, it can be highly effective. Often once those involved in the conflict have a few days apart, they are able to approach their problems in a much more rational manner. Also the child is only apart from his or her guardian for a maximum of seventy-two hours in the proposed legislation.[617] Since due process requires in Care and Protection cases that a hearing is convened within seventy-two hours it could be argued that a custody hearing in short-term

[617] An Act Regarding Children and Families Requiring Assistance, Draft Legislation from Senator Spilka's Office, §8, Line 201. (2007).

respite cases is superfluous. However, if after seventy-two hours, it is decided by either the child or the caseworkers that it is in the child's best interest to stay in the respite program, a hearing to determine custody should be required.

### *Who should act as prosecutor in a CHINS hearing?*

In choosing from the broad range of progressive juvenile status offender systems currently being used internationally as well as in the United States, Massachusetts has a number of non-adversarial approaches to consider. In so many of the models, the focus has been to shift the systems away from an adversarial process to reinforce the fact that juvenile status offender systems are not meant to be punitive. Many programs use collaborative systems in which multiple parties work together to find a solution that will work for the child as well as the other involved parties, such as the parents. This progression within the judicial system towards meeting the needs of children by alternatives to a long, formal court session is evident even at the Supreme Court level. In *Troxel v. Granville*, Justice O'Conner stated,

> the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated."[618]

This quotation expresses the philosophical problem of handling juvenile behaviors with an adversarial model by acknowledging that litigation can be detrimental to the purpose of the proceedings and, in fact, undermine the whole process by causing more harm than good.

Nevertheless, if the CHINS system adopts an adversarial model, there are certain parties that are better suited to the prosecutorial role. The prosecutor in the proceedings will be the

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[618] Troxel, 530 US at 74. Justice O'Conner writing for the four-justice plurality, citing the dissent of Justice Kennedy at 100.

party who advocates for the acceptance of the petition and requests judicial action to reach an ultimate conclusion on what happens next. Under the draft legislation, the petitioner bears the burden of proving a child is in need of services.[619] While we ultimately recommend that the role of prosecutor is given to a court appointed attorney, it is important to recognize some of the arguments in favor of keeping the set up currently in the draft legislation. Having the petitioner act as prosecutor gets the petitioner more involved in the process. If petitioners are aware from the orientation supplied prior to filing a CHINS petition that they will be forced to take on the role of prosecutor later in the process, they may be deterred from filing unnecessary petition. It may add an incentive for the petitioner to cooperate during informal proceedings and services in order to avoid this role later in the process.

Additionally, having the petitioner act as prosecutor may increase the likelihood that the resolution will be carried out since as a party to the hearing, the decision is binding on the petitioner-prosecutor. At the same time, however, it may potentially increase the number of appeals because which ever side loses at the hearing will have strong feelings about the decision and may seek to have it overturned. One additional benefit to having the petitioner act as prosecutor is that in most cases, the petitioner is much more familiar with the child and situation than a court-appointed individual who may not have the time to fully investigate the situation due to the fact that he or she is managing multiple cases. Despite these persuasive reasons, we believe that the role should be out of the hands of the petitioner.

CHINS should attempt to build up relationships rather than add tension between the parties. Having the petitioner act as prosecutor further strains the already tense relationship between the child and the petitioner. Alienation of the parties should be avoided because it will

[619] An Act Regarding Children and Families Requiring Assistance, Draft Legislation from Senator Spilka's Office, §39V, Line 501-5. (2007).

not encourage a successful resolution of the underlying problem. If the petitioner is the child's parent or legal guardian, placing them in adversarial roles can only enhance the difficulties between them. The child will likely see the parent's confrontational actions as a betrayal of trust. If the petitioner is the child's school, the child is likely to resist the control of the school even further. The child and the school system need to cooperate to resolve issues of truancy, otherwise, the child will continue to reject the school, exacerbating the problem. If the petitioner is a police officer, the system mirrors the criminal system from which CHINS seeks to separate itself. Placing these two parties on opposite sides of a gladiatorial fight only reinforces the image of the child having done something wrong. Although the petitioner may seem to have more information about the child's problematic behavior, the petitioner may be unable to see past what he or she knows about the child to understand the underlying problems. Jumping to conclusions at the adjudication phase is unwise. Therefore, the prosecutorial role should be given to a third party who can embrace the duty of protecting more than the specific interests of the petitioner.[620]

The most serious concern regarding the statutory language giving the petitioner the role of prosecutor is that in many cases, this would force the child and parent to be adversaries at the hearing. No good can come of pitting a child against his or her parents in a gladiatorial setting. Their relationship would be damaged, making it difficult for the two sides to cooperate to achieve a successful result after the conclusion of the proceedings. Even if the parents have filed the CHINS petition, they should not be the ones to directly advocate for it in court. Too many

[620] In the Matter of Kenneth J., 423 NYS 2d 821, 824 (N.Y.Fam.Ct. 1980); *see also Brady v. Maryland*, 373 US 83, 87 (1963) for further discussion of duty of Corporation Counsel, County Attorney or District Attorneys to represent more than the individual wishes of the petitioners because they are government officials.

conflicts of interest may potentially interfere with a productive hearing if the parents prosecute the petition.

Additionally, what the petitioner wants may directly oppose both what the child wants and what is best for the child. As a New York Family Court judge wrote in an opinion from a PINS case,

> By its very nature, a parental PINS proceeding is highly sensitive, posturing parent versus child in full adversarial framework. Thus, the delicate parental-child relationship, already strained, can be destroyed forever unless both sides conduct themselves with due regard for the feelings and sensitivities of the other.[621]

Parents who file CHINS petitions should be involved in the hearings, but their role while in court should not be to aggressively prosecute the child. In theory, a parent who files a CHINS petition is doing so in order to best help the child, not to punish. The New York Family courts have established that "the very nature of a parental PINS case precludes the parent from being, at the same time, both the petitioner and the guardian *ad litem*."[622] Therefore, a major flaw in having the petitioner act as prosecutor is that this role cannot be effectively served when the petitioner is the child's parent.

In the New York PINS system, it is sometimes a county attorney who acts as prosecutor at the request of the family court.[623] When a county attorney (or other corporation counsel) becomes involved, "the County Attorney's role [is] that of prosecutor and, despite the respondent's assertion to the contrary, he appeared not on behalf of the petitioner, but on behalf

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[621] *Id.* at 823.

[622] *Id. at* 825; Additionally, the court in this case decided that it was best for the parents and their counsel not even be present in the courtroom during the hearing, *Id.* at 826.

[623]NY Family Court Act 254(a) (McKinney 2007); *see also* 1-3 LN AnswerGuide NY Family Court Proceedings § 3.01, which says "in some counties in New York, some or all PINS petitions are prosecuted at the request of the family court by the county attorney," *see also* 1-2 LN AnswerGuide NY Family Court Proceeding § 2.19.

of the State."[624] The petitioner of *In the Matter of Matthew "FF"* was the eight year old child's own mother.[625] This model allows for the parents to initiate a petition but does not force them to assume a position contrary to the child's wishes.

The Massachusetts juvenile status offender system should avoid using a litigation based, adversarial model, thus eliminating the need for a prosecutor altogether. If litigation needs to be a part of the program, it should remain as informal as possible as to not further injure the child's self-esteem or his relationship with the petitioner. If the system demands an adversarial approach, the parent should certainly not act as the prosecutor. Because parents can be petitioners, it would be unwise to always have the petitioner act as prosecutor. The prosecutor appearing in support of the petition should be a court appointed, third party.

[624] *In the Matter of Matthew "FF"* 179 A.D.2d 928, 929 (N.Y.A.D. 1992).
[625] *Id.* at 928.