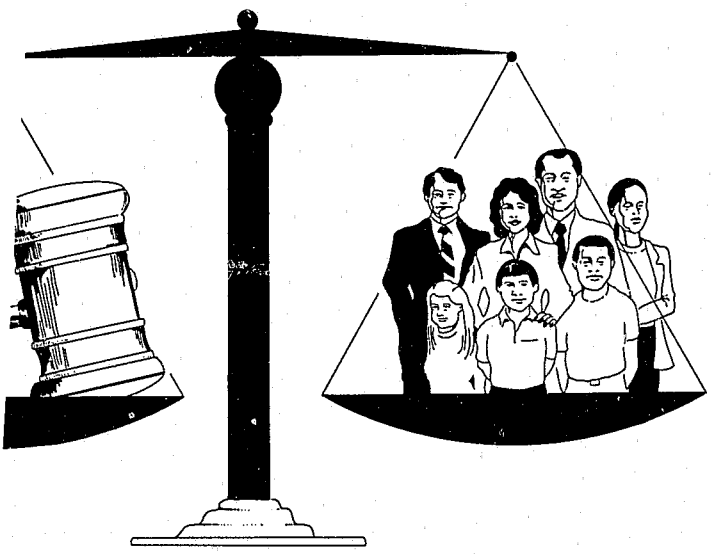

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Valid Court Order Exception: Yes or No?

Judge Gary Crippen

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FOREWORD

> Nonculpable children faced with the criminal process must be protected, not by the state, but *from the state.* There is nothing unique in the juvenile process, including the concept of lesser culpability, that excludes it from this conclusion. Walkover, *The Infancy Defense in the New Juvenile Court,* 31 UCLA L. Rev. 503 (Emphasis Added).

The preceding statement when read with the requirements of *In re Gault,* 387 U.S. 1 1967, as to due process are important factors to be considered when reading the following article by Judge Gary Crippen.

The classification of children for illegal or anti-social conduct is the embodiment of the concept that children, like adults, are accountable for their conduct. Where the adult system of justice and the juvenile justice system differ is in the objectives they seek.

The adult system is punishment-oriented, conviction of a criminal act results in some type of punishment, and if treatment or rehabilitation occur it is a gratuitous side-effect.

The juvenile system is designed to reconcile public safety with the interest of society in having a child become a productive citizen. Juvenile courts have traditionally been thought of as vehicles to accommodate these interests and as a means of securing aid and rehabilitation of children.

What both systems have in common is a rock hard legal requirement that whatever is done is based on due process of law. The question presented by this article is whether the adversarial system and the use of secure detention for children labeled "status offender" is an appropriate approach to the problems presented.

Judge Crippen makes an enlightened and convincing case for the re-examination of the provisions of law that allow children, guilty only of misconduct that violates no criminal law, to be securely detained. Judge Crippen has several premises each of which is well thought out, supported by credible research and legal authority.

Data and research clearly demonstrate that this practice is in direct conflict with the stated objectives of the juvenile justice system. Children simply get worse in secure care — custody seems to beget custody.

Second, Judge Crippen examines the legal requirement that secure detention of children for non-criminal behavior be based on a *valid* court order. (Valid means the entire proceeding is subject to due process requirements. First, where the court order alleged to

have been violated was entered, and second at the contempt hearing.) Research available clearly points out that very few status offenders are afforded counsel or a full due process proceeding. This raises serious questions about the legality of their custody.

Third, Judge Crippen makes an enlightened argument for re-thinking the "Ashbrook Amendment" and the practice of incarcerating status offenders. He points out that what we are doing is harming children and actually contributing to the potential for future criminal behavior.

This article is a basis for us to ask whether or not other institutions (schools, churches, public and private non-residential programs, and families) deal more effectively with non-criminal behavior than courts. Research has clearly demonstrated that our past efforts have not worked and that it is time for a new approach. Judge Crippen, a man of extensive experience, sensitivity and intelligence, has offered us an idea that is long overdue.

Judge Frank Orlando (Ret.)
Director, Center for the
Study of Youth Policy
Florida Atlantic University

PREFACE

Ten years after the "Ashbrook Amendment" to the JJDP Act which created the "valid court order exception," this article is published by the Children, Families and the Law Judicial Council. The Judicial Council is part of the Key Decision Maker Project sponsored by the Annie E. Casey Foundation. All members may not totally agree with the author's positions, but all agree that the topic is important and should be brought to the public policy arena. Judge Gary Crippen is a member of the Council. He served admirably for many years as a Juvenile Court Judge and is now a respected member of the Minnesota Court of Appeals.

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Valid Court Order Exception: Yes or No?

Remarks by Gary Crippen*
Judge, Minnesota Court of Appeals
Member of *Children, Families and Law Judicial Council*

May 9, 1989

Prefatory Comments

This issue concerns the "Valid Court Order Amendment" to the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA). Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified at 42 U.S.C. §5633(a)(12)(A) (1974)). Under the original act, State juvenile justice plans had to provide that juveniles "who have committed offenses that would not be criminal if committed by an adult" cannot be placed in secure detention facilities. *Id.* In 1980, Congress approved the amendment whereby secure detention could also be permitted for "offenses" constituting "violations of valid court orders." Pub. L. No. 96-509 §11(a)(13), 94 Stat. 2750, 2757 (1980). The amendment is also known as the "Ashbrook Amendment," referring to Congressman John Ashbrook (R-Ohio), who authored the amendment, evidently as a friend of the National Council of Juvenile and Family Court Judges.

In 1984, Congress also included in the JJDPA a definition of "valid court order." The term includes any order of a juvenile court judge "to a juvenile who has been brought before the court and made subject to a court order." Pub. L. No. 98-473 §613(b), 98 Stat. 2107, 2108 (1984) (codified at 42. U.S.C. §5603(16)). For the order to be valid, Congress provided that the juvenile who is the subject of the order must have received "full due process rights as guaranteed by the Constitution of the United States." *Id.*

* This statement was presented during a luncheon debate before the annual conference of the National Coalition of State Juvenile Justice Advisory Groups, meeting in Reno, Nevada on May 7 through 10, 1989. Judge Crippen's brief prefatory comments served to define the topic and its significance.

This narrow issue is a microcosm of the ongoing juvenile court crisis, a crisis of toleration for a system consistently prone to exact unusual penalties for minor childhood misbehavior and permitted at the same time the freedom to act without regard for fundamental liberty interests of the child. At the core of the problem are two facts highlighted by the 1980 amendment. First, the most symptomatic abuse by the system is its unnecessary use of secure incarceration. Second, the offenses of the system trace to an American judicial anomaly, a preference for unfettered discretion of juvenile authorities rather than for the rule of law. Moreover, never is unbridled discretion more dangerous to others than when dealing with the accusation that its authority has been offended — that its valid orders have not been duly heeded — a problem often further enlarged when the alleged offender is a child.

Questioning The Valid Court Order Exception

Should we have or should we not have a valid court order exception to the determination of Congress that secure detention not be employed for status offenders — children whose only offense is premised on their status as a minor person?

I urge upon you three policy considerations that need attention when this question is examined. I hope you share these concerns. For those of you who do, I urge your actions as a group and as individuals to keep them before lawmakers who deal with this issue. For those who disagree, often including a number of judges and the councils that represent them, I urge your reconsideration of policy positions to take these concerns into account.

Policy Consideration: Incarceration of Children Is Not Harmless

Twenty-five years ago my wife and I were asked by a social worker to act as foster parents for a fifteen-year-old girl who was separated from her parents. I first met the girl in a cell of a county jail, where she had been detained for three days. She was charged with a curfew violation after her parents locked her from the home when she failed to arrive before midnight. For three years we struggled through the estrangement which exploded on the occasion when the parents decided to "get the attention" of their daughter. I learned then, and I remember now, that incarceration of children is not harmless.

Secure detention is harsh and it is punitive. Why does this even have to be said in a democratic society? The French writer, Andre Gide, reminded us: "Everything that needs to be said has already been said. But since no one was listening, everything must be said again."

Detention is especially harmful for children. In measuring their constitutional rights, we say their age has other significance, that it makes custodial rights of adults a part of their lives. No matter what the law says in this regard, incarceration is threatening to the fragile lives of young people.

Detention is especially harmful in facilities where there is no pretense of treatment. For the overwhelming majority of young people, coercion alone without any other attempt to respond to their needs is both fruitless and destructive.

Detention is especially harmful when it occurs in jails, as often remains the case; or in jail-like facilities — fortresses built with the euphemisms of "detention center," "dormitory," and "bedrooms"; or where the detention facilities are overcrowded; or they mix the innocent with the violent; or when detainees are abused; or when secure detention is unnecessarily prolonged.

Secure detention of status offenders is especially harmful when it is discriminatory, a policy for young girls.

Secure detention is especially harmful when it is used to coerce "volunteering" for long-term residential confinement.

Secure detention is especially harmful when it involves scapegoating, putting upon the child the family problems that should rightfully be reviewed in a dependency or neglect proceeding.

In 1974, Congress moved boldly and properly by declaring the public policy against secure detention of status offenders. The critics of the JJDPA dare not be too casual about reversing its policy and unleashing widespread incarceration. Nor can anyone reasonably propose to tighten public controls over children, aimed at governing some who might escape the system, without fully accounting for the offsetting harm through unnecessary incarceration of thousands of others. Thus, I challenge the thoughtfulness of former Administrator Regnery's call for abandoning the JJDPA to avoid "emancipat(ing) runaways."[1] I question the similar analysis in 1986 by the Metropolitan Judges Committee of the National Council of Juvenile and Family Court Judges, condemning JJDPA policy on the premise that it "ignor(es) children."[2] On the other hand, I credit the

Metro Committee for its emphasis in 1988 on the development of alternative services to respond to the problems of runaways and other status offenders.[3]

Policy Consideration: Determining Real Need for Detention

A dozen years ago when serving as a trial judge, I was called on a Sunday afternoon by neighbors of a 16-year-old girl who had just been locked in a hospital room for emergency psychiatric detention. Stewing over a dispute the day before, the child's father came to her work place, forcefully removed her, and took her to the hospital. She was brought into the hospital under the force of a half-nelson, screaming uncontrollably. A physician in residence agreed she was hysterical and in need of confinement. I appointed an attorney to go visit the girl, choosing a big-hearted man with the capacity to be a bull in a china shop. He was told he couldn't see the young lady because she would hurt him. Instead, he had no difficulty calming her. Within ten minutes he had persuaded authorities to unlock and open the door to her room. Ten minutes later he succeeded in getting a telephone for her. Within two hours, after the lawyer got a review of the matter by the physician, she was released. By then, the problem in the case was evident. The father had four sons, fine athletes, whom he favored dearly. In contrast, for years he had found their older sister to have no redeeming value, in spite of her high academic performance and her good peer relationships. What would have happened if the fortuitous telephone call had not come, or if the lawyer had not been available, or had not been effective in dealing with the system? I determined then, and I remember now, that there should be no policy for detention of children which is not founded on a demonstration of real need.

What is the need for secure detention based on violation of a valid court order? The valid court order amendment goes to matters of truancy, family dissention, curfew, and use of alcohol. On none of these topics have proponents of the amendments recited a credible rationale of need for secure detention. Look especially at the prospect for unnecessary detention in truancy cases. With the simple scheme of a court appearance and an order for being in school every day, the prospect arises for jailing or detention by the following noon. It is the burden of defenders of the amendment to show evidence of need for this kind of authority.

And what of runaways? In 1986, Attorney General Meese's Advisory Board on Missing Children condemned the JJDPA, puffing at one point that "thousands [of children are] set adrift" under the Act[4] — an indictment made without a single item of demonstrated evidence, not even anecdotal, to show that runaway problems are not successfully handled without secure detention. The Meese board had congressional authority to advise on use of federal resources in cases of missing children, not for advising Congress on the wisdom of its enactments. It added insult to injury by making its recommendations without an iota of evidence.

It is evident, in fact, that the board merely capitalized on the hysteria of the moment. It had been observed at the time that some 50,000 American children were kidnapped every year by strangers. Fifty-six cases per year were later confirmed. It was reported that 1.8 million American children were missing each year, but discovered that this figure was greatly enlarged, that more than one-half of the children actually missing were with a parent, and that most of the others returned home within a short time.

The worst lapse in looking for need on secure detention has been the failure to study jurisdictions which are not detaining. Why not examine Flint County, Michigan? Judge Luke Quinn tells us that this jurisdiction locked up nearly 800 runaways in 1973, but abandoned the practice without adverse consequence after the JJDPA was enacted. Is Judge Quinn lying to us? What about the other jurisdictions who report absolutely abandoning detention of runaways? If we want to research need, we should at least examine the jurisdictions that successfully deal with status offenders without detention.

At best, anecdotal evidence indicates a very narrow need for exceptions to the policy determined by Congress in 1974. We should take a stand for nothing more than a very narrow exception. We should question with some vigor the Meese board call for unfettered detention authority, with corresponding amendments of the JJDPA. And we can plead that the National Council of Juvenile and Family Court Judges firmly contradicts the report of policy by its Fiftieth Anniversary historian, that secure detention authority on all status offense cases is "absolutely essential."[5] We can plead as well that the National Council join with others in reporting to Congress that the valid court order amendment is overbroad at best.

Policy Consideration: Limiting the Maximum Authority Available

The third consideration does not so easily trace to a memorable event, but to a learning experience over three decades of dealings with juvenile court matters. In my mind, the importance of the observation enlarges as each year passes. In a nutshell: major segments of the juvenile justice system will always use the maximum authority available to it, regardless of policy statements suggesting the good will of the system. Let me review some examples.

As a matter of policy, jailing of kids has been deplored since the beginning of the American experience under the Constitution. Jail removal was a part of federal policy long before enactment of the JJDPA: In 1923, standards promulgated by the Children's Bureau said that children "should not be detained in jails or police stations."[6] Notwithstanding the policy, the juvenile courts have enjoyed broad authority to detain in jails. Moreover, as we all know, the practice of jailing has remained a stubborn part of the American juvenile justice system. Finally, we are starting to dig in our heels on the topic. Hopefully, Minnesota will stop jailing kids in 1989. In 1988, our state had 3,600 jailings, 2,300 of them with an actual detention in the cell, beyond an "administrative" hold.[7] Three hundred of the kids who were locked up were held on status offenses. Even more telling, however, are the specific deviations from good policy on use of jailings. In 1988, looking at two adjoining metropolitan counties in Minnesota, one jailed four percent of arrested juveniles, and the other jailed 20 percent of those arrested. In one rural county, jailing occurred in eight percent of 117 arrests, and in a next-door county it occurred in 82 percent of 185 arrests. The system as structured cannot follow determined policy with reasonable consistency.

Another example: the courts pledge themselves to protect children's rights. These rights include right to assistance of counsel. In 1940, long before *Gault*,[8] the National Council's predecessor organization of judges declared: "[The] court must recognize and protect the rights of those brought before it as provided by the law and the constitution."[9] We should remember in this regard that the right to counsel is an important ingredient in determining whether a prior court order is "valid," and in determining whether any remedy exists for improper detention. Still, the courts have broad authority to determine how a child waives the right of counsel. In 1986, in St. Paul, and in three suburban counties, zero to seven percent of

the children in juvenile court waived counsel.[10] In Minneapolis, 48 percent waived, and in another suburb 93 percent waived. Three counties in Minnesota never met a child in 1986 who did not waive counsel. Overall, waiver occurred in 54 percent of the cases in Minnesota. One-third of the children placed by the court in institutions never saw a lawyer. In addition, in counties with higher patterns of legal representation, waiver occurred in 28 percent of the cases after adjudication and before disposition. Here again, major segments of the system go astray.

Another issue immensely relevant to the valid court order amendment: policy statements call for restraint in use of secure detention for children. Since 1923, federal standards have said that detention "should be limited to children for whom it is absolutely necessary."[11] Juvenile Court Standards, The Children's Bureau, U.S. Dept. of Labor, Bureau Pub. No. 121, §III(A) (1) (1923). In spite of the policy, juvenile courts have enjoyed immense authority to permit secure detention. In practice, there have been over 400,000 secure detention admissions every year since at least 1965.[12] There were nearly 500,000 in 1987. More significantly, 65 percent of the secure detention admissions in 1987 were for nonfelonious conduct, including status offenses. Here again, the practice is riddled with inconsistencies. One state has a pattern of detaining three children per 1,000 youths, another six for 100 — 23 times the rate. In Flint, Michigan, the rate is six per 10,000, one-fourth of the lowest state rate in the nation. The same disparities are evident on the particular topic of detaining status offenders. These rates were last measured before the JJDPA was enacted. In 1974, in Wisconsin, one of three status offense cases involved secure detention. Across the border in Hennepin County (Minneapolis), Minnesota, 83 percent of the status offenders were detained.

What about the authority for detention on violation of a valid court order, and the leveling policy for restraint and detention? We know remarkably little about local practices in this regard, largely because valid court order cases are dispersed in so many categories, some as part of delinquency figures, some as part of figures on status offenses, and some in special categories for probation violations, obstructing justice, etc. Detention figures often exclude figures on jailing. We know this much in Minnesota: In 1983, 10 percent of all juvenile court placements were premised on "obstructing justice."[13] That figure was 43 percent higher than the number in 1982.

Major departures from policy and gross inconsistencies in juvenile justice practice are not a matter of individualized justice. To the

contrary, they are a matter of local discretion in the shaping of policy. We are dealing here with a system that tinkers not only with individual liberties but with the democratic practice of policy-making. Unless policy exceptions are remarkably narrow and precise, policy is not shaped by Congress, by legislators, by executive agencies, by appellate courts, or by groups of judges. Rather, it is shaped by individual judges — by their ability and insight, their degree of interest, and often enough by the degree of their anger.

In talking about departures from policy in the juvenile court, we are not dealing with a new topic. Again: "Everything that needs to be said has already been said." Listen to the District of Columbia's Judge Orman Ketcham in 1977:

> My conclusion is that status offense jurisdiction is so inherently discretionary in principle that it is subject to manipulation by police, parents and social workers. Consequently, I believe that further efforts to restore status offense jurisdiction to its intended purpose as a socially beneficial and rehabilitative process are doomed to fail. Better to cut the losses now and seek a more effective solution through noncoercive, voluntary social service methods than to attempt renovation of the badly flawed, though well-intended, status offense concept.[14]

Listen also to Dean Roscoe Pound forty years earlier:

> Child placement involves administrative authority over one of the most intimate and cherished of human relations. The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts and courts of domestic relations. The latter may bring about a revolution as easily as did the former. It is well known that too often the placing of a child in a home or even in an institution is done casually or perfunctorily or even arbitrarily. Moreover effective preventive work through these courts requires looking into much more than the bad external conditions of a household, such as poverty or neglect or lack of discipline. Internal conditions, a complex of habits, attitudes, and reactions, may have to be dealt with and this means administrative treatment of the most intimate affairs of life. Even with the most superior personnel, these tribunals call for legal checks.[15]

What we learn from the system is that its standards must be strictly limiting if they are to be meaningful at all.

Summary

In sum, I urge upon you three things. We must be unusually cautious in licensing the detention of children. We should never authorize detention without evidence the authority is needed. Finally, whatever permit is given, it should be in narrow terms, premised on a clear showing of danger in an individual case. Authority for detention should be conditioned upon immediate and mandatory access to counsel, and it should not occur at facilities without a treatment component. As we promote good policy, and review bad policy, these are considerations that should shape our views.

Notes

[1]Witlatch, *A Brief History of the National Council*, 38(2) Juv. & Fam. Ct. J. 1, 10 (1987).

[2]The Metropolitan Court Judges Committee, National Council of Juvenile and Family Court Judges, *Deprived Children: A Judicial Response, 72 Recommendations*, 37(4) Juv. & Fam. Ct. J. 1, 39 (1986). In 1988, the Committee observed that non-involvement of the juvenile court in status offense cases was a "ludicrous perversion" of the good intent in the movement for deinstitutionalization. The Metropolitan Court Judges Committee, National Council of Juvenile and Family Court Judges, *A Call to Action* 8 (1988) (published report following conference, October 30, 1988, Washington, D.C., titled "America's Missing, Runaway and Exploited Children: A Juvenile Justice Dilemma.")

[3]*Id.*

[4]U.S. Attorney General's Advisory Board on Missing Children, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Provision, *America's Missing and Exploited Children: Their Safety and Their Future* 3 (1986).

[5]Witlatch, *supra* note 1, at 11.

[6]Children's Bureau, U.S. Department of Labor, Pub. No. 121, *Juvenile-Court Standards* 4 (1923).

[7]This data is now included in a January 1990, Report of the Juvenile Detention Alternatives Task Force, Minnesota Department of Corrections, St. Paul, MN.

[8]*In re Gault*, 387 U.S. 1 (1967).

[9]National Association of Juvenile Court Justices, 1940 Resolution, *quoted in* Witlatch, *supra* note 1, at 5.

[10]This data was gathered by the Minnesota Supreme Court Judicial Information System. A report on the data is found in Feld, *The Right to Counsel in Juvenile Court: American Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. Crim. L. & Criminology 1185, 1215, 1220, 1239 (1989). Earlier data of the same kind, gathered by the Criminal Justice Statistical Analysis Center, Minnesota State Planning Agency, is found in I. Schwartz, *(In)Justice for Juveniles* 154-57 (1989).

[11]Children's Bureau, *supra* note 6, at 3.

[12]Data on secure detention comes from scattered sources. See, principally, Schwartz, Fishman, Hatfield, Krisberg, & Eisikovitz, *Juvenile Detention, The Hidden Closets Revisited*, 4(2) Just. Q. 219

(1987); Sarri, *Status Offenders: Their Fate in the Juvenile Justice System,* in *Status Offenders and the Juvenile Justice System, An Anthology* 61 (2d ed., R. Allison, ed. 1980). *See also* C. Silverman, *Criminal Violence, Criminal Justice* 536 (1978).

[13]Criminal Justice Statistical Analysis Center, Minnesota State Planning Agency, *Directions: How Today's Juvenile Justice Trends Have Affected Policy* 13, 21 (1984).

[14]Ketcham, *Why Jurisdiction of Status Offenders Should be Eliminated from Juvenile Courts,* 57 B.U.L. Rev. 645, 661 (1977).

[15]Pound, *Foreword* to P. Young, *Social Treatment In Probation and Delinquency* at xxvii (1937).