SUPPORT WITH A CATCH: NEW YORK'S PERSONS IN NEED OF SUPERVISION AND PARENTAL RIGHTS

MIKAYLA K. CONSALVO*

When parents find they can no longer control their children—they are skipping school, staying out past curfew, and even getting in trouble with the police—what can they do? That answer depends, of course, on what types of resources are available to them. For unprivileged parents in New York State, the answer is often Persons in Need of Supervision (PINS). Intended to be a tool for parents in these situations that avoids exposing children to the criminal justice system, enlistment in PINS has become a "risky resource" to parents. In exchange for the support of county diversion programs offered by PINS, parents relinquish the control they have over their children's lives. This is not required to happen through affirmative and fully informed waivers of their control, even though parents' rights are afforded constitutional protection. Instead, parents are assumed to implicitly waive their right to raise their children by filing a request for PINS services. This Note argues that this system is out of line with Supreme Court precedent defining and outlining parents' substantive due process rights and has serious consequences for children and their families. To remedy these constitutional and policy-based issues, this Note proposes that New York cease treating PINS petitions as implicit waivers of parental control. Though certainly not a complete fix for all concerns that arise from the PINS system, this solution would at least partially correct the imbalance between parents and the state under the PINS regime.

 J.D., 2015, New York University School of Law. This Note is dedicated to Tosh Juneau, whose experiences show why PINS is in need of attention and reform and whose resilience continues to inspire me. I'd like to thank Professor Martin Guggenheim, who helped me understand that it is not the quality of the parenting, but the privilege of the parents that often determines whether the government will intervene in families' lives; my AnBryce family, particularly East Berhane, Joshua Espinosa, Brea Hinricks, and Arin Smith, for supporting me throughout law school; and my *Law Review* family, especially Andrew Lyubarsky, Paul White, and Hilary Hoffman, for providing me with an incredible community and thoughtful direction with this Note.

Introduction

Your fourteen-year-old child has been staying out past curfew and skipping classes. It's difficult for you to keep a close eye on him because your shift at work doesn't end until the late evening. At the guidance counselor's suggestion, you enroll him in Persons in Need of Supervision (PINS), a social services program administered by your county. Although it works at first, he resumes his old habits; perhaps he attends a party where there's underage drinking or gets into a fight. The social services worker overseeing his case decides he would fare better in a youth facility. You object, but she tells you it's now up to a family court judge to decide what should be done. Once there, the judge doesn't afford your opinion any weight: Your son is placed in a residential group home that is hours away from you for six months. While in placement, he gets in trouble for things like disrupting class and fighting with other boys. When he reappears before the judge, the judge is disappointed with his lack of progress and sentences him to another year. This cycle continues until your son turns eighteen, at

which point family court no longer has the power to extend his placement.

This hypothetical is an example of what might happen under PINS, New York's ungovernability statute. New York is one of forty-one states that has enacted status-offense statutes directed towards minors found to be ungovernable.[1] A status offense is an act "that [is] illegal only because the person committing [it] is of juvenile status."[2] Being ungovernable means a child is "beyond the control of one's parents."[3] The incidence of formal judicial intervention in status-offense cases is high: "In 2004, juvenile courts in the United States formally processed an estimated 159,400 status offense cases."[4] The number of cases in New York State is likewise extensive. As of 2001, approximately 22,000 youths entered the PINS system through county social services programs, and almost 10,000 of these youths were eventually referred to family court.[5] Today the volume of cases is likely to be significantly higher.[6]

---

[1] *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATUS OFFENSES SPECIFIED IN STATUTE, 2013, http://www.ojjdp.gov/ojstatbb/structure_process/qa04121.asp?qaDate=2013 (last visited Aug. 10, 2015) (listing the status offenses specified in state statutes as of 2013 and providing that forty-one states have ungovernability statutes). The status offense of ungovernability is also referred to as incorrigibility. COALITION FOR JUVENILE JUSTICE, NATIONAL STANDARDS FOR THE CARE OF YOUTH CHARGED WITH STATUS OFFENSES 10 (2013), http://www.juvjustice.org/sites/default/files/ckfinder/files/National%20Standards%20for%20the%20Care%20of%20Youth%20Charged%20with%20Status%20Offenses%20FINAL(1).pdf. For background information on ungovernability laws, see generally Mary Kay Lanthier, *Children's Right to be Heard*, NE. U. F. 1, 1 (1997) (discussing the development of laws regulating children's non-criminal behavior in the United States).

[2] CHARLES PUZZANCHERA ET AL., NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 1999, at 51 (2003), www.ncjrs.gov/pdffiles1/ojjdp/201241.pdf.

[3] *Id.* In New York State, status offenses that can form the basis of a Persons in Need of Supervision (PINS) adjudication includes "running away, abusive language, alcohol or drug use, keeping late hours, threats or use of force, destruction or theft of property, being sexually active or abusive, and associating with undesirable companions." JESSE SOUWEINE & AJAY KHASHU, VERA INST. OF JUSTICE, CHANGING THE PINS SYSTEM IN NEW YORK: A STUDY OF THE IMPLICATIONS OF RAISING THE AGE LIMIT FOR PERSONS IN NEED OF SUPERVISION (PINS) 11 (2001), http://www.vera.org/sites/default/files/resources/downloads/pins_report.pdf.

[4] ANNE L. STAHL, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, PETITIONED STATUS OFFENSE CASES IN JUVENILE COURTS, 2004, at 1 (2008), https://www.ncjrs.gov/pdffiles1/ojjdp/fs200802.pdf.

[5] *See* SOUWEINE & KHASHU, *supra* note 3, at 27 (projecting a 69–105% increase). The incidence rates can be very high in certain counties. In St. Lawrence County, for example, the incidence rate is sixty-two youths per thousand. *Id.* at 5.

[6] This increase can be expected because the data collection predated the extension of PINS jurisdiction to reach sixteen- and seventeen-year-olds. The Vera Institute predicted that the number of intakes and court referrals would increase between 69 and 105%. A 105% increase in intakes would mean an additional 23,000 intakes per year and an additional 10,000 court referrals. *Id.* at 27.

PINS was enacted fifty years ago as a tool for parents who had run out of options. The goal was to provide services to families that did not expose their children to the criminal justice and juvenile delinquency systems. Despite these progressive intentions, "ungovernability jurisdiction is a risky resource" for parents.[7] This is true in states like New York, where courts intervene to help "through the family's own, often unexpected, relinquishment of control."[8] As commentators have acknowledged, while PINS is designed to "enlist[ ] the power and authority of the court in support of parental efforts to control a difficult or disobedient child and to maintain their fundamental liberty to raise their children 'as they see fit,' . . . [it] often accomplishes the reverse."[9]

This occurs because courts often do not adhere to "the presumption that parental custody is in the child's best interests"[10] in PINS cases, interpreting a petition for PINS services as an indication of unfitness. When combined with the courts' power to transfer custody from parents to social services departments,[11] this approach to PINS cases has the effect of taking away parents' control over their children's lives.

There is no requirement that parents be informed of this legal reality, so parents petitioning for PINS services often do not relinquish this control knowingly.[12] Furthermore, the relinquishment is not revocable by the parent. Parents do not have the option for a court to set aside a PINS adjudication,[13] and parents' wishes are heard at

---

[7] Randy Frances Kandel & Anne Griffiths, *Reconfiguring Personhood: From Ungovernability to Parent Adolescent Autonomy Conflict Actions*, 53 SYRACUSE L. REV. 995, 1016 (2003); *see also* Robert A. Baruch Bush et al., *Supporting Family Strength: The Use of Transformative Mediation in a PINS Mediation Clinic*, 47 FAM. CT. REV. 148, 149 (2009) ("[D]espite good intentions, the laws and policies surrounding [status offenders] have proven to be as troubled and troubling as the children they serve.").

[8] Kandel & Griffiths, *supra* note 7, at 1016. As part of the process of petitioning a court for a PINS adjudication, "[t]he parents are labeled, if only implicitly. The home environment is perceived as dysfunctional or deficient. . . . Parenting classes, family counseling, and/or alcohol and substance abuse counseling may be made explicit or implied conditions for the child's remaining in or returning to the parental home." *Id.* at 1016–17.

[9] *Id.* at 1034.

[10] *Id.* at 1035; *see id.* ("The initiation of a petition itself suggests an inability to personally and independently perform what the petitioner believes to be his or her parental responsibilities and duties.").

[11] Transfers can involve removing the child from her parents' home and placing her in a foster home, group home, or other state-run facility. *See infra* notes 63–69 and accompanying text (describing potential transfer of custody from parents at PINS adjudications).

[12] *See* SOUWEINE & KHASHU, *supra* note 3, at 15 (2001) ("[M]any parents are not aware that their child could be placed in foster care as a result of the PINS petition.").

[13] Parents may initiate the proceedings if, for instance, circumstances have changed and they are able to better provide support for their children, or parents are concerned with the

court-initiated reviews of orders. But no deference is given to parents at any stage after a PINS adjudication: The judge retains what is effectively complete discretion, guided only by the vague best-interests standard.[14] In other words, parents may voluntarily sign their children up for PINS, but they can never voluntarily take them "off of" PINS. In light of the restrictions PINS places on parents and the lack of any requirement that parents be informed of these restrictions, this Note finds that the PINS system conflicts with parental rights as established by the Supreme Court's parental rights jurisprudence.[15]

Despite the scrutiny given to the juvenile justice system, the prevalence of ungovernability actions, and the issues of equity that arise with them, statutes like New York's have not received significant attention from legal academia.[16] This is especially alarming because ungovernability adjudications can carry serious consequences, such as removal from the parental home and placement in a secured facility,[17]

---

way their children are treated in placement. N.Y. FAM. CT. ACT § 764 (McKinney 2010). For example, some parents claim youths are poorly supervised in group homes. SOUWEINE & KHASHU, *supra* note 3, at 25. In reality, however, most parents typically wait for the court-initiated review of the original order. N.Y. FAM. CT. ACT § 768 Practice Commentaries (McKinney 2010). It is unclear why this is the case, but unfamiliarity with this legal mechanism may be a major reason.

14 *See* Lanthier, *supra* note 1, at 2–3 (describing the best-interests standard as "vague and ambiguous" and asserting that "the determination of what is in a child's best interests presents a challenge to everyone" because it requires "predict[ing] what circumstances and experiences will most benefit a particular child"). The lack of uniformity does not just occur at the dispositional setting. When PINS petitions are first filed, probation officers decide whether to refer them to the court setting. *See* SOUWEINE & KHASHU, *supra* note 3, at 14–15 (describing this process and finding that "[t]he weight given to parents' preferences for court involvement varies by jurisdiction and probation officer"). The discretion that pervades PINS is troubling because, in the amorphous world of ungovernability, determinations that a child's behavior warrants PINS adjudications are especially subjective. *See infra* notes 85–86 and accompanying text (describing the class-based, hetero-normative, and locality-driven nature of PINS adjudications and potential consequences).

15 *See infra* Part II.B (describing constitutional issues).

16 *See* Kandel & Griffiths, *supra* note 7, at 998–99 ("[M]ost of the legal scholars who have debated the viability of the juvenile justice system, even those who probe adolescent rights, have shied away from interrogating the ungovernability action in favor of the more sensational issues of delinquency and juvenile crime." (citations omitted)).

17 *See id.* at 1039 ("The protective custody given to PINS youths resembles other non-criminal semi-incarcerations, such as detention of undocumented alien children or hospitalization of mentally ill teenagers . . . ." (citations omitted)); Lanthier, *supra* note 1, at 2 ("[C]hildren found to be 'in need of supervision' are subject to several potentially serious repercussions involving restraints on their liberty."); Baruch Bush et al., *supra* note 7, at 152 ("By the late seventies, [a main complaint about PINS was its] heavy reliance on out-of-home placements for social services."). *But see* CLAIRE SHUBIK & AJAY KHASHU, VERA INST. OF JUSTICE, A STUDY OF NEW YORK CITY'S FAMILY ASSESSMENT PROGRAM 8 (2005), http://www.vera.org/sites/default/files/resources/downloads/323_595.pdf (finding that the institution of Family Assessment Program in New York City drastically reduced the incidence of out-of-home placements). As might be expected, placement is "the most

the incidence of which is twice the national average in New York State.[18] The literature that does discuss ungovernability statutes tends to focus on the rights of the juveniles,[19] procedural tools that could improve PINS,[20] or normative concerns.[21] The scholarship does not take up the issue of parents' rights in PINS cases, although many commentators acknowledge the implicit waiver of parental rights that occurs with the filing of a PINS petition and the fairness concerns that it raises. Further, no author has argued that this waiver is out of line with Supreme Court precedent, pointed out the specific normative shortcomings of the waiver, or advocated for a systematic change in the ways PINS filings by parents are viewed. This Note seeks to fill these gaps in the literature.

In Part I, this Note provides background information on New York State's PINS system, including the consequences of a PINS adjudication. Part II.A looks at Supreme Court precedent regarding parents' substantive due process rights. Part II.B then analyzes the PINS system in light of this precedent, posits that recognized exceptions for interfering with parental rights do not apply and that other justifications are not sufficient, and concludes that PINS is out of line with these Supreme Court cases. Part II.C then discusses additional normative issues with PINS.

Part III advances possible changes to remedy the normative and constitutional issues with the PINS system. These changes range from making the waiver of parental rights conditional or revocable, ensuring that parents are fully informed of the potential consequences of PINS adjudications, and requiring an affirmative and distinct confirmation of the choice to waive parental rights, rather than assuming waiver through the filing of a petition.

---

expensive" option, but is also "often [the] least effective" one for PINS youths. *Id.*; *see also* SOUWEINE & KHASHU, *supra* note 3, at 26 (discussing the extreme cost associated with out-of-home placements).

[18] Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1098 (2014).

[19] *See, e.g.*, Lanthier, *supra* note 1, at 2 (advocating for provision of both attorney and guardian *ad litem* in ungovernability proceedings); Diane Somberg, Comment, *Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law*, 19 TOURO L. REV. 529, 542–43 (2003) (arguing that children have a liberty interest at stake in PINS proceedings and are thus entitled to representation by a law guardian who should "defend [their] wishes vigorously as an advocate").

[20] *See, e.g.*, Baruch Bush et al., *supra* note 7 at 162–63 (arguing for a mediation-driven model in PINS proceedings).

[21] *See, e.g.*, Godsoe, *supra* note 18, at 1093 (discussing gendered enforcement of ungovernability laws); Kandel & Griffiths, *supra* note 7, at 1000 (offering a new way to conceptualize children's personhood that would affect ungovernability determinations and complaining that the system "treats [PINS youths] as subordinated subjects").

I
THE PINS SYSTEM IN NEW YORK STATE

A. History and Overview

The New York State Legislature designed the category of "persons in need of support" through the Family Court Act in 1962.[22] The term PINS refers to a person under eighteen-years-old who is either truant,[23] "incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent" or other lawful guardian.[24] As an example of a recent PINS adjudication, take *In re Sonya LL*.[25] There, the evidence against the minor was that she "disobeyed and physically abused her mother" and had "physically attacked her mother or acted violently by screaming and throwing things on four separate occasions . . . ."[26] In another case, a minor was adjudged PINS because he had received disciplinary actions at school on numerous occasions, his father was incarcerated, he had no contact with his biological mother, and his current caregiver, his grandmother, was an alcoholic.[27]

New York's PINS statute was one of the first attempts by a state to address the concern that status offenders were being treated too similarly to delinquents. It accordingly created a different system for non-criminal juvenile offenders[28] and distinguished juvenile delinquents guilty of criminal acts and "those who merely misbehave in ways which, frequently, would not be objectionable save for the fact that the actor is a minor."[29] As the *New York Times* reported when the law was passed, the creation of PINS was an effort to narrow the category of juvenile delinquency because "of the social stigma believed to attach to the label of juvenile delinquency and because of varying subjective standards that judges may have applied in making

---

22 N.Y. FAM. CT. ACT § 712(a) (McKinney 2010).

23 Truancy is determined in accordance with New York Education Law. N.Y. EDUC. LAW § 3210.

24 N.Y. FAM. CT. ACT § 712(a) (McKinney 2010). The constitutionality of the provision governing incorrigibility has been upheld. *See* 47 N.Y. JUR. 2D *Domestic Relations* § 1573 (2015) (citing People *ex rel*. Uviller v. Luger, 384 N.Y.S.2d 47 (N.Y. App. Div. 1976)).

25 861 N.Y.S.2d 463 (N.Y. App. Div. 2008).

26 *Id.* at 465. This was deemed sufficient to uphold the PINS adjudication on appellate review. *Id.*

27 *See In re* Robert T., 687 N.Y.S.2d 496, 497 (N.Y. App. Div. 1999) (demonstrating the low threshold of disobediency often applied to PINS proceedings).

28 *See* Lanthier, *supra* note 1, at 10.

29 *In re* Jeanette P., 310 N.Y.S.2d 125, 125 (N.Y. App. Div. 1970); *see* Ellery C. v. Redlich, 300 N.E.2d 424, 424 (N.Y. 1973) ("Until 1962, a child who committed acts which now warrant his adjudication as a person in need of supervision was treated as a juvenile delinquent.").

determinations under the broader definition."[30] It makes sense, then, that the purpose clause of the provision does not contain "any statement concerning public interest or community protection . . . . Unlike delinquency . . . [PINS proceedings] are not intended to protect the community or designed to provide public safety through deterrence or incapacitation."[31] PINS was implemented as a deterrence and rehabilitative model focused on helping the youths themselves, rather than society at large.[32]

The next Subpart discusses the way PINS has evolved and is implemented at the county level and in family courts. Unfortunately, this often diverges from the statute's original intent.

B. County Implementation of PINS Diversion Programs & PINS Adjudications in Family Court

The Family Court Act was amended in 1985 by the PINS Adjustment Services Act, which created PINS diversion programs to provide support to PINS youths through "community services without judicial involvement."[33] The goal was to "reduce unnecessary and inappropriate use of court intervention" and "to reduce out-of-home placements by encouraging a broad range of services."[34] Counties

---

[30] *Family Court to Bring Together the Law and Social Services*, N.Y. TIMES, Sept. 4, 1962, at 28.

[31] N.Y. FAM. CT. ACT § 711 Practice Commentaries (McKinney 2010); *see* N.Y. FAM. CT. ACT § 711 (McKinney 2010) ("The purpose of this article is to provide a due process of law (a) for considering a claim that a person is in need of supervision and (b) for devising an appropriate order of disposition for any person adjudged in need of supervision."); *see also* Lanthier, *supra* note 1, at 1 ("Juvenile courts retain jurisdiction over status offenders not for the purpose of punishment, but in a purported attempt to steer these troubled youths away from their impending involvement in crime . . . ."); Baruch Bush et al., *supra* note 7, at 149 (writing that status offenders "were thought to need help in the form of treatment, counseling, and discipline" and that PINS was "based on . . . a 'deterrence rationale'" according to which "[status] offenses were viewed as predictive of more serious lawbreaking").

[32] Of course, PINS as implemented doesn't necessarily achieve these goals. As Professor Baruch Bush points out, "[r]esearch has demonstrated that punitive approaches that remove misbehaving children from their communities and families do not reduce recidivism and make it harder to resolve problems in the long term." Baruch Bush et al., *supra* note 7, at 153 (citing A.B.A. COMM'N ON YOUTH AT RISK, REPORT TO THE HOUSE OF DELEGATES 104C, at 10 (2007), http://www.americanbar.org/content/dam/aba/administrative/youth_at_risk/defending_childhood_final_draft529.authcheckdam.pdf); *see also* LEGISLATIVE MEMO: PERSONS IN NEED OF SUPERVISION, NYCLU, www.nyclu.org/content-legislative-memo-persons-need-of-supervision (last visited June 28, 2015) ("There is now ample evidence that coercive court intervention and detention of children who have committed no crimes increases the likelihood of subsequent criminal behavior.").

[33] SOUWEINE & KHASHU, *supra* note 3, at 7.

[34] *Id.*

were made responsible for instituting probation mechanisms to avoid formal proceedings in family courts.[35]

Today, there is wide variation in the ways that counties implement PINS. According to a Vera Institute for Justice report, "[c]ounties with similar demographic profiles and in close proximity use the PINS system in very different ways . . . suggest[ing] differences driven by local agency policy and practice rather than by differences in families and their needs."[36] These variations in policy and practice lead to social services agencies referring as few as five percent of cases to court in some counties and more than eighty percent of cases to court in others.[37]

Parents, schools, and government officials can all file recommendations that a child receive PINS diversion services, typically with a probation department or social services agency.[38] Parents often file to gain support for their authority, assistance in disciplining their children, and access to other services.[39] To file, a complainant simply needs to allege five specific instances of PINS behavior.[40] Some counties strongly encourage parents to obtain diversion services. Genesee County's website, for instance, says: "The best advice is to act early. If you are experiencing difficulty with your child, the sooner you get help, the better. Once your child reaches 18 years of age, your ability to assist them is limited."[41]

Once a PINS petition is filed, probation officers conduct intake interviews to determine whether PINS services are appropriate.[42] Although probation officers are mandated to consider certain factors

---

[35] The PINS statute requires "[e]ach county and any city having a population of one million or more" to "offer diversion services . . . to youth who are at risk of being the subject of a [PINS] petition." N.Y. FAM. CT. ACT § 735(a) (McKinney 2015).

[36] SOUWEINE & KHASHU, *supra* note 3, at 3–4. There is even significant variation within New York City. *Id.* at 4.

[37] *Id.*

[38] N.Y.C. BAR ASS'N, INTRODUCTORY GUIDE TO THE NEW YORK CITY FAMILY COURT 9 (Jan. 2006), www.nycourts.gov/courts/nyc/family/IntroductoryGuidetoNYCFamily Court.pdf. In a sample of ten counties in New York, the Vera Institute found that parents file PINS petitions in forty-two to ninety-five percent of all cases. SOUWEINE & KHASHU, *supra* note 3, at 9.

[39] SOUWEINE & KHASHU, *supra* note 3, at 10. These services include family counseling, educational programs, individual counseling, and mental health services. *See id.* at 16 (describing the services available in various counties in New York).

[40] *What is PINS?*, GENESEE CNTY. PROB. DEP'T, http://www.co.genesee.ny.us/departments/probation/pins.html (last visited Apr. 27, 2015).

[41] *Id*.

[42] SOUWEINE & KHASHU, *supra* note 3, at 15.

in making this determination,[43] in practice, the weighing of those factors "is based in large part upon the preferences of the individual probation officer and the culture of the local probation department."[44]

Children and parents alike are expected to comply with and participate in diversion program requirements[45] and can be ordered to do so through orders of protection.[46] The programs are often open ended and entail a number of treatment recommendations.[47] Parental cooperation can include providing transportation for services and attending required meetings.[48] Cooperation by children may mean attending school and obeying their parents. If cooperation is found in the diversion stage, "no petition is filed, and no court case begins."[49] Children commonly fail to meet these requirements: They often "continu[e] to miss school" or disobey parents.[50] Sometimes, though, the failure is not the child's. Cases can be referred to court because the services are inadequate themselves, as can occur with "youth needing mental health treatment where the family lacked the means to pay for

---

[43] N.Y. COMP. CODES R. & REGS. tit. 22, § 205.62 (2010) (listing factors such as child's age, prior involvement with PINS or juvenile justice, and likelihood that services could be administered effectively within four months).

[44] SOUWEINE & KHASHU, *supra* note 3, at 14–15.

[45] *See What is PINS?*, GENESEE CNTY. PROB. DEP'T, *supra* note 40 ("Participation is expected by the parents and the respondent in the Diversion process."); CLINTON CNTY. DEP'T OF SOC. SERVS., *supra* note 47, at 3–4 ("The youth and parents may be asked to sign a Parent and Child Behavioral Agreement. . . . It is expected that the youth and their parents will cooperate with all treatment recommendations.").

[46] *What is PINS?*, GENESEE CNTY. PROB. DEP'T, *supra* note 40; CLINTON CNTY. DEP'T OF SOC. SERVS., *supra* note 47, at 5. Clinton County also warns that a Child Protective Services report may be an appropriate measure in response to a parent's lack of cooperation. *Id*.

[47] *See, e.g.*, CLINTON CNTY. DEP'T OF SOC. SERVS., CLINTON COUNTY PINS DIVERSION PROGRAM 4 (Dec. 3, 2009), *available at* safeschools.cves.org/partnersplace/Taskforce AgainstBullying/2011-12_meeting_notes/2011-12-08/CC_PINS_Program.pdf (listing service plan options such as mental health evaluations, anger management, parenting classes, and community service). In many counties, petitioners must exhaust all of the services provided by these PINS programs before cases can be referred to family court. *See, e.g.*, *id.* ("All community resources will need to be exhausted before a case can be deemed closed without successful adjustment."); *What is PINS?*, GENESEE CNTY. PROB. DEP'T, *supra* note 40 ("Until it is determined that all available community resources have been utilized to alleviate the PINS behavior, a petition to Family Court will not be filed."); *Juvenile Justice, Persons in Need of Supervision (PINS)*, ONONDAGA CNTY. CHILDREN & FAMILY SERVS., www.ongov.net/cfs/pins/html ("When all attempts to work with the child have been exhausted and the behaviors continue, the Probation Department will provide the parent or school with access to the Family Court to file their petition."). In New York City, the diversion program is called Family Assessment Program (FAP). N.Y.C. BAR ASS'N, *supra* note 38, at 9.

[48] *What is PINS?*, GENESEE CNTY. PROB. DEP'T, *supra* note 40.

[49] N.Y.C. BAR ASS'N, *supra* note 38, at 9.

[50] SHUBIK & KHASHU, *supra* note 17, at 4.

the available services," or when issues arise with the "structure of the services."[51]

Should a county agency determine the child is ungovernable after efforts of diversion have been made, the agency charged with administering the diversion programs can refer the case to a PINS proceeding in family court.[52] The PINS petitions filed in family court "describe[ ] the child's behavior and ask[ ] the court to find that the child needs supervision."[53] Parents are not required to be present before proceedings begin if "reasonable and substantial effort has been made to notify" them of the hearing.[54] In some cases, the child can be held in a detention facility before the next stage in the PINS proceeding.[55]

In a PINS proceeding, the minor is the respondent and she must be advised of certain rights, including the right to be represented by counsel or a law guardian.[56] Despite this guarantee, the effectiveness of counsel and law guardians provided to PINS youths is question-

---

51 SOUWEINE & KHASHU, *supra* note 3, at 18. As an example of a structural issue, the Vera Report lists when a "provider requires a youth to attend family counseling" at a specified time that the parent, because of her job, is unable to attend. In cases like these, court referral is possible. *Id.*

52 Family courts have original jurisdiction in all PINS proceedings. N.Y. FAM. CT. ACT § 713 (McKinney 2010). The general rule is that all that is required for a New York State family court to assume jurisdiction over a child is his physical presence. *See* Mary S. v. Bill S., 333 N.Y.S.2d 649, 651 (N.Y. Fam. Ct. 1972) (finding jurisdiction even though neither child nor her mother, who had custody rights, were residents of New York, because child was physically present in the State).

53 N.Y.C. BAR ASS'N, *supra* note 38, at 10.

54 N.Y. FAM. CT. ACT § 741(c) (McKinney 2015). Although the statute seems to allow PINS proceedings to be open to the public, *see id.* § 741(b) ("The general public *may* be excluded." (emphasis added)), "[m]any courtrooms do not have a public section" and "court officials never encourage, and may overtly discourage, public attendance." N.Y. FAM. CT. ACT § 741 Practice Commentaries (McKinney 2010).

55 N.Y. FAM. CT. ACT § 739(a) (McKinney 2010) (granting courts authority to direct detention before the fact-finding hearing if "there is a substantial probability that the respondent will not appear in court on the return date and all available alternatives to detention have been exhausted"); *see also Persons In Need of Supervision*, NEW YORK STATE UNIFIED COURT SYSTEM, 7TH JUDICIAL DISTRICT, www.nycourts.gov/courts/7jd/courts/family/case_types/persons_in_need_of_supervision.shtml (last visited June 24, 2015) ("In rare cases, the respondent is held or remanded to a detention facility pending a fact-finding hearing in PINS cases."). Detention facilities for youths in New York "provide care and maintain custody of youth." *Juvenile Justice and Opportunities for Youth*, N.Y.S. OFFICE OF CHILDREN & FAMILY SERVS., http://www.ocfs.state.ny.us/main/rehab/ (last visited Mar. 3, 2015).

56 N.Y. FAM. CT. ACT § 741(a) (McKinney 2015). Parents do not enjoy this right. *See* LEGAL INFO. FOR FAMILIES TODAY, THE PINS PROCESS: A GUIDE FOR PARENTS AND CAREGIVERS 3 (2009), http://www.liftonline.org/guides/pdf/guide_118.pdf ("The person who files the PINS petition does NOT have an automatic right to a lawyer appointed by the court. However, if your child may enter foster care, the judge MAY assign a lawyer to help you with the case."); *see also* SOUWEINE & KHASHU, *supra* note 3, at 19 ("[T]he parent or other petitioner [in the initial court hearing] does not have a legal representative.").

able.[57] If the judge concludes through the hearing that the minor has committed the acts complained of, she will declare the child PINS and set a date for a dispositional hearing.[58] Otherwise, the judge will dismiss the case.[59]

At the dispositional hearing, the judge decides whether the child needs supervision or treatment. Testimony is again taken from parties; anyone with "information about the child may testify and present evidence," and "[t]he child may also testify."[60] Judges have extremely wide discretion at dispositional hearings[61] because once a youth receives a PINS adjudication, the court simply needs to make decisions based on the vague best-interests standard. The best-interests standard requires a judge to conduct "a thorough investigation into the child's life, family, friends, and surroundings" to make a determination that best promotes a child's welfare.[62]

C. Consequences of PINS Adjudications

At the dispositional hearing, the judge orders an initial disposition. The judge may simply discharge the child with a warning, or "adjourn the case in contemplation of dismissal (ACD) for up to 6 months."[63] The judge may also place the child into a foster group home or a social service facility,[64] place the child under the supervision of a probation officer for a probation period of up to one year,[65] or order restitution for damage done by the child to someone's prop-

---

[57] For example, in light of several interviews with PINS youths, Professors Kandel and Griffiths wrote that "PINS youths feel a certain distance between themselves and their law guardians. . . . [They] frequently stated that they met with their law guardians only briefly, sometimes meeting them only shortly before court." Kandel & Griffiths, *supra* note 7, at 1010 n.46. In addition, PINS youths report that "law guardians tell them what to do, often in words they do not understand, [and] that they sometimes are afraid to tell the law guardians what they really want." *Id.*

[58] *See* N.Y. FAM. CT. ACT § 752 (McKinney 2010) (providing statutory authority for family court judges to enter order declaring children to be PINS).

[59] N.Y. FAM. CT. ACT § 751 (McKinney 2010). According to the Vera Report, "between 13 and 47 percent [of cases referred to court] were withdrawn or dismissed." SOUWEINE & KHASHU, *supra* note 3, at 21.

[60] N.Y.C. BAR ASS'N, *supra* note 38, at 10.

[61] SOUWEINE & KHASHU, *supra* note 3, at 34.

[62] Lanthier, *supra* note 1, at 3–4.

[63] N.Y.C. BAR ASS'N, *supra* note 38, at 10–11.

[64] *See* N.Y. FAM. CT. ACT § 756(a) (McKinney 2010) ("[T]he court may place a child . . . in the custody of a suitable relative or other suitable private person or commissioner of social services."). Until 1999, the initial period could be up to eighteen months; an amendment enacted in accordance with the Federal Adoption and Safe Families Act reduced the permitted placement period to twelve months. N.Y. FAM. CT. ACT § 756 Practice Commentaries (McKinney 2010).

[65] N.Y. FAM. CT. ACT § 757(a)–(b) (McKinney 2010).

erty.[66] Many cases lead to probation, placement, or foster care, with about thirteen percent of cases in surveyed counties leading to placement outside parental custody.[67]

If placement is ordered, a child may be placed in the custody of a relative or other suitable private person or under the supervision of the Commissioner of Social Services.[68] Placement with the department of social services results in a loss of parental custody "without any finding that parental custody is detrimental to the child."[69] The collateral consequences of placement are severe,[70] and often placement, like other resolutions of PINS proceedings, is counter-

---

66 N.Y.C. BAR ASS'N, *supra* note 38, at 10. Restitution is only allowed when children are at least ten years old. *Id.*

67 SOUWEINE & KHASHU, *supra* note 3, at 4, 21–22 ("[T]he result of a court referral in most cases is to place the child under probation supervision, into a juvenile group home, or into foster care."). As of 2001, surveys by the Vera Institute of five counties in New York revealed that between forty-three and eighty percent of PINS cases referred to court led to probation, and, depending on the county, eleven to twenty-five percent led to foster care, "a small but substantial number" that "represents the most expensive part of the PINS system." *Id.* at 21–22. When parents are the petitioners, out-of-home placements are more likely. *Id.* at 22–23. There is a significant proportion of PINS foster care youth who remain in foster care for extended periods of time. "Approximately one-quarter of PINS foster care placements in New York City last longer than one year." *Id.* at 25.

68 N.Y. FAM. CT. ACT § 756(a)(i) (McKinney 2010).

69 Kandel & Griffiths, *supra* note 7, at 1035. When children are placed, parents can be held liable for child support. *See* LEGAL INFO. FOR FAMILIES TODAY, *supra* note 56 at 2 ("If the judge places your child in a non-secure facility, group home or foster home, you may be responsible for financially supporting him or her. This means that a child support case may be started against you.").

70 According to Professors Kandel and Griffiths, the "constraint of autonomy, deprivation of liberty, and prolonged separation from family suffered by ungovernable youths [in placement] is comparable to the consequences meted out for serious crimes." Kandel & Griffiths, *supra* note 7, at 998.

Placement carries consequences for children's adolescent development. Group homes and other institutional settings do not provide the "environmental rules and cues" necessary for proper development. *Id.* at 1024. Such settings lack the give-and-take nature of maturing teenager-parent interactions; in the family home, "there is an individualized flexibility of expanding and testing limits and privileges as a child becomes increasingly responsible. This flexibility naturally entails not only the re-setting of limits by parents, but children disagreeing with parents, pushing limits, and adventuring in contrary autonomous choice." *Id.* at 1025–26; *see also* Baruch Bush et al., *supra* note 7, at 153 ("Research has demonstrated that punitive approaches that remove misbehaving children from their communities and families do not reduce recidivism and make it harder to resolve problems in the long term.") (citing A.B.A. COMM'N ON YOUTH AT RISK, REPORT TO THE HOUSE OF DELEGATES 104C, at 10 (2007)). In addition to concerns that arise from placements, adjudicating a child PINS in and of itself can have negative effects. *See id*. ("[A]djudicating PINS cases and formally labeling the child as pre-delinquent serves to reinforce a child's negative self-image.").

productive.[71] As has been written, "placement is a poor answer to the most common problems PINS youth present."[72]

Once a child is placed in an institutional setting, the commissioner may petition the court to extend the placement.[73] In such cases, the family court conducts a permanency hearing to determine whether good cause is shown to grant an extension.[74] Successive extensions may be granted; the only limitation on consecutive extensions is that they cannot extend past the child's eighteenth birthday without her consent.[75]

A parent, guardian, or authorized agency may file a petition to terminate placement.[76] The court may initiate a hearing to consider the petition,[77] and may either deny the petition outright upon a determination that continued placement serves the purposes of PINS, decide to reduce the duration of the placement or change the placement itself,[78] or discharge the person from the agency's custody and

---

[71] *See, e.g.*, SOUWEINE & KHASHU, *supra* note 3, at 25 (finding that "[o]ut-of-home placement has also been shown to reduce, rather than increase, school attendance among PINS youth" and that "PINS children in foster care have the highest AWOL rate . . . of all foster children").

[72] *Id.* at 26.

[73] N.Y. FAM. CT. ACT § 756-a(a) (McKinney 2010). In addition, the child or the private person with whom the child has been placed may petition for an extension. *Id.*

[74] N.Y. FAM. CT. ACT § 756-a(b) (McKinney 2010). Here, the child also has a right to notice and to be heard. *Id.* An example of good cause for extension is *In re Charles BB*, 579 N.Y.S.2d 195, 196 (N.Y. App. Div. 1992), where the child was cited with negative and disruptive behavior on several occasions and a social worker reported he required "considerable structure." Extension was granted for one year. *Id.* The formal criteria that are supposed to guide such determinations of extensions are whether reasonable efforts were made to make a child's safe return to her home possible or to secure some other permanent living arrangement (such as adoption), N.Y. FAM. CT. ACT § 756-a(d)(i)–(ii) (McKinney 2010), and, in the case of a child at least sixteen years old, what services would be needed "to assist the child to make the transition from foster care to independent living." N.Y. FAM. CT. ACT § 756-a(d)(ii) (McKinney 2010).

[75] N.Y. FAM. CT. ACT § 756-a(f) (McKinney 2010). Extended placement can also be granted for persons between the ages of eighteen and twenty-one with their consent. *Id.* In Professors Kandel and Griffiths's study, they found "many children who are PINSed [in Canal County] find that they have at least one extension on their placement." Kandel & Griffiths, *supra* note 7, at 1006 n.33.

[76] N.Y. FAM. CT. ACT § 764 (McKinney 2010). There are statutory limitations as to how soon a denied petition can be refiled. *See* N.Y. FAM. CT. ACT § 768 (McKinney 2010) (prohibiting petitions denied under Section 764 from being renewed for ninety days absent permission from court to renew petition sooner).

[77] N.Y. FAM. CT. ACT § 766 (McKinney 2010). The court may also grant or deny the petition without a hearing. *Id.*

[78] N.Y. FAM. CT. ACT § 767(a) (McKinney 2010).

continue probation or court supervision.[79] Few motions are filed pursuant to these Sections.[80]

Due to the degree of discretion afforded by judges in terminating placement, parents wishing to remove their children from placement have limited avenues to pursue. Although at least in situations in which the parents themselves filed the PINS petition, a parent's wish to "un-PINS" their children would mean "the gravamen of the [initial PINS] action ceases to exist,"[81] courts can still justify the continuation of placement for various reasons. For example, Professors Kandel and Griffiths completed a case study of a female teenager who was kept in placement even though her parents requested she be allowed to live with them.[82]

The flexibility of judges to modify orders under § 762 can certainly be a useful tool should placement prove ineffective, different placement options become available or preferable, or other alterations to the order be warranted. Still, in many situations, untrammeled judicial discretion can be quite problematic, at least from the perspective of a parent who wants to retain custody of her child—for example, in cases where an agency seeks the child to be placed in a more restrictive setting. Whether the flexibility afforded to courts overseeing PINS proceedings is a blessing or curse depends entirely on the family court judge deciding how a case should be disposed.

---

[79] N.Y. FAM. CT. ACT § 767(b) (McKinney 2010). The statutory right to file a petition to terminate has been subsumed by Section 762, which authorizes the court "on its own motion or on motion of any interested person acting on behalf of the respondent" to modify or vacate any order it had previously issued. N.Y. FAM. CT. ACT § 762. The good cause standard is "exceedingly liberal" and gives the court "almost absolute flexibility to modify decisions and orders whenever arguably warranted." N.Y. FAM. CT. ACT § 763 Practice Commentaries (McKinney 2010).

[80] N.Y. FAM. CT. ACT § 768 Practice Commentaries (McKinney 2010). PINS scholarship does not explain why so few motions are filed pursuant to these Sections. It may be the case that parents—who often do not have counsel—are unaware of the procedural mechanisms to file termination petitions, or are otherwise advised not to file them. Another potential explanation is that parents, in an effort to show they are cooperating with the court and county services providers, may avoid filing termination proceedings because it seems counter-productive. In any case, this Note seeks to explain why these Sections are inadequate solutions to the issues presented by PINS. *See infra* Part II.C.4 (discussing how these Sections are predicated on the same vague best-interests inquiry which does not defer to parents' desires and leaves all discretion in the hands of the judge).

[81] Kandel & Griffiths, *supra* note 7, at 1023.

[82] *Id.* at 1022. In the case study Professors Kandel and Griffiths conducted, the child's parents no longer found her to be ungovernable and tried "to regain custody and their constitutional right to raise her as they see fit." *Id.* at 1022. The child was put into placement because she was sexually active, broke the curfew her parents imposed, and had "problems in school." *Id.* at 1006.

D. The Intersection of Marginalization and PINS

As the above Subparts begin to illustrate, affording huge discretion to family court judges and social services departments in every facet of PINS raises a number of concerns. Perhaps chief among these concerns should be the impact of PINS on marginalized members of society.

As Professors Kandel and Griffiths note, "[t]he vague standard [of ungovernability laws] causes cases to turn on the personal values of parents and the culturally embedded mores and expectations of particular communities about how youths should behave."[83] This is exacerbated by the role the best-interests standard plays in PINS dispositions; as Professor Lanthier discusses, "[a] determination of what experiences and circumstances will best promote the welfare of any particular child is also subject to contemporary societal views."[84]

As an example of the dangers of the unbounded application of the best-interests standard, consider the case study discussed earlier, where a female teenager was kept in placement even though her parents requested she be allowed to live with them—the justification being that she had been labeled promiscuous.[85] This situation is in line with a troubling criticism that "[t]he status offense has historically been the vehicle of choice to control the sexuality of teenage girls." It is hard to imagine this result being uniformly reached by all judges and in all counties. Locality-centered adjudications such as these also have the potential to seriously harm certain groups—such as LGBT youths—who might be considered abnormal in one city or county (or to one judge), but conforming or normal in another.[86]

Further, PINS proceedings demonstrate a "confrontation of working-class and middle class views of rights, protection, and disci-

---

[83] Kandel & Griffiths, *supra* note 7, at 997.

[84] Lanthier, *supra* note 1, at 4 n.16 (describing a case where the judge considered the parents' "wealth, social position, health, educational advantages, and moral training").

[85] Kandel & Griffiths, *supra* note 7, at 1023.

[86] *See* Kandel & Griffiths, *supra* note 7, at 1032–33 (arguing that a finding of ungovernability "places a particular onus on teens whose own personal development may be out of set with the mainstream chronological cultural norm" and that "[c]onstraining teens who 'act-out' to follow traditional community norms may limit cultural diversity and may change society as a whole in a way which curtails creativity and diversity"); *see also* Sarah E. Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child*, 2008 MICH. ST. L. REV. 1053, 1091–96 (analyzing difficulties confronted by queer youth who are placed in foster homes, group homes, and secure detention facilities). Of course, in institutional settings there are also concerns about strict reinforcement of local norms: Professionals in one PINS case observed by Kandel and Griffiths used the term "appropriate" to refer to what the professors called "the cultural mores of a traditional rural middle class culture in which age and gender roles are highly demarcated." Kandel & Griffiths, *supra* note 7, at 1025.

pline," as PINS petitioners are often members of the working class, while the judges who adjudicate the proceedings are not.[87] This truth is intertwined with the origins of status offenses: As Professor Baruch Bush points out, "[t]he children 'saved' from their unfit parents [through the enactment and implementation of ungovernability laws] were drawn almost exclusively from immigrant, poor, and minority families."[88] These paternalistic and class-based origins may explain the atypical—and arguably unconstitutional—subordination of parents' rights that pervades the PINS system today.

Of course, something is not negative simply because it is decided in accordance with or influenced by local norms. And, the fact that uniform results are not reached may be a good thing: Every child and every family is different, and each situation might require a different judicial approach. But the ambiguous nature of status offenders, the opportunity for marginalization of the poor, girls, and racial minorities, the wide discretion given to judges, and the potential for serious consequences combine to make such locality-driven determinations that do not incorporate any deference to parents highly suspect.

Although this Note focuses on the role of these norms in judicial decisions, these norms are also surely influential when parents are making decisions about how to raise their children. I distinguish parents from judges because of the underlying presumption in the Supreme Court's parental rights jurisprudence that parents are in the best position to know what is right for their children.[89] As Professor Martin Guggenheim has written, there is a strong connection between parents' rights and children's interests.[90]

This Subpart highlights normative concerns with PINS to demonstrate the need for scrutiny over the program and explain why its implementation is often problematic. Taking this into account, the next Part describes the protections afforded to parents under the Federal Constitution and analyzes how PINS conflicts with those protections.

---

[87] Kandel & Griffiths, *supra* note 7, at 1035; *see also* Lanthier, *supra* note 1, at 3 n.16 (acknowledging that while "[a] judge today could never expressly base a custody decision on such factors as wealth and educational advantages," they still might "be the controlling factors in the judges' mind").

[88] Baruch Bush et al., *supra* note 7, at 163 n.5; *see also* Godsoe, *supra* note 18, at 1094 (stating that the first U.S. juvenile justice court was in large part designed to "'Americaniz[e]' the exploding population of immigrant and low-income urban youth" and "focused on instilling middle class moral values").

[89] *See infra* Part II.A (discussing this jurisprudence).

[90] MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 34–38 (2005).

II
PINS AND THE FEDERAL SUBSTANTIVE DUE PROCESS RIGHTS OF PARENTS

Beginning in 1923, the Supreme Court has viewed the Due Process Clause of the Fourteenth Amendment as protecting parents' right to control the upbringing of their children. The parent-child relationship is thus not a "creature of the state" that can be endlessly infringed upon by statutory decree, but rather a relationship whose privacy is fundamentally and constitutionally protected.[91] This Part reviews Supreme Court precedent regarding parents' substantive due process rights, analyzes the PINS system as it pertains to these rights, and attempts to apply the recognized exceptions for interfering with these rights. After determining that these exceptions do not apply and that other possible justifications are insufficient, this Part concludes that PINS is out of line with Supreme Court precedent.

A. The Long Tradition of Parental Rights Under Substantive Due Process

The Supreme Court first recognized the substantive due process right of parents to raise their children in *Meyer v. Nebraska*.[92] Writing for the Court, Justice McReynolds observed that "it is the natural duty of the parent to give his children education suitable to their station in life"[93] and described the Due Process Clause as "[w]ithout doubt" encompassing an individual's right, among other things, to "establish a home and bring up children."[94] Just two years later, the Supreme Court again addressed parental rights under the Due Process Clause in *Pierce v. Society of Sisters*.[95] Striking down an Oregon law that required all children to attend public schools, the Supreme Court wrote "[t]he 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."[96]

Of course, the Court also came to recognize limits on parental rights. In 1944, it upheld the conviction of a minor's guardian—a Jehovah's Witness convicted of violating Massachusetts's child labor

---

[91] Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

[92] 262 U.S. 390, 397 (1923) (striking down a state statute banning instruction in any language other than English).

[93] *Id.* at 400.

[94] *Id.* at 399.

[95] 268 U.S. 510 (1925).

[96] *Id.* at 535. The Court wrote that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534–35.

law—for having the minor sell copies of a religious magazine on the street.[97] While acknowledging the guardian's parental rights under the Due Process Clause, Justice Rutledge, writing for the Court, asserted that "the family itself is not beyond regulation in the public interest."[98]

In the context of minors obtaining abortions, the Supreme Court announced further limitations on a parent's right to control the upbringing of her child. In *Bellotti v. Baird* and *Planned Parenthood v. Danforth*, the Supreme Court struck down state statutes requiring parental consent before a minor could obtain an abortion, finding that the right to an abortion trumped parents' interest in giving consent.[99]

In 1979, the Supreme Court decided *Parham v. J.R.*, which involved the issue of whether parents could commit their children to mental health institutions without an adversarial proceeding.[100] The processes surrounding the Georgia statute challenged in *Parham* are similar to those under New York's PINS statute in many ways. In *Parham*, admission to a hospital began with "an application for hospitalization signed by a 'parent or guardian,'"[101] mirroring New York's allowance for parental PINS petitions. But notably different from New York's PINS statute, Georgia's mental health statute provided for the discharge of "[a]ny child who has been hospitalized for more than five days . . . at the request of a parent or guardian."[102]

The Supreme Court upheld the statute, recognizing the child's interest "in not being committed" as "inextricably linked with the parents' interest in and obligation for the welfare and health of the child." It viewed the total private interest as "a combination of the child's and

---

[97] Prince v. Massachusetts, 321 U.S. 158, 170–71 (1944). While *Prince*, *Pierce*, and *Meyer* were all decided during the *Lochner* era of the Court, under the same analytical framework for substantive due process as the now-overturned *Lochner*, their reaffirmation in cases like *Yoder*, *Parham*, and *Troxel* (discussed in the remainder of this Subpart) resolves any doubt surrounding their validity. *But see* Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (implying willingness to overturn *Meyer* and its progeny).

[98] *Prince*, 321 U.S. at 166. In 1972, the Supreme Court decided another case upholding parental rights and freedom of religion, where Amish respondents disputed Wisconsin's compulsory education law. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

[99] Bellotti v. Baird, 443 U.S. 622, 642 (1979) (striking down the state statute based on "[t]he need to preserve the constitutional right [to an abortion] and the unique nature of the abortion decision"); Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976) (invalidating statute because it imposed the requirement of parental consent "without a sufficient justification for the restriction"). *Danforth* and *Bellotti* are still good law in light of the Supreme Court's decision in *Planned Parenthood v. Casey*. *See* Planned Parenthood v. Casey, 505 U.S. 833, 899–900 (1992) (upholding the requirement for informed parental consent provided there is a judicial bypass and citing *Bellotti*).

[100] 442 U.S. 584, 587 (1979).

[101] *Id.* at 590–91.

[102] *Id.* at 591.

parents' concerns."[103] The Court rejected the argument that "the likelihood of parental abuse" of the Georgia statute was so great that parents' constitutional rights to direct their children's upbringing should be subordinated to the children's own rights.[104]

The Court instead acknowledged that parental authority "includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice."[105] It went on to assert that parents generally act in accordance with their children's best interests, even if they sometimes fail to do so.[106] The Court wrote:

> In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply.[107]

The Court refused to require that a judge be the final decision-maker regarding whether a child be institutionalized. The opinion said an adversarial hearing was unnecessary because parents

> play a significant role in the treatment while the child is hospitalized and even more so after release, [so] there is a serious risk that an adversary confrontation will adversely affect the ability of the parents to assist the child while in the hospital. Moreover, it will make his subsequent return home more difficult. These unfortunate results are especially critical with an emotionally disturbed child . . . .[108]

The Supreme Court found the alliance of the interests of parents and their children to be a given, and accordingly upheld the statute's protection of parental control.

Most recently, the Court decided *Troxel v. Granville*.[109] The case involved a visitation-rights dispute between a mother, Tommie Granville, and her child's paternal grandparents, the Troxels.[110] The

---

103 *Id.* at 600.

104 *Id.* at 603.

105 *Id.* at 602. The Court wrote that its "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Id.*

106 *Id.* at 602–03. This understanding, coupled with the statute's requirement that "the superintendent of each regional hospital . . . exercise independent judgment as to the child's need for confinement," and in light of the fact that "[n]either state officials nor federal courts are equipped to review such parental decisions" as whether to hospitalize a child, was sufficient to uphold the statute. *Id.* at 604.

107 *Id.*

108 *Id.* at 610.

109 530 U.S. 57 (2000).

110 *Id.* at 60.

Troxels were entitled to petition a Washington Superior Court for visitation rights based on a state statute that allowed "any person" to "petition the court for visitation rights at any time." The statute authorized state superior courts to "order visitation rights for any person when visitation may serve the best interest of the child."[111]

A majority of the United States Supreme Court found the statute unconstitutional.[112] Writing for a four-justice plurality, Justice O'Connor acknowledged "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by" the Court.[113] The plurality then asserted that "[t]he extension of statutory rights . . . to persons other than a child's parents . . . can place a substantial burden on the traditional parent-child relationship."[114]

Justice O'Connor took issue with the fact that the statute was "breathtakingly broad."[115] First, it allowed "*any person*" at "*any time*" to petition the superior court.[116] Second, and in the plurality's view most significantly, "[o]nce the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference."[117] The plurality viewed placing the "best-interest determination solely in the hands of the judge" and allowing the judge to "overturn *any* decision by a fit custodial parent concerning visitation" as fatally flawed.[118]

To support this conclusion, the plurality stated, "there is a presumption that fit parents act in the best interests of their children" and noted the Washington statute had no requirement of showing parental unfitness. Justice O'Connor wrote:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[119]

---

111 *In re* Troxel, 940 P.2d 698, 699 (Wash. Ct. App. 1997) (quoting WASH. REV. CODE ANN. § 26.10.160(3) (1997)). The Washington Superior Court found that visitation with the Troxels would indeed be in the children's best interest. The Washington Court of Appeals then reversed on standing grounds. *Id.* at 701.

112 *Troxel*, 530 U.S. at 63.

113 *Id.* at 65.

114 *Id.* at 64.

115 *Id.* at 67.

116 *Id.*

117 *Id.*

118 *Id.* at 68.

119 *Id.* at 68–69.

Ultimately, the plurality held "[t]he problem . . . [was] not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests."[120] The reasoning of the Superior Court rendered its findings "nothing more than a simple disagreement" with Granville over what was in her children's best interests.[121]

These cases demonstrate the Supreme Court's long-standing commitment to protecting the parental right to control the upbringing of one's children. In fact, its precedent only indicates a shying away from this right when children's own constitutional rights are implicated, as in *Danforth* and *Bellotti*,[122] or when the safety or health of the child is at risk, as in *Prince*.[123] As Part II.B will show, this precedent supports the assertion that PINS raises constitutional concerns.

B. Possible Issues with PINS

Despite the admirable goal of saving children from the criminal justice system,[124] PINS, as designed and implemented in New York, significantly interferes with the parental right to control the upbringing of one's children. In exchange for the county services it offers, PINS places a burden on families to comply with the program's requirements or face losing custody over their children in a family court proceeding, even if they feel that the requirements imposed are unreasonable or unhelpful.[125] Moreover, parents who *do* comply with PINS requirements might nevertheless lose custody; once they file a PINS petition, every decision is out of their hands. This pattern continues should the child be placed outside the home. The parent is given no deference in the decision of whether to remove the child from placement and return her to the parent's home. This complete dearth of deference begins with the request for aid and can continue through successive decisions to extend a child's placement.[126]

---

120 *Id.* at 69.

121 *Id.*

122 *See supra* note 99 and accompanying text (describing these cases).

123 *See supra* notes 97–98 and accompanying text (describing these cases).

124 *See supra* notes 28–30 and accompanying text (explaining that the legislative intent behind PINS was to distinguish juveniles who were criminal offenders from those who were not).

125 *See supra* notes 45–50 and accompanying text (discussing the expectation of compliance by children and parents with agency diversion program requirements and the consequences of failure to comply).

126 *See supra* Part I.B–C (explaining the PINS program and the consequences of PINS adjudications).

Troxel demonstrates that there are constitutional issues when a parent's decisions are "accorded no deference,"[127] especially when there is no indication of parental unfitness and the *Parham* presumption that parents act in the best interests of their children is intact.[128] Indeed, though this statute mirrors the *Parham* statute, it lacks the crucial provision in *Parham* that allowed parents to discharge their children from institutionalization upon request.[129] So the very same aspect of the statute that most bothered the plurality in *Troxel* is present in the PINS statute: Once parents come before a judge, their own views about what is in their children's best interest are not accorded any weight under the statute.[130]

In addition to the issues of deference presented by PINS, there is also the same potential issue presented in *Parham*: Leaving judges as the final decision-makers amounts to an unwarranted intrusion in the family life.[131] And, just as in *Parham*,[132] because parents have a crucial role during a child's placement and after her release in the PINS context,[133] the potential to make home life more difficult after release should make us pause at the extreme discretion afforded judges—and complete lack of parental deference—in PINS proceedings.

Bearing this in mind, PINS proceedings certainly have the same potential of placing a "substantial burden on the traditional parent-child relationship" that was found to be a fatal flaw in *Troxel*.[134] There are also severe information gaps when parents petition for PINS support. Parents often do not anticipate the complete relinquishment of control that comes with a PINS petition, so they are not aware of exactly how risky of a resource PINS diversion programs can be. This is especially alarming because the consequences of PINS can be great, there are extensive normative concerns with the system, and a number of treatment recommendations can be thrust upon parents. The

127 Troxel v. Granville, 530 U.S. 57, 57 (2000).

128 *See supra* notes 119–21 and accompanying text (discussing the *Parham* presumption and its application in the *Troxel* context).

129 Parham v. J.R., 442 U.S. 584, 591 (1979).

130 *See Troxel*, 530 U.S. at 67 ("Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference."); *supra* notes 61–62 and accompanying text (describing judges' "wide discretion" in making PINS determinations).

131 *See Parham*, 442 U.S. at 604 (discussing the important role parents play in their children's treatment and unconstitutional interference that occurs when the judge is the final decision-maker regarding whether the child is institutionalized).

132 *Id.* (referencing the Court's discussion of the importance of the role of parents who use the Georgia statute and that such importance should lead to less judicial involvement).

133 *See* SOUWEINE & KHASHU, *supra* note 3, at 18 ("Many service providers report that discovering how to engage families is the key to successful service delivery.").

134 *Troxel*, 530 U.S. at 64.

absence of a requirement that parents be informed of the consequences of a PINS petition, in combination with the finding of a waiver of parental rights upon the filing of a petition, leaves many parents unknowingly forfeiting the ability to control what happens to their children. This is especially concerning given that many counties encourage parents to enlist the support of PINS programs.[135]

Because it infringes on what has been recognized as a fundamental constitutional right, the implicit waiver of parental rights that PINS proceedings trigger can only be justified under a recognized exception to this constitutional rule. However, as the following section will demonstrate, none of these exceptions apply.

C. PINS Does Not Fit Under Recognized Exceptions to the Presumption of Parental Control

1. Parental Unfitness Is Not a Sufficient Justification

One typical reason for denying parental rights is a finding that the parents in a given case are unfit. Parental unfitness does not justify denying parents deference at PINS proceedings for a number of reasons. First, the statute does not require a showing that parental custody is detrimental to the child before complete discretion is given to family court judges.[136] In addition, because New York law allows courts to supersede PINS proceedings with neglect petitions,[137] there is a statutory argument that PINS was in fact not intended to cover cases in which parental unfitness was at issue.

Beyond the absence of a statutory requirement of a showing of unfitness and the evidence that the legislature intended that other provisions cover instances of parental unfitness, it is constitutionally unwarranted and unfair to assume that reaching out to the state for support is equivalent to admitting parental unfitness. No case law equates a mere reliance on the state (or any other institution) with unfitness. Parents in this situation are not per se unfit. Unruly adolescents are certainly not unique to one socioeconomic group, but there are substantial differences in access to support. Most or all of the working- and lower-class families who rely on PINS proceedings could not afford private means of support, such as boarding schools or pri-

---

135 *See, e.g.*, *What is PINS?*, GENESEE CNTY. PROB. DEP'T, *supra* note 40 (encouraging parents to act in their children's best interests by signing PINS petitions). The problems resulting from a lack of information being communicated to parents are exacerbated by the inadequate provision of counsel.

136 *See* N.Y. FAM. CT. ACT § 712(a) (McKinney 2010) (failing to require a showing that parental custody is detrimental).

137 This might happen if, for instance, the court finds the child has run away because of parental abuse.

vate counselors. At the same time, the upper-middle and upper-class families who can afford private services are not placed in a position that compromises their role in their children's lives. All parents in these situations rely on others for help; the differences in who the "others" are are based on accessibility.

A showing of parental unfitness is not legally required before parents' rights are infringed, and it cannot be seen as inherent to the filing of a PINS petition. Therefore, the typical rationale of parental unfitness does not justify the way parents are treated under PINS.

2. *Children's Superior Constitutional Rights Do Not Apply:* Danforth *and Its Progeny*

As discussed *supra*, the Supreme Court has recognized exceptions to the parental right to control the upbringing of one's child when a conflicting and more important right is at stake. This exception does not justify the waiver of parental rights in the PINS context. While parents and children may be said to have conflicting interests at the petitioning stage,[138] a PINS proceeding is not generally one in which the parents' rights are subordinated to the rights of their children. Instead, both the child's interest in personal liberty and the parental interest in directing the child's upbringing are subordinated to the decisions of the state. The decision of a parent to enlist the support of PINS through diversion programs or court order is very similar to that in *Parham*, where parents enlisted the support of mental institutions. As in *Parham*, the interests of parents and children should be seen as aligned. Thus, a *Danforth* justification based on a child's conflicting constitutional right does not hold.

3. *Children's Safety and the Public Welfare Exception Do Not Apply*

As in *Prince*, defenders of the PINS system may argue that an exception to the parental right to control the upbringing of one's children should be found because giving judges the ability to decide the fate of ungovernable children advances those children's safety or the public welfare. This defense does not justify PINS' treatment of parents.

The PINS statute itself was not "intended to protect the community or designed to provide public safety through deterrence or inca-

[138] The exceptions being PINS petitions that are not filed or supported by parents and those petitions to which parents, while perhaps initially supporting them, ultimately become opposed.

pacitation,"[139] so the public welfare justification does not fit. Supporters might counter that improving the child's welfare through PINS is the "public welfare" being advanced. On the one hand, in practice, this is questionable because PINS is arguably ineffective at reducing recidivism.[140] On the other hand, even if PINS is effective at reducing recidivism—say, for instance, that PINS youth would be arrested without the program—there is no reason to think that parental deference would curb this efficacy. Before allowing the family court system to infringe on parental rights, some proof that such interference is necessary to protect public welfare should be provided.

In any case, it is not clear that a judicial determination about placement or any other PINS disposition advances the welfare of children more so than a parental determination, especially because the parent in question won't have been shown to be unfit. Supporters of PINS as it currently exists might argue parents are much less informed than judges about potential ways of helping PINS youths, so judges are better equipped to decide the child's fate. But a county agency or the family court itself could inform the parents of all options and even recommend which option to pursue. And calls for family court judges to be better educated about "resources available for case disposition" and for more careful screening and education of judges[141] certainly imply that judges themselves are not always fully equipped to make these determinations.

So, textually and on policy grounds, this justification does not apply. If children are a threat to public safety, law enforcement should of course be allowed to intervene, but only through juvenile delinquency proceedings, which other statutes are intended to cover.

4. Section 764 Is Not a Sufficient Remedy for the Issues Identified with PINS

A proponent of the current PINS regime might argue that, even where there are legitimate concerns over the implicit waiver associated with filing a PINS petition, those concerns are remedied by § 764, which enables parents to file termination proceedings in family

---

139 N.Y. FAM. CT. ACT § 711 Practice Commentaries (McKinney 2010).

140 In fact, "[s]ixty-eight percent of male PINS and 31 percent of female PINS were arrested within 30 months of discharge," which is greater than the normal population. Bruce Frederick, *Factors Contributing to Recidivism Among Youth Placed with the New York State Division for Youth*, N.Y.S. DIV. OF CRIM. JUSTICE SERVS. 10 (1999), http://www.criminaljustice.ny.gov/crimnet/ojsa/dfy/dfy_research_report.pdf.

141 Aaron Spiwak, Reporter, Working Group Report, *Children Who Break the Rules: Juvenile Delinquency and Status Offenses*, 40 COLUM. J.L. & SOC. PROBS. 467, 475 (2007).

court.[142] This provision might signal that parents already have an adequate means of regaining control over their children's lives. This is not the case.

Very importantly, § 764 is very different from a straightforward withdrawal of the initial PINS petition. The case of *In re Robert H.* illustrates this. There, a father sought to either affirmatively terminate his son's PINS placement or withdraw his PINS petition.[143] His reasons for doing so were that other residents had "threatened Robert with physical abuse, and . . . subjected him to sexual contact."[144] The court denied the father's petition, finding that "there is no provision in the [PINS] statute for the withdrawal of a PINS petition as a method of obtaining the termination of a placement," and that the legislature probably had a specific intent to relegate parents wishing to end their children's placement to the realm of § 764.[145]

Instead of facilitating a simple withdrawal of the petition, the § 764 procedure requires a new best-interests inquiry led by the judge.[146] This triggers the same issues with parental control that are introduced by the PINS adjudication in the first place: Parents are afforded no deference. In *In re Robert H.*, for example, the court did not delve into the specifics of the son's situation, but rather discussed the import of using § 764 to "protect[ ] troubled youngsters from being arbitrarily removed from treatment programs by parents with motives other than the best interests of the child."[147] The court went on to say "[a] child has the right to be guided and protected by an enlightened society, and not to be subjected to the caprice of parents whose motives are often questionable at best."[148] The court never explains why the father in the case—who sought to remove his child from placement because of abuse he was suffering—had questionable motives "at best," or why it found him to have interests other than his son's in mind. If anything, the court reveals an attitude distrusting of PINS parents without providing a justification for such distrust. The actions of the parents, the court argued, "must be more carefully screened than those of the accused child."[149]

---

142 *See* N.Y. FAM. CT. ACT § 764 (McKinney 2010) (allowing parents to initiate proceedings to terminate PINS adjudications); *see also supra* note 13 (discussing the dearth of motions filed pursuant to § 764).

143 383 N.Y.S.2d 813, 813 (N.Y. Fam. Ct. 1976).

144 *Id.*

145 *Id.* at 816.

146 *See supra* notes 60–62 and accompanying text (discussing the best-interests inquiry).

147 *In re Robert H.*, 383 N.Y.S.2d at 817.

148 *Id.*

149 *Id.* at 816.

This example shows why termination proceedings under § 764 are an unsatisfactory remedy for the unknowing relinquishment of parental rights in the PINS regime. They do not put parents on a level playing field with judges, nor do they require a finding of parental unfitness, and therefore do not give them the opportunity to recover their constitutional rights.

5. PINS Petitions Should Not Be Deemed Sufficient Waiver

The assumption that "[i]nitiating an ungovernability petition results in an implicit waiver of the usual constitutional rights of fit parents to custody and control of their children"[150] is ubiquitous in PINS adjudications. This Note argues parental petitions should not be considered waivers of parental rights.

As a first matter, it is not clear that there is anything inherently negative (or indicative of a desire or need to forfeit parental rights) in PINS petitions.[151] Finding a waiver in such cases should be considered hugely problematic from a fairness perspective, as most information available concerning PINS does not reveal the extent to which petitioning strips parents of their rights.[152]

Finding an implicit waiver in these circumstances is not only unfair, but may be unconstitutional. A waiver is "ordinarily an intentional relinquishment or abandonment of a known right or privilege."[153] Here, parents are often unintentionally relinquishing control over their children. This is especially problematic given the Court's recognition of this right to be fundamental.[154] Supreme Court cases examining waivers of fundamental constitutional rights have emphasized the high standard that applies to finding them valid. In *Aetna Insurance Co. v. Kennedy*, for example, the Court wrote that in cases involving fundamental rights—in this case, the right to a jury trial—"courts indulge every reasonable presumption against waiver."[155]

---

150 Kandel & Griffiths, *supra* note 7, at 1035.

151 *See supra* notes 136–38 and accompanying text (discussing parental unfitness in PINS context).

152 *See What is PINS?*, GENESEE CNTY. PROB. DEP'T, *supra* note 40 (not explaining the potential for institutional placement through PINS); CLINTON CNTY. DEP'T OF SOC. SERVS., *supra* note 47 (same); ONONDAGA CNTY. CHILDREN & FAMILY SERVS., *supra* note 47 (same); *see also* SOUWEINE & KHASHU, *supra* note 3, at 19 ("In court, many parents are still confused about the PINS process and the potential outcomes. Judges and law guardians reported that many parents are not aware that their child could be placed in foster care as a result of the PINS petition.").

153 Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

154 *See supra* notes 92–96 and accompanying text (discussing *Meyer* and *Pierce*, where the Court recognized the right to control the upbringing of one's children to be fundamental).

155 301 U.S. 389, 393 (1937).

Likewise, in discussing an administrative adjudication and an argument that a party had waived their right to a fair and open hearing, the Court wrote, "[w]e do not presume acquiescence in the loss of fundamental rights."[156]

Waivers of constitutional rights in the criminal context require an "'awareness' of the consequences of the waiver,"[157] and a showing that the defendant was "sufficiently appraised of the nature of his [constitutional] rights, and of the consequences of abandoning those rights."[158] As the Southern District of New York has pointed out, "[a] description of the rights that are being waived is one way to satisfy this requirement, particularly when such a description can easily be included in a preexisting document."[159] In the PINS context, this could be accomplished by informing the parents of their presumed right to control the upbringing of their children, the ways that PINS petitions curb that right, and the potential results of PINS proceedings. This could be done on the PINS petition forms themselves, though ideally it would also be done on all county publications about PINS, including websites. This means addressing this constitutional concern is fairly straightforward.

Although it is true that PINS is explicitly not the criminal context, and so there may be an argument that the knowing standard for waivers does not apply, the heightened protection afforded to those waiving fundamental constitutional rights does not only extend to the criminal arena, as *Zerbst*, *Aetna Insurance*, and other Supreme Court and lower court cases show. In *Morris v. New York City Employees Retirement System*, for example, the Southern District of New York asserted that "a party waiving constitutionally protected rights—even when doing so through the execution of a contract—must also be made aware of the significance of the waiver."[160] This principle was drawn, in part, from the Supreme Court case *Fuentes v. Shevin*, where the Court emphasized that "a waiver of constitutional rights in any context must, at the very *least*, be clear."[161] There it found that plaintiffs had not waived the right to due process through a contract.[162]

This strengthens the argument that the implicit PINS waiver of parental rights is unconstitutional, not only because the case provides

156 Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 307 (1937).

157 Morris v. N.Y.C. Emps. Ret. Sys., 129 F. Supp. 2d 599, 609 (S.D.N.Y. 2001) (citing United States v. Morgan, 51 F.3d 1105, 1110 (2d Cir. 1995)).

158 United States v. Yu-Leung, 910 F.2d 33, 38 (2d Cir. 1990) (citations omitted).

159 *Morris*, 129 F. Supp. 2d at 609.

160 *Id.*

161 407 U.S. 67, 95 (1972).

162 *Id.* at 95–96.

support for protection in the civil context, but also because it shows that the Supreme Court is willing to recognize that affirmative conduct, such as entering into a contract, does not mean constitutional rights are more easily waived. In other words, although the plaintiffs in *Fuentes* engaged voluntarily in the formation of a contract that, by its own terms, restricted their rights, the Supreme Court still protected them and found their waiver inadequate—largely because there was a lack of bargaining power and they were not "actually aware or made aware of the significance" of the waiver provisions.[163]

This is significant for the PINS context because, while parents are engaging in affirmative conduct by signing their children up for PINS, there is still constitutional concern in that there is no requirement that the consequences of this conduct be made clear. Like in *Fuentes*, parents have little "bargaining power" when they file a PINS petition. They must either take or leave the petition as is. And, in the PINS context, there is only one "provider," at least for parents without resources—the municipal government—so the imbalance of bargaining power is especially stark. This is only more important given the necessity of taking action with respect to their misbehaving children that many parents feel (and which is communicated to them by school officials, police, and social services workers).

In light of this Supreme Court precedent, the PINS petition as waiver argument should be found constitutionally defective.

III
Recommended Changes to the PINS System

This Note suggests two aspects of the PINS program that can be altered in a way that remedies the constitutional and normative shortcomings it identifies: waiver and parental unfitness. First, it advocates changing the current approach of interpreting petitions as waivers. There are two dimensions to this. One involves the waiver itself. This Note uses Subpart III.A to recommend either eliminating the waiver inherent in PINS—and giving deference to parents at every step—or making a waiver of parental rights temporary or revocable. The second dimension is procedural in nature: If the waiver remains, it should only be accepted when made knowingly and affirmatively.

PINS could also be aligned with Supreme Court precedent involving parental rights if parents were only deprived of deference upon a showing of unfitness. Subpart III.B outlines that approach.

163 *Id.*

A. The Waiver of Parental Rights

The waiver of parental rights that occurs implicitly through PINS proceedings should either be eliminated in its entirety or made revocable or temporary. Further, courts should only accept waivers when they are made knowingly and affirmatively.

1. Eliminate the Waiver of Parental Rights

The most sweeping reform that could be made to New York's PINS statute regarding the waiver of parental rights would be to completely eliminate the waiver. The result would be that parents could reach out to the state for help, beginning with their county's PINS diversion programs, and receive support through voluntary trainings and counseling, among other things. It would also mean that parents could use state sanctions—such as placement, probation, and other court orders—as a way to incentivize their children's compliance with rules, while not relinquishing their ability to tell the state where they want to draw the line. Further, any state sanctions that would be ordered on the child would need to be approved by the parents first. It may very well be that this suggested structure would be the reality best reflective of the choices that families with greater means are able to make.

Opponents of this regime could argue that requiring parental approval at each stage of state intervention would result in inconsistent state services that may leave children worse off than they would be had they not received the services at all. But without a showing of parental unfitness undermining parents' assumed ability to make good decisions for their children, there is no reason to think that parents of PINS-eligible youths could not understand the risk of inconsistency themselves and make their decisions accordingly.[164]

---

[164] *But see* SOUWEINE & KHASHU, *supra* note 3, at 18 (discussing parents' failures in PINS, including that "parents regularly drop out"). Although data does point to at least some inconsistency on the part of parents, it is not clear that this results from something wrong the parent does—for instance, perhaps parents "drop out" because of merited frustration with the program. Even if parents are to blame, it is not clear these failures warrant complete loss of parental control.

If policymakers wish to address the risk that parents will engage in a "cycle" with PINS, *id.*, that affects the program's success, they could use a three (or two) strikes approach: If the parent wishes to take his or her child out of PINS, they are able to under the waiver-less regime I propose. If, however, they subsequently wish to re-enter PINS, their parental rights will be curtailed because potentially detrimental inconsistency has been demonstrated.

2. *Make Waivers Temporary or Revocable*

Parental waivers could also be improved by being made either temporary or revocable by the parents themselves. A revocable waiver would be one in which a parent confers authority on the court to supervise her child, but retains the right to decide at any moment that she will take that authority back.

A temporary waiver would result in largely the same picture we have today: A parent would file a PINS petition and thus relinquish his rights to dictate the way in which his child is reared to the supervising family court. But this relinquishment would be limited, for instance, to a six-month period. At the expiration of the waiver, the parent would be able to decide whether to extend the waiver and continue allowing the family court judge to supervise her child, or whether to regain supervision of her child herself.

The benefits of such a revocable waiver would be that the parent would be less involved on a micro-level of the decisions that affect her child. For instance, under a revocable waiver, the court would still be empowered to order the child to placement, decide the length of the placement, and approve which placement is granted, without being required to obtain parental approval. Yet if the parent believed—or came to believe—that the court's decision was ultimately harmful to her child, she could decide to revoke the waiver of her parental rights.

A temporary waiver would also be less vulnerable to criticisms of promoting inconsistency because it would entail a statutorily designated period of time in which the parent could not enforce her wishes over the objection of the court.

3. *Require Waivers to Be Made Knowingly and Affirmatively*

So long as parents are required to waive their rights upon filing a PINS petition to any extent, those waivers should only be accepted as valid when they are made knowingly.[165] This would include requiring county PINS diversion programs and courts to provide information to parents about the consequences of PINS adjudications, such as the potential for placement until the age of eighteen through extensions. It should also include a discussion of the actual waiver itself. Ideally, a

[165] This would resemble the requirement for accepting guilty pleas under the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 11(b) ("Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court."). Rule 11(b) requires the court to, inter alia, ensure that the defendant is aware of the right to plead not guilty, the right to a jury trial, the right to counsel, the waiver of such trial rights if the court accepts the guilty plea, possible maximum and minimum penalties, and that the plea is voluntary (i.e., did not result from force, threats, or promises other than the plea agreement). *Id.*

requirement that waivers be made knowingly would further include a disclosure about county statistics on the number of PINS youths who were eventually placed out of their homes and the lengths of those placements. Of course, that data may not be collected already and there may be significant costs associated with collecting it.[166]

Courts should also be required to find parents have made an affirmative and knowing (i.e., fully informed) choice to waive parental rights before continuing a formal proceeding, rather than assume waiver through the filing of a petition. This could be done in court before the fact-finding hearing when the petition is filed with the family court, and could include such inquiries as whether the parent understands that she is relinquishing her parental rights, she will not automatically be accorded deference in future proceedings concerning her child, and the range of possible consequences for her child that could result from those proceedings.

B. Require a Finding of Parental Unfitness Before Transferring Custodial Rights

A requirement that courts make a finding of parental unfitness before depriving parents of any weight in the decision-making process is another potential solution to the issues this Note finds with PINS. This would resolve the *Troxel* concern of infringing upon parent-child relationships without finding parents unfit to make the best decisions for their children.

Opponents may argue this requirement will add administrative costs to proceedings that are unjustified because parents are conceding they are not able to care for their children without state support. But it is not clear that by conceding they need support, parents are conceding they should not have *any* control over their children's lives. Before stripping parents of decision-making about what is best for their children, the state should be required to justify this measure by proving the parents are unfit.

---

166 Aaron Spiwak called for the collection of such data in response to the current dearth of record keeping and data collection surrounding youths' movement through the court after a PINS proceeding is initiated. Spiwak, *supra* note 141, at 471. He proposed that the New York Office of Court Administration could "collect this data, including information on recidivism rates, timely educational attainment upon release, and court adjournments and reasons therefore," *id.*, and that this information should be made available to youths and their parents. *Id.* at 476–77. Solutions like these are much needed: "[I]nformation about the [PINS] system is fragmented" because responsibility for it "is split among many government and nonprofit agencies." SOUWEINE & KHASHU, *supra* note 3, at 2.

Conclusion

Though intended to be a tool for parents in these situations that avoids exposing children to the criminal justice system, enrollment in PINS has become a "risky resource" to parents. In exchange for the support of county diversion programs offered by PINS, parents are required to relinquish the control they have over their children's lives. This does not happen through affirmative and fully informed waivers of this control, despite the fact that the right to control the upbringing of one's children is constitutionally protected. Instead, parents are assumed to waive their right to raise their children by filing a request for PINS services.

This Note argues this system is out of line with Supreme Court precedent defining and outlining this substantive due process right. To remedy these constitutional and attendant policy-based issues, this Note proposes New York amend its ungovernability statute and cease treating the filing of PINS petitions as implicit waivers of parental control. Though certainly not a complete fix for all concerns that arise from the PINS system as it exists, this solution would at least partially correct the imbalance between parents and the state under the PINS regime and lead to better results for children and their families.