Hush, Little Baby, Don't Say a Word: How Seeking the "Best Interests of the Child" Fostered a Lack of Accountability in Georgia's Juvenile Courts

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INTRODUCTION

Since 1899, when America's first juvenile court opened its doors to the lost children of Chicago,[1] two primary assumptions have governed the administration of the juvenile justice system: that it should operate in *parens patriae*[2] for the "best interests of the child"[3] and that it should

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1. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

2. Stanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1192-93 (1970).

3. *Id*. at 1230; *see also* McKeiver v. Pennsylvania, 403 U.S. 528, 568 (1971); Steven Friedland, *The Rhetoric of Juvenile Rights*, 6 STAN. L. & POL'Y REV. 137, 139 (1995) (quoting Mack, *supra* note 1, at 119-20).

be given flexibility and leeway in doing so.[4] Georgia's juvenile courts, established in 1908,[5] function squarely within that framework: "[a] petition alleging delinquency, deprivation, or unruliness of a child shall not be filed unless the court or a person authorized by the court has determined and endorsed upon the petition that the filing of the petition is in the best interest of the public and the child."[6]

Initially, there was a great deal of excitement about juvenile courts, but by the mid-1950s, children's rights advocates became concerned about problems brought by the flexibility built into juvenile proceedings. When *Kent v. United States*,[7] *Winship*,[8] and *In re Gault*[9] were decided successively by the United States Supreme Court, the juvenile court system became more structured and extended more "adult" due process rights to children. This, like the origination of juvenile courts, brought hope for improved protection of children.[10]

However, the promises of these cases remain unfulfilled, and studies indicate serious problems with the practices and administration of the juvenile courts. The costs of fundamental assumptions about the methods and goals of juvenile court are too great: children's[11] rights are not nearly as carefully protected as their adult counterparts', but the juvenile penalties are growing ever harsher. While it may be true that the problems that plague the juvenile courts are attributable to a number of factors (the difficulty of funding public services for families

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4. *In re* Winship, 397 U.S. 358, 376 (1970) (Burger, C.J., and Stewart, J., dissenting).

5. MARK H. MURPHY, GEORGIA JUVENILE PRACTICE AND PROCEDURE § 1-4 (3d ed. 2000). Georgia's first juvenile courts' jurisdiction covered delinquent and "wayward children." It was not until the legislature authorized those courts to cover both delinquent and neglected children that the statute passed constitutional muster in 1916. The first code of juvenile court procedure was enacted in 1951. *Id.* (quoting 1908 Ga. Laws 1107).

6. O.C.G.A. § 15-11-37 (2005).

> State statutory preambles that contain phrases similar to "welfare of the minor" and "best interest of the state" imply that the well-being of the child must be balanced against the safety of the public in determining the disposition of the juvenile in question. Not surprisingly, many states utilize such middle-of-the-road and arbitrary statutory language as a catch-all justification for choices made within their juvenile justice system.

Linda F. Giardino, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J.L. & POL'Y 223, 237 (1996).

7. 383 U.S. 541 (1966).

8. 397 U.S. 358 (1970).

9. 387 U.S. 1 (1967).

10. Fox, *supra* note 2, at 1192-93.

11. We use "child" or "children," rather than "juvenile" because of the negative connotations that accompany the term juvenile. The first juvenile courts authorized by the Georgia Legislature in 1908 were known as "children's courts." MURPHY, *supra* note 5, at § 1-4.

and children, for example, or inadequate parental or community support),[12] most of the problems emerging from Georgia's juvenile courts are linked inextricably to the lack of meaningful accountability within—or without—that court system.

For example, disturbing numbers of children are allowed to waive the right to counsel in delinquency proceedings.[13] Studies performed by the Georgia Office of the Child Advocate showed that many attorney guardians *ad litem* are appointed just prior to court appearances and often do not meet the child or parents before a court appearance.[14] Such trends in inadequate representation often lead to harsh sentences due to the broad discretion afforded juvenile judges and prosecutors in many jurisdictions.[15]

Even with competent counsel, however, the decisions of the juvenile courts reflect a lack of systemic accountability. One Georgia juvenile defender reported that a judge determined his client to be delinquent because the defense "had not proven its case."[16] In *In the Interest of M. S.*,[17] a juvenile court in Baker County, Georgia sentenced a child as though he had committed a "designated felony," even though such sentencing (in that instance) is not allowed by statute.[18] The child's counsel argued that the charge was not a designated felony under Official Code of Georgia ("O.C.G.A.") section 15-11-63,[19] and therefore the court was not authorized to sentence him pursuant to that statute;

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12. *Lack of Funding, Lack of Help*, ORLANDO SENTINEL, May 1, 2006, at A12; *Parents Share Blame for Crime Stats*, USA TODAY, July 21, 2006, at 8A; Ben Cunningham, *Teens Want More Deterrents to Violence*, GRAND RAPIDS PRESS, Mar. 23, 2006, at 1.

13. ABA JUVENILE JUSTICE CTR. & SOUTHERN CTR. FOR HUMAN RIGHTS, GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 19 (2001). The percentage of children waiving counsel in delinquency proceedings climbs as high as 90% in some jurisdictions. Because they lack proper advice from an advocate, these children often make damaging admissions and testify against themselves in proceedings. *Id.* at 1-2. Of course, the usual practice in counties with contract defender or public defender systems is to automatically appoint counsel for every juvenile case. However, the criticism of this practice is that defense attorneys become overwhelmed with the volume of cases they are required to handle, making competent representation difficult. *Id.* at 20.

14. OFFICE OF THE CHILD ADVOCATE, FOR THE PROTECTION OF CHILDREN, 2003-2004 ANNUAL REPORT 13 (2004).

15. *See* Miles Moffeit & Kevin Simpson, *Teen Crime, Adult Time: Laws Converge to Put Teens Away Forever Cases of Juveniles Convicted as Adults Since Youths More Likely to Face Felony Murder Charge*, DENVER POST, Feb. 19, 2006, at A01.

16. Interview with Mike Randolph, Chief, Juvenile Division, Macon Judicial Circuit Public Defender's Office in Macon, Ga. (Oct. 5, 2006).

17. 277 Ga. App. 706, 627 S.E.2d 422 (2006).

18. *Id.* at 706, 627 S.E.2d at 422.

19. O.C.G.A. § 15-11-63 (2005).

nevertheless, the court replied, "'it's the Court's opinion that [it] can sentence [M.S.] under the *Designated Felony Act* and [the Court is] going to do so.'"[20] The court of appeals reversed the disposition,[21] but as will be discussed in Part IV, this was only one of a very few child delinquency cases appealed in 2005.

Some of the inherent flexibility in juvenile court may itself be violative of children's rights. Under the terms of the designated felony statute, for example, the Department of Juvenile Justice "shall retain the power to continue the confinement of the child in a youth development center or other program beyond the periods specified by the court within the term of the order."[22] Adult felons, on the other hand, may not be confined for a period greater than the sentence pronounced in court.[23] The juvenile system also suffers from careless record keeping that allows scores of children to languish in detention centers, having been forgotten by a system in which they have "fallen through the cracks."[24] These are only a few examples of how the lack of systematic oversight leads to abuses of discretion, but there are many more.

Rather than focusing on one problem in particular, this Article examines how Georgia's juvenile justice system suffers because of a historic and continuing lack of accountability. In adult criminal cases, counsel, juries, media access, and appellate oversight each provide important and interconnected avenues for oversight. In Georgia, however, children frequently admit to delinquency petitions without counsel (often after incomplete explanations of their constitutional rights), or are represented by counsel operating under conflicts of interest or limited by inexperience.[25] Children have no right to a jury trial.[26] Further, Georgia juvenile courts operate under confidentiality rules that limit access to juvenile records and prohibit releasing identifying information about children with cases in juvenile court.[27] This applies to matters involving delinquency (cases involving a child's bad behavior) or deprivation (cases involving abandonment, abuse, or

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20. *M.S.*, 277 Ga. App. at 707, 627 S.E.2d at 422 (brackets in original).

21. *Id.*, 627 S.E.2d at 423.

22. O.C.G.A. § 15-11-63(g).

23. O.C.G.A. § 17-10-1(a)(1) (2004 & Supp. 2006).

24. *See* ABA JUVENILE JUSTICE CTR. & SOUTHERN CTR. FOR HUMAN RIGHTS, *supra* note 13, at 26 (citing Ron Martz, *Children Held 'Inappropriately' in Jail*, ATLANTA J. CONST., Mar. 3, 2001, at H-1).

25. *See id.* at 19-24, 26-27.

26. LINDA A. SZYMANSKI, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE DELINQUENTS' RIGHT TO A JURY TRIAL Vol. 7, No. 9 (Sept. 2002). However, ten states do afford the right to a jury trial. *Id.* Eleven other states provide for jury trials in limited circumstances. *Id.*

27. *See* O.C.G.A. §§ 15-11-78, -79, -82 (2005).

neglect)[28] and prevents otherwise interested parties—including the media or advocacy groups—from gaining access to information that might shed light on problems plaguing the courts.[29] Because children's delinquency orders are rarely appealed,[30] the body of juvenile common law is scant, and lower courts rarely benefit from meaningful appellate review or guidance.

Intended or not, juvenile courts operate in little unrestricted fiefdoms. Some, certainly, are overzealous in protecting their charges' constitutional rights. Others, however, burdened by heavy caseloads or driven by cynicism or concern, take liberties with children's rights that would not withstand more careful scrutiny. In a perfect world, of course, parents provide important oversight, but children's uniquely perilous situation makes systematic reform essential. Without the meaningful answerability through conflict-free counsel (or any counsel at all), jury consideration, the media or interested third parties, or meaningful appellate review, Georgia's juvenile courts have strayed from seeking and protecting "the best interests of the child." This Article seeks to explore these issues of accountability and will offer possible solutions to problems that emerge when juvenile courts operate with nearly limitless power in the lives of the children who come before them.

I. THE ADJUDICATORY AND DISPOSITIONAL PHASES

A. Accountability through the Assistance of Counsel

According to most studies examining the system, counsel-related problems are the central issue in Georgia's juvenile justice reform movement.[31] Though any child before a juvenile court should have the right to counsel's zealous and competent representation (provided at no cost if she is indigent), that reality is far from realized. First, the law is rather unclear about when counsel must be appointed. Further, children's rights are not always adequately explained by counsel or judges or explained in language that children are able to comprehend.[32]

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28. O.C.G.A. § 15-11-78(a); *see* O.C.G.A. §§ 15-11-62 to -73 (2005 & Supp. 2006) (delinquency proceedings); O.C.G.A. §§ 15-11-54 to -61 (2005) (deprivation proceedings).

29. O.C.G.A. § 15-11-78(b)(1). The rules requiring confidentiality do not apply to cases in which children have been charged as adults. *Id.*; *see also* O.C.G.A. § 15-11-63.

30. *See infra* Part II for further discussion of this issue.

31. *See* ABA JUVENILE JUSTICE CTR. & SOUTHERN CTR. FOR HUMAN RIGHTS, *supra* note 13, at 19-24, 26-27.

32. One public defender put it plainly: "Kids don't understand those waiver forms." Interview with Cheryl Milton, Assistant Public Defender, Macon Judicial Circuit, in Macon, Ga. (Oct. 5, 2006); *see also* ABA JUVENILE JUSTICE CTR. & SOUTHERN CTR. FOR HUMAN

Some children who would otherwise request counsel may be prevented from doing so by a parent or guardian.[33] In many counties, both delinquency and deprivation cases are hampered by the fact that juvenile court positions are often filled by the least experienced attorneys in the circuit.[34]

The statutory promise of counsel is also complicated by the legislature's inadequate funding for counsel for children. Counties bear financial responsibility for funding counsel in juvenile deprivation matters and for juvenile defenders beyond those funded by the state. At least some juvenile defenders are statutorily required, but their positions are not fully funded.[35] As reported in the *Fulton County Daily Report*, though a funding bill was at some point a seeming possibility, Georgia legislators "removed language from a public defender bill . . . that would have urged counties to hire an assistant public defender for each full-time juvenile court judge."[36]

If a child has no counsel, or ineffective, conflicted, or unprepared counsel, then not only does the child lack an advocate in legal proceedings, but the child also lacks a voice in the process.

1. A Child's Right to Counsel in Delinquency Petitions

Just as adults have the right to counsel in any proceeding where there is a risk of confinement[37] or in any direct appeal proceeding challenging an adverse final order,[38] children also have the right to legal representation.[39] However, in Georgia, that right has not been fully recognized and is certainly far from realized.

The Georgia Juvenile Code explains the right to counsel rather cryptically: "Except as otherwise provided . . ., a [child] is entitled to representation by legal counsel at all stages of any proceedings alleging delinquency, unruliness, incorrigibility, or deprivation" and, if a party is

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RIGHTS, *supra* note 13, at 11, 13, 20-21 (citing THOMAS GRISSO & ROBERT G. SCHWARTZ, YOUTH ON TRIAL 125 (2000)).

33. ABA JUVENILE JUSTICE CTR. & SOUTHERN CTR. FOR HUMAN RIGHTS, *supra* note 13, at 21.

34. *Id.* at 26-27.

35. *See* O.C.G.A. § 17-12-23 (2004 & Supp. 2006); GPDSC Website: Information for County, Municipal & Consolidated Governments, Answers to Frequently Asked Questions, http://www.gpdsc.org/cpdsystem-transition-faq.htm (last visited Mar. 15, 2007).

36. Greg Bluestein, *State Judicial Branch Takes Budget Hit*, FULTON COUNTY DAILY REP., Mar. 31, 2005, at 1.

37. *See* Alabama v. Shelton, 535 U.S. 654, 657, 674 (2002).

38. O.C.G.A. § 5-6-33(a)(1) (1995); O.C.G.A. § 17-12-23; *see also* Douglas v. California, 372 U.S. 353, 357 (1963).

39. O.C.G.A. § 15-11-6(b) (2005); *see also* O.C.G.A. § 17-12-23.

indigent, the court will provide appointed counsel.[40] The Code provides, furthermore, that "[i]f a party appears without counsel," the court must inquire into the party's understanding of his or her right to counsel and to appointed counsel, depending on the party's financial circumstances.[41] However, the final two sentences of the section allow for representation by a parent: "Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more parties conflict, separate counsel shall be provided for each of them."[42] The statute, however, provides no mechanism for appointment of counsel over a parent-representative's objections or for explaining the right to counsel to a child who is currently represented by a parent or guardian.[43] These vague and seemingly-contradictory promises undercut a child's right to counsel in delinquency proceedings. For the sake of the children and the courts, the message must be clear.

The flexibility allowed in the process of appointing counsel and the lack of adequate funding for counsel's presumptive presence frees juvenile courts from the accountability that competent counsel provides. As described in *United States v. Cronic*,[44] "Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'"[45] This warning holds true for juvenile court as well, and its threat is borne out by reports, studies, and real children's stories.

a. Admissions Without Any Representative. Even if it were acceptable to be represented in a juvenile adjudication only by a parent, in practice, Georgia juvenile courts fall short of even that low standard. Children routinely "admit" to delinquency petitions without any

40. O.C.G.A. § 15-11-6(b).

41. *Id*.

42. *Id*.

43. *See id.* "I've seen many children admit without counsel—both because their parents forced them to and because they had bad experiences with previous contract lawyers." Interview with Amy Stone, Assistant Public Defender, Macon Judicial Circuit, in Macon, Ga. (Oct. 4, 2006).

44. 466 U.S. 648 (1984).

45. *Id.* at 656 (quoting Cuyler v. Sullivan, 446 U.S. 335, 343 (1980)). "'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" *Id.* at 655 (quoting Herring v. New York, 422 U.S. 853, 862 (1975)). "It is that 'very premise' that underlies and gives meaning to the Sixth Amendment. It is meant to assure fairness in the adversary criminal process." *Id.* at 655-56 (quoting United States v. Morrison, 449 U.S. 361, 364 (1981)) (citations and internal quotation marks omitted).

representative.[46] According to the *ABA Assessment of Access to Counsel and Quality Representation in Delinquency Proceedings*, widely regarded as the most thorough study of counsel in the Georgia juvenile justice system, children often plead guilty or proceed without counsel.[47] Amy Stone of the Macon Judicial Circuit reported, "I have seen children admit without counsel to [designated felonies] that carried several years of [Department of Juvenile Justice] commitment. The judges in Spalding County would often strongly encourage them to talk with a lawyer in these cases, but oftentimes parents would refuse."[48]

More critical, however, is the fact that the lack of the right to counsel is seen as necessary to the administration of the juvenile court system:

> One juvenile judge even expressed concern about the negative impact upon the operation of the court if children truly understood their right to counsel and asserted that right. Obtaining waivers from children is considered by many people working in the juvenile court to be a critical part of managing the court docket and handling the caseloads that come through the juvenile court.[49]

Often, juvenile court judges take care to prevent admissions without counsel. One juvenile public defender explained that the juvenile court judge before whom she practices will not allow children to admit to delinquency petitions without counsel's assistance.[50] Others report that juvenile courts do not allow uncounseled admissions in designated felony

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46. Interview with Mike Randolph, *supra* note 16. Though Mr. Randolph explained that uncounseled pleas are relatively common,

> children have been advised of their rights by a DJJ worker when they are served with the petition and they are advised again in open court before the plea is taken. [The judges] are both good about not allowing a child to admit without counsel if the charge is serious enough to get some time, or if the child does not seem to understand what it [sic] going on, or if they get any whiff of pressure from a parent not to get an attorney. I have not done any sort of formal study on the matter but my sense of things is that 9 times out of 10 the child who admits without counsel simply gets probation. I have never seen a child charged with a [designated felony] allowed to enter a plea without counsel.

Id.

47. *See* ABA JUVENILE JUSTICE CTR. & SOUTHERN CTR. FOR HUMAN RIGHTS, *supra* note 13, at 19-20. Because of confidentiality rules that govern Georgia's juvenile court proceedings, it would be nearly impossible to identify the instances in which children had been allowed to admit without counsel. This illustrates how the multiple accountability features are essential to a constitutional juvenile justice program.

48. Interview with Amy Stone, *supra* note 43.

49. *See* ABA JUVENILE JUSTICE CTR. & SOUTHERN CTR. FOR HUMAN RIGHTS, *supra* note 13, at 19.

50. Interview with Janelle Layne, Juvenile Defender, in Bartow County, Ga. (Oct. 15, 2006).

cases, but often do in situations that will not result in a disposition with confinement.[51]

But even one child who admits to delinquent charges without the benefit of counsel is one child too many. Systemically, this reflects something even worse than a lack of accountability: it shows a juvenile system willing to make decisions about children's lives without hearing from someone who can translate a child's perspective and story into language that courts recognize.

b. Competent Counsel is Required in Delinquency Proceedings. Under United States Supreme Court precedent and guidelines offered by juvenile law experts, current Georgia practice is not acceptable: every child needs representation in every case.[52] But mere possession of a bar card is not enough to protect children's due process rights. The courts need the involvement of competent counsel for accountability's sake. Especially in delinquency actions, children need the assistance of counsel to navigate the court process and effectively advocate for a child's legal rights. "Without effective representation, children are subject to the whims and vagaries of the decisionmakers in the system who may not always make the individualized decisions that promote the treatment and rehabilitation of the child."[53]

The Georgia Assessment, however, describes a system in which there is little or no investigation; where pretrial motions practice is scarce; where attorneys meet their clients only before a hearing; and where a sense of hopelessness pervades.[54] "Overall, there is a general sense of futility among defense attorneys about preparing juvenile cases for adjudication because courts are less interested in inquiring into the guilt or innocence of a child and more intent on dispensing treatment or punishment to the child."[55]

With the advent of Georgia's public defender system and the revival of the Youth and Family Justice Division (formerly the Juvenile Justice Division),[56] the quality of juvenile representation is improving. To address the changing role of the juvenile defense attorney and to try to effect change throughout the system, the Georgia Public Defender Standards Council ("GPDSC") has published standards for representa-

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51. Interview with Mike Randolph, *supra* note 16.

52. *See* ABA JUVENILE JUSTICE CTR. & SOUTHERN CTR. FOR HUMAN RIGHTS, *supra* note 13, at 3.

53. *Id.*

54. *Id.* at 18, 23-24.

55. *Id*. at 24.

56. GPDSC website, Youth and Family Justice Division, http://www.gpdsc.org/resources-juvenile-main.htm (last visited Mar. 15, 2007).

tion in juvenile courts. This was both necessary and ground-breaking—never before has Georgia had minimum performance standards for attorneys who represent children. These standards include, for example, the requirement that counsel provides "zealous and effective representation for his or her client"[57] and that the "defense attorney's duty and responsibility is to promote and protect the child's expressed interest."[58] The individual standards are strongly worded and provide guidance about what zealous and competent representation entails, including investigation; knowledge of dispositional alternatives; understanding of developmental and mental health issues; and appellate advocacy.[59]

There are problems, however, that still must be addressed: the GPDSC must continue to provide training in these issues so that new attorneys or attorneys new to the juvenile system understand how to fulfill these performance standards.[60] Even more importantly, however, juvenile defender positions should be fully staffed, and staffed so that ABA caseload limits are not exceeded; overwhelming caseloads prevent even the most competent attorneys from adequately defending their child clients.[61]

2. Representation in Deprivation Proceedings

As it relates to deprivation proceedings, the Georgia Code provides that a "party" is "entitled to representation by legal counsel at all stages of any proceedings alleging . . . deprivation."[62] A "party" has the right to appointed counsel if he or she is indigent.[63] It is not clear, however,

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57. Georgia Performance Standards for Juvenile Defense Representation in Indigent Delinquency and Unruly Cases, Performance Standard 1, http://www.gpdsc.com/cpdsystem-standards-juvenile_cases.pdf (last visited Mar. 15, 2007) [hereinafter Georgia Performance Standards] (adopted Dec. 10, 2004, ratified by the 2006 General Assembly, signed by the Governor on May 5, 2006).

58. *Id.*

59. *See generally* Georgia Performance Standard 2.2 (a) to (t).

60. *See* Georgia Public Defender Standards Council—Training Schedule, http://training.gpdsc.com/schedule.php (last visited Mar. 15, 2007). In 2006, training for attorneys representing children comprised three of twelve trainings either sponsored or co-sponsored by GPDSC, including one training for attorneys in deprivation matters. *Id.*

61. The Georgia caseload standards limit counsel from handling more than 150 felonies, 300 misdemeanors, 250 juvenile delinquency cases, or 25 appeals per year. These limits are not aggregated, and attorneys carrying a mixed caseload must adjust for the differences in case weighting. Georgia Public Defender Standards Council, Standards For Limiting Case Loads and Determining the Size of Legal Staff in Circuit Public Defender Offices, http://www.gpdsc.com/cpdsystem-standards-limiting_caseloads.htm; http://www.gpdsc.org/cpdsystem-standards-limiting_caseloads_ammend.htm (last visited Mar. 15, 2007).

62. O.C.G.A. § 15-11-6(b) (2005).

63. *Id.*

whether a child is even a "party" to all deprivation matters. The language of the statute seems to contemplate situations in which the child is not a party ("[c]ounsel must be provided for a child not represented by the child's parent, guardian, or custodian"),[64] and in practice, whether or not a child is a "party" may depend on how the case is styled.[65]

As described in *A Child's Right to Legal Representation in Georgia Abuse and Neglect Proceedings*,[66] the potential for varying interpretations of this statute should make no difference because of how a Georgia Attorney General's Report construes "conflicting interests" between a child and a parent ("[D]eprivation proceedings arising from child abuse and neglect by a parent or caretaker do present a conflict of interest. . . .").[67] That article concluded that "the interests of children and their parents necessarily conflict, [and] it no longer matters if children qualify as parties. Their interests by definition conflict with those of their parents and thus they are entitled to counsel at all deprivation proceedings under § 15-11-6(b)."[68]

The truth is, however, that it does matter. Without a clear message about whether children are entitled to counsel in deprivation actions beyond terminations of parental rights matters, Georgia juvenile courts will continue to act inconsistently and deny counsel—finding that a *guardian ad litem* sufficiently represents a child's interests—when counsel is needed.

Unlike in general deprivation matters, children clearly have the right to counsel in "any proceeding for terminating parental rights or any rehearing or appeal thereon."[69] The lack of equivocation in this statute—missing in the other statutes related to counsel for children—clearly helps preempt confusion or frustration of the right. But this code section raises problems other than ones of clarity; it raises one of inherent conflict. Though disfavor of this practice is gathering among

64. *Id.*

65. *Id.*; *see also* Beth Locker & Melissa Dorris, *A Child's Right to Legal Representation in Georgia Abuse and Neglect Proceedings*, 10 GA. ST. B.J. 12 (2004), *available at* http://www.gabar.org/public/pdf/GBJ/aug04.pdf (last visited Mar. 15, 2007) ("Unfortunately, a definition of 'party' for purposes of this section is not statutorily provided in the code. Nor is there any case law addressing whether a child is to be considered a party in a deprivation hearing in Georgia."). *Id.* at 14.

66. Locker & Dorris, *supra* note 65, at 12.

67. *Id.* at 14-16 (quoting 76 Op. Atty Gen. Ga. 236 (1976)).

68. *Id.* at 16.

69. O.C.G.A. § 15-11-98(a) (2005).

juvenile rights activists, experts, and practitioners,[70] Georgia law allows an attorney (if one is available and involved in the proceedings) to serve both functions of *guardian ad litem* and child attorney:

> In any proceeding for terminating parental rights or any rehearing or appeal thereon, the court shall appoint an attorney to represent the child as the child's counsel and may appoint a separate guardian *ad litem* or a guardian *ad litem* who may be the same person as the child's counsel.[71]

Juvenile courts across the nation appoint *guardians ad litem* ("GALs") to represent a child's "best interests" in pending deprivation or other family law cases.[72] A child's attorney, on the other hand, should only advocate for the child's expressed wishes.[73] Though having an attorney/GAL is in some ways preferable to having no counsel at all, this practice raises serious conflict of interest concerns.

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70. *See Proceedings of the Conference on Ethical Issues in the Legal Representation of Children: Recommendations of the Conference*, 64 FORDHAM L. REV. 1301, 1301 (1996).

> A lawyer appointed or retained to serve a child in a legal proceeding should serve as the child's lawyer.
>
> The lawyer should assume the obligations of a lawyer, regardless of how the lawyer's role is labelled [sic], be it as guardian ad litem, attorney ad litem, law guardian, or other. The lawyer should not serve as the child's guardian ad litem or in another role insofar as the role includes responsibilities inconsistent with those of a lawyer for the child.
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> The role of the child's lawyer will vary, however, depending on whether the child has capacity to direct the representation. The lawyer for a child who is not impaired (i.e., who has capacity to direct the representation) must allow the child to set the goals of the representation as would an adult client.

Id.; *see also* Hollis R. Peterson, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1096 n.82 (2006) ("The definition of the precise roles of the attorney and the guardian ad litem of children is still evolving and not without difficulty." (quoting S.S. v. D.M., 597 A.2d 870, 877 (D.C. 1991))); Peterson, *supra*, at 1096 n.82 ("A dichotomy exists between the attorney as guardian and the attorney as advocate, and the lines become very easily blurred." (quoting Leary v. Leary, 627 A.2d 30, 37 (Md. Ct. Spec. App. 1993))).

71. O.C.G.A. § 15-11-98(a).

72. Georgia Performance Standard 3.2; *see also* O.C.G.A. § 15-11-9. *Guardians ad litem*, or GALs, are not typically appointed in delinquency cases unless an issue of the child's competency arises. *See* O.C.G.A. § 15-11-9.

73. GA. RULES OF PROF'L CONDUCT R. 1.7 & cmts. 1-4, 6 (2000) (duty of loyalty and lawyer's interests). The GPDSC performance standards (albeit tailored to juvenile defense attorneys) explain further, "[c]ounsel's principal duty is to zealously advocate the client's expressed interests rather than for counsel's opinion as to what is in the client's best interests." Georgia Performance Standards 3.1-3.2.

For example, while a GAL might suggest that residential mental health treatment is in a child's best interests, if the child wishes to avoid a restrictive placement, the lawyer is ethically bound to zealously advocate that outcome. A *guardian ad litem* may recommend the termination of a child's parental rights, despite the fact that a child wishes reunification; if a child's perceived "best interests" and expressed interests conflict, the attorney is bound to act on his client's behalf. Further, a conversation with a GAL might not be privileged as attorney-client communications would be.[74] There are currently no guidelines or requirements for serving as a *guardian ad litem* (nonattorneys may also serve in this general role as a court-appointed special advocate, or CASA), though some counties require extensive training as a prerequisite to participation.[75]

The Report of a well-known children's rights symposium at Fordham Law School offered helpful recommendations on this subject:

> B. Recommendations for Practice Guidelines:
>
> 1. When it is uncertain whether a lawyer has been appointed to represent a child as the child's lawyer, to serve as the child's guardian ad litem, to serve in a dual lawyer/guardian ad litem role, or to serve the child in some other role, the lawyer should elect to represent the child as a lawyer. Similarly, when the lawyer is appointed to serve in a role other than as lawyer, but it is unclear or unspecified what obligations and responsibilities that role entails, the lawyer should assume the obligations and responsibilities of a child's lawyer.
>
> 2. A lawyer should not serve as both a child's lawyer and guardian ad litem. When a lawyer has been appointed to serve in both roles, the lawyer should elect to represent the child as a lawyer and not to serve as guardian ad litem. If that is not permissible, the lawyer should elect to decline the appointment where feasible.[76]

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74. Georgia Performance Standard 3 Commentary.

75. Atlanta Volunteer Lawyers Foundation Guardian ad Litem Program, http://www.avlf.org/guardian.html (last visited Mar. 15, 2007).

76. *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children*, *supra* note 70, at 1302. The Recommendations also urged changes in the law:

> A. Recommendations for Changes in the Law:
>
> 1. Laws currently authorizing the appointment of a lawyer to serve in a legal proceeding as a child's guardian ad litem should be amended to authorize instead the appointment of a lawyer to represent the child in the proceeding.
>
> 2. Laws that require lawyers serving on behalf of children to assume responsibilities inconsistent with those of a lawyer for the child as the client should be eliminated.

Id. at 1301-02.

The GPDSC performance standards reflect similar thinking about inherent conflicts between the role of counsel and GAL, though those standards only apply to delinquency cases rather than deprivation cases.[77] There is not yet an official Georgia document that reflects the trend in national thinking that a child should have an attorney in every delinquency or deprivation case and that someone who merely advocates for a child's perceived "best interests" does not adequately fill that need.

Put differently, children's rights advocates are in favor of additional parties who will advocate for a child before a juvenile court, but these parties should never be substitutes for counsel generally or for counsel who advocates for a child's expressed interests. The importance of counsel in deprivation actions, of course, is that "[c]hildren's voices are not being heard at the time when the future of their families is being determined. . . . Children need zealous and effective legal advocacy if the child welfare system is to succeed at protecting children."[78]

System-wide, courts and counsel fail to fully recognize children as clients entitled to zealous counsel and as parties who stand to lose the most in the encounter with the court. This is not to suggest that all juvenile defenders are ineffective or that no juvenile court judges recognize the importance of the right to counsel. Many juvenile defenders—whether public defenders or in private practice—are extremely well-respected and work well with their counties' juvenile court judges. However, zealous and competent counsel may be the central feature of the adversarial system's check on judicial and prosecutorial power;[79] therefore, it should not be the status quo's exception or even an aspiration for the distant future. There is an unacceptably wide gap between present realities and the minimum features of a system that protects children's interests and rights. Committed, competent counsel is the first step of bringing about change.

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77. Georgia Performance Standard 3 Commentary; *see also* Georgia Performance Standard 3.2.

78. *See* Locker & Dorris, *supra* note 65, at 17.

79. *Cronic*, 466 U.S. at 655.

> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It is meant to assure fairness in the adversary criminal process.

Id.

B. Accountability Through Open Courtrooms

1. Confidentiality Generally

Since early in the history of Georgia's Children's Courts, all proceedings have been presumptively private.[80] Currently, the general public "shall be excluded from hearings involving delinquency, deprivation, or unruliness."[81] Georgia law provides, "Only the parties, their counsel, witnesses, persons accompanying a party for his or her assistance, and any other persons as the court finds have a proper interest in the proceeding or in the work of the court may be admitted by the court."[82] The juvenile court is even permitted to exclude the child from proceedings, but it may not do so "while allegations of his or her delinquency or unruly conduct are being heard."[83] Though there are some exceptions to this general rule,[84] privacy remains the presumption in order to prevent children from having to endure undue embarrassment or publicity surrounding private matters, or to protect children from long term repercussions of past behaviors. Given the severity of the possible range of dispositions in juvenile court—from time confined in a Regional Youth Detention Center, to losing contact with one or more parents, to losing contact with one or more siblings, to time confined in a secure residential treatment center, to legal vulnerability on probation—concern for a child's embarrassment, particularly considering the potential advantages of openness, seems disconnected from the reality of children's lives.

Child advocates in Georgia have called for increased media access to juvenile court proceedings and records. As recently as the fall of 2006, an *Atlanta Journal-Constitution* editorial explained that the stated purposes of confidentiality are far outweighed by the benefits of

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80. *See* 1915 Ga. Laws 39.

81. O.C.G.A. § 15-11-78(a) (2005).

82. *Id.*

83. *Id.*

84. There are a number of exceptions to this general rule. The general public "shall be admitted" to adjudicatory hearings involving an allegation or allegations that a child has committed a designated felony (though however, the proceedings "shall" be closed if the allegations involve allegations of sexual assault or if there is evidence of the child's deprivation), or any child support or legitimation hearing. O.C.G.A. § 15-11-78. The court may, in its discretion, open dispositional proceedings. *Id.*

The vast majority of juvenile court hearings, however, are closed to the public and the press; most of the statutory exceptions, by their very nature, involve matters more "adult" than "juvenile." Just as proceedings are closed, records, too, are sealed to the general public and media. O.C.G.A. § 15-11-82(c) (2005).

openness and accountability.[85] Explaining the enormous power that juvenile courts hold over children's lives, the authors explained:

> Georgia's juvenile court hearings are closed to the public and the press, hiding any flaws or failures of the courts and child welfare system behind the shield of confidentiality. Too often, closed juvenile courts do much more to protect the adults running the court than the children whose cases are heard there.[86]

The editorial referenced a proposed bill to open juvenile courtrooms, but reflected that the referendum failed.[87]

Open courtrooms are fundamental to Western aspiration for proceedings that can stand the light of day.[88] In light of the importance of accountability, any decision to close courtrooms should be made carefully and reevaluated in light of evidence of imbalanced power. In *In re Oliver*,[89] the U.S. Supreme Court explained, "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[90] It further quoted Jeremy Bentham's impassioned belief that

> [w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.[91]

Moreover, the justification that privacy must be maintained for the "best interests" of children is weakened by the fact that several broad exceptions to general privacy rules redound greatly to a child's detriment. O.C.G.A. section 15-11-82(c) permits certain nonparties to access a child's records. These include law enforcement officers; a court in which the child is later convicted of a criminal offense (if helpful for preparing a pre-sentence report); administrators in prisons or secure facilities where the child is committed; the parole board; or school law enforcement officers.[92] In fact, in designated felony cases, juvenile

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85. *See* Julie Bolen & Alice McQuade, Editorial, *Juvenile Courts' Secrecy Harmful*, ATLANTA J. CONST., Sept. 18, 2006, at 15A.

86. *Id.*

87. *Id.*

88. *See* Waller v. Georgia, 467 U.S. 39, 46 (1984).

89. 333 U.S. 257 (1948).

90. *Id.* at 270.

91. *Id.* at 271 (quoting 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

92. O.C.G.A. § 15-11-82(c) (2005).

courts are directed to transmit copies of the record to any school that the child has recently attended or plans to attend.[93]

These exceptions reflect a willingness to put children's privacy interests second to public safety interests. While the institutions or parties referenced in these two statutes surely have an interest in accessing full information from juvenile court records, records from juvenile proceedings can negatively impact a child who was the subject of the hearing. Because access to private records—to a child's personal or legal detriment—is already permitted, there should be less resistance to opening juvenile courtrooms for increased systemic accountability to the ultimate benefit of children.

2. Open Juvenile Courtrooms in Other Jurisdictions

After careful consideration of the issue, a number of other jurisdictions have addressed these issues by opening their juvenile courtrooms. Concerned about the secrecy of juvenile proceedings, the Minnesota Supreme Court Task Force on Foster Care and Adoption explained, "[T]he juvenile protection system lacks accountability because it is a closed system."[94] Recommending a Pilot Project to test the success of public access to juvenile courtrooms, the Task Force wrote:

> Although the purpose of a closed system is to provide a protective rehabilitative environment for both parents and children by shielding them from public scrutiny and stigmatization, a closed system allows abuses to exist uncorrected and lack of funding for children's services to go unnoticed by the public. In effect, the very confidentiality that

93. O.C.G.A. § 15-11-63(h) (2005).

94. MINN. SUP. CT. ADVISORY COMM. ON OPEN HEARINGS IN JUVENILE PROTECTION MATTERS, INTRODUCTION TO THE FINAL REPORT OF NAT'L CENTER FOR STATE COURTS 6 (Aug. 2001) (quoting MINN. SUP. CT. FOSTER CARE AND ADOPTION TASK FORCE, FINAL REPORT 120 (Jan. 1997)). A minority of the Task Force argued strongly against any statewide or national move toward opening juvenile courtrooms:

> Opening child protection proceedings in Juvenile Court to the public and media is not in the best interests of children. We agree with the majority's goal of improving the system and making it more accountable, however the benefits of opening the hearings and court records to the public do not outweigh the risks of emotional harm and embarrassment to the children who are the subjects of these proceedings. The goal of the child protection system is to rehabilitate and reunite families. The majority of these children will continue to be part of their communities long after the case has closed. Exposing their families' dysfunctions to the public will not serve, and may actually deter, this goal.

Id. at 8 (quoting MINN. SUP. CT. FOSTER CARE AND ADOPTION TASK FORCE, FINAL REPORT App. D).

> was meant to protect children ends up harming them by keeping abuses in the system and the effects of lack of funding a secret.[95]

After the completion of that pilot project, the National Center for State Courts ("NCSC"), in conjunction with the Minnesota Supreme Court Advisory Committee on Open Hearings in Juvenile Protection Matters, recommended that states presumptively open juvenile courts for public access.[96] It wrote that "real and potential benefits result from open hearings/records including enhanced professional accountability, increased public and media attention to child protection issues, increased participation by the extended family, foster parents and service providers in child protection proceedings, and openness of judicial proceedings in a free society."[97] Furthermore, though it is the main concern of those who favor continued privacy in juvenile courts, "[d]uring the course of the data collection, the NCSC project team did not encounter any cases where harm to children or parents irrefutably resulted from open hearings/records."[98] Accountability was the central issue in urging juvenile courts to open their proceedings to the community.[99]

These recommendations of the NCSC either directly or indirectly led to a number of states determining to presumptively open juvenile courts to the public and the media. As of October 2006, the following states had presumptively-open juvenile court hearings: Arizona, Arkansas, Colorado, Florida, Iowa, Kansas, Maryland, Michigan, Montana, Nevada, New Mexico, North Carolina, Ohio, and Washington.[100] Some states (including Georgia)[101] that provide for open proceedings for children

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95. *Id.* at 6 (quoting MINN. SUP. CT. FOSTER CARE AND ADOPTION TASK FORCE, FINAL REPORT 120).

96. FRED L. CHEESMAN, NATIONAL CENTER FOR STATE COURTS, KEY FINDINGS FROM THE EVALUATION OF OPEN HEARINGS AND COURT RECORDS IN JUVENILE PROTECTION MATTERS 32 (Aug. 2001).

97. *Id.* at viii.

98. *Id.* at 32.

99. *See id.* at 25-26.

100. Kristen Henning, *Eroding Confidentiality In Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 537 n.89 (2004) (citing ARIZ. JUV. CT. R. 19(B); ARK. CODE ANN. § 9-27-325(i)(2) (2003); COLO. REV. STAT. § 19-1-106(2) (2003); FLA. STAT. ANN. § 985.205(1) (West 2001); IOWA CODE ANN. § 232.39 (West 2000); KAN. STAT. ANN. § 38-1652(a) (2000) (limiting court's discretion to close proceedings to those juveniles under sixteen years of age); MD. R. JUV. CAUSES § 11-110 (2002); MICH. COMP. LAWS ANN. § 712A.17(7) (West 2002); MONT. CODE ANN. § 41-5-1502(7) (2003); NEV. REV. STAT. § 62.193(1) (2001); N.M. STAT. ANN. § 32A-2-16(B) (LexisNexis Supp. 1999); N.C. GEN. STAT. § 7B-2402 (2000); OHIO REV. CODE ANN. § 2151.35(A)(1) (West Supp. 2003); WASH. REV. CODE ANN. § 13.40.140(6) (West 1993)).

101. O.C.G.A. § 15-11-78 (2005).

over a certain age or for children charged with specifically enumerated offenses are California, Delaware, Hawaii, Idaho, Indiana, Louisiana, Maine, Minnesota, Missouri, North Dakota, Pennsylvania, South Dakota, Texas, Utah, and Virginia.[102] These provisions include rather exceptional circumstances, however, such as when a child is being charged as an adult.

Of course, this issue is not without controversy. Reports subsequent to allowing the public to access juvenile court matters indicate some mixed results about whether openness effected real change.[103] One law review article reported that openness did not increase media presence in or attention to juvenile matters and that hearings remained as brief as they had been before.[104] In contrast, it urged, children were more subject to exposure of private and embarrassing personal pain.[105]

Connecticut, Nebraska, New Hampshire, and Oregon all mandate that juvenile proceedings remain closed, without exception, to nonparties.[106] Alabama, Alaska, the District of Columbia, Illinois, Kentucky, Massachusetts, Mississippi, New Jersey, New York, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming have presumptively-closed juvenile hearings.[107] Those states'

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102. Henning, *supra* note 100, at 537 n.90 (citing CAL. WELF. & INST. CODE § 676(a) (West Supp. 2004); DEL. CODE ANN. tit. 10, § 1063(a) (1999); HAW. REV. STAT. §§ 571- 41(b), -84.6 (Supp. 2001); IDAHO CODE ANN. § 20-525(1) (LexisNexis 1997); IND. CODE ANN. §§ 31-32-6-2, -3 (West 1999); LA. CHILD. CODE ANN. art. 879 (Supp. 2004); ME. REV. STAT. ANN. tit. 15, § 3307(2) (2003); MINN. STAT. ANN. § 260B.163(c) (West 2003); MO. ANN. STAT. § 211.171(6) (West Supp. 2004); N.D. CENT. CODE § 27-20-24(5) (Supp. 2003); 42 PA. CONS. STAT. § 6336(e) (2002); S.D. CODIFIED LAWS § 26-7A-36 (1999); TEX. FAM. CODE ANN. § 54.08 (Vernon 2002); UTAH CODE ANN. § 78-3a-115 (2002); VA. CODE ANN. § 16.1-302(C) (2003)).

103. *See* William Wesley Patton, *Revictimizing Child Abuse Victims: An Empirical Rebuttal To The Open Juvenile Dependency Court Reform*, 38 SUFFOLK U. L. REV. 303, 320 (2005).

104. *Id.* at 321-22.

105. *Id.* at 325-29.

106. Henning, *supra* note 100, at 536 n.88 (citing CONN. GEN. STAT. ANN. § 46b-122 (West 1995); NEB. REV. STAT. § 43-277.01 (1998); N.H. REV. STAT. ANN. § 169-B:34(I)(a) (Supp. 2003); OR. UNIF. TRIAL CT. R. 3.180(2)(c) (2003)).

107. *Id*. at 537 n.91 (citing ALA. CODE § 12-15-65(a) (Supp. 2002); ALASKA STAT. § 47.10.070(a) (2002); D.C. CODE ANN. § 16-2316(e) (LexisNexis 2001); 705 ILL. COMP. STAT. ANN. 405/1-5(6) (West Supp. 2003); KY. REV. STAT. ANN. § 610.070(3) (West 1999); MASS. GEN. LAWS ANN. ch. 119, § 65 (West 2003); MISS. CODE ANN. § 43-21-203(6) (1999); N.J. CT. R. 5:19-2(a)(1)-(a)(2) (2002); N.Y. FAM. CT. ACT § 341.1 (Consol. 1999); OKLA. STAT. tit. 10, § 7303-4.2 (Supp. 1997) (specifying presumptively closed proceedings for first-time offenders, but mandating public proceedings for subsequent adjudications); R.I. GEN. LAWS § 14-1-30 (2002); S.C. CODE ANN. § 20-7-755 (Supp. 2003); TENN. CODE ANN. § 37-1- 124(d) (2001); VT. STAT. ANN. tit. 33, § 5523(c) (2001); W. VA. CODE ANN. § 49-5-2(i) (LexisNexis 2001); WIS. STAT. § 48.299(1)(a) (2001-02); WYO. STAT. ANN. § 14-6-224(b) (2003)).

justifications for maintaining privacy of juvenile courtrooms may be instructive when Georgia revisits its system.

However, because of the accountability issues endemic to Georgia's juvenile court system and the national trend to open juvenile court proceedings, the issue must at least be studied, discussed, vetted, and addressed.[108] Georgia's system is too fraught with problems, and children suffer too many life-altering decisions at the hands of juvenile courts, to flatly maintain that secrecy is in the "best interests" of every child.

C. Accountability Through the Right to a Jury Trial

In Georgia, all juvenile court proceedings are heard "without a jury."[109] The rationale behind this practice is similar to the one behind privacy of juvenile court hearings: that it is "for the benefit of the child to spare it from unfavorable publicity of a public trial before a jury."[110] After all, "[t]he State as *parens patriae* created the juvenile courts for the protection of children."[111]

The United States Supreme Court has not interpreted the due process clause—or other precedent conferring due process protections upon children—to include the right to a jury trial, and, therefore, Georgia has not been required to provide such a right. An early challenge on this issue failed;[112] it was brought just after adult defendants were ensured the right to a jury trial, but not soon enough to entitle that petitioner to the benefits of *Duncan v. Louisiana*.[113] Justices Black and Douglas dissented vigorously, explaining both that the right to a jury trial is "a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world,"[114] and that, if promised to adult defendants in a criminal trial, should be available to children who are alleged to have committed delinquent acts.[115]

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108. In a presentation to the Adoptive and Foster Parent Association of Georgia ("AFPAG") in February 2005, the Barton Clinic of Emory Law School led discussion of the pros and cons of opening juvenile courtrooms. Barton Clinic, Presentation to AFPAG Conference (Feb. 24, 2005). While it made no explicit recommendations, those sorts of open-ended conversations with those affiliated with or affected by the juvenile court system are essential.

109. O.C.G.A. § 15-11-41(a) (2005 & Supp. 2006).

110. Robinson v. State, 227 Ga. 140, 142, 179 S.E.2d 248, 250 (1971).

111. *Id.*

112. DeBacker v. Brainard, 396 U.S. 28, 30 (1969).

113. *Id.*; Duncan v. Louisiana, 391 U.S. 145 (1968) (determining that the right was to be applied prospectively, not retroactively); DeStefano v. Woods, 392 U.S. 631, 633 (1968).

114. *DeBacker*, 396 U.S. at 34 (Douglas & Black, JJ., dissenting).

115. *Id*. at 35.

That argument forms the basis for many strong dissents and policy arguments for widespread change, but has not yet carried the day in the Supreme Court. "Despite all these disappointments, all these failures, and all these shortcomings [described *supra*], we conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."[116]

The Court described the inadequacies of the juvenile court—quoting heavily from the *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime*[117]—and recognizing the Task Force report's "devastating commentary upon the system's failures as a whole."[118] However, even as it acknowledged widespread problems with disastrous impact upon the lives of children,[119] the Court rather ironically determined:

> In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel we would be impeding that experimentation by imposing the jury trial. The States, indeed, must go forward. If, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature. That, however, is the State's privilege and not its obligation.[120]

Again, courts' well-intentioned determination to seek the "best interests of the child" through flexible and informal hearings outweighed the importance of built-in accountability: "There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."[121] Although the Court was loathe to impose the requirement of a jury trial upon states' administration of juvenile justice systems, it failed to recognize that juries provide the kind of accountability which, if put in place, could help remedy the problems described in the *McKeiver* opinion.

The jury system may be imperfect, but it does provide the benefit of sunshine and the promise of the community's conscience to oversee the

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116. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

117. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967).

118. *McKeiver*, 403 U.S. at 544.

119. *Id.* at 544 n.5.

120. *Id.* at 547.

121. *Id.* at 545.

adjudicatory process. In adult criminal cases, for example, "the Constitution mandates a jury to prevent abuses of official power by insuring, where demanded, community participation in imposing serious deprivations of liberty and to provide a hedge against corrupt, biased, or political justice."[122]

Juries provide oversight of the judge as a "guard against judicial bias;"[123] they provide oversight of the parties ("the jury is a buffer to the corrupt or overzealous prosecutor in the criminal law system");[124] and they provide oversight of the outcome when they, rather than a judge, are permitted to serve as the fact-finder. Even if its members are ultimately bound by a confidentiality rule to keep the outcome of the proceedings private, the very presence of community members could elevate the quality of the process. Because of the desirability of this sort of oversight, Janet E. Ainsworth, in *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*,[125] has called the lack of juvenile jury trials the "single most serious procedural infirmity of the juvenile court."[126]

Because Georgia neither provides "general" nor "oversight" access to a jury, all adjudications and dispositions are heard solely by a judge, which means practically that the only people who are guaranteed to know about how the child is treated are the judge, the parties, and their counsel (if the parties are represented). Eleven states, on the other hand, provide children with the right to a jury trial. As of September 2002, those states were Alaska, Massachusetts, Michigan, Montana, New Mexico, Oklahoma, South Dakota, Texas, West Virginia, and Wyoming.[127] The Alaska case that afforded juveniles the right to jury trials explained that the "right to a jury trial in both delinquency and criminal contempt proceedings, even though traditionally denied, should depend not on the name of the proceeding or the nature of the alleged

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122. *McKeiver*, 403 U.S. at 551 (White, J., concurring).

123. *Id.* at 552.

124. *Id.*

125. 36 B.C. L. REV. 927 (1995).

126. *Id.* at 942.

127. ALASKA CONST. art. I, § 11; MASS. GEN. LAWS ch. 119, § 56 (2006); MICH. CT. R. 3.911; MONT. CODE ANN. § 41-5-1607 (2006); MONT. CONST. art. II, § 26; N.M. STAT. ANN. § 32A-2-16 (West 2006); OKLA. STAT. tit. 10, § 7303-4.1 (2006); S.D. CODIFIED LAWS § 15-6-38(a) (2006); TEX. FAM. CODE ANN. § 54.03(c) (Vernon 2006); W. VA. CODE § 49-5-6 (2006); WYO. STAT. ANN. § 14-6-223(c) (2006); R.L.R. v. State, 487 P.2d 27 (Alaska 1971); *In re* Banschbach, 323 P.2d 1112 (Mont. 1958); *see also* SZYMANSKI, *supra* note 26.

offense but upon the possibility of a loss of liberty for a substantial period of time."[128]

Following a similar rationale, eleven other states (Arkansas, Colorado, Connecticut, Idaho, Illinois, Kansas, Minnesota, New Hampshire, Ohio, Rhode Island, and Virginia) afford children the right to request a jury determination, but only as oversight or in unusual circumstances.[129] These special circumstances include situations where children are tried under "extended" jurisdiction prosecution procedures; where children may be sentenced to adult detention centers;[130] in cases involving serious violent offenders; and in matters related to repeat juvenile offenders.[131]

Since *McKeiver*, there has been little debate in Georgia about whether children should be provided with the option of a trial by jury. Any requests for children to have the right to a jury trial have been flatly denied.[132]

Despite Georgia's reluctance to grant children the right to a jury trial, some factors are worthy of consideration. First, juvenile justice has so evolved in the last thirty years that the benefits of flexibility may no longer outweigh the pitfalls. In a dissent from a Louisiana Supreme Court case that upheld the continued denials of children's access to juries, one Justice wrote:

> [O]ur juvenile court system has evolved so drastically in nature that due process requires that juvenile offenders be afforded the right to elect to be tried by a jury. Even without the right to jury trial, all the elements necessary to make the juvenile process into an adversary process have already been injected into the juvenile system.[133]

Further, Justice Brennan's concurrence in *McKeiver* itself laid a foundation for a successful challenge of Georgia's system and others like

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128. *R.L.R.*, 487 P.2d at 32 n.27 (quoting T. Foley, *Juveniles and Their Right to a Jury Trial*, 15 VILL. L. REV. 972, 984 (1970)).

129. SZYMANSKI, *supra* note 26.

130. *Id.* Georgia provides a right to jury trial to children tried as adults. However, these studies differentiate between providing juries to those tried "as adults" and those who are tried as juveniles but who may be subject to sentencing in an adult facility. *Id.*

131. *Id.*

132. *See In re* L.C., 273 Ga. 886, 889, 548 S.E.2d 335, 337 (2001); A.B.W. v. State, 231 Ga. 699, 702, 203 S.E.2d 512, 514 (1974).

133. In the Interest of D.J., 817 So. 2d 26, 38 (La. 2002) (Johnson, J., dissenting); *see also In re* L.C., 273 Ga. at 887, 548 S.E.2d at 336 (a discussion of other changes in the juvenile justice system); *see* ABA JUVENILE JUSTICE CTR. & SOUTHERN CTR. FOR HUMAN RIGHTS, *supra* note 13, at 37-45 (a discussion of the harsh penalties for delinquent acts).

it.[134] Because Georgia does not allow the media to access juvenile proceedings, it does not provide an extra safeguard that Justice Brennan considered essential to his support of the Court's decision in *McKeiver*:

> The availability of trial by jury allows an accused to protect himself against possible oppression by what is in essence an appeal to the community conscience, as embodied in the jury that hears his case. To some extent, however, a similar protection may be obtained when an accused may in essence appeal to the community at large, by focusing public attention upon the facts of his trial, exposing improper judicial behavior to public view, and obtaining, if necessary, executive redress through the medium of public indignation.[135]

Justice Brennan, however, noted an important difference between the Pennsylvania cases consolidated in *McKeiver* and the North Carolina cases addressed in the opinion.[136] While the Pennsylvania cases involved open juvenile courtrooms, the North Carolina system prohibited media access in juvenile courts.[137] That distinction, Justice Brennan wrote, made a constitutional difference; any court without media, community, or jury access was too closed, lacking in accountability, and should not stand.[138]

II. THE APPELLATE STAGE

After trial, the so-called "best interests of the child" continue to impede on Georgia's children's rights and deprive them of many of the protections and benefits that are routinely afforded adults. This inequity can be seen in several different areas. Just looking at the number of appeals in juvenile proceedings compared to the number of appeals from criminal proceedings in superior court and state court demonstrates that children's rights to appeal are not fully being exploited. This dearth of appeals could be attributable to many different factors, including Georgia juvenile courts' practice of entering sentences that have been deemed nonappealable, even though these sentences severely limit the child's freedoms. The length of the sentences and trying to get the court of appeals to reach the case on the merits before it becomes "moot" also may be a contributing factor to the dearth of juvenile appeals.

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134. *See McKeiver*, 403 U.S. at 555 (Brennan, J., concurring in part and dissenting in part).

135. *Id.* at 554-55.

136. *Id.* at 556. Several juvenile appeals raising the issue of the constitutional right to a trial by jury were consolidated in *McKeiver*. *Id.* at 536-38 (plurality opinion).

137. *Id.* at 555-56 (Brennan, J., concurring in part and dissenting in part).

138. *Id.* at 556.

Furthermore, in the rare instances where a child does pursue an appeal, the confidentiality provisions harm him or her. Specifically, children appealing convictions from juvenile court are not guaranteed the same benefit that an adult may receive of having third parties review the record and file amicus briefs when there is an important juvenile law issue that is going to be decided.

A. Accountability through the Appellate Review

In Georgia, a child is entitled to an appeal after he or she has been found to be delinquent and the juvenile court has imposed a sentence at the disposition hearing.[139] Further, because this is a critical stage in the proceedings, children are entitled to counsel on appeal.[140] Adults enjoy these same rights.[141] Even though children are guaranteed the same right to appeal as adults, very few children in Georgia take advantage of this right. In fact, in 2005 approximately 993[142] adults appealed their convictions (including seeking certiorari) or pursued other post-conviction remedies, while only approximately 11[143] children appealed the juvenile courts' findings of delinquency and disposition. Similarly, in 2004 approximately 1089[144] adults appealed their convic-

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139. O.C.G.A. § 15-11-3 (2005).

140. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Douglas v. California, 372 U.S. 353, 357 (1963); Thornton v. Ault, 233 Ga. 172, 173, 210 S.E.2d 683, 684 (1974).

141. *See* GA. CONST. art. VI, § 5, para. 3; GA. CONST. art. VI, § 6, para. 2; GA. CONST. art. VI, § 6, para. 3; O.C.G.A. § 5-6-33 (1995).

142. A LEXIS search in the Georgia Cases database for "name (State) and date (geq (1/1/2005) and leq (12/31/2005)) and not 'without published opinion'" returned 836 cases. After reviewing these 835 cases, it appears that approximately 822 cases were related to criminal charges. A LEXIS search in the Georgia Cases database for "name (state) and date (geq (1/1/2005) and leq (12/31/2005)) and 'without published opinion'" returned 179 cases. After reviewing these 179 cases, it appears that approximately 169 cases were related to criminal charges. These statistics are similar to those from 2004. This search does not necessarily capture all the habeas petitions because those are against the wardens of the various institutions. Because adults do not enjoy a right to counsel in these actions, the authors were not as concerned with these petitions.

143. A LEXIS search in the Georgia Cases database for "delinquency or delinquent and date (geq (1/1/2005) and leq (12/31/2005))" returned 30 cases. After reviewing these 30 cases, it appears that 11 of those cases were delinquency cases in juvenile court.

144. A LEXIS search in the Georgia Cases database for "name (State) and date (geq (1/1/2004) and leq (12/31/2004)) and not 'without published opinion'" returned 903 cases. After reviewing these 903 cases, it appears that approximately 877 cases were related to criminal charges. A LEXIS search in the Georgia Cases database for "name (state) and date (geq (1/1/2004) and leq (12/31/2004)) and 'without published opinion'" returned 220 cases. After reviewing these 220 cases, it appears that approximately 212 cases were related to criminal charges. This search does not necessarily capture all the habeas petitions because those are against the wardens of the various institutions. Because adults

tions (including seeking certiorari) or pursued other post-conviction remedies, while only approximately 11[145] children appealed the juvenile courts' findings of delinquency and disposition. This means that there were over 90 times more appeals from superior court than from juvenile court.

Although the numbers of appeals standing alone seems shocking, this number needs to be compared with the number of cases in superior court and juvenile court for its full significance to be understood. According to the *2005 Annual Report: Georgia Courts*, from July 1, 2004 to June 30, 2005, there were 135,203 dockets filed in criminal cases in superior court; 67,159 serious traffic cases filed and 121,333 misdemeanors filed in state court; and 70,348 children entering the juvenile court system through delinquency filings and 16,478 children entering the juvenile court system for traffic violations.[146] These statistics are similar to those in the *2004 Annual Report: Georgia Courts*, where from July 1, 2003 to June 30, 2004, there were 132,053 dockets filed in criminal cases in superior court; 72,575 serious traffic cases filed and 131,390 misdemeanors filed in state court; and 57,384 children entering the juvenile court system through delinquency filings and 14,596 children entering the juvenile court system for traffic violations.[147]

This means that there were approximately four times more cases filed in superior and state court than in juvenile court. Of course it is impossible to determine exactly how many of those cases ended in convictions, pleas, dismissals, etc., but one must assume that a percentage of the children decided to go to trial (and definitely more than 11 children), just as a percentage of adults decide to proceed to trial.[148]

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do not enjoy a right to counsel in these actions, the authors were not as concerned with these petitions.

145. A LEXIS search in the Georgia Cases database for "delinquency or delinquent and date (geq (1/1/2004) and leq (12/31/2004))" returned 33 cases. After reviewing these 33 cases, it appears that approximately 11 of those cases were delinquency cases in juvenile court.

146. *See* JUDICIAL COUNCIL OF GEORGIA, ADMINISTRATIVE OFFICE OF THE COURTS, 2005 ANNUAL REPORT: GEORGIA COURTS (2005), http://www.georgiacourts.org/aoc/publications/ar2005.pdf (last visited Mar. 15, 2007). Although from this information one cannot determine how many of the defendants from July 1, 2004 to June 30, 2005 exercised their right to appeal (or even if these cases were disposed of), the criminal filings in superior court has hovered around 130,000 since 2000. *See id.*

147. *See* JUDICIAL COUNCIL OF GEORGIA, ADMINISTRATIVE OFFICE OF THE COURTS, 2004 ANNUAL REPORT: GEORGIA COURTS (2004), http://www.georgiacourts.org/aoc/publications/ar2004.pdf (last visited Mar. 15, 2007).

148. From taking these numbers, it appears that approximately 1 out of every 325 individuals exercised their right to appeal from state or superior court (including petitions

Although these numbers do not provide enough information to figure out the exact percentage of adults who appeal their criminal sentences and children who appeal their dispositions, the disparity is significant and apparent. There are several possible explanations for why children are not exploiting their right to appeal: they may not be advised of their right to appeal; judges may try to insulate their dispositions from appellate review; or they may not appeal because of the length of their sentences and problems with mootness. Most likely, the dearth of appeals is a result of a combination of these explanations—each of which results in depriving children of an important right.

1. Children Who Are Not Advised of Their Right to Appeal

Despite a clear statutory right to appeal from a delinquency proceeding,[149] and despite the absolute requirement that one be advised of his or her right to appeal,[150] many attorneys admit that they do not advise their clients of their right to appeal from juvenile court sentences or that they only do the appeal if they think there is an issue. It is not the attorneys' choice, however, to decide whether or not they want to advise children of their right to appeal—it is their duty.[151] Further, although retained attorneys are not required to do an appeal for free, children are entitled to an appeal and are not required to pay for it if they cannot afford it.[152]

While many attorneys that handle juvenile matters are worked hard and paid little, this does not excuse an attorney's failure to advise his or her clients of their right to appeal. When a child is not advised of his or her right to appeal, he or she is denied his or her rights guaranteed by the Sixth and Fourteenth Amendments.[153] Additionally, a child cannot

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for a writ of certiorari) or sought post conviction remedies, while only approximately 1 out of every 7893 children exercised their right to appeal from juvenile court.

149. O.C.G.A. § 15-11-3 (2005).

150. Bell v. Hopper, 237 Ga. 810, 810-11; 229 S.E.2d 658, 659 (1976) (explaining that the Georgia Supreme Court has "held that the failure of *retained* counsel to advise a defendant of his right to appeal amounted to ineffective assistance of counsel"). In this case, "the failure was to *fully* advise the defendant of his rights regarding appeal, i.e., his right, as an indigent to have appointed counsel for his appeal." *Id.* at 811, 229 S.E.2d at 659 (emphasis added). The Georgia Supreme Court held that if, on remand, the court found that the defendant had not been fully apprised of his rights to appeal (including his right to an attorney) by the lower court and if he was indigent and qualified for appointed counsel, then the trial court was directed to grant his motion for an out of time appeal. *Id.*, 229 S.E.2d at 659-60.

151. *See, e.g.*, *Bell*, 237 Ga. at 810-11, 229 S.E.2d at 659; *see In re* Gault, 387 U.S. 1 (1967).

152. *Gideon*, 372 U.S. at 343; *Douglas*, 372 U.S. at 357.

153. *See, e.g.*, *Bell*, 237 Ga. at 810, 229 S.E.2d at 659.

validly waive his or her right to appeal if he or she is not aware of the right that is being waived.[154]

Until children are fully apprised of their right to appeal and of the possible benefits of appealing the findings of the juvenile court, the percentage of appeals from juvenile court will continue to lag behind the percentage of appeals from superior court, and children will be deprived of their Sixth and Fourteenth Amendment rights.

2. "Nonappealable" Sentences

Juvenile courts sometimes try to insulate their rulings by imposing sentences that are nonappealable and justify these sentences because they are in the "best interest of the child." One such example of this sort of sentence is the improper use of abeyances. Abeyance, in its true sense, means "[t]emporary inactivity; suspension."[155] There is a proper use for abeyances in juvenile courts—when the charges are held in abeyance for a period of time and then dismissed if the juvenile does not acquire additional charges.[156] This is similar to the codified pretrial diversion programs in adult courts, which are authorized based on public policy.[157] When the juvenile court holds a sentence in abeyance in this manner, it is proper and, depending on the circumstances, may be in the best interest of the child.

Unfortunately, however, juvenile courts also use abeyances in another manner—they find the child delinquent after a delinquency hearing and then enter an order in which they include the finding of delinquency but

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154. *See* Faretta v. California, 422 U.S. 806, 814 (1974). A criminal defendant who wishes to represent himself or herself on appeal must make an unequivocal, knowing, and intelligent waiver. *Id.* There is no distinction between self-representation at trial or on appeal:

> We recognize that *Clarke v. Zant* involved the trial of the case pro se and that in this instance the choice was to proceed with the appeal pro se. We make no distinction between the two. An indigent defendant is entitled to representation by counsel on appeal as well as at trial.

Cochran v. State, 253 Ga. 10, 11, 315 S.E.2d 653, 654 (1984).

155. BLACK'S LAW DICTIONARY 4 (7th ed. 1999).

156. *See, e.g.,* In the Interest of A.Q.H., 239 Ga. App. 865, 866, 522 S.E.2d 264, 265 (1999) (holding a juvenile's charges in abeyance before an adjudicatory hearing and eventually dismissed "because he had no further charges").

157. O.C.G.A. § 42-8-80 (1997 & Supp. 2006) ("The Department of Corrections shall be authorized to establish and operate pretrial release and diversion programs as rehabilitative measures for persons charged with felonies for which bond is permissible under the law in the courts of this state prior to conviction."); Byrd v. State, 186 Ga. App. 446, 448, 367 S.E.2d 300, 303 (1988) ("The concept of pretrial diversion programs is part of the public policy of the state.").

hold the conviction in abeyance.[158] Pursuant to this so-called abeyance, the court also imposes numerous terms and conditions on the juvenile. If and when the child successfully completes the abeyance, the conviction and charges are dismissed. If the child ever gets into trouble again in the future, however, the judge considers the abeyance in sentencing, and the child is no longer entitled to the benefit of having the charges dismissed after serving a period of probation.[159]

In effect, when juvenile courts enter a finding of delinquency and purportedly hold the charges in abeyance, they are creating first offender probation in juvenile courts. First offender probation is only statutorily available in superior and state courts.[160] In those courts, if a defendant is put on first offender probation, he is given the statutory right to appeal.[161] Because there is no statutory right in juvenile court to first offender probation, there is no statutory right to appeal from this judicially created first offender sentence, and therefore, the juvenile court's decisions may be insulated from review.

Despite this finding of delinquency and these restrictions, Georgia juvenile courts believe that these orders are nonappealable, and the

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158. In the Interest of M.T., 223 Ga. App. 615, 615, 478 S.E.2d 428, 429 (1996). Although the court in *M.T.* orally declared the child delinquent, its written order of abeyance did not include this finding of delinquency, but instead stated that "'after evidence was presented, it is found that it would be in the best interest of said youth that the charges against said youth be held in ABEYANCE . . . .'" *Id.* This means that the final order did not contain a finding of delinquency because "'[w]hat the judge orally declares is no judgment until it has been put in writing and entered as such. . . . Until an order is signed by the judge it is ineffective for any purpose.'" Bradshaw v. State, 163 Ga. App. 819, 820-21, 296 S.E.2d 119, 121 (1982) (quoting Majors v. Lewis, 135 Ga. App. 420, 421, 218 S.E.2d 130, 130 (1975)) (internal citations omitted). Nevertheless, in an unpublished opinion, the Georgia Court of Appeals recently stated that it did not find *M.T.* distinguishable from a case where the order contains a finding of delinquency. Further, if there were numerous terms and conditions imposed in *M.T.*, these terms and conditions would make the sentence similar to first offender probation and, therefore, should be appealable in the same manner adult offenders are able to appeal first offender sentences. Because this matter is unpublished, and because of the confidentiality rules, and out of an abundance of caution, the authors of this article cannot cite to this opinion. This just demonstrates how insulated juvenile court proceedings are from public review.

159. Because there is no statute authorizing the imposition of abeyances, there is also no rule stating that it is only available for first offenders. A juvenile defender who used to practice solely in juvenile court confirmed that it is the practice to only allow abeyances for first offenses.

160. O.C.G.A. § 42-8-60 (1997 & Supp. 2006) (permitting a court to withhold adjudication after a verdict or a plea, until a first offender completes his or her probation); O.C.G.A. § 42-8-64 (1997) ("A defendant sentenced pursuant to this article shall have the right to appeal in the same manner and with the same scope and same effect as if a judgment of conviction had been entered and appealed from.").

161. O.C.G.A. § 42-8-64.

State has made that argument to the court of appeals.[162] This is true even in cases where the order contains specific findings of delinquency and significant restrictions are placed on the children's liberties while under the abeyance.

If the appellate courts continue to allow the juvenile courts to insulate their rulings from review in this manner, children will be prevented from being able to challenge the findings of juvenile courts—even though they have been labeled delinquent, have suffered significant restrictions on their freedom, and have had to endure significant conditions in order to avoid further punishment. As the California Court of Appeals recognized, this is not an abeyance, but rather it is a clear adjudication.[163] Because it is an adjudication, it should be appealable.

Even if the child is able to later have the charges erased from his record, the harm is not lessened. The right to appeal and challenge the findings of the trial court (or jury) is an important right.[164] Georgia has long recognized the importance of appeals and has specifically provided the right to appeal in criminal proceedings[165] and juvenile proceedings.[166] As long as judges are permitted to insulate their rulings from appellate review, children are going to be deprived of this important right, and their rights will continue to be infringed upon.

3. Problems with Mootness

While it is certainly appropriate that children who have committed a delinquent act suffer shorter sentences than adults that commit the same crime because children are less culpable and less capable of

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162. Based on discussions with juvenile attorneys, both in the context of appeals and at conferences, the Authors of this Article are aware that judges are using abeyances as discussed in this section with the belief that their orders are not appealable.

163. Ricky J. v. Superior Court of Sacramento County, 27 Cal. Rptr. 3d 494, 500 (Cal. Ct. App. 2005). The court noted:

> The juvenile court's acceptance of the minor's admission to the charge of petty theft constituted an adjudication of the petition. It was clear error for the court to adjudicate the petition before placing the minor on a program of informal supervision, even though the court purported to hold the admission "in abeyance."

Id.

164. Garrison v. Wilcoxson, 11 Ga. 154, 158 (1852) ("His right to appeal and a hearing before a special Jury, is, under our system, a great and valuable right, and ought not to be discouraged but upon clear grounds."); Veruki v. Savannah Elec. Co., 10 Ga. App. 201, 204, 73 S.E. 41, 42 (1911) ("The right of appeal is an important right.").

165. *See* GA. CONST. art. VI, § 5, para. 3; GA. CONST. art. VI, § 6, para. 2; GA. CONST. art. VI, § 6, para. 3; O.C.G.A. § 5-6-33 (1995).

166. *See* O.C.G.A. § 15-11-3.

understanding the consequences of their actions,[167] with the way that the Georgia appellate process works and how the appellate courts interpret mootness, these short sentences often evade appellate review. That is, by the time a case reaches the Georgia appellate court and has been briefed and considered by the court, the sentence has been served, and the court may refuse to reach the merits of the case because it deems the issues moot.

It is a general rule that once a sentence has been served, any appeal of the sentence is moot.[168] The problem that this general rule raises in Georgia is that it typically takes more than one year for an appeal to be filed and decided (from the date of the sentence), while many juvenile sentences are less than a year.[169] Specifically, it often takes well over a year to file a motion for new trial,[170] obtain a transcript,[171] review the transcript, research the legal issues, file an amended motion for new trial, have a hearing on the motion for new trial, file the notice of appeal,[172] have the case docketed in the appropriate appellate court,

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167. *See Gault*, 387 U.S. at 10, 14-27 (discussing the history of the development of the juvenile system and the justifications for treating children differently, but holding that a child is entitled to certain due process rights).

168. *See, e.g.*, Baker v. State, 240 Ga. 431, 431-32, 241 S.E.2d 187, 188 (1978) ("This appeal is dismissed as moot in view of the fact that the sentence has been served. Although a court may exercise its discretion to decide a criminal case even after the sentence has been served, it is not bound to do so.") (internal citations omitted); Dykes v. State, 272 Ga. App. 203, 203, 612 S.E.2d 53, 53 (2005) ("in an unpublished opinion issued on June 9, 2004, Dykes's appeal was dismissed as moot because his sentence under the guilty plea had been served and, in 1991, his civil and political rights were restored"). In *Gamble v. State,* the Georgia Court of Appeals dismissed an appeal because:

> "[a]lthough a court may exercise its discretion to decide a criminal case even after the sentence has been served . . . it is not bound to do so . . . ." Here . . . , if there are any "adverse collateral consequences" resulting from appellant's misdemeanor conviction, she "has not shown, on this record," their existence . . . . Likewise, any "question raised [in the instant case] is not one which can never be decided because it inevitably becomes moot prior to an appeal. . . ." This is true because appellant was not required to pay the fine so as to avoid the immediate commencement of the 30-day sentence.

181 Ga. App. 871, 871; 354 S.E.2d 174, 175 (1987) (quoting *Baker*, 240 Ga. at 431-32, 241 S.E.2d at 188) (internal citations omitted).

169. *See* O.C.G.A. § 15-11-66 (2005 & Supp. 2006) (juvenile delinquency dispositions often result in sentences that are one year or less and sometimes include as little as community service).

170. O.C.G.A. § 5-5-40 (1995) ("All motions for new trial, except extraordinary cases, shall be made within 30 days of the entry of judgment on the verdict or entry of the judgment where the case was tried without a jury.").

171. O.C.G.A. § 5-6-41 (1995).

172. O.C.G.A. § 5-6-38 (1995) (the notice of appeal must be filed within 30 days after the entry of an appealable decision or "within 30 days after the entry of the order granting,

file the Appellant's Brief,[173] file the Appellee's Brief,[174] and have the appellate court review the briefs and record and issue an opinion.[175]

It is a well-recognized exception to the rule of mootness that sentences that are likely to continue to occur and continue to evade review are reviewable.[176] Georgia's appellate courts, however, have refused to recognize that this exception applies just simply because a sentence may be shorter in length and, therefore, completed by the time the appellate court considers it.[177] Specifically, the appellate courts have recognized that they have the discretion to consider cases after a sentence has been served, but that it is not required to exercise that discretion.[178]

This same reasoning may be used to find many juvenile appeals moot. As discussed above, many juvenile sentences are less than a year.[179] At the same time, however, many are more than a year.[180] Therefore, the shorter sentences may face mootness problems.[181] Because of the longer sentences, however, the appellate courts may not find that

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overruling, or otherwise finally disposing of the motion [for new trial].").

173. GA. CT. APP. R. 23 (appellant's brief due 20 days from the date of docketing); GA. SUP. CT. R. 10 (appellant's brief due 20 days from the date of docketing).

174. GA. CT. APP. R. 23 (appellee's brief due 40 days from the date of docketing or 20 days after appellant's brief has been filed, whichever is later); GA. SUP. CT. R. 10 (appellee's brief due 40 days from the date of docketing or 20 days after appellant's brief has been filed, whichever is later).

175. GA. CONST. art. VI, § 9, para. 2 ("The Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court's docket for hearing or at the next term."); GA. SUP. CT. R. 3 (The Supreme Court has three terms, beginning in January, April, and September).

176. *See, e.g.*, Honing v. Doe, 484 U.S. 305, 318 (1987) (finding that the claims were not "moot if the conduct . . . originally complained of is 'capable of repetition, yet evading review.'" (quoting Murphy v. Hunt, 455 U.S. 478, 482 (1982))). Another exception to the rule of mootness is when a person will continue to suffer collateral consequences. *See, e.g.*, Nix v. State, 233 Ga. 73, 75, 209 S.E.2d 597, 598 (1974) ("It was held that a habeas corpus petition which alleged that the petitioner's conviction was void would not be dismissed as being moot, even though his sentence has been completely served, where the petitioner 'is suffering collateral consequences in the nature of a due process violation.'" (quoting Parris v. State, 232 Ga. 687, 690, 208 S.E.2d 493 (1974))).

177. *See supra* note 168.

178. *Id.*

179. *See* O.C.G.A. § 15-11-66 (2005 & Supp. 2006) (juvenile sentences can include as little as community service).

180. *See id.* (discussing the wide range of punishments, including suspending a child's drivers license until he or she reaches 18 years of age); O.C.G.A. § 15-11-63(e)(1)(B) (2005) (a child adjudicated of a designated felony may be sentenced for up to 60 months).

181. Interview with Amy Stone, *supra* note 43 (during this interview Ms. Stone expressed her belief that juvenile court judges sometimes purposely enter short sentences so that any possible issues with the adjudicatory hearing or the disposition will be moot before any appeal is decided).

juvenile sentences in general will continue to evade review. This will probably lead to the appellate courts refusing to consider numerous juvenile appeals simply because the sentence has been served.

Therefore, because Georgia does not streamline juvenile appeals,[182] as long as the courts refuse to recognize that many of the shorter sentences will continue to evade review, juveniles will continue to be deprived of the right to appeal simply because they have successfully completed their sentence by the time the appellate courts are ready to decide their cases. While it is very important that children are not sentenced to long sentences, it is also important that they receive the benefit of appellate review. Protecting children with appropriate sentences should not mean that children must forfeit their right to appellate review.

B. Confidentiality Provisions on Appeal

In the few delinquency cases that are appealed, children are not afforded some of the same benefits as adults because of the confidentiality provisions in juvenile courts.[183] The requirement that juvenile files be kept confidential and are only open to inspection "upon order of the court" applies equally to appeals.[184] This means that interested attorneys are not able to access the record without the approval of the court.[185] This limited access means that attorneys often are unable to file amicus briefs in juvenile appeals because they are unable to review the record and prepare a brief with the required references to the facts and record.[186]

Although in theory an attorney could petition the court for access to the record when the attorney knows a case that could potentially make important law in practice, the confidentiality provisions often prevent this from happening. As discussed above, proceedings in the juvenile

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182. *See generally* GA. CT. APP. R.

183. Not only do the confidentiality provisions pose the problems discussed below, but they have also posed problems for the Authors of this Article. The Authors are aware of specific instances demonstrating each of the problems discussed in the appeals section, but are unable to cite to these specific instances because the records are confidential, the opinions are unpublished, etc. Following the confidentiality provisions, the Authors have taken great care not to reveal the identity of the children or the charges against the children in any of the unpublished cases referred to herein.

184. O.C.G.A. § 15-11-79 (2005).

185. *Id.*

186. GA. CT. APP. R. 25(c)(3)(i) (each enumeration of errors must have specific record references or else it will not be considered); GA. SUP. CT. R. 19 ("page references to the record . . . and transcript . . . are essential.").

court are shielded from public review.[187] Moreover, when a case is appealed, the record, including the briefs outlining the issues, is shielded from public review.[188] Therefore, an attorney may be unable to find out what issues are pending before the court before the opinion is published in order to determine whether he or she would like to file an amicus brief.

Conversely, in appeals from superior court proceedings, the general public may go to the Georgia Court of Appeals or the Georgia Supreme Court and request to view the record. The attorney may read the briefs, look at the evidence, read the transcript from the proceedings below, and then determine whether he or she desires to file an amicus brief. This means that adults are afforded the benefit of the possibility of having a disinterested (or interested) third party file a brief that supports the defendant's position, while children are not.[189]

Further, even in the rare instances where an attorney is able to find out that a case with an important issue is pending before one of the state's appellate courts, there is no guarantee that he or she will be given access to the record. Even if an attorney requests access to the record, the court is not required to grant the request. In fact, the Authors of this Article are aware of two instances when the Georgia Court of Appeals has denied an interested agency's request for access to the record of a juvenile case on appeal for purposes of filing an amicus brief.

Given the dearth of juvenile appeals, it seems even more important that attorneys be able to file amicus briefs when an important issue relating to juvenile law is before the Georgia's appellate courts.

CONCLUSION

In recent months, human rights activists have drawn our attention to the apparent procedural problems, lack of access to the courts, and lack of accountability attending cases involving allegations of terrorism.[190]

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187. *See supra* Part I.B.

188. O.C.G.A. § 15-11-79.

189. In general, any party may file an amicus brief. *See* GA. CT. APP. R. 26; GA. SUP. CT. R. 23. But, without access to the record, transcript, and arguments of the parties, it is nearly impossible to imagine a circumstance where amicus could file a brief that would benefit the court.

190. *E.g.*, Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909 (2006); Ellen Yaroshefsky, *Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063 (2006); Neil A. Lewis & Mark Mazzetti, *Lawyers Weighing Suits Over C.I.A.'s Secret Jails*, N.Y. TIMES, July 13, 2006, at A20; *They Came for the Chicken Farmer*, N.Y. TIMES, Mar. 8, 2006, at A22.

That system is frightening and constitutionally suspect, but Georgia's juvenile court system is at least as troublesome. Because of the age of these constituents; their innocence of the rules, procedures, and potential penalties; their sheer numbers; and their future beyond the juvenile system, change is imperative.

There is a gathering storm of groups interested in addressing these sorts of problems: the Georgia Supreme Court has recently established a commission to help examine and address issues of juvenile justice in Georgia;[191] the Georgia Public Defender Standards Council has recently instituted a Division of Youth and Family Justice (reviving its temporarily-dispersed Juvenile Division).[192] That Division spearheads the drafting, proposal, acceptance, and legislative endorsement of performance standards for counsel in delinquency cases; provides training to juvenile public defenders; and serves as a general resource to attorneys who represent children.[193] The Office of the Child Advocate oversees complaints and quality of services offered for deprived children and children in DFACS custody. The Atlanta Volunteer Lawyers Foundation, which trains *guardians ad litem* who serve in Fulton County, created its "One Child, One Lawyer Program" in order to respond "to resource challenges facing the juvenile courts and their attorneys, which undermine the courts' ability to properly serve the abused and neglected

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191. In Atlanta on July 5, 2006, the supreme court met pursuant to adjournment and passed the following order:

> In recognition of the need to ameliorate the burgeoning domestic relations caseload in the Georgia court system, to reduce the high rates of family fragmentation in Georgia, and to ensure justice and protection for the children of Georgia, the court hereby creates: The Georgia Supreme Court Commission on Children, Marriage and Family Law[.] . . . The Committee on Justice for Children will work with the Georgia judiciary and other state leaders to establish outcome measures for children within the court system as a means of ensuring that the crucial goals of child safety, permanency, and well-being are met. By studying the proceedings and outcomes of juvenile court cases in this state and others, the Committee will identify specific steps that might be taken by the judicial system to improve results for children in state custody. The Committee will also identify and support specific measures that can be taken by the judicial system to increase the quality of legal representation to all the parties involved in juvenile deprivation and delinquency proceedings. Finally, recognizing the harm that is done to children who remain in the custody of the state indefinitely, the Committee will seek to expedite the appeals process for termination of parental rights matters.

Order of Georgia Supreme Court, July 5, 3006, *available at* www.gasupreme.us/pdf/comm_familylaw.pdf (last visited Mar. 15, 2007).

192. GPDSC, http://www.gpdsc.com/resources-juvenile-main.htm (last visited Mar. 15, 2007).

193. *Id.*

children appearing before them."[194] The program seeks to provide conflict-free counsel to children in deprivation matters.[195] The Juvenile Law Committee of the State Bar's Young Lawyers Division has initiated a "Juvenile Law" project.[196] The newly-formed Georgia Appleseed, a "national, non-partisan, non-profit network of public interest law centers working to build a just society through education, legal advocacy, community activism and policy expertise,"[197] whose Director is a former Fulton County Juvenile Court Judge,[198] will initiate a pro bono project to examine juvenile court practices in the state.[199]

As these and other groups consider study reports and consult lay and expert stakeholders in juvenile justice, it is imperative that they seek to strike a more effective balance between the goal of serving children's "best interests" through flexibility, informality, and providing meaningful accountability within the system. Arguments have been made that

> the benevolent social theory supposedly underlying juvenile court acts justifies dispensing with constitutional safeguards. This theory, based on the assumption that the special features of juvenile court procedure lead to less recidivism than ordinary adult criminal proceedings, has not been supported with empirical evidence, but even if it is true, this theory does not justify deprivation of constitutional rights.[200]

In order to fulfill the promises and visions of *In re Gault*[201] and *In re Winship*,[202] accountability is necessary to ensure that Georgia's children's due process rights are protected.

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194. Atlanta Volunteer Lawyers Foundation—One Child, One Lawyer Program, http://www.avlf.org/onechild-onelawyer.html (last visited Mar. 15, 2007).

195. *Id*.

196. State Bar of Georgia—YLD Committees, http://www.gabar.org/young_lawyers_division/yld_committees/ (last visited Mar. 15, 2007). The listed duties of this committee include "researching, drafting, and editing recommended revisions to Georgia's Juvenile Code." *Id.*

197. Appleseed—Georgia, http://appleseeds.net/servlet/Centers (last visited Mar. 15, 2007).

198. Meredith Hobbs, *On the Record: Former Judge Tackles Legal, Social Issues*, FULTON COUNTY DAILY REP., May 11, 2006, at 1, 8.

199. Appleseed—Georgia, http://georgia.appleseeds.net/servlet/IssueAreas (last visited Mar. 15, 2007).

200. R.L.R. v. State, 487 P.2d 27, 30-31 (Alaska 1971) (footnote omitted).

201. 387 U.S. 1 (1967) (guaranteeing children the right to due process).

202. 397 U.S. 358 (1970) (noting that the due process guarantee includes the requirement that the charges be proven beyond a reasonable doubt).

As Justice Brennan recognized in *McKeiver v. Pennsylvania*,[203] both accountability and flexibility are important in juvenile court proceedings.[204] Further, while he recognized that there is no one right answer, he realized that whatever form a juvenile justice system takes, accountability—so lacking in Georgia's system—is an absolute must.

As the discussions about juvenile justice continue, the groups involved should address the lack of accountability in Georgia's system. Whether the solution entails open proceedings, partially open proceedings, better funding for counsel for children, trial by jury, specialized appellate processes, stricter practice standards, a combination thereof, or solutions yet to be proposed will be determined in the future. But that future should be determined by people and groups dedicated to protecting Georgia's children by making sure that the system set up to deal with them has both the built-in flexibility necessary when dealing with a child and the accountability required to ensure that the child's rights are being protected.

It is also important that the discussions encompass oversight in both delinquency and deprivation proceedings. While Georgia's appellate courts provide theoretical oversight for both deprivation and delinquency proceedings, and the Office of the Child Advocate provides oversight for deprivation matters, many children are not savvy enough to navigate the processes and take advantage of these checks on the juvenile court's power. Discussions about accountability should necessarily address the oversight and how to make it more accessible to all children.

This Article just scratches the surface, exploring a few of the areas where the lack of accountability may harm children. There are likely many more such examples of systemic injustices in Georgia's juvenile justice system, but as the discussions continue, it is important that all involved remember that children need to be protected both by and from the system.

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203. 403 U.S. 528 (1971).

204. *Id.* at 554-55 (Brennan, J., concurring in part and dissenting in part).