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"Decision Rules" and Kids: Clarifying the Vagueness Problems with Status Offense Statutes and School Disciplinary Rules

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I. INTRODUCTION

Because they are dependent and vulnerable, young people[1] have long been the recipients of governmental policies and legal measures aimed at promoting their welfare and protecting them in circumstances of perceived need.[2] Through its *parens patriae* power, the state routinely maintains a paternalistic posture in its interactions with minors in hopes of assisting their development into mature and responsible adulthood.[3] In similar fashion, governmentally employed

1. In relation to other forms of life, human children are unique, especially among the primates, in the extent of their vulnerability and dependence on an extended period of socialization and learning in order to achieve maturity. David Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 20 (1980). Thus, human childhood is a comparatively long period during which young people generally acquire the competencies of adulthood. *Id.*
2. Some argue, however, that the concept of childhood is a relatively recent social invention, noting that medieval children were typically absorbed in the working world of adults at about age seven. For example, see the summary of the work of Phillipe Aries in Bruce Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* B.Y.U. L. REV. 605, 613 (1976). Nevertheless, Hafen questions this view, pointing out that the common law's recognition of a longer childhood with the coming of the Renaissance, the Enlightenment, and the Industrial Revolution actually constituted a rediscovery of traditional notions of childhood found in ancient Greek and Roman cultures. *Id.* at 613–14. For John Stewart Mill, the perception of vulnerability and dependence required the law to protect children "against their own actions as well as against external injury." JOHN STEWART MILL, ON LIBERTY 13–14 (Currin V. Shields ed., Liberal Arts Press 1956) (1859).
3. Through the concept of *parens patriae* (the state as a parent), English courts of equity could declare a child a ward of the Crown when parents or guardians failed to adequately provide for the child's welfare. SAMUEL M. DAVIS, RIGHTS OF JUVENILES 1–2 (2d ed. 1996). The *parens patriae* principle has been extended in recent times to support a host of state mechanisms aimed at protecting children in need. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 335 (2d ed. 1988). *But see* Douglass R. Rendleman, Parens Patriae: *From Chancery to Juvenile Court*, 23 S.C. L. REV. 205, 210–12 (1971) (questioning whether the early Chancery notion of *parens patriae* explains the origin of state intervention for the protection of minors).

   When the protection of children is not adequately provided by private parties charged with their protection, the state intervenes, sometimes by helping parents or guardians to care for the child, sometimes by modifying the custodial situation of the child, and sometimes by imposing penalties for failure to provide the required protection of the child. *See, e.g.*, *In re* Phillip B., 156 Cal. Rptr. 48, 51 (Cal. App. 1979) ("[U]nder the doctrine of *parens patriae*, the state has the right, indeed the duty, to protect children."). Moreover, the *parens patriae* concept provides the philosophical basis for the juvenile justice system, enacted to provide a non-punitive alternative to the criminal law in dealing with youthful offenders. *See, e.g.*, Barry Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 476 (1987); *see also* Kent v. United States, 383 U.S. 541, 554–55 (1966) (indicating that in juvenile courts "the state is *parens patriae* rather than prosecuting attorney and judge").

educators are often loosely deemed to act *in loco parentis* and thus are sometimes thought to assume a quasi-parental relationship with their students.[4] Juveniles are thus the recipients of unique legal attention in a variety of ways. Such attention has, of course, generated a host of judicial controversies.[5]

A particularly troublesome issue concerns the extent to which enacted rules thought to be addressed specifically to young people are unconstitutionally vague. Such rules appear in two separate and distinct contexts: (1) enactments defining status offense jurisdiction of juvenile courts, and (2) measures intended to maintain discipline in schools.[6]

In this Article, I clarify the vagueness problems in the contexts of status offense jurisdiction and school discipline by appealing to the distinction between "conduct rules," which are addressed to the general public, and "decision rules," which are addressed to official decisionmakers. This distinction, as others have argued recently in other contexts,[7] illuminates these particular vagueness problems in the law.

Much of the controversy and confusion in the case law results from courts assuming that status offense statutes and school disciplinary rules operate as conduct rules aimed at notifying young people—potential status offenders and students, respectively—of conduct to be

4. Until recently, some courts literally saw educators as standing *in loco parentis* to their students. Thus the teacher was deemed, like the parent, a private person whose actions toward the student raised no state action and thus no possible constitutional claim. *See, e.g.*, D.R.C. v. State, 646 P.2d 252, 256 (Alaska Ct. App. 1982) (indicating the Fourth Amendment is not implicated when a teacher searches her student at school); Mercer v. State, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970). In *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), the Supreme Court viewed such reasoning as "in tension" with the realities of modern compulsory education laws and earlier Supreme Court cases granting students certain constitutional rights in the school setting. *Id.* at 336. Thus for the Court it was "difficult to understand why [educators] should be deemed to be exercising parental rather than public authority when conducting searches of their students." *Id*. The Court went on to hold that when conducting searches and other disciplinary functions school officials act as "representatives of the State, not merely as surrogates for the parents," and thus they "cannot claim the parents' immunity from the strictures of the Fourth Amendment." *Id.* at 336–37.

While such language would seem to totally reject the *in loco parentis* doctrine, the Court in a later case seemed to give at least limited approval to the doctrine. "[W]e have acknowledged that for many purposes 'school authorities [a]ct *in loco parentis.*'" Veronia Sch. Dist. 477 v. Acton, 515 U.S. 646, 655 (1995) (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684 (1986)); *see infra* Part V.

5. *See generally* MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW (3d ed. 2009).

6. *See* discussion *infra* Parts III, IV.

7. Several commentators have focused on the conduct rule/decision rule distinction in clarifying problems in the criminal law. *See, e.g.*, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990).

avoided, when, in fact, the rules constitute decision rules aimed at guiding the exercise of discretion of juvenile court functionaries and educational officials. Appreciation of the conduct rule/decision rule distinction will provide the courts with a vital analytical tool in deciding future vagueness claims, as well as afford policymakers guidance in fashioning status offense legislation and school discipline rules.

Part II of the Article discusses the conduct rule/decision rule distinction and its relevance to vagueness problems. Part III discusses relevant status offense cases raising the vagueness issue, rethinks them in terms of the distinction, and offers an assessment of when decision rules alone are constitutionally permissible. Part IV offers a similar case analysis relating the conduct rule/decision rule distinction to the context of vagueness attacks on student disciplinary rules.

II. CONDUCT RULES, DECISION RULES, AND THE DOCTRINE OF VAGUENESS

Professor Meir Dan-Cohen observed that it "is an old but neglected idea" that a distinction can be drawn in the law between rules addressed to the general public, "conduct rules," and rules addressed to officials, "decision rules."[8] The distinction was recognized in Talmudic law[9] and reintroduced in modern times by Bentham.[10] While Bentham, Dan-Cohen, and others[11] have employed the distinction to illuminate problems in the criminal law, it is also useful in clarifying a variety of problems elsewhere,[12] particularly claims of vagueness regarding status offense statutes and school disciplinary rules. As I will show, decision rules are often by their nature purposely and permissibly vague. Conduct rules, by contrast, constitutionally require, at least in the criminal context, greater clarity and certainty.

A. Explaining the Distinction

Scholarly discussion of the conduct rule/decision rule distinction often focuses on the relationship between rules defining criminal offenses and those prescribing punishment for those offenses.[13] The for-

8. Dan-Cohen, *supra* note 7, at 625.
9. *See, e.g.*, DAVID DAUBE, FORMS OF ROMAN LEGISLATION 24 (1956), *cited in* Dan-Cohen, *supra* note 7, at 626 n.1.
10. Dan-Cohen, *supra* note 7, at 626; *see infra* note 13.
11. *See, e.g.*, Robinson, *supra* note 7.
12. *See*, *e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 14–63 (1987) (discussing issues in contracts, torts, property, and welfare rights law in terms of the distinction between "rules" and "standards," which is in many ways analogous to the conduct rule/decision rule distinction).
13. The classic statement comes from Bentham:

> A law confining itself to the creation of an offence, and a law commanding a punishment to be administered in case of the commission of such an offence, are two distinct laws; not parts (as they seem to have been

mer operate to communicate to the public what they can, must, and must not do under threat of criminal sanction. Indeed, conduct rules are constitutionally necessary preconditions for the imposition of punishment.[14] On the other hand, decision rules function as the means for adjudicating whether offenses have occurred and, if so, administering legal consequences.[15] The two kinds of rules have different doctrinal foundations. Conduct rules provide notice to the public of activity subject to sanction; decision rules guide decisionmakers such as police, prosecutors, juries, and judges in assessing the blameworthiness of, and imposing sanctions against, conduct rule violators.[16]

By their nature, conduct rules, whether in the criminal context or elsewhere, should be understandable to the general community and provide sufficient clarity to provide notice of the scope of the law so

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> generally accounted hitherto) of one and the same law. The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, *Let no man steal*; and, *Let the judge cause whoever is convicted of stealing to be hanged.*

JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (W. Harrison ed., 1948), *quoted in* Dan-Cohen, *supra* note 7, at 626.

While Bentham observes that rules defining offenses (conduct rules) and those directing judges to administer punishment (decision rules) are distinct, the two kinds of rules are closely related. He noted that

> though a simply imperative law, and the punitory law attached to it, are so far distinct laws, that the former contains nothing of the latter, and the latter, in its direct tenor, contains nothing of the former; yet by *implication*, and that a necessary one, the punitory does involve and include the import of the simply imperative law to which it is appended. To say to the judge, *Cause to be hanged whoever in due form of law is convicted of stealing*, is, though not a direct, yet as intelligible a way of intimating to men in general that they must not steal, as to say to them directly, *Do not steal*: and one sees, how much more likely to be efficacious.

Id.

For a discussion of a variety of problems in the criminal law in terms of the conduct rule/decision rule distinction, see generally Robinson, *supra* note 7. *See also* KELMAN, *supra* note 12, at 25–32 (utilizing the distinction between "rules" and "standards" in discussing problems in criminal law); George Fletcher, *Rights and Excuses*, 3 CRIM. JUST. ETHICS 17, 19, 23 (1984) (providing that rules defining excuses are not aimed at notifying citizens but are instead meant to govern evaluative decisions of courts).

14. *See* Robinson v. California, 370 U.S. 660, 666–67 (1962) (finding punishment constitutional under the Cruel and Unusual Punishments Clause of the Eighth Amendment only for "acts" and not mere "status" conditions). I have recently argued that the Due Process Clause rather than the Eighth Amendment provides the proper constitutional ground for *Robinson*. *See* Martin R. Gardner, *Rethinking* Robinson v. California *in the Wake of* Jones v. Los Angeles: *Avoiding the "Demise of the Criminal Law" by Attending to "Punishment,"* 98 J. CRIM L. & CRIMINOLOGY 429 (2008).
15. Robinson, *supra* note 7, at 731.
16. *Id.*

that members of the public can avoid committing criminal offenses.[17] Thus it is essential that conduct rules be simple, brief, and grounded in objective criteria in order to avoid unpredictability, vagueness, and ambiguity.[18] The primary rationale of conduct rules is notice.[19]

Decision rules, on the other hand, are addressed to officials empowered and often trained in making judgments. They are routinely broad and open-ended, allowing the decisionmaker to take into account the complex and varied situational factors of a particular case. Such rules embrace subjective criteria inviting individualized discretion and normative assessments.[20] Because decision rules are routinely applied only after thoughtful consideration, there is less need for clarity than with conduct rules.[21] Indeed, given the multiplicity of factors relevant to making wise decisions in any given case, relative vagueness in decision rules is a virtue, in order to properly permit evaluations without the constraints imposed by conduct rules.[22] Instead of providing notice—the primary rationale of conduct rules—decision rules are aimed primarily at defining areas where the exercise of official discretion and protecting against its abuse is appropriate in deciding legal cases.[23]

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17. *See* KELMAN, *supra* note 12, at 14–63; Robinson, *supra* note 7, at 770.
18. Robinson, *supra* note 7, at 758–59.
19. *Id.* at 770. The requirement of clear notice of prohibited conduct is a central aspect of the "Rule of Law" or the "Principle of Legality," a basic tenet of criminal law theory. *See, e.g.*, GEORGE FLETCHER, RETHINKING CRIMINAL LAW 157 (1978) ("The premise underlying objectivist theory is a general proposition about the nature of legal liability, particularly criminal liability. The proposition is that no liability should attach unless . . . the defendant's conduct objectively conforms to criteria specified in advance."); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 25, 28 (2d ed. 1960) ("The principle of legality is in some ways the most fundamental of all the principles . . . [T]he principle means that no conduct may be held criminal unless it is precisely described in a penal law."); HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 80 (1968) ("The principle [of legality] may be essentially sound, and the all-but-universal compliance with it that characterizes the administration of the criminal law in this country . . . may be the loftiest of tributes to the civilized state we have achieved."). *But see* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 205–12 (1985) (identifying the notice requirement in terms of "lawyers notice" rather than the necessity of particular defendants actually having prior notice of conduct rules).
20. Robinson, *supra* note 7, at 732.
21. *Id*. at 759.
22. *Id.* Mark Kelman observes that "all actors in our system are deeply committed to a jurisprudence of informal standards, of highly general policy commands, permitting ad hoc situation-sensitive decisions in particular cases with little precedential value." KELMAN, *supra* note 12, at 15. Paradoxically, at the same time he notes that we also favor constraining decisionmakers' discretion by the use of clear rules. *Id; see also* Dan-Cohen, *supra* note 7, at 639–40 (discussing judicial toleration of the "vague and open-ended quality of the defenses of duress and necessity").
23. Robinson, *supra* note 7, at 770; Dan-Cohen, *supra* note 7, at 650.

As illustrated above, conduct rules and decision rules sometimes co-exist in a given legal context.[24] However, any given rule may be a conduct rule, a decision rule, or both.[25] Therefore, decision rules will sometimes be the sole basis for resolving a legal controversy as, for example, in situations where legal functionaries are empowered to make decisions "in the best interests" of a child when deciding child custody disputes.[26]

As will be shown throughout this Article, the conduct rule/decision rule distinction provides a useful analytical tool in deciding questions of unconstitutional vagueness of legal rules, particularly those concerning status offense jurisdiction and school discipline regulation. Before illustrating this usefulness, however, attention must be directed to the void for vagueness doctrine itself.

B. The Void for Vagueness Doctrine

Courts have traditionally refused to enforce rules deemed too uncertain to be applied,[27] particularly rules invoking the criminal sanction.[28] Although a variety of early doctrinal grounds were employed

24. *See supra* notes 13–16 and accompanying text.

25. Dan-Cohen, *supra* note 7, at 631.

26. JOHN DE WITT GREGORY et al., UNDERSTANDING FAMILY LAW 371 (2d ed. 1995).

27. *See generally*, Ralph W. Aigler, *Legislation in Vague or General Terms,* 21 MICH. L. REV. 831 (1928).

28. *See infra* notes 32–33 and accompanying text. The cases of unconstitutional vagueness routinely are criminal in nature. *See, e.g.*, Winters v. New York, 333 U.S. 507 (1948) (declaring statute imposing criminal penalties for prohibiting distribution of magazines depicting deeds of "bloodshed or lust" so "massed as to become vehicles for inciting violent and depraved crimes" void); Lanzetta v. New Jersey, 306 U.S. 451 (1939) (declaring void a statute making it a crime to be a "gangster"); Connally v. Gen. Constr. Co., 269 U.S. 385 (1926) (declaring void a statute imposing requirement to pay "not less than current rate of per diem wages in the locality" on penalty of fine or imprisonment); *see also infra* notes 46–60 and accompanying text.

The Court on occasion has considered vagueness cases outside the criminal law. *See, e.g.*, Keyishian v. Bd. of Regents of N.Y., 385 U.S. 589 (1967) (upholding on vagueness and overbreadth grounds a challenge by faculty members to a state statute requiring them to sign, on penalty of dismissal, a statement that they were not Communists nor engaged in "seditious" activities). *Keyishian* also raised issues of statutory overbreadth in chilling First Amendment rights of Free Speech. Separate from due process vagueness, *see infra* note 30 and accompanying text, the overbreadth doctrine is peculiar to the First Amendment. NORMAN REDLICH et al., UNDERSTANDING CONSTITUTIONAL LAW 371 (2d ed. 1999). One commentator has observed that "[o]utside of the criminal and First Amendment contexts, courts virtually never find a statute to be unconstitutionally vague." Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1309–10 (2000); *see infra* note 36 and accompanying text.

for such refusal,[29] the Supreme Court presently has settled on the due process clauses of the Fifth and Fourteenth Amendments as the foundation for the void for vagueness doctrine.[30] The constitutional concern centers on whether the "words and phrases [of a statute or regulation] are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law."[31]

A fundamental objection to vague rules is that they fail to notify persons potentially subject to their sanction. Where the sanction is punitive, the ancient maxim *"nullum crimen sine lege, nulla poena sine lege"*[32] has long embodied a fair warning requirement as a precondition for punishment.[33] Thus statutes are unconstitutional if "men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application."[34] While the vagueness doctrine nominally applies to civil cases,[35] it is almost always raised in attacks on criminal statutes, since the threat of punishment has traditionally triggered a vagueness inquiry.[36]

The Court's reference "to men of common intelligence" might suggest that the fair warning inquiry is addressed to whether a particular defendant in a particular case was adequately warned. It is settled, however, that the proper inquiry is addressed to whether a hypothetical ordinary person familiar with the statute and its official interpretations would have fair warning.[37] Such a view has led some to conclude that all that is required is a form of "lawyers notice,"[38] the

29. Early cases struck down vague statutes on separation of powers grounds (Congress in enacting ambiguous statutes could not pass on its law-making job to the judiciary) and Sixth Amendment grounds (accused persons have right to be informed of the "nature and cause of the accusation"). WAYNE E. LA FAVE, CRIMINAL LAW 103 (4th ed. 2003). For an examination of the historical origins of the vagueness doctrine, see Bell, *supra* note 28, at 1285 n.123.

30. LA FAVE, *supra* note 29, at 103.

31. Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 243 (1932).

32. The maxim is roughly translated as "no crime without law nor punishment without law." PAUL H. ROBINSON, CRIMINAL LAW 74 (1997); *see supra* note 19.

33. *See supra* note 19.

34. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

35. *See supra* note 28.

36. *See* Jeffrey I. Tilden, Note, *Big Mama Rag: An Inquiry Into Vagueness*, 67 VA. L. REV. 1543, 1553–56 (1981). The Supreme Court has specifically demanded a higher degree of certainty where punishment is imposed for a rule violation. "The standards of certainty in statutes punishing for offenses is [sic] higher than in those depending primarily upon civil sanction for enforcement." Winters v. New York, 333 U.S. 507, 515 (1948).

37. *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347, 355 n.5 (1964) ("The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants."); *see also* Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 4–5 (1997).

38. Jeffries, *supra* note 19, at 211.

kind of notice an ordinary person would receive if he sought a legal opinion of a statute's meaning in deciding whether the statute applied to him.[39]

In addition to the fair warning rationale underlying the vagueness doctrine, vague rules also create two other problems: (1) vague rules potentially encourage arbitrary and discriminatory law enforcement and (2) they risk chilling constitutionally protected activity,[40] particularly free speech interests protected by the First Amendment.[41]

In the context of the conduct rule/decision rule distinction, the fair warning rationale applies exclusively to conduct rules addressed to the public,[42] while the arbitrary/discriminatory enforcement rationale applies exclusively to decision rules.[43] The chilling effect rationale would seem to speak both to conduct rules, protecting the public from being discouraged from engaging in permissible or even desirable activity,[44] and to decision rules, inviting official definitions of protected activity.[45]

These points are illustrated by the Supreme Court's opinion in *City of Chicago v. Morales*,[46] a case invalidating a city ordinance that prohibited loitering by gang members with other persons. Commission of

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39. LA FAVE, *supra* note 29, at 103–05.
40. *See infra* notes 43–54 and accompanying text. *See generally*, Anthony Amsterdam, Note*, The Void-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).
41. *See*, *e.g.*, LA FAVE, *supra* note 29, at 108–09; REDLICH ET AL., *supra* note 28, at 380–81 ("In free speech cases, overbreadth and vagueness challenges are often asserted together even though overbreadth is a First Amendment challenge and vagueness is a Fifth or Fourteenth Amendment due process challenge, not confined to speech cases."); Jeffries, *supra* note 19, at 216–17; Amsterdam, *supra* note 40, at 75–85.
42. Dan-Cohen, *supra* note 7, at 661.
43. *Id.*
44. In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Court struck down on vagueness grounds a statute prohibiting, among other things, "wandering or strolling around from place to place without any lawful purpose or object." *Id.* at 157 n.1. In worrying that the statute might deter normal, everyday conduct, the Court said:

> The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

Id. at 164.
45. In addition to determining the scope of constitutionally protected rights, "courts may also consider the chilling effect on subconstitutional rights in deciding whether ambiguous statutory language is tolerable under the vagueness doctrine." Batey, *supra* note 37, at 18; *see supra* note 44.
46. 527 U.S. 41 (1999).

the offense required that a police officer reasonably believe that at least one of the two or more persons present in a "public place" was a "criminal street gang member"[47] who was "loitering," defined by the ordinance as "remaining in any one place with no apparent purpose."[48] The officer was then required to order "all" the persons to remove themselves "from the area."[49] Failure of any such person to honor the officer's request constituted violation of the ordinance.

A plurality of the Court invalidated the ordinance on vagueness grounds, finding that it provided inadequate notice to citizens, adversely impacted protected liberty interests, and afforded too much discretion to the police, thus inviting arbitrary and discriminatory law enforcement.[50]

The plurality found that the ordinance, which it characterized as a "criminal law that contains no mens rea requirement,"[51] provided insufficient warning, leaving "the public uncertain as to the conduct it prohibits."[52] Citizens standing in a public place with a group of people would have no way of knowing whether or not they had an "apparent purpose."[53] That the ordinance was not violated until the perceived loiterer refused the police officer's dispersal order did not solve the vagueness problems for the plurality because "[i]f the loitering [was] in fact harmless and innocent, the dispersal order itself [would be] an unjustified impairment of liberty."[54] Because an officer could issue the dispersal order only after the "loitering"[55] had already occurred, the order could not "provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law."[56]

Perhaps even more problematic for the *Morales* plurality was the degree of discretion the ordinance granted police to determine whether one remained in any place "with no apparent purpose." The

47. The ordinance defined a "criminal street gang" as "any ongoing organization, association in fact or group of three or more persons . . . having as one or more of its activities the commission of . . . criminal acts." *Id.* at 47 n.2.
48. *Id.*
49. After initial passage of the ordinance, the Chicago Police Department promulgated an internal regulation aimed at structuring the exercise of enforcement discretion. Only certain designated officers trained in gang affairs could arrest and then only in areas of the City identified as having gang problems. *Id.* at 48.
50. *Id.* at 60–63. Protected liberty interests including "the right to move from one place to another according to inclination." *Id.* at 53.
51. *Id.* at 55.
52. *Id.* at 56 (quoting Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966)).
53. *Id.* at 56–57.
54. *Id.* at 58.
55. *Id.*
56. *Id.* at 59.

plurality saw the ordinance as "inherently subjective" because its application depends on whether some "purpose" is "apparent" to the officer on the scene.[57]

The plurality thus saw both the "loitering" and the order to disperse components of the ordinance as conduct rules which failed to sufficiently warn the public. The ordinance also constituted a decision rule, which inadequately limited the discretion of relevant governmental officials. In the eyes of the plurality, the City had enacted an ordinance that "affords too much discretion to the police and too little notice to citizens who wish to use the public streets."[58]

Justice Scalia, in dissent, found no constitutional infirmity with the ordinance. Upon examination, the basis for his disagreement with the plurality can be understood in terms of his interpretation of the conduct rule/decision rule distinction, which differed from that of the plurality.

For Scalia, the part of the ordinance referring to loitering was a decision rule addressed to the police and not to the citizen. "The only part of the ordinance that refers to loitering is the portion that addresses, not the punishable conduct of the defendant, but what the police officer must observe before he can issue an order to disperse."[59] Moreover, the decision rule, "what the police officer must observe," was "carefully defined in terms of what the defendant *appears* to be doing, not in terms of what the defendant is *actually* doing."[60]

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57. *Id.* at 62. The plurality observed, "Presumably an officer would have discretion to treat some purposes—perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening—as too frivolous to be apparent if he suspected a different ulterior motive." Moreover, because the ordinance "applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them," therefore "[f]riends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member." *Id.* at 62–63.

58. *Id.* at 64.

59. *Id.* at 89 (Scalia, J., dissenting).

60. *Id.* Scalia explained:

> The ordinance does not require that the defendant have been loitering (*i.e.*, have been remaining in one place with no purpose), but rather that the police officer have observed him remaining in one place without any *apparent* purpose. Someone who in fact *has* a genuine purpose for remaining where he is (waiting for a friend, for example, or waiting to hold up a bank) *can* be ordered to move on (assuming the other conditions of the ordinance are met), so long as his remaining has no *apparent* purpose. It is likely, to be sure, that the ordinance will come down most heavily upon those who are actually loitering (those who really have no purpose in remaining where they are); but that activity is not a *condition* for issuance of the dispersal order.

Id.

For Scalia, the decision rule "could hardly be clearer." *Id.* at 92. The police must have "probable cause" to believe that one of a group to which the order is to

The only conduct rule entailed in the ordinance was, for Scalia, the prohibition against disobeying the officer's request to disperse.[61] Thus understood, the conduct rule clearly defines the prohibited act and also supplies a mens rea component.[62]

Finally, the fact that the officer's order to disperse may reach a substantial amount of innocent conduct is constitutionally irrelevant, because, for Scalia, the conduct was not constitutionally protected. It was thus up to the citizens of Chicago and not for the Court to decide whether it is worth trading the loss of some innocent conduct for the value of reducing the evils of gang-related activity.[63]

This is not to argue that utilization of the conduct rule/decision rule distinction solves the vagueness problems posed in *Morales*. Rather, the point is simply that sensitivity to the distinction may

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be issued is a "criminal street gang member" substantiated by the officer's "experience and knowledge of the alleged offenders" and supported by "reliable information." *Id.* Moreover, while the "remaining in one place with no apparent purpose" requirement may be somewhat ambiguous "at the margin," it is "clear in most of its applications." *Id.* The provision does not apply to mere "standing" but to "remaining," a term "obviously mean[ing] 'to endure or persist.'" *Id.* at 92–93 (quoting AMERICAN HERITAGE DICTIONARY 1525 (1992)).

61. *Id.* at 89.

62. *Id.* Scalia explained:

> The *only* act of a defendant that is made punishable by the ordinance—or, indeed, that is even mentioned by the ordinance—is his failure to "promptly obey" an order to disperse. The question, then, is whether that *actus reus* must be accompanied by any wrongful intent—and of course it must. As the Court itself describes the requirement, "a person must *disobey* the officer's order." No one thinks a defendant could be successfully prosecuted under the ordinance if he did not hear the order to disperse, or if he suffered a paralysis that rendered his compliance impossible. The willful failure to obey a police order is wrongful intent enough.

Id.

63. *Id.* at 94. The ordinance was enacted to deal with a well-documented gang problem in Chicago. *Id.* at 46 (majority opinion). On the trade-off involved, Scalia observed:

> But in our democratic system, how much harmless conduct to proscribe is not a judgment to be made by the courts. So long as constitutionally guaranteed rights are not affected, and so long as the proscription has a rational basis, *all sorts* of perfectly harmless activity by millions of perfectly innocent people can be forbidden—riding a motorcycle without a safety helmet, for example, starting a campfire in a national forest, or selling a safe and effective drug not yet approved by the Food and Drug Administration. All of these acts are entirely innocent and harmless in themselves, but because of the *risk* of harm that they entail, the freedom to engage in them has been abridged. The citizens of Chicago have decided that depriving themselves of the freedom to "hang out" with a gang member is necessary to eliminate pervasive gang crime and intimidation—and that the elimination of the one is worth the deprivation of the other. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.

Id. at 97–98 (Scalia, J., dissenting).

greatly simplify the analysis[64]—an adroit application of Occam's Razor. If the loitering component is indeed merely a decision rule and not also a conduct rule, the fair warning concern essentially drops out of the case. The order to disperse thus becomes the only conduct component. There is nothing unclear about such an order. Without the corresponding conduct rule, the case is thus reduced to the single issue of the decision rule's vagueness.[65] The rule may, of course, still be vague if it unduly encourages arbitrary or discriminatory enforcement.

Before leaving *Morales*, it is worth noting that many have observed that the Supreme Court's vagueness cases are probably best understood as primarily grounded in limiting the evils of arbitrary and discriminatory law enforcement, particularly against racial minorities, rather than in assuring fair warning and protecting against chilling

64. As Professor Dan-Cohen has observed, "Vagueness . . . must be examined with reference to the relevant audience. We cannot simply inquire whether a statute is vague, but instead we must always ask: vague for whom?" Dan-Cohen, *supra* note 7, at 661.

65. The distinction between conduct rules and decision rules may appear obvious on its face and useful in sorting out issues of alleged unconstitutional vagueness. It is surprising, however, how often judicial failure to appreciate the distinction obfuscates sound analysis in vagueness cases. For example, in *Pennsylvania v. Howe*, 842 A.2d 436 (Pa. Super. Ct. 2004) a defendant convicted of various sexual offenses received an enhanced sentence under a statute imposing such upon "sexual violent predators" suffering from a "personality disorder" or "mental abnormality" in situations where predators are "likely to engage" in future offense. 42 PA. CONS. STAT. ANN. §§ 9792, 9795.1, 9795.4 (2004). The defendant argued that the quoted terms were unconstitutionally vague. *Howe*, 842 A.2d at 443. The terms are clearly aspects of a decision rule similar to the terms "mental illness" and "in the best interests of the individual" identified in *Stamus v. Leonhardt*, 414 F. Supp. 439, 451–52 (S.D. Iowa 1976), as status conditions to be determined by those deciding whether individuals should be civilly committed and not as attempts to advise individuals of conduct triggering involuntary civil commitment. Nevertheless, the *Howe* court saw the language of the sexual predator statute as a conduct rule, and consequently assessed it in terms of whether the language was sufficiently definite "that ordinary people can understand what conduct [the language] prohibit[s]" and whether the language was not so vague that "men of common intelligence must necessarily guess at [its] meaning and differ as to [its] application." 842 A.2d at 444. See also *E.H. v. State*, 443 So. 2d 1083, 1084 (Fla. Dist. Ct. App. 1984), which considered a vagueness attack on a statue that found child neglect "when a parent . . . permits a child to live in an environment when such . . . environment causes the child's . . . mental or emotional health . . . to be in danger of being significantly impaired." FLA. STAT. § 39.01(26) (1981). While the statute could easily be read as a decision rule, the court saw the statute as aimed at notifying parents of "the type of activity they must avoid" to preclude a finding of neglect. The court concluded that the statute provided sufficient notice. *E.H. v. State*, 443 So. 2d at 1084. A later court engaged in the same analysis of the same statute and reached the same conclusion. *See In re* D.M., 616 So. 2d. 1192, 1193 (Fla. Dist. Ct. App. 1993).

the exercise of protected rights.[66] Given the nature of urban street gangs, perhaps the *Morales* Court was particularly sensitive to the possible discriminatory application of the Chicago ordinance against racial minorities.

C. The Virtue of Vague Decision Rules: State Efforts in Promoting the Welfare of Young People

As shown above, vagueness problems with decision rules are concerned with controlling governmental power.[67] Clear rules are a means of fettering discretion. Such rules, however, sometimes limit desirable discretion since the use of nondiscretionary decisionmaking procedures will inevitably lead to results the policymaker did not intend.[68] Specific rules, as opposed to open-ended standards, are often under-inclusive because they may not cover situations or people the rule is intended to address.[69] At the same time, such rules are also often over-inclusive because they cover situations or people that do not pose the harm that the rule was intended to address.[70] These problems are arguably resolved by utilizing vague standards embodied in decision rules that allow the exercise of discretion on a case-by-case basis. This poses a risk, of course, of that discretion being abused. Thus, an ongoing scholarly debate rages regarding the relative merits of specific rules and vague standards.[71]

As noted above, the Supreme Court's vagueness doctrine opinions almost always involve criminal cases.[72] The sensitivity to the need for clear rules in this context led one commentator to see a "hyper privi-

66. *See, e.g.*, Batey, *supra* note 37, at 5–8; Jeffries, *supra* note 19, at 212–18. The Supreme Court has itself recognized as much: "Although the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

67. Dan-Cohen, *supra* note 7, at 661.

68. KELMAN, *supra* note 12, at 15. Professor Kelman explains:

> The point is familiar to anyone who has been through a semester of law school and can even be illustrated to a nonlawyer quite readily. For example, if the purpose of establishing a voting age is to screen out immature or imprudent voters, directing the voting registrar to allow only those older than eighteen to vote will screen out some who are mature and entitle some who are immature, but at the same time it will reduce occasions for the registrar to exercise arbitrary power and discretion.

Id.

69. Bell, *supra* note 28, at 17.

70. *Id.* at 17–18.

71. *Id.* at 18; *see also* KELMAN, *supra* note 12, at 15–63 (weighing "whether to cope with [an] issue by imprecise rule or by imperfectly administrable standard").

72. *See supra* notes 35–36 and accompanying text.

leged status of rules in the criminal area."[73] Open-ended standards are thus most often deemed appropriate in contexts outside the criminal law.

Even those favoring specific rules usually recognize that open-ended standards are sometimes necessary in situations where the law is unable to make exact pronouncements due to the difficulty of framing general rules for all contingencies.[74] State attempts to promote the welfare of children manifest such a situation. Whether through exercise of its *parens patriae* power[75] or through its endeavors to educate young people,[76] the law embraces a variety of open-ended standards—such as "the best interests of the child,"[77] "substantial change of circumstances,"[78] and being an "unfit parent."[79]

Open-ended decision rules are particularly appropriate in situations where courts and other decisionmakers are required to assess status conditions of individuals, characterized by Lon Fuller as a "person-oriented" evaluation of the "whole person viewed as a social being."[80] Such determinations involve no necessary attention to

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73. KELMAN, *supra* note 12, at 26. Given the severity of the punitive sanction, "the costs of vagueness are so high in the criminal area that rules ought generally be preferred" to standards. *Id.* at 31.

74. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176, 1182 (1989).

75. *See supra* note 3 and accompanying text.

76. *See infra* notes 225–77 and accompanying text.

77. Seymour v. Seymour, 433 A.2d 1005, 1007 (Conn. 1980) (noting the legislature acted wisely in embracing the "best interests of the child" standard, thus leaving the delicate and difficult process of fact-finding in family matters to flexible, individualized adjudication of the particular facts of each case without the constraint of objective guidelines, and accordingly finding the standard is not unconstitutionally vague). The court in *In the Matter of Petition for Adoption of J.S.R.*, 374 A.2d 860, 863 (D.C. 1977), noted that the "best interest of the child standard" had become "well engrained" in the law in a variety of contexts. "Given the multitude of varied factual situations which must be embraced by such a standard, it must of necessity contain certain impression and elasticity." *Id.* The court added:

> We think it is plain that the standard "best interest of the child" requires the judge, recognizing human frailty and man's limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives. No more precision appears possible. In this context, no more is constitutionally required.

Id.

78. McLane v. Paul, 189 P.3d 1039, 1041 (Alaska 2008) ("substantial change in circumstances," a necessary condition for modifying a child custody judgment).

79. A HANDBOOK OF FAMILY LAW TERMS 584 (Bryan A. Garner, ed., 2001) (noting that designation as an "unfit parent" is often a basis for disqualifying a parent in child custody determinations); *see* Henry Foster, Jr. & Doris Jonas Freed, *Child Custody*, 39 N.Y.U. L. REV. 423, 427–35 (1964).

80. Lon Fuller, *Interaction Between Law and Its Social Context* 8 (unpublished material, item 3 of unbound class material for Sociology of Law, Summer 1971, University of California, Berkeley), *cited in* Robert H. Mnookin, *Child-Custody*

conduct, are not "act-oriented" determinations,[81] and thus do not involve conduct rules. Moreover, person-oriented assessments often require the decisionmaker to make predictions, such as deciding whether an individual is mentally ill and poses an on-going danger.[82]

Person-oriented decision rules are by their nature ad hoc. Results in earlier cases involving different people have little relevance to a subsequent case requiring individualized evaluations of a particular party.[83] Thus the scope of appellate review of person-oriented decision rules is extremely limited.[84] As a consequence, decisions in such cases are routinely upheld, absent clear abuse of discretion by the decisionmaker or consideration of an inappropriate factor in making that decision.[85]

Person-oriented decision rules apply to young people in a variety of contexts.[86] As will be shown in Part III, understanding the role of such rules essentially solves the vagueness problems that arise in a significant subset of status offense statutes.

D. Summary

Before turning to vagueness problems raised by status offense statutes and school disciplinary rules, it is helpful to summarize the key concepts identified in this section: conduct rules concern only issues of fair warning and are constitutionally required if punishment is to be imposed.[87] As compared to decision rules, conduct rules require greater clarity.[88] Any given rule may be a conduct rule, a decision rule, or both.[89] Sometimes decision rules alone apply in a particular legal context.[90] Decision rules are often purposely vague, a perceived virtue especially in the person-oriented context, and are almost al-

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Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS. 226, 250–51 (1975).

81. Mnookin, *supra* note 80, at 250–51. In making such determinations, as for example in deciding the "best interest of the child" in a custody dispute, the court must evaluate the attitudes, dispositions, capacities and shortcomings of both parents to apply the best-interest standard. Mnookin, *supra* note 80. The inquiry essentially consists of determining what kind of person each parent is, and what the child is like. *Id.* For a view that the "best interests" standard allows unfettered discretion and is thus "unjust," see Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449, 462 (2005).
82. Mnookin, *supra* note 80, at 252; *see also supra* note 63 (summarizing several cases involving rules which contained forward-looking decision elements).
83. Mnookin, *supra* note 80, at 253.
84. *Id.* at 254.
85. *Id.*
86. *See*, *e.g.*, *supra* note 81.
87. *See supra* notes 14, 16, and 42 and accompanying text.
88. *See supra* notes 17–19 and 21 and accompanying text.
89. *See supra* note 25 and accompanying text.
90. *See supra* note 26 and accompanying text.

ways constitutional.[91] The void for vagueness doctrine is aimed at assuring that conduct rules (almost always criminal in nature) provide fair warning[92] and also at assuring that decision rules (again almost always in criminal cases) do not permit arbitrary or discriminatory law enforcement or inhibit the exercise of protected activity.[93] Finally, decision rule concerns have come to take priority over conduct rule concerns in the Supreme Court's vagueness cases.[94]

III. VAGUENESS AND DECISION RULES IN JUVENILE JUSTICE

In order to understand the vagueness doctrine as it relates to status offense statutes, some background of the juvenile court movement is necessary. In particular, appreciation of the distinction between "delinquency" and "status offense" jurisdiction, as well as an understanding of the Supreme Court's juvenile law cases, needs to be kept in mind. The following brief sketch provides such background.

A. The Juvenile Court Movement and Supreme Court Oversight

Until the late nineteenth century, juveniles who committed crimes were dealt with through the same criminal justice system applicable to adult offenders.[95] However, because young people were deemed more malleable and less culpable than their adult counterparts, policymakers became uneasy with subjecting juvenile offenders to the ordinary punitive sanctions imposed by the criminal law.[96] As a result—beginning in 1899 in the Illinois legislature and quickly spreading throughout all the United States and much of Europe—the juvenile court movement was born, promising a treatment-oriented alternative to deal with young people who committed criminal acts, which are now characterized as acts of "delinquency."[97] Juvenile court jurisdiction was not limited to delinquency offenses but also extended to so-called "status offenses," offenses such as truancy and running away from home that are prohibited only for those occupying the "status" of juveniles.[98] Jurisdiction also extended to juveniles who

91. *See supra* notes 21–23, 80–85 and accompanying text.
92. *See supra* text and accompanying notes 36–39.
93. *See supra* text and accompanying notes 36, 40–45.
94. *See supra* text and accompanying note 61–65.
95. GARDNER, *supra* note 5, at 171. Children under the age of fourteen, however, were afforded access to the infancy defense. *Id.* at 172–73.
96. *See, e.g.*, Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 661–64 (1970); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909).
97. DAVIS, *supra* note 3, at 1, 14.
98. *Id.* at 2-13, 2-14.

committed no "offense" at all, but instead manifested undesirable status conditions (hereinafter described as "status condition" jurisdiction), such as being a "wayward child" or one "in need of supervision."[99] Such conditions rendered juveniles subject to juvenile court intervention with its rehabilitative dispositions.[100] Today, juvenile courts continue to exercise jurisdiction over young people in both the delinquency and status offense contexts. As will be discussed, the courts have struggled in adequately addressing vagueness attacks on status condition statutes.

Until the mid-twentieth century, the juvenile courts operated without legal oversight or monitoring.[101] Beginning with the *Kent* case[102] and continuing immediately with *Gault*[103] and its progeny,[104] the Court viewed juvenile court dispositions skeptically, suggesting that those involving confinement in juvenile institutions appeared more punitive than rehabilitative.[105] Specifically, the Court found that due process was required in proceedings "whose object is to determine whether [a juvenile] has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years."[106] Therefore, the Court constitutionalized the delinquency ad-

99. *Id.*

100. *Id.* Juvenile court dispositions available for status offenders characteristically consist of probation with court imposed conditions, but some jurisdictions permit commitment to a juvenile institution. SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM, 481–87 (2d ed. 2009).

101. SAMUEL M. DAVIS et al., CHILDREN IN THE LEGAL SYSTEM 860 (4th ed. 2009).

102. Kent v. United States, 383 U.S. 541 (1966) (requiring right to hearing, access to social recoils, and statement of reasons in proceedings waiving juvenile court jurisdiction to criminal court).

103. *In re* Gault, 387 U.S. 1 (1967) (requiring rights to notice, counsel, confrontation, and the privilege against self-incrimination in delinquency adjudications).

104. Breed v. Jones, 421 U.S. 519 (1975) (holding violation of double jeopardy when juvenile is tried in criminal court after an adjudication for the same offense in juvenile court); *In re* Winship, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt in delinquency adjudications).

105. *See* Martin R. Gardner, *Punishment and Juvenile Justice*, 35 VAND. L. REV. 791, 823–33 (1982). The Court cited with approval the following conclusion of a task force studying juvenile justice: "In theory the juvenile court was to be helpful and rehabilitative rather than punitive. In fact the distinction often disappears . . . ." McKeiver v. Pennsylvania, 403 U.S. 528, 544 n.5 (1971) (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967).

106. *Breed*, 421 U.S. at 529 (holding that juveniles are put in jeopardy for purposes of the Double Jeopardy Clause at delinquency adjudications); *In re Gault*, 387 U.S. at 36 ("A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."). The *Gault* Court found the term "delinquent" has come to involve only slightly less stigma than the term "criminal" applied to adults. *Id.* at 24–25.

judication process,[107] requiring many of the procedural protections of criminal trials theretofore unavailable under the traditional juvenile court philosophy espousing procedural informality.[108]

Although recognizing its punitive aspects, the Court has never judged juvenile justice as systematically non-therapeutic. Indeed, in *McKeiver*[109] the Court denied juveniles the right to jury trials based, in part, on the view that the presence of juries might frustrate the rehabilitative goals of the juvenile system.[110] Thus, juvenile courts continue to be viewed as "civil" alternatives to the criminal justice system, reflecting the state's *parens patriae* power to treat children as wards of the state, not fully responsible for their conduct and capable of being rehabilitated.[111] Accordingly, when punitive or non-rehabilitative dispositions are imposed, due process protections including fair warning requirements are mandated.

B. Punishment v. Rehabilitation

In the *Gault* line of cases—again all concerning the delinquency context and its necessary connection to the criminal law[112]—the Court specifically spoke to the consequences of delinquency adjudications as the determining factor in requiring the due process protections imposed.[113] The Court emphasized that dispositions of adjudicated delinquents permit confinement in juvenile institutions—entailing substantial losses of liberty that inevitably result in stigmatizing the juvenile with the pejorative label "delinquent."[114]

It is not clear whether any of this speaks to the problem of defining when a disposition in a status condition case constitutes punishment, thus triggering fair warning requirements. In the first place, the Court's focus on loss of liberty accompanied by pejorative stigma does not offer a definition of "punishment." After all, persons involuntarily committed to a mental institution for being "mentally ill persons dan-

107. All of the Court's cases dealt with delinquency adjudications. *See supra* notes 101–02; *infra* note 107. It is uncertain whether the Court's pronouncements also apply to status offense adjudications given the fact that confinement in a juvenile institution is sometimes not permitted. *See* DAVIS, *supra* note 100, at 295–96 (noting that many states do not require proof beyond a reasonable doubt in status offense cases); *supra* note 99; *infra* note 117.

108. For discussion of the perceived virtues of informality, see, for example, Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court,* 69 MINN. L. REV. 141, 150–51 (1984); Monrad G. Paulsen, Kent v. United States: *The Constitutional Context of Juvenile Cases,* 1966 SUP. CT. REV. 167, 170–72.

109. 403 U.S. 528 (1971).

110. *Id.* at 541–51.

111. DAVIS, *supra* note 100, at 2–8.

112. *See supra* notes 100–08 and accompanying text.

113. *See supra* notes 103–06 and accompanying text.

114. *Id.*

gerous to themselves or to others"[115] surely experience as severe a loss of liberty as adjudicated delinquents and, with the attendant label of "crazy," likely suffer at least as much stigmatization as that attached to "delinquent." Yet the hospitalized persons are not "punished" as the Court itself recognized by refusing to impose the "beyond a reasonable doubt" standard required in delinquency adjudications[116] to civil commitment proceedings.[117]

Moreover, even if one sees the "loss of liberty and attendant stigma" test as defining "punishment," it may prove irrelevant in status condition cases that lie outside the delinquency context. Being adjudicated a "person in need of supervision," for example, does not carry the stigma of "delinquent" with its necessary connection to the criminal law.[118] Thus, institutional confinement of a juvenile adjudicated under a status condition measure would not in itself constitute punishment given the absence of the "delinquent" stigma.[119]

It is thus helpful to look beyond the Court's juvenile cases to arrive at an adequate definition of punishment as a possible disposition of a juvenile adjudicated under a status condition provision. Because the imposition of the punitive sanction entails a variety of legal consequences, the Supreme Court has addressed a number of cases turning on whether or not punishment was present.[120] The Court has never offered a concise definition of the concept, although in *Mendoza-Martinez*[121] the Court noted several defining characteristics. Punishment involves an "affirmative disability or restraint" applied to "behavior" for the purpose of promoting "the traditional aims" of punishment: "retribution and deterrence."[122] Later, in the *Wolfish* case,[123] the Court added that to be punishment, coercive governmental action must be motivated by punitive purposes, specifically retribution and deterrence.[124] The *Wolfish* Court further specified that particular restrictions, which on their face appear to be punitive, are not in fact

115. O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).
116. *In re* Winship, 397 U.S. 358, 368 (1970).
117. Addington v. Texas, 441 U.S. 418, 428 (1979) (holding the "clear and convincing" standard constitutionally adequate in civil commitment proceedings which are not "punitive" in nature).
118. *See supra* notes 95–99 and accompanying text.
119. Some courts have seen the absence of the stigmatizing label of "delinquency" as itself sufficient to distinguish status offense cases from delinquency cases for purposes of determining whether or not the *Gault* protections apply in status offense adjudications. *See, e.g.*, *In re* Spaulding, 332 A.2d 246 (Md. 1975) (finding that the privilege against self-incrimination requirement of *Gault* in delinquency adjudications is not required in child in need of supervision proceedings).
120. *See* Gardner, *supra* note 103, at 797–98.
121. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).
122. *Id.* at 168–69.
123. Bell v. Wolfish, 441 U.S. 520 (1979).
124. *Id.* at 539.

punitive if reasonable non-punitive governmental objectives support them.[125] Moreover, if a particular restriction appears unduly excessive in light of its articulated non-punitive purpose, it may be assumed that the purpose is, in fact, punitive.[126]

From a rich philosophical literature on the subject, several other defining characteristics of punishment can be added. Punishment entails the purposeful infliction of pain or other unpleasant consequences upon an actual or supposed offender because of his offense against rules imposed and administered by authorized officials.[127] Moreover, because punishment is, by definition, always meted out for an offense, its kind and duration are determined by the severity of the offense.[128] Punishment is thus "determinate."[129]

Unlike punishment, rehabilitative dispositions, while often unpleasant to their recipients, are not imposed to cause suffering for an offense. Rather, they are aimed at helping alleviate undesirable conditions in a manner beneficial to the person.[130] Rehabilitation thus responds, not to action, but to unhealthy status conditions. Moreover, rehabilitative dispositions are subject to revision upon a showing that a different regimen would produce more beneficial results or that a change in the person's condition has eliminated the need for further rehabilitation.[131] Because it is generally unknowable in advance how effective a rehabilitative disposition will be for a particular person or how long it will take to be effective, rehabilitative dispositions are characteristically "indeterminate" in their duration.[132]

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125. The Court observed: "[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition which may on its face appear to be punishment, is instead but an incident of a legitimate non-punitive governmental objective." 441 U.S. at 539 n.20. The Court added that "retribution and deterrence" are not legitimate non-punitive governmental objectives. *Id.*

126. *Id.*

127. H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 4–5 (2d ed. 2008).

128. *See, e.g.*, Richard A. Wasserstrom, *Some Problems with Theories of Punishment, in* JUSTICE AND PUNISHMENT 173, 178–79 (Jerry B. Cederblom & William L. Blizek, eds., 1977). The widespread use of indeterminate sentencing, of course, precludes knowledge of the exact term to be served by an offender at the time he is sentenced for an offense. *See* Alan Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 298–99 (1974). Even under indeterminate sentencing, however, the legislature sets maximum sentences for each given offense, thus "determining" their duration.

129. Wasserstrom, *supra* note 128, at 178–79.

130. *See id.*

131. *Id.*

132. *Id.* The conceptual distinction between punishment and rehabilitation described in the text has been recognized by some courts. For example, in *In re Felder*, 402 N.Y.S.2d 528 (N.Y. Fam. Ct. 1978), the court found minimum mandatory confinements in juvenile institutions for serious offenses committed by juveniles to constitute punishment for purposes of jury trial rights. *Id.* at 536. The court rejected the argument that the dispositions were "rehabilitative" and thus within

C. Status Condition Rules and Vagueness

The Supreme Court has never considered a vagueness attack on a statute defining juvenile court jurisdiction. Given the fact that the overwhelming majority of vagueness cases reaching the Supreme Court have arisen in the criminal law context,[133] it might therefore be assumed that the lower courts would have regularly entertained vagueness claims in delinquency cases given the linkage of such cases to the criminal law.[134] Instead, the courts have struggled in numerous cases with vagueness problems in the status offense area, particularly in the area of status condition rules.[135] Appealing to the *parens*

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the *McKeiver* holding that juvenile court proceedings need not include jury trials. *Id.* at 531. *See supra* notes 107–08 and accompanying text. The *Felder* court saw the fact that the dispositions were linked to the *acts* committed by juveniles and increased in duration depending on the increased seriousness of the acts as clear manifestations of punishment. Such considerations belied a rehabilitative disposition that would have responded to the condition of the offender (not his acts) and imposed an indefinite disposition (not a mandatory minimum term) until such time as he was no longer in need of the state's help.

133. *See supra* notes 92–93 and accompanying text.

134. *See supra* note 97 and accompanying text.

135. *See infra* notes 133–198 and accompanying text. The courts have occasionally dealt with vagueness issues in status offense cases where an offense is entailed in the rule rather than a mere status condition. For example, several cases have assessed the vagueness of "habitual truancy" measures. *See, e.g.*, Sheshan v. Scott, 520 F.2d 825 (7th Cir. 1975) (holding that a claim that the statutory term "habitual truant" was unconstitutionally vague failed to raise a substantial federal question); Stern v. E.B., 287 N.W.2d 462 (N.D. 1980) (finding a statute imposing juvenile court jurisdiction for a child who "was habitually and without justification truant from school" not unconstitutionally vague). Moreover, several courts have addressed vagueness claims regarding juvenile curfew provisions. *See*, *e.g.*, Nunez v. San Diego, 114 F.3d 935 (9th Cir. 1997) (finding unconstitutionally vague a provision forbidding "loitering" by juveniles between the hours of ten o'clock p.m. and daylight); People v. Daniel W., 41 Cal. Rptr. 2d 202 (Cal. Ct. App. 1995) (upholding against vagueness attack a statute proscribing "loitering" by persons under eighteen years upon public streets and public places between the hours of ten p.m. and five a.m.); People v. Frank O., 247 Cal. Rptr. 655 (Cal. Ct. App. 1988) (invalidating as vague a provision proscribing "loitering" in public places by persons under the age of eighteen years between the hours of ten p.m. and sunrise); Ashton v. Brown, 660 A.2d 447 (Md. 1992) (finding unconstitutionally vague a provision prohibiting juveniles from "remain[ing] in or upon any public place or any establishment" during nighttime hours).

An actual act or offense is entailed within both the truancy and curfew contexts—in the former, "going" someplace other than to school, in the latter, "going" into public and staying there after a particular time. Thus, unlike status condition rules, which entail no conduct rule component, *see infra* notes 142–186 and accompanying text, the truancy and curfew statutes contain conduct rule components. In that situation, the courts correctly require fair warning and thus properly appreciate the conduct rule/decision rule distinction. On the other hand, in the context of status condition rules where only a decision rule exists, the courts invariably engage in misguided searches for conduct rules. I therefore limit my critique in this Article to status condition rules.

patriae powers of the state to rehabilitate troubled youth, the courts have almost universally upheld status condition rules,[136] sometimes over strong dissents[137] and despite heavy criticism from commentators.[138]

In my critique of the status condition cases to follow, I will show that they are woefully unconvincing examples of courts engaging in tortured analysis amounting to no more than judicial question-begging[139] or, perhaps even worse, simply drawing conclusions without so much as an attempt at analysis.[140] After reviewing two representa-

136. DAVIS, *supra* note 100, at 28; DONALD T. KRAMER, 2 LEGAL RIGHTS OF CHILDREN 315 (rev. 2d ed. 2005). *But see* Gonzalez v. Mailliard, no. 50424 (N.D. Cal., Feb. 9, 1971), *excerpted in* 5 CLEARINGHOUSE REV. 1, 45 (1971), *vacated and remanded* Mailliard v. Gonzalez, 416 U.S. 918 (1974) (declaring statutory language granting juvenile court jurisdiction over minors "in danger of leading an idle, dissolute, lewd, or immoral life" to be unconstitutionally vague); *see also* Gesicki v. Oswald, 336 F. Supp. 371, 373 (S.D.N.Y. 1971) (finding a statute, which permitted punishment of juveniles found to be "wayward minors" who are "in danger of becoming morally depraved," unconstitutionally vague); *infra* notes 187–92 and accompanying text.

137. *See* discussion of the *S**** S***** and *E.S.G.* cases, *infra* notes 144–65, 172–86 and accompanying text.

138. *See, e.g.*, Al Katz & Lee E. Teitelbaum, *PINS Jurisdiction, The Vagueness Doctrine, and the Rule of Law*, 53 IND. L.J. 1 (1977); Stuart Stiller & Carol Elder, *PINS—A Concept in Need of Supervision,* 12 AM. CRIM. L. REV. 33 (1974); Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745 (1973); Robert G. Rose, Comment, *Juvenile Statutes and Noncriminal Delinquents: Applying the Void-for-Vagueness Doctrine*, 4 SETON HALL L. REV. 184 (1972); Comment, *Statutory Vagueness in Juvenile Law: The Supreme Court and* Mattiello v. Connecticut, 118 U. PA. L. REV. 143 (1969).

139. *See, e.g.*, District of Columbia v. B.J.R., 332 A.2d 58, 61 (D.C. 1975) (citing Patricia A. v. City of New York, 286 N.E.2d 432 (N.Y. 1972)) (upholding "child in need of supervision" provision); *In re* L.N., 263 A.2d 150, 153–54 (1970) (assuming without analysis that a statutory provision allowing jurisdiction over juveniles "engaging in conduct detrimental to health, morals, or general welfare" is not vague because juvenile court systems in general had been upheld by a variety of courts prior to *Gault,* and *Gault* presumably changes nothing regarding the "basic philosophy, idealism, and purposes of juvenile courts"); *Patricia A.*, 286 N.E.2d at 434 (upholding provision allowing juvenile court jurisdiction over "persons in need of supervision" ("PINS") who, inter alia, are "incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of parent" because similarly broad language has been upheld in other cases); *In re* Napier, 532 P.2d 423 (Okla. 1975) (upholding PINS measure merely by citing *Patricia A.*, *E.S.G.*, and *S**** S*****, cases discussed *infra* at notes 144–181 and accompanying text); *see also* discussion of S**** S**** v. Maine, 299 A.2d 560, 561 (Me. 1973) (upholding a Maine statute extending jurisdiction to juveniles "living in circumstances of manifest danger of falling into vice or immorality") *infra* notes 140–164 and accompanying text.

140. *See, e.g.*, United States v. Meyers, 143 F. Supp. 1 (D. Alaska 1956) (concluding with no discussion that a juvenile court measure extending jurisdiction to "any child under the age of eighteen who is in danger of becoming or remaining a person who leads an idle, dissolute, lewd, or immoral life or who is guilty of or takes part in or submits to any immoral act or conduct" is not unconstitutionally

tive cases, I will offer a critique by rethinking the cases in terms of the conduct rule/decision rule distinction, arguing that sensitivity to the distinction provides the basis for a sound analysis that justifies the conclusions reached by the courts. The approach herein is offered in hopes of assisting future courts, for in the words of a leading commentator, "[v]agueness challenges to [status condition] statutes will probably continue to mount."[141]

1. Misguided Searches for Conduct Rules

A review of vagueness attacks on status condition statutes reveals a common and recurring mistake: courts consistently fail to see the statutes in their true character as exclusively person-oriented decision rules[142] and instead search vainly for a conduct component, thus diverting attention from genuine issues and obfuscating effective analysis.[143]

Consider, for example, *S**** S**** v. State*[144] in which the court upheld, against a vagueness attack, a Maine statute extending jurisdiction to juveniles "living in circumstances of manifest danger of falling into vice or immorality." Because no underlying facts were present, the court entertained a facial attack on the statutory language. Noting that juvenile provisions do not punish but are aimed at "salvation" of the child,"[145] the court rejected claims that *Gault* ushered in the demise of *parens patriae*.[146] Offering neither citation to authority nor explanation, the court reasoned that "the statute does not relate to a status,"[147] concluding it would clearly be unconstitutional if it did because "if no standard of conduct is specified at all, legislation is unconstitutionally vague."[148]

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vague); Anonymous v. Anonymous, 504 So. 2d 289 (Ala. Civ. App. 1986) (dismissing "as simply without merit" and with no further comment a vagueness claim against a provision permitting juvenile court jurisdiction over "a child in need of supervision").

141. DAVIS, *supra* note 100, at 28–29.

142. *See supra* notes 80–86 and accompanying text.

143. In addition to the *S**** S***** and *E.S.G.* cases, discussed *infra* at notes 144–186 and accompanying text, see, for example, *B.J.R.*, 332 A.2d at 60 ("children in need of supervision" statute entails a conduct rule); *In re Napier*, 532 P.2d at 425–26 ("children in need of supervision statute entails a conduct rule"); *Patricia A.*, 286 N.E.2d at 433–34 ("persons in need of supervision" statute entails a conduct rule); *In re* Jackson, 497 P.2d 259, 261 (Wash. Ct. App. 1972) (finding that the phrases "beyond the control and power of parents" and being "incorrigible" give "fundamentally fair" notice to the child).

144. 299 A.2d 560 (Me. 1973).

145. *Id.* at 564. The court presented a long history of juvenile justice in Maine. *Id.* at 565–67.

146. *Id.* at 567.

147. *Id.* at 568.

148. *Id.*

Believing a conduct rule necessary to save the statute, the court claimed to find one by interpreting the language "living in circumstances of manifest danger of falling into habits of vice or immorality" to mean that if such "conduct" is continued, there is manifest danger of the juvenile falling into "habits of *criminal* conduct when he becomes an adult," such conduct being considered "vice and immorality."[149] Because the elements of criminal statutes are "clearly described,"[150] the court found that the juvenile statute satisfied fair warning requirements.[151] The court did not explain how giving a clear definition of predicted future events supplies notice of the present conduct serving as the basis for the future prediction. As interpreted, the statute therefore essentially covered juveniles "living in circumstances where there is a manifest risk that they might commit a crime in the future." The court explicitly found that "living" in such circumstances is the proscribed conduct of which the juvenile has clear warning.[152]

Such analysis is obviously tortured. First, the court offered no justification for its substitution of the criminal code for the legislature's "vice or immorality" language. Those terms may include parts of the criminal law but surely extend beyond criminal offenses. Had the legislature intended to limit "vice or immorality" to the criminal code, it surely could have specifically done so. In fact, status offense legislation is characteristically understood to cast a wide net to respond to juveniles whose welfare is jeopardized by non-criminal, but nevertheless undesirable, behavior.[153] More problematic, however, is the court's conclusion that "living" in a manner posing a risk of future criminal consequences is "conduct." "Living" is the only element of the statute speaking to the present, the remainder of the statute focuses on the future possibility of committing criminal acts. "Living" is thus the only possible "conduct" element of the statute—the circumstance requirements being non-conduct "circumstance elements."[154] But "liv-

149. *Id.* at 569 (emphasis added).

150. *Id.*

151. Thus, "men of common intelligence" would understand its meaning. *Id.* at 568 (applying the test announced in *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *see supra* note 34 and accompanying text).

152. 299 A.2d at 578–79.

153. *See*, *e.g.*, E.S.G v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), discussed *infra* notes 172–86 and accompanying text.

154. MODEL PENAL CODE § 1.13(9) (1985) (distinguishing "conduct" and "circumstance" elements). Conduct includes "voluntary" action. *Id.* at § 2.01; *see also* Martin v. State, 17 So. 2d 427, 427 (1944) (finding "that an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer"). However, there is nothing voluntary about "living" (although its opposite, "dying," is sometimes voluntary). Thus "living" is not an act but a status condition.

ing" is not "conduct;" it is the quintessential "state of being."[155] Clearly the court struggled in vain to find a conduct rule where none exists.

A dissenting opinion in *S* **** *S* **** is no more helpful. The dissent found that the statute was aimed at "proscribing active conduct" and not at penalizing a "juvenile's status as such acquired by the pursuit of a certain pattern of living."[156] Thus the statute would be constitutional only if it "provided the definition of the juvenile offense" in terms "intelligible to guide the child" as well as his parents, the police, and the courts.[157] For the dissent, "the youth of this State are entitled to know what conduct will jeopardize their right to live at home and force them into a State institution."[158] Moreover, the "rule of law implies . . . justice in application which cannot exist when legislation provides no reasonable standard to determine prohibited conduct."[159]

Thus, both the *S***** *S***** majority and dissent make the fundamental mistake of assuming that there must be a conduct rule for the statute to escape unconstitutional vagueness. Some rules are simply free-standing decision rules with no conduct component.[160] Such rules, while characteristically vague, are almost always constitutional outside the criminal law context.[161] Failing to appreciate this fact, the majority struggles to find a conduct rule where none exists, while the dissent finds unconstitutional vagueness for want of a conduct rule.

The dissent is correct that there is no conduct rule entailed in the statute, but that does not necessarily render it unconstitutionally vague. The statute is best understood as one defining a status condi-

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It is, of course, sometimes possible to choose one's status condition of "living in circumstances . . . ." One could choose to be "living in [the] circumstances" of Paris or London. In such situations, one's status is the product of conduct, the voluntary move to Paris or London. There is, however, no reason to assume that the Maine legislature intended the "living in circumstances" provision to apply only where juveniles have chosen the "circumstances" of their "living." Juveniles usually don't have that choice. Surely the statute is meant to apply in a case, for example, where a juvenile lives in an impoverished environment, by no choice of his own, where he is constantly subjected to peer pressure to engage in anti-social, immoral, or potentially criminal activity. *See infra* notes 167–71 and accompanying text.

The reference, *supra,* to *Martin v. State* is by analogy only. The "living in circumstances" statute is not a criminal statute.

155. For an extensive discussion of the distinction between conduct (or acts) and status conditions, see generally Gardner, *supra* note 14.

156. 299 A.2d at 576 (Dufresne, C.J., dissenting).

157. *Id.*

158. *Id.* at 579.

159. *Id.* at 577.

160. *See supra* notes 89–93 and accompanying text.

161. *Id.*

tion, a "person-oriented decision rule" with no conduct component.[162] As such, it is aimed at assessing the "whole person of the juvenile as a social being"[163] in order for the decisionmaker to make a prediction of the future.[164] As a *parens patriae* manifestation of state power, the statute is akin to those authorizing involuntary hospitalization of the "mentally ill and dangerous."[165] Such statutes make no attempt at notifying the public,[166] but are instead directed entirely at informing official decisionmakers as to the propriety of exercising beneficent state power.

It seems clear that this statute was not addressed to juveniles. They are not expected to know when they are "living in circumstance of manifest danger of falling into habits of vice or immorality." As young, malleable people, they are in the process of learning the meaning of "vice and immorality" as they progress towards responsible adulthood. In assisting this process, the statute allows decisionmakers to exercise case-by-case discretion to protect juveniles from the negative consequences of "habits of vice or immorality" while, at the same time, affording the opportunity to teach them the meaning of those terms.

Again, person-oriented decision rules are seldom unconstitutionally vague.[167] This is particularly true of such statutes directed to young people where the risk of vague statues chilling the exercise of protected liberty[168] is minimal, given that the Supreme Court has recognized that minors possess only meager liberty interests.[169] There-

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162. *Id.*
163. *See supra* text accompanying note 80.
164. *See supra* text accompanying note 82.
165. *See* Stamus v. Leonhardt, 414 F. Supp. 439, 451–52 (S.D. Iowa 1976).
166. *Id.*
167. *See supra* notes 91–93 and accompanying text. *But see* the *Gesicki* case discussed *infra* notes 188–92 and accompanying text.
168. *See supra* notes 40, 45 and accompanying text.
169. For example, in *Schall v. Martin*, 467 U.S. 253, 265 (1984), a case upholding preadjudication detention of minors accused of acts of delinquency who were deemed to pose a risk of additional criminal behavior, the Court said this about juvenile's interest in being free from confinement:

> The juvenile's . . . interest in freedom from institutional restraint . . . is undoubtedly substantial. But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as parens patriae. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."

Id. (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1981) (citations omitted). See also *Parham v. J.R.*, 442 U.S. 584, 600–01 (1979), where the Court opined that for a minor the infringement of liberty entailed in being involuntarily hospitalized results in less "stigma" than being left free with untreated mental health

fore, the statute in *S**** S***** is almost certainly constitutional, but not for the reasons given by the majority. Of course, a different conclusion would be reached if the disposition of the juvenile adjudicated in *S**** S***** were in fact punitive. If so, want of a conduct rule would render the statute unconstitutional, both on vagueness grounds[170] and as a violation of the Supreme Court's decision in *Robinson v. California*.[171]

One other example should suffice to illustrate misguided judicial searches for conduct rules in cases assessing vagueness claims directed at status condition statutes. In *E.S.G. v. State,*[172] the court upheld, against a vagueness attack, a Texas statute extending jurisdiction to juveniles who "habitually so deport [themselves] as to injure or endanger the morals or health of [themselves] or others."[173] Unlike the *S**** S***** case just considered, the court in *E.S.G.* spelled out the underlying factual context that triggered state intervention. The appellant was a fourteen-year-old girl who had left home to live with a girl reputed to be a prostitute and who, with the other girl, frequented the bus station and other public places. At the request of her mother, the police found the appellant partially dressed and in a transient apartment with a young adult male. The appellant was adjudicated under the statute and the juvenile court committed her for an indefinite period to a state institution.

In upholding the statute against the appellant's vagueness attack, the *E.S.G.* court observed that the statute was necessarily broadly worded because specificity is impossible in defining "all the types and

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problems, and *Ginzberg v. New York*, 390 U.S. 629, 638 (1968) (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)), where the Court upheld a broader standard for obscenity for juveniles than that applied to adults recognizing that "even where there is an invasion of protected freedoms, 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" *See also infra* notes 210–21 and accompanying text (discussing the Supreme Court's special treatment of minors).

170. *See supra* notes 85–86 and accompanying text; *infra* notes 187–191 and accompanying text.

171. 370 U.S. 660 (1962) (holding punishment of a status condition constitutes a violation of the Cruel and Unusual Punishments Clause); *see also* discussion of *Gesicki v. Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971), *infra* notes 187–92 and accompanying text).

172. 447 S.W.2d 225 (Tex. Civ. App. 1969).

173. The statute has subsequently been repealed. DAVIS, *supra* note 100, at 27–28. For courts upholding similar statutory language, see, for example*, State v. Mattiello*, 225 A.2d 507, 509 (Conn. Cir. Ct. 1966) (upholding provision extending jurisdiction to any "unmarried female . . . who is in manifest danger of failing [sic] into habits of vice or who is leading a vicious life"), and *In re L.N.*, 263 A.2d 150, 153 (N.J. Super. Ct. App. Div. (1970) (upholding provision extending jurisdiction to juveniles "engaging in conduct detrimental to [their] health, morals, or general welfare").

patterns of behavior . . . injurious to a child."[174] Such statutory breadth was to be expected given "the need to correct habits and patterns of behavior which are injurious to the health or morals of the child," a matter "going to the very heart" of juvenile court legislation.[175] Nevertheless, the court found that words such as "health" and "morals" have a "well-accepted and understood meaning" such that they are understood by "men of ordinary intelligence,"[176] thus affording fair warning.

As with the *S**** S***** court and most others reviewing similar statutes,[177] the *E.S.G.* court felt impelled to find a conduct rule in order to uphold the statute. But again, as in *S**** S*****, the statute in *E.S.G.* is best understood as a person-oriented decision rule with no conduct component.[178] "Habitually deporting oneself so as to endanger" is language much more at home with assessing dangerous or troubled persons, rather than specifying any particular action or conduct. Thus, it is who the juvenile *is*—his status condition— that matters, not what he has *done*. The court itself seems to sense as much with its realization that the statute is necessarily vague in order to achieve its purposes.

Also similar to *S**** S*****, a dissent in *E.S.G.* correctly finds that no conduct rule is entailed in the Texas statute but again mistakenly concludes that such absences necessarily render the measure unconstitutionally vague. Assuming that all rules must entail conduct components[179] and interpreting the statue as a "directive addressed to children,"[180] the dissent finds the statute unconstitutional for want of a clear conduct rule. Thus, as in *S**** S***** and virtually every other similar case,[181] all members of the *E.S.G.* court fail to appreci-

174. 447 S.W.2d at 226.

175. *Id.*

176. *Id.* at 227. The court concluded that "this fourteen-year-old girl understood" that such conduct as running away from home was "injurious to her morals." *Id.* at 226.

177. *See supra* note 143.

178. *See supra* notes 162–66 and accompanying text.

179. The dissent saw the distinction between status condition rules and conduct rules as "illusory." 447 S.W.2d at 231 (Cardena, J., dissenting).

180. The dissent explained:

> Here, a directive addressed to children is couched in terms which have been the source of controversy among theologians, philosophers and judges for centuries. It is one thing to say that a judge, drawing upon his experience and knowledge of the law and of "meanings" attached to nebulous terms at common law, should understand what is moral and what is not. It is another thing to expect a child of ten or, as in this case, of fourteen, to understand the meaning of words which judges are unable to define while assuring us that the language is "perfectly clear."

Id.

181. *See* cases cited *supra* note 143.

ate the significance of the conduct rule/decision rule distinction and thus fail to utilize it to resolve the issues raised in the case.

Before leaving *E.S.G.*, however, it should be noted that the dissent correctly observes that the "provision in question is vague enough to allow almost any child, given compromising circumstances, to be caught up in the jurisdictional net of the juvenile court."[182] Such a conclusion is true of virtually all status condition provisions in juvenile statutes nationwide. The *E.S.G.* dissent saw such a consequence as particularly troubling given the disposition in the case: confinement in a state institution for possibly as much as seven years.[183] For the dissent, such a consequence requires greater definiteness than a vague measure imposing, say, a small fine.[184]

These concerns merit attention. A lengthy commitment under the Texas statute might not be particularly troubling if the disposition were genuinely rehabilitative and helpful to the child. If so, such a commitment, while perhaps controversial on policy grounds,[185] would be constitutional.[186] On the other hand, if the commitment were not rehabilitative, but rather punitive, much different constitutional consequences follow.

2. Status Condition Statutes and Punishment

As noted earlier, where punishment is imposed, conduct rules are constitutionally required.[187] Thus, if punishment is imposed for the violation of status condition rules, which lack conduct components, then those rules are unconstitutional on two grounds.

Imposition of punishment constitutionally requires rules clearly defining the conduct to be punished. Thus, punishment cannot be visited on juveniles adjudicated under status condition rules, a form of person-oriented decision rules. These points are made clear in *Gesicki v. Oswald*,[188] where the court invalidated provisions of a New York statute which permitted punishment of juveniles found to be "wayward minors in danger of becoming morally depraved."[189] The "punishment" consisted of being sentenced to terms in an adult penal institution with no pretense of "rehabilitation."[190] The court found

182. 447 S.W.2d at 232.
183. *Id.* at 228.
184. *Id.*
185. *See infra* notes 201–05 and accompanying text.
186. *See supra* notes 112–61 and accompanying text.
187. *See supra* note 87 and accompanying text.
188. 336 F. Supp. 371 (S.D.N.Y. 1971).
189. *Id.* at 373.
190. The court found that the confinement could not be deemed "rehabilitative" in nature because "the statute fails to require any course of treatment at all." *Id.* at 378–79.

the statute unconstitutionally vague for want of a clear conduct rule and also violative of *Robinson* for punishing a status condition.[191]

Gesicki is a relatively straightforward decision. Being a "wayward minor in danger of becoming morally depraved" is obviously a status condition, a person-oriented decision rule with no conduct component, and the disposition was quite clearly meant to be punitive given its excessiveness in light of any arguable non-punitive, rehabilitative purposes.[192] Most cases, however, are not as straight-forward as *Gesicki*.

Often, the question of whether a given disposition of a juvenile adjudicated under a status condition is unconstitutional "punishment" or permissible "rehabilitation" is uncertain. Consider, for example, a variation on the facts of *Blondheim v. State*.[193] Suppose a minor is adjudicated an "incorrigible [child] who is beyond the control and power of his parents by reason of the . . . nature of said child."[194] Such a rule is clearly a person-oriented decision rule with no conduct component. Suppose the juvenile is committed to a juvenile institution at disposition.[195] Is the statute vague, and is *Robinson* offended? The answers are only "yes" if the commitment constitutes "punishment."

Some commitments are clearly punitive,[196] but others often constitute non-punitive rehabilitation. Courts are thus required to distinguish punishment and rehabilitation.[197] Unfortunately, their decisions often simply beg the question, one way or the other, without adequate legal analysis.[198]

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191. *Id.* at 373; *see supra* note 16 and accompanying text.

192. *See also* Lollis v. N.Y. Dep't of Soc. Servs., 322 F. Supp. 473 (S.D.N.Y 1970) (finding cruel and unusual punishment where a fourteen-year-old girl confined to a state training school provoked a fight therein and was kept in isolated custody for two weeks in a room stripped of everything but a wooden bunk, without a mattress during day time, and with virtually no natural light).

193. 529 P.2d 1096 (Wash. 1975) (en banc).

194. *Id.* at 1100. In the actual *Blondheim* case the juvenile was adjudicated under an alternative provision of the statute, defining "incorrigibility" as being "beyond the control . . . of [her] parents . . . by reason of [her] *conduct*," and the court applied this provision to the specific act of running away from home. *Id.* at 1101 (emphasis added). Thus, the version of the statute at issue in *Blondheim* contained a conduct rule component. *Id.*

195. This was the disposition in *Blondheim* and also in the *S**** S***** and *E.S.G.* cases considered earlier. *See supra* notes 144–81 and accompanying text.

196. *See, e.g.,* discussion *supra* note 132.

197. *See supra* notes 112–32 and accompanying text.

198. For example, in *Blondheim* the court assumed that commitments of "delinquents" and "incorrigible" juveniles in the same institutional facility would necessarily constitute "punishing" the latter. 529 P.2d at 1101. The court attempted no explanation of why commitment to the institution would constitute punishment, rather than rehabilitation, for either class of adjudicated juveniles. *See also* State v. Lawley, 591 P.2d 772, 773 (Wash. 1979) (en banc) (seeing no distinction in punishment and rehabilitation and noting that "punishment [may do] as much

D. Summary

I have argued that attending to the conduct rule/decision rule distinction is central to resolving vagueness attacks on status condition rules in juvenile justice. Once understood as decision rules with no conduct component, such rules are not constitutionally vague unless they trigger a punitive disposition. Failure to appreciate this insight has led the courts, and even some leading commentators,[199] to confuse the inquiry by assuming that fair warning must be afforded to juveniles when in fact the statutes are addressed solely to official decisionmakers. Where no punishment is at stake, the search for fair warning is thus a red herring that impedes sound analysis when assessing the constitutionality of status condition statutes. These statutes are purposely vague, allowing decisionmakers to exercise discretion on a case-by-case basis. Such discretion is characteristic of statutes authorizing state-imposed rehabilitation through person-oriented decision rules that are almost always constitutional.[200]

To say that status condition statutes are not unconstitutionally vague is not to say, however, that they are free from controversy. A variety of policy issues call into question the wisdom of their continued employment.[201] The statutes obviously vest immense discretion in decisionmakers who in particular cases may exercise it for arbitrary or discriminatory purposes. While such concerns are somewhat ameliorated by the fact that most status condition adjudications are instigated by the juvenile's parent or guardian,[202] concerns regarding abuse of discretion by official functionaries are nevertheless real.[203] Whether continuing to grant broad discretion allowing intervention to

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to rehabilitate, correct and direct an errant youth as does the . . . philosophy of focusing upon the particular characteristics of the individual juvenile").

199. Samuel Davis has stated that a "major problem" with status condition provisions is "determining exactly what *conduct* is included." DAVIS, *supra* note 100, at 28 (emphasis added).

200. *See supra* notes 87–94, 165 and accompanying text.

201. *See, e.g.*, Orman W. Kitcham, *Why Jurisdiction Over Status Offenders Should Be Eliminated*, 57 B.U. L. REV. 645 (1977); Christine Rinik, *Juvenile Status Offenders: A Comparative Analysis*, 5 HARV. J.L. & PUB. POL'Y 151 (1982) (arguing for diverting CHINS from juvenile court).

202. *See* Katz & Teitelbaum, *supra* note 138, at 18, 22; Still & Elder, *supra* note 138, at 53.

203. For example, studies have suggested that status condition provisions are more often invoked against girls than boys. *See, e.g.,* Christine Alder, *Gender Bias in Juvenile Diversion*, 30 CRIME & DELINQ. 400 (1984); Meda Chesney-Lind, *Judicial Paternalism and the Female Status Offender: Training Women to Know Their Place*, 23 CRIME & DELINQ. 121 (1977); Note, *Ungovernability: The Unjustified Jurisdiction*, 83 YALE L.J. 1383, 1386–89 (1974).

help troubled juveniles like E.S.B.[204] is worth the risk of its abuse is a question worthy of consideration by policymakers.[205]

In this Part, I have explored vagueness issues relating to status condition rules as a subset of the status offense jurisdiction of juvenile courts.[206] As shown, the courts consistently and mistakenly interpret such rules as entailing conduct rule components. Such rules are not, however, addressed to juveniles but always to official decisionmakers. Outside the juvenile justice system, there is one other area where rules are arguably addressed solely to young people: rules utilized in maintaining student discipline.

IV. SCHOOL DISCIPLINARY RULES AND VAGUENESS

Although the lower courts have considered a variety of claims attacking school disciplinary rules as unconstitutionally vague,[207] the Supreme Court has done so on only one occasion. In the *Fraser* case,[208] discussed in detail later, the Court signaled that educational policymakers are allowed broad deference in implementing open-ended disciplinary rules in order to maintain order in their schools. Before considering *Fraser* and representative samples of the lower court vagueness case law, it is important to understand the Court's general attitude towards students in public schools. The attitude is complicated and perhaps ambiguous.[209] Nevertheless, it is clear that the Court has generally adopted a paternalistic posture towards young people—students in particular.

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204. *See supra* notes 172–74 and accompanying text.

205. *See, e.g.*, JOINT COMM'N ON JUVENILE JUSTICE STANDARDS, INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR 1–2 (1982) (proposing elimination of status offense jurisdiction and sole reliance on programs of voluntary, non-judicial assistance for troubled youths and their families). Moreover, some opponents of status offense jurisdiction argue that a protectionist posture towards juveniles, particularly adolescents, is misguided in light of social science evidence that suggests their cognitive abilities are essentially the same as adults, and thus juveniles should be treated as autonomous persons. *See* GARDNER, *supra* note 5, at 6, 12–13.

206. Of course, some rules imposing status offense jurisdiction, such as rules proscribing running away from home, seem clearly addressed to juveniles. *See supra* note 135.

207. *See infra* notes 249–80 and accompanying text.

208. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); *see* discussion *infra* notes 225–48 and accompanying text.

209. For thorough examinations of the Court's school cases, see Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49 (1996) and Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663 (1996).

A. The Supreme Court Case Law

In the majority of its cases, the Supreme Court has viewed young people, not as full-fledged autonomous persons, but instead as vulnerable and dependent beings in need of protection.[210] Outside the school context, for example, the Court has stated that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . . . Parents can and must make those judgments."[211] The Court has more recently noted that young people "lack maturity," tend to possess an "underdeveloped sense of responsibility," and possess personality traits that are "more transitory" and "less fixed" than those of adults.[212]

The Court's public education cases reflect a similar protectionist posture towards students. While the *Tinker* case announced that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[213] the Court has at the same time embraced "the paternalism inherent in school discipline"[214] by allowing school officials broad discretion in maintaining order within their institutions.

In its search and seizure cases, the Court has recognized minimal Fourth Amendment protection for students while at school[215] but has nevertheless defined the power of educators as "custodial," "tutelary," and that of a "reasonable guardian" who "for many purposes acts *in loco parentis*."[216] Similarly, the Court has observed that "without first establishing discipline and maintaining order, teachers cannot begin to educate their students."[217]

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210. *See supra* note 169 and accompanying text.

211. Parham v. J.R., 442 U.S. 584, 603 (1979).

212. Roper v. Simmons, 543 U.S. 551, 569–70 (2005). However, not all the Court's cases are clearly protectionist in their view of young people. For example, in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), the Court held that minor females, at least if they're competent, have a constitutional right to decide to have abortions without the consent of their parents.

213. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (holding that school children have First Amendment rights to exercise political speech in school so long as they do not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966))).

214. Hafen, *supra* note 209, at 689.

215. *See generally,* Martin R. Gardner, *The Fourth Amendment and the Public Schools: Observations on an Unsettled State of Search and Seizure Law*, 36 CRIM. L. BULL. 373 (2000).

216. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655, 665 (1995) (upholding drug testing of students as a precondition for participating in school athletics).

217. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 831 (2002) (upholding drug testing of students as precondition for participating in school extra-curricular activities).

In assessing due process claims, the Court has held that students enjoy protected property and liberty interests when subjected to temporary suspensions from school.[218] Such interests appear minimal, however, in light of subsequent case law holding that a student's liberty interest in being free from bodily restraint and punishment could be denied with no advance procedural protections.[219] The Court saw excessive corporal punishment in schools as "an aberration,"[220] essentially trusting the good faith of educators to discipline their students within reason.[221]

In the free speech cases, the Court appeared initially in *Tinker* to embrace a view of educational policy that saw students and teachers as adversaries, thus empowering students to confront the authority of the school through the courts.[222] While such a view well describes *Tinker*,[223] later free speech cases have clearly moved away from such a strong student rights position and towards the position expressed throughout the Court's school cases: teachers should have broad power to teach and discipline their students free from legally recognizable objections from their students.[224]

As mentioned earlier, the *Fraser* case is fundamental to understanding the Court's position on possible vagueness of school disciplinary rules. After being counseled by two teachers that his speech might be inappropriate, Matthew Fraser nevertheless gave the speech at a school assembly nominating his friend for student office.[225] The speech was laced with sexual innuendo and resulted in a variety of reactions from the assembled students ranging from bewilderment and embarrassment to hooting accompanied by sexually graphic gestures.[226] School officials suspended Fraser from school for three days and removed his name from the list of candidates for violation of a school rule prohibiting "conduct which materially and substantially

218. Goss v. Lopez, 419 U.S. 565 (1975) (finding that students are entitled to oral or written notice of reasons for suspensions up to ten days in duration as well as an opportunity to explain themselves).

219. Ingraham v. Wright, 430 U.S. 651 (1977) (holding that twenty licks inflicted by a teacher with a paddle injuring a student did not violate the Eighth Amendment).

220. *Id.* at 677.

221. The *Ingraham* Court did point out that while no procedural protections were required prior to administering corporal punishment, common law remedies were available after the fact should the punishment be excessive. *Id.*

222. Dupre, *supra* note 209, at 72–73.

223. *Goss*, 419 U.S. 565, also represents such a view, described by Professor Dupre as the "social reconstruction" theory of education. Dupre, *supra* note 209, at 64–67.

224. *See generally*, Dupre, *supra* note 209.

225. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 677 (1986).

226. *Id.* at 677–78. It was also reported that on the day after Fraser's speech a teacher found it necessary to forego part of the scheduled class lecture in order to discuss the speech. *Id.*

interferes with the educational process . . . including the use of obscene, profane language or gestures."[227]

Fraser attacked the school action in federal court, arguing, among other things, that the school rule was unconstitutionally vague.[228] After the district court sustained the vagueness challenge, the Supreme Court eventually reversed,[229] upholding the school action and the constitutionality of the rule.[230]

The Court distinguished *Tinker* as a case involving political speech,[231] unlike the speech given by Fraser. The Court identified the "role and purpose" of public school education as preparing students for citizenship by inculcating the "habits and manners of civility" essential to a democratic society.[232] In pursuing these educational purposes, the Court recognized that school authorities act *in loco parentis* in determining what manner of speech in the classroom or in the school assembly is inappropriate.[233]

As to the alleged vagueness of the rule, the Court interpreted it as embodying a conduct rule component and concluded that it, along with the admonitions of the teachers, gave fair warning to Fraser.[234] However, in language suggesting that the rule might instead be understood as a decision rule exclusively, the Court said:

> We have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the education

227. *Id.* at 678.

228. Brief of Respondents at 36–39, Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (No. 84-1667).

229. Five members joined in a majority, two Justices concurred, and two dissented. 478 U.S. at 676.

230. *Id.* at 686–87.

231. 478 U.S. 680–81. *Tinker* involved students wearing black armbands to school to protest the war in Vietnam. 393 U.S. 503, 504 (1969).

232. 478 U.S. at 681.

233. *Id.* at 684. The Court has decided two student speech cases subsequent to *Fraser*. Neither case cast any doubt on the Court's recognition of the broad power possessed by school officials to police their institutions. In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), the Court upheld the actions of a school principle as "reasonable regulation" when the principal exercised editorial control over the contents of a high school newspaper deemed offensive and inappropriate. *Id.* at 270. In *Morse v. Frederick*, 551 U.S. 393 (2007), the Court upheld the suspension of a high school student for displaying a banner believed by school officials to encourage illegal drug activity. The Court recognized the "difficult and vitally important [job]" of school officials in governing public schools. *Id.* at 409.

234. The Court concluded that "[t]he school disciplinary rule proscribing 'obscene' language and prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions." 478 U.S. at 686.

> process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.[235]

Justice Stevens dissented, concluding that the rule was unconstitutionally vague and resulted in Fraser being "punished" without fair warning.[236] Stevens found that Fraser was "entitled to fair notice of the scope of the prohibition,"[237] thus dismissing out of hand the possibility that the rule might be permissible as a decision rule with no conduct rule component.

On close examination, it appears that both the *Fraser* majority and Justice Stevens in dissent misconceived the issue in the case. The problem with the rule imposed by the school in *Fraser* was not that the rule was vague, but that it did not apply to Fraser's speech. None of the individual words he spoke were themselves inappropriate.[238] As Justice Blackmun noted in a concurring opinion, Fraser's remarks were not "obscene."[239] The "most that can be said about the speech" was that it "exceeded permissible limits" and justified the imposition of discipline in order to teach Fraser "how to conduct civil and effective public discourse," a matter well within the school's discretion.[240] Justice Blackmun thus appears to see that it was sufficient that school officials acted under an unarticulated decision rule allowing them "discretion . . . to teach high school students how to conduct civil and effective discourse."[241]

It thus appears that the *Fraser* Court fell into the same trap that clouds the analysis of the status condition vagueness cases discussed earlier. The Court reached to find fair warning and a corresponding conduct rule when it was unnecessary to do so. The correct way to resolve the vagueness issue in *Fraser* is to realize that no conduct rule need be present for the sanctions against Fraser to be upheld. All that is needed is a decision rule addressed to school officials allowing them

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235. *Id.*
236. *Id.* at 691–96 (Stevens, J., dissenting).
237. *Id.* at 691, 695 n.5.
238. *Id.* at 687–89 (Blackmun, J., concurring).
239. *Id.* at 687. Fraser gave the following speech:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id.

240. *Id.* at 687–88.
241. *Id.* at 687.

to determine appropriate student behavior on a case-by-case basis in order to teach "habits and manners of civility" in the multitude of situations that might arise during the school day during which such lessons should be taught. Indeed, school officials could easily have resorted to another provision of the student conduct code which stated: "Any student who willfully performs any act which . . . is detrimental to . . . any aspect of educational process within the Bethel School District, shall be subject to discipline, suspension, or expulsion."[242] This rule is broader than the obscenity rule chosen to deal with Fraser's situation and seems clearly addressed to official decisionmakers and not to students. Given the *Fraser* Court's acknowledgment of broad authority to school officials in maintaining discipline, and considering the Court's posture in other cases,[243] this decision rule would surely have been constitutional if it had been the basis for the sanctions imposed upon Fraser, so long as those sanctions did not constitute punishment.[244]

Justice Stevens was correct in concluding that Fraser would be entitled to fair warning if his suspension and removal from the valedictorian list constituted "punishment."[245] Stevens offered no analysis for his conclusion that Fraser had been punished. In fact, the sanctions imposed can easily be understood as non-punitive measures aimed at regulating educational quality in the future rather than making Fraser suffer for past misconduct.[246] The suspension could reasonably have been imposed to avoid educational disruptions resulting from Fraser's presence at school in the days immediately following his speech.[247] Similarly, the removal from the candidate list could be seen as reasonable action aimed at avoiding the risk of another inappropriate speech being given at graduation and not as an attempt to make Fraser suffer for his past speech.[248]

Thus the analysis in *Fraser* would have been much clearer and more convincing had the Court not succumbed to the temptation to elicit a conduct rule, with its corresponding fair warning requirement, when neither was necessary to correctly decide the case. Not surpris-

242. BETHEL SCH. DIST. NO. 403, STUDENT RIGHTS AND RESPONSIBILITIES 3 (2009), *available at* http://media.bethelsd.org/website/resources/ee/weblog/students/pdf/Rights_and_Responsibilities.pdf.

243. *See supra* notes 213–24 and accompanying text.

244. *See supra* note 87 and accompanying text.

245. 478 U.S. at 692–93.

246. *See supra* notes 120–29 and accompanying text.

247. *See id.*; Clements v. Bd. of Trs. of Sheridan County Sch. Dist. No. 2, 585 P.2d 197, 203 (1978) (finding that school suspension is not "punishment" for double jeopardy purposes but rather a "remedial" sanction aimed at protecting the educational environment).

248. *See supra* notes 120–129 and accompanying text.

ingly, as the next section illustrates, *Fraser* sends a somewhat confusing message to lower courts faced with school rule vagueness claims.

B. Conduct Rules/Decision Rules and Lower Court Case Law

Failure to attend to the conduct rule/decision rule distinction results in two kinds of mistakes by lower courts deciding vagueness attacks on school disciplinary rules. Some courts mistakenly find such rules unconstitutionally vague for want of fair warning when the relevant rule constitutes a constitutionally permissible decision rule with no conduct rule component.[249] Other courts mistakenly uphold decision rules in situations where such rules impose punishment, thus approving rules failing to provide constitutionally necessary fair warning. Two case examples should suffice to illustrate these mistakes.[250]

1. Mistaken Vagueness

In *Packer v. Board of Education of Tomaston,*[251] the Connecticut Supreme Court entertained a vagueness claim brought against a disciplinary rule permitting expulsion of students for conduct occurring off school grounds if the conduct is "seriously disruptive of the educational process."[252] The court found the rule failed to give fair warning to a student who had been expelled under the rule for possessing ma-

249. *See, e.g.* Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303 (8th Cir. 1997) (finding unconstitutionally vague a rule prohibiting "gang related activities"); Dothan City Bd. of Educ. v. V.M.H., 660 So. 2d 1328 (Ala. Civ. App. 1995) (finding unconstitutionally vague a rule prohibiting "possession of any item which may be conceivably used as a weapon"); Myers v. Arcata Union High Sch. Dist., 75 Cal. Rptr. 68 (Cal. Ct. App. 1969) (finding unconstitutionally vague a rule prohibiting "extremes of hair styles"); Mitchell v. King, 363 A.2d 68 (Conn. 1975) (finding unconstitutionally vague a rule prohibiting "conduct inimical to the best interests of the school"*); see also* discussion *infra* notes 249–60 and accompanying text.

250. A third category of cases, while correct in their outcomes, represents the red herring confusion illustrated by the *S**** S***** and *E.S.B.* cases, *see supra* notes 144–81 and accompanying text, and finds supposedly adequate fair warning in decision rules that in fact inadequately warn. *See, e.g.,* Sypniewski v. Warren Hills Reg'l Bd. of Educ. 307 F.3d 243, 249 (3d Cir. 2002) (finding students had fair warning under a rule prohibiting wearing or possessing items that are "racially divisive or create ill will or hatred"); Clements v. Bd. of Trs. of Sheridan County Sch. Dist. No. 2, 585 P.2d 197, 199 (Wyo. 1978) (finding students had fair warning under a rule prohibiting "behavior which in the judgment of the local [school] board is clearly detrimental to the education, welfare, safety, or morals of other pupils").

251. 717 A.2d 117 (Conn. 1998).

252. *Id.* at 128.

rijuana and drug paraphernalia in his car as he was driving on city streets.[253]

The court recognized the vagueness doctrine's interrelated rationales of fair warning protection against arbitrary and discriminatory enforcement but assumed, without citation to authority, that both rationales are relevant in every vagueness claim, thus assuming that all rules depriving protected interests must provide fair warning.[254] Therefore, in the court's view, because the student's expulsion denied him his property interest in education, he could not be expelled unless he had fair warning.[255] The court saw the "fundamental inquiry" in the case to be whether "a person of ordinary intelligence" could determine whether he could be expelled from school for possessing marijuana in his car on city streets after school hours.[256] The court thus assumed that the rule was a conduct rule addressed to students.

School officials argued that the rule granted them complete discretion to determine whether off-campus conduct was "seriously disruptive of the education process"—in essence arguing that the rule was exclusively a decision rule.[257] The court rejected this argument, concluding that the school official's "opinion" of the meaning of the "seriously disruptive" language was "irrelevant."[258] In the eyes of the court, the rule must be a conduct rule providing "constitutionally adequate notice" to the student.[259] Such notice must come from "the language of the [rule] . . . not from opinions expressed by persons not authorized to construe the statute."[260]

To conclude that school officials are not authorized to decide whether a matter is "seriously disruptive of the educational process," and that their opinions on the issue are essentially irrelevant, is seriously at odds with *Fraser's* approval of vesting broad discretion in school officials to "impose disciplinary sanctions for a wide range of conduct disruptive of the educational process."[261] While students are entitled to procedural protections before they can be denied their edu-

253. The court struck down the statute as applied but concluded that it might provide fair warning in other contexts. *Id.* at 134.
254. *Id.* at 128.
255. *Id.*
256. *Id.* at 129. The court engaged in an extensive analysis of what the terms "seriously," "disruptive," "educational," and "process" meant in order to decide whether "a person of ordinary intelligence" would understand their meanings, and it eventually concluded that such a person "could not be reasonably certain" whether possession of marijuana "by itself and without some tangible nexus to school operation" would be "seriously disruptive of the educational process" under the circumstances. *Id.* at 130.
257. *Id.* at 130.
258. *Id.* at 131.
259. *Id.*
260. *Id.*
261. *See supra* note 234 and accompanying text.

cational interests,[262] there is nothing in the Supreme Court's case law that requires that they be given fair warning as mandated under the principle of legality.[263] Thus, it would be constitutionally permissible to interpret the rule in *Packer* as the free-standing decision rule it clearly seems to be,[264] entrusting school officials to determine which off-campus conduct risks disrupting the education process. Therefore, the expulsion of the student in *Packer* was constitutionally permissible even if he lacked fair warning.[265]

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262. *See supra* note 218 and accompanying text.

263. *See supra* notes 32–36, 87, 213–44 and accompanying text.

264. The interpretation of the rule becomes solely a matter of statutory interpretation with no constitutional issues. The legislative history of the rule in *Packer* gives every indication that the Connecticut legislature intended the rule to be a decision rule exclusively. The statute in *Packer* was the product of an earlier statute permitting "[the] school board to expel any student found guilty of 'conduct inimical to the best interests of the school.'" Mitchell v. King, 363 A.2d 68, 69 (1975). The earlier statute was deemed unconstitutionally vague in *Mitchell* and the statute in *Packer* was passed in response to the action of the *Mitchell* court. *Packer*, 717 A.2d at 133. The earlier statute, with its "best interests of the school" language, is clearly a decision rule only. The "seriously disruptive of the educational process" language, which was found vague in *Packer*, was aimed at replacing the earlier vague "best interests of the school" provision with "a clearly defined statutory scheme which affords due process to all persons involved." *Id.* at 133 (quoting Comm. B. 5550, 1975 Sess., Gen. Assem. (Conn. 1975)). There is no reason to believe that in passing the latter measure the legislature had deviated from its desire to enact a decision rule directed to school officials rather than a conduct rule aimed at students.

265. Ordinarily, the conclusion in the text is true unless the sanction imposed under the rule were punitive. *See supra* note 87 and accompanying text. However, under the facts of *Packer*, even if the sanction—expulsion—were punitive, the rule would not be unconstitutionally vague for want of fair warning. The student's conduct in the case, possessing illegal drugs, was clearly illegal and known to be so by the public at large. Thus the student would have little chance of successfully arguing that the school rule was vague. The point is clearly illustrated in *Rose v. Locke*, 423 U.S. 48, 48–49 (1975), where the defendant argued that a statute proscribing "crimes against nature" did not adequately warn him that his act of forcible cunnilingus was covered by the statute. Admitting that the statute was broadly drafted, the Court rejected the defendant's vagueness attack in light of the fact that defendant's obviously wrongful conduct put him on notice that "his conduct might be within [the] scope [of the statutes]." *Id.* at 53. Surely the student in *Packer* was on notice that his wrongful conduct "might be within the scope" of the school rule.

In any event, the sanction in *Packer*, expulsion for possessing illegal drugs off campus, can easily be understood as a non-punitive attempt to keep the educational environment free from drugs and disruptions caused by students who use drugs. Thus understood, the expulsion would constitute future regulation of the educational process rather than punishment of the student for his act of possessing drugs. *See supra* text and notes 120–29.

2. Decision Rules and Punishment

While the *Packer* court mistakenly finds a decision rule unconstitutionally vague, other courts sometimes mistakenly find such rules constitutional when the student violating the rule is punished rather than dealt with non-punitively. Thus, in *Schmader v. Warren County School District,*[266] the court rejected a vagueness claim and upheld a rule providing that

> any student who engages in inappropriate behavior . . . [or] behavior that may be harmful to others or . . . other behavior which negatively reflects [on] the . . . philosophy, goals, and aims of the Warren County School District, will be subject to . . . disciplinary action.[267]

An eight-year-old student, Jedidiah, was ordered to spend three fifteen-minute sessions in after-school detention after being found in violation of the rule for failing to inform school officials of a classmate's plans to take a plastic throwing dart to school in hopes of injuring another student.[268] Failing to recognize that the rule is clearly a rule aimed at official decisionmakers and not at students, especially ones as young as eight years old, the court found it "fundamental to due process" that the regulation provide fair warning as to the proscribed conduct "measured by common understanding and practice."[269] The court concluded that "any eight-year-old child knows or should know" that he will be in "trouble" at school for failing to report another student who intends to inflict harm on other students.[270]

It strains credulity to assume that an eight-year-old could even read a rule couched in terms of "behavior," aimed at *action*, and glean from it notice of a risk of being disciplined for *inaction*, failing to report the threat of a fellow student. Rather than searching for nonexistent fair warning, the court should have simply declared the rule a decision rule with no conduct rule component. As discussed throughout this Article, such rules are virtually always constitutionally permissible so long as punishment is not imposed for their violation. Thus the issue in *Schmader* is whether, given that Jedidiah did not receive fair warning, he received punishment for his inaction.

In response to objections from a dissenting colleague that the imposition of after-school detention constituted "punishment," thus requiring a clear conduct rule,[271] the *Schmader* majority concluded that the detention was imposed "not so much to punish" the eight-year-old, but to "teach him a lesson that he should attempt to prevent harm from

266. 808 A.2d 596 (Pa. Commw. Ct. 2002).
267. *Id.* at 599.
268. *Id.* at 597–98.
269. *Id.* at 599.
270. *Id.* at 600.
271. *Id.* at 602–03 (Friedman, J., dissenting).

befalling another human being."[272] Such a conclusion is highly questionable. Being required to stay after school was surely aimed at visiting some unpleasantness, a defining characteristic of punishment,[273] upon Jedidiah because of his violation of the school rule. Imposing such unpleasantness to "teach him a lesson" appears aimed at "specially deterring" the student[274] while perhaps sending a "general deterrence" message to the rest of the student body.[275] The *Schmader* majority saw the detention as simply "more school" aimed at promoting the educational interests of the student rather than at punishing him,[276] but the dissent questioned whether the student received any additional "education" of any kind during the detention.[277] There was no evidence in the case that any educator spent any time with Jedidiah during the detention periods teaching him the evils of his ways. Rather, the detention appeared simply to be restraint imposed during a time when the student would normally (and preferably) be someplace else. Thus, if in fact he "learned his lesson" through the detention, it was a consequence of the deterrent effect of being punished, not the product of "more school."

Lacking fair warning, the student in *Schmader* was subjected to unconstitutional punishment. While this conclusion may seem a stretch in light of the arguably de minimis punishment imposed in the case,[278] the principle is not. Punishment, no matter its form or duration, is unjustly imposed in the absence of a rule, available at the time an offender engages in conduct triggering such punishment, which clearly defines such conduct.[279] As the *Schmader* dissent put it, al-

272. *Id.* at 600 (majority opinion).
273. *See supra* notes 121–29 and accompanying text.
274. "Special" or "particular" deterrence is aimed at deterring the offender himself by giving him an unpleasant experience as a consequence of his offense that he will not want to endure again. LAFAVE, *supra* note 29, at 26–27.
275. "General" deterrence aims at deterring others by punishing an offender "lest [the others] suffer the same unfortunate fate." *Id.* at 28.
276. *Schmader*, 808 A.2d at 600.
277. *Id.* at 602 (Friedman, J., dissenting).
278. The Supreme Court has recognized that there is a "*de minimis* level of imposition" of school punishment which does not interfere with protected liberty interests of students. Ingraham v. Wright, 430 U.S. 651, 674 (1977).

    Whether the detention in *Schmader* would so qualify is not clear. While students enjoy minimal liberty interests during school hours, being detained *after* school does involve a form of "bodily restraint" arguably constituting infringement of protected student liberty and thus implicating the fair warning requirements of the Due Process Clause. *Id.* at 673–74. Clearly, some forms of school punishment implicate student liberty interests. *Id.* at 674 (corporal punishment); *see* Sherpell v. Humnoke Sch. Dist. No. 5, 619 F. Supp. 670, 676–77 (E.D. Ark. 1985) (rejecting as "subjective" and vague school rules permitting corporal punishment in an "intense racial atmosphere" for such "offenses" as "put downs," "disrespectful behavior" or "caus[ing] unusual circumstances to occur which is [sic] not covered" by other rules).
279. *See supra* notes 19, 32 and accompanying text.

though the punishment in the case was "very minimal," it nevertheless could not be sanctioned where the student "could not reasonably anticipate" the punitive consequences of his inaction.[280]

C. Summary

The Supreme Court has recognized that educators possess broad discretion in carrying out their "custodial," "tutelary," and "guardian" roles. As is clear from *Fraser,* the Court has given a constitutional blessing to educators to make case-by-case judgments in disciplining and teaching students. There is no question that the *Fraser* Court was much less concerned with whether Matthew Fraser had fair warning of possible discipline than with allowing the school power to teach and discipline him. Nevertheless, the *Fraser* Court appeared surprisingly interested in finding a conduct rule in the case.[281] I have argued that no such rule applied, and that *Fraser* should have been decided solely in terms of an available decision rule not utilized in the case.[282]

Fraser thus represents another example of the recurring failure of courts deciding vagueness claims to recognize that conduct rules and fair warning are not necessarily required in every case. This failure distorts sound analysis and sometimes, as in *Packer,* leads to incorrect constitutional conclusions. Analytical clarity and simplicity are enhanced by recognizing the simple fact that many school disciplinary rules are in fact decision rules with no conduct rule components, and such rules are constitutionally permissible so long as their violation does not entail punitive consequences. However, as illustrated by *Schmader*, courts must be vigilant in assessing whether or not the consequences of decision rules are in fact punitive.[283]

Thus, apart from situations where punishment (as opposed to nonpunitive sanctions such as school suspensions or expulsions) is imposed, educational policymakers,[284] and not courts considering constitutional matters, are left with the question of whether to employ

280. 808 A.2d at 602 n.7 (Friedman, J., dissenting).

281. *See supra* note 233 and accompanying text.

282. *See supra* notes 236–44 and accompanying text.

283. *See supra* notes 261–77 and accompanying text.

284. Thus, should they so choose, educators embracing "social reproduction" theories of education are free to enact broad decision rules without concerns that such rules are unconstitutionally vague for failing to give students fair warning. On the other hand, educational policymakers favoring "social reconstruction" theories empowering students to assert their interests against school authorities may favor drafting specific conduct rules as a means of protecting student rights. For a detailed discussion of these contrasting educational policies as they are manifested in the Supreme Court's case law, see generally Dupre, *supra* note 209.

broad decision rules with no conduct rule component.[285] Awareness of this doctrinal situation should assist the formulation of sound educational policy while helping the courts to focus on the narrow range of issues appropriate for judicial consideration.[286]

V. CONCLUSION

In this Article, I have joined others who have recently attended to the distinction between conduct rules and decision rules in analyzing various problem areas of the law. I have utilized the distinction in considering vagueness challenges to rules addressed, or thought to be addressed, solely to young people. These vagueness challenges raise unique considerations because the law responds paternalistically towards juveniles who are in many ways deemed not to be full-fledged constitutional persons.

As I have discussed, the vagueness challenges arise in the contexts of statutes defining status offense jurisdiction of juvenile courts and rules aimed at maintaining discipline in schools. In describing the conduct rule/decision rule distinction as it relates to the void for vagueness doctrine, I identified several concepts derived from Supreme Court case law and the scholarly literature, particularly the concept that conduct rules are constitutionally necessary only if punishment is imposed. As illustrated in Parts III and IV, the courts consistently misunderstand this concept and instead assume that conduct rules and fair warnings are necessary to avoid unconstitutional vague-

285. Of course, in rare cases school officials might arbitrarily apply a decision rule or impose it in a discriminatory fashion. In such instances, the vagueness doctrine would render such abuses of discretion unconstitutional. *See supra* note 93 and accompanying text.

286. Judicial recognition of the arguments presented in this Article would remove incentives for students to litigate vagueness claims against disciplinary rules that are exclusively decision rules. Absent a serious claim of arbitrary or discriminatory application or imposition of punitive sanctions, students lack standing to raise vagueness attacks. Not only would this free the courts from hearing cases like *Packer* and those described in note 247 *supra*, where the courts mistakenly found unconstitutional vagueness, but it would also free courts from hearing cases where the courts needlessly expend resources upholding decision rules against vagueness attacks. For example, in *Broussard v. Sch. Bd. of the City of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992), the court upheld a rule stating that "a student does not have a right to engage in conduct that will cause a disruption, disturb, or interrupt any school activity." *Id.* at 1529. School officials suspended a student for violating the rule after the student wore a shirt to school with the words "drugs suck" printed thereon. *Id.* at 1528. Concluding that the shirt embodied an offensive sexual message that risked disruption of the school environment, the officials so informed the student and her father and asked her to change into another shirt. *Id.* at 1529. After both the student and her father refused, the officials suspended the student, arguing that the rule supplied her adequate notice. *Id.* at 1530. The court concluded simply that the claim had "no merit." *Id.* at 1532.

ness. This misunderstanding has two manifestations. Sometimes it merely clouds the analysis of courts, which nevertheless decide their cases correctly; but at other times the courts' misguided insistence on a conduct rule leads them to the incorrect conclusion that a rule is vague for want of a conduct rule, when in fact the extant decision rule is itself constitutionally sufficient.

When courts engage in misguided searches for unnecessary conduct rules, they fail to see that the constitutional issue is a narrow one: Is the decision rule by itself constitutional? I have shown also that courts sometimes make the opposite mistake of assuming a more narrow constitutional issue than actually exists by failing to address the issue of whether or not punishment is imposed under a decision rule with no conduct rule component.

Understanding the relationship between conduct rules and decision rules is essential to resolving the constitutional issues involved in vagueness attacks on statutes addressed to juveniles. Such understanding is not only crucial to courts in deciding vagueness cases, but it is also critical to policymakers in deciding whether and when to rely exclusively on open-ended decision rules to achieve their policy objectives. Broad decision rules are often deemed especially useful in promoting the welfare of young people, whether through person-oriented status condition rules in juvenile court or through broad standards permitting case-by-case opportunities to teach and discipline school students. Understanding the scope of the vagueness doctrine thus permits policymakers to make decisions that are not only constitutionally permissible, but are also more likely to be good for young people.