NOTE

THE RIGHT TO EDUCATION IN JUVENILE DETENTION UNDER STATE CONSTITUTIONS

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INTRODUCTION

IN 1996, over 200 children were housed in the Mount View Youth Services Center in Denver, Colorado.[1] The facility was operating at twice its capacity. As a result, children were forced to sleep on the floor and staff members were required to supervise as many as forty children at a time. Children did not feel safe; they complained of verbal, physical, and sexual assault by staff and other inmates. There was a "near total absence of educational and recreational programs."[2] The facility did not provide any special education services and did not follow a written curriculum.[3] Children were detained here in the name of rehabilitation.

Over 96,000 children were confined to residential juvenile detention facilities in 2003.[4] While the detention center at Mount View represents one end of the spectrum, and there are exemplary detention centers,[5] conditions in many facilities are not substantially better than the conditions at Mount View. As the executive director of the National Juvenile Detention Association noted, overcrowding, abuse, and inadequate services "are the norm, rather than the exception" in juvenile detention facilities.[6] Basic education services are often not provided. In some institutions, children re-

[1] Human Rights Watch, High Country Lockup: Children in Confinement in Colorado 46 (1997) (reporting observations of Human Rights Watch visit to facility and audit conducted by Colorado Division of Youth Services).

[2] Id. at 47.

[3] Id. at 45–47.

[4] Melissa Sickmund, T.J. Sladky & Wei Kang, Office of Juvenile Justice and Delinquency Prevention, Census of Juveniles in Residential Placement Databook (2005), http://www.ojjdp.ncjrs.org/ojstatbb/cjrp/asp/Age_Sex.asp.

[5] See, e.g., Coalition for Juvenile Justice, Ain't No Place Anybody Would Want to Be: Conditions of Confinement for Youth 19–20 (1999) (describing conditions at the Giddings State Home and School in Texas).

[6] Id. at 29. For a survey of Justice Department reports noting poor conditions in juvenile detention facilities, see Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability and Public Safety*, 84 Or. L. Rev. 1001 (2005).

ceive no education whatsoever for extended periods of time.[7] In others, children meet sporadically for classes that are not based on a coherent curriculum and only meet for a fraction of the state-mandated minimum amount of instructional time.[8] Some correctional facilities do not have libraries, books, or separate classrooms.[9] Often, teachers are poorly trained, are not required to meet standard qualifications, and are not trained to meet the special needs of children in detention.[10] For children serving longer sentences, this is their last chance to receive an education, but they are not given a realistic opportunity to pursue one.

The importance of education as necessary to succeed in today's society is well documented and has been recognized by courts, but it is not adequately provided to juveniles who are incarcerated in the name of rehabilitation. The Supreme Court famously stated, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[11] This is especially true in the juvenile detention context where education has been consistently linked with reduced recidivism rates and successful reintegration into society.[12] Yet, very few of the thousands of children confined to juvenile detention facilities receive an adequate education.

This Note will argue that children in juvenile detention have a right to an adequate education based on state constitutional guarantees of education. This right can be used to challenge the inadequacy of the current educational services provided in juvenile de-

[7] See, e.g., Letter from Bradley J. Schlozman, Acting Assistant Attorney Gen., to the Honorable Mitch Daniels, Governor of Ind. 19–20 (Sept. 9, 2005), available at http://www.usdoj.gov/crt/split/documents/split_indiana_plainfield_juv_findlet_9-9-05.pdf [hereinafter Plainfield letter] ("[Students in the Intensive Treatment Unit] remain on the unit all day with no school work or instruction [and] . . . classes in Cottage 13 are held erratically or not at all."); see also Coalition for Juvenile Justice, supra note 5, at 4 (describing conditions for juveniles in D.C. Jail, where juveniles accused of serious crimes who will be tried as adults are detained pre-trial).

[8] See, e.g., Human Rights Watch, supra note 1, at 37–38 (describing conditions at High Plains Youth Center); see also infra Subsection III.C.2.

[9] See, e.g., Human Rights Watch, supra note 1, at 38 (noting lack of access to library); Abrams, supra note 6, at 1031, 1039 (noting facilities with no textbooks and inadequate classroom space).

[10] See infra Subsection III.C.2.

[11] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[12] See infra Subsection I.B.2.

tention facilities.[13] The argument will proceed in three parts. Part I will provide background on the juvenile justice system, explain the importance of education in juvenile detention, and survey the applicable federal statutes and corresponding litigation. Part II will briefly discuss and dismiss potential federal constitutional challenges based on the Equal Protection Clause and the Due Process Clause. Part III will argue that state constitutional guarantees of education are applicable to students in juvenile detention facilities. First, it will analyze the contours of the state rights to education as they have been interpreted in school finance litigation. Second, it will respond to the main objection that children in juvenile detention have forfeited their right to education by arguing that (1) the purpose of confinement is rehabilitation, which is consistent with the right to education, and (2) even if the purpose of confinement is punishment, it does not follow that juveniles have forfeited their right to education. Fundamental rights are not automatically forfeited in the punishment context; rather, they are balanced against state interests in safety and security. Third, building on these arguments, this Note will analyze specific challenges that could be raised by children in juvenile detention.

I. AN OVERVIEW OF THE JUVENILE JUSTICE SYSTEM

A. Juvenile Detention and the Juvenile Justice System

The juvenile justice system was originally established during the Progressive Movement to keep juvenile offenders out of the criminal justice system so that they would not suffer harsh penalties and instead could be rehabilitated by the state.[14] Premised on the doctrine of *parens patriae* (the state as parent), juvenile courts were thought of as intervening on behalf of the child's best interests. They were civil courts, not criminal; their jurisdiction included children charged with offenses as well as children suffering from abuse or neglect.[15] Since these courts were aimed at rehabilitating

[13] This Note uses the term "juvenile detention" generically to refer to all forms of court-ordered juvenile confinement.

[14] See Nat'l Research Council and Inst. of Med., Juvenile Crime Juvenile Justice 154 (Joan McCord et al. eds., 2001); Barry C. Feld, The Transformation of the Juvenile Court, 75 Minn. L. Rev. 691, 693–96 (1991).

[15] Feld, supra note 14, at 695.

juveniles, they did not grant children the extensive criminal procedural protections, such as jury trials and lawyers, that adult criminal defendants enjoyed.[16] Rather than sentencing delinquents in the traditional sense, juvenile courts had broad flexibility to craft dispositions in the best interests of the child.[17] Recently, this view of the juvenile justice system as purely rehabilitative has started to erode. Some states have incorporated public safety and accountability as additional purposes of their juvenile codes. Despite these changes, the juvenile justice system is still focused primarily on rehabilitation.[18]

In contrast to the rehabilitative ideal, as prominent juvenile justice scholar Barry Feld noted, "[s]ince their inception, the reality of custodial institutions has contradicted the juvenile court's rhetorical commitment to rehabilitation."[19] Facilities are often overcrowded and underfunded.[20] Horrible incidents of suicide and death are all too common.[21] At some detention centers, violence is "an almost everyday occurrence" and staff abuse of delinquents is frequent.[22] In the worst facilities, there have been reports that juveniles have escaped, mentally ill juveniles have been shackled, and race riots have occurred.[23] There is wide variation among juvenile detention facilities, but deplorable conditions are a common thread present throughout the system.

There is no uniform national juvenile justice system; each state, and the District of Columbia, operates its own juvenile justice system.[24] States that accept federal funds under the Juvenile Justice

[16] Id.
[17] Id.
[18] For a more detailed discussion, see infra Subsection III.C.1.a.
[19] Feld, supra note 14, at 715.
[20] See Sue Burrell, Improving Conditions of Confinement in Secure Juvenile Detention Centers, *in* Pathways to Juvenile Detention Reform 6–7 (Annie E. Casey Found., 1999), available at http://www.aecf.org/KnowledgeCenter/PublicationsSeries/JDAIPathways.aspx (citing statistics demonstrating that over sixty percent of detained youth were in overcrowded facilities in 1995).
[21] Abrams, supra note 6, at 1001–02.
[22] Id. at 1002 (citing U.S. News & World Report study).
[23] Noam N. Levey, Reform Is Locked Out of Juvenile Hall, L.A. Times, Aug. 21, 2006, at A1.
[24] The federal government does have limited jurisdiction over juveniles that, for example, commit crimes in national parks or on Indian reservations. See National Research Council, supra note 14, at 155.

and Delinquency Prevention Act ("JJDPA")[25] must meet certain requirements, but these requirements leave room for wide variation among states.[26] Even within a state, juvenile detention facilities vary widely. States have both long-term and short-term facilities that vary along a number of dimensions including the level of security, types of programs offered, size, funding, and status as either public or private.[27] The type of facility that a juvenile is assigned to is within the discretion of the juvenile court and often depends on the type of offense committed, the social history of the juvenile, and the expected length of stay.[28] In publicly operated facilities, the average stay for juveniles is six months.[29] The sheer size of juvenile detention programs—in 2003, over 96,000 juveniles were confined to residential juvenile detention facilities—further underscores the importance of providing adequate educational services in juvenile detention.[30]

The juvenile detention population is disproportionately male, poor, disabled, and minority. In 2003, approximately 85% of juveniles in residential placement facilities were male.[31] Racial minorities were disproportionately represented, with black and Hispanic males accounting for 58% of all male juvenile inmates.[32] Minority juveniles are more likely to be sent to public facilities than their white counterparts, who are more likely to be housed in private fa-

[25] 42 U.S.C. §§ 5601–5792(a) (Supp. IV 2004).

[26] The JJDPA has four requirements: (1) deinstitutionalization of status offenders, (2) juveniles may not be detained in adult facilities unless convicted of an adult offense, (3) "sight and sound" separation between children and adults, and (4) states must assess the reasons for disproportionate minority confinement. See Building Blocks for Youth, Juvenile Justice and Delinquency Prevention Act Fact Sheet, http://www.buildingblocksforyouth.org/issues/jjdpa/factsheet.html; see also Claude Noriega, Note, Stick A Fork in It: Is Juvenile Justice Done?, 16 N.Y.L. Sch. J. Hum. Rts. 669, 686–87 (2000) (noting the ineffectiveness of the JJDPA).

[27] Gus Martin, Juvenile Justice: Process and Systems 230 (2005).

[28] Id. at 213–216, 230.

[29] Peter E. Leone et al., Special Education Programs for Youth with Disabilities in Juvenile Corrections, 53 J. Correctional Educ. 46, 47 (2002).

[30] Sickmund, Sladky & Kang, supra note 4.

[31] Id.

[32] Melissa Sickmund, T.J. Sladky & Wei Kang, Office of Juvenile Justice and Delinquency Prevention, Census of Juveniles in Residential Placement Databook (2005), http://www.ojjdp.ncjrs.org/ojstatbb/cjrp/asp/Age_Race.asp (reporting that 38% of males in residential placement were black and 20% of males in residential placement were Hispanic).

cilities or avoid the juvenile justice system altogether.[33] The juvenile detention population is also disproportionately disabled; studies estimate that as many as 70% of delinquents have learning disabilities.[34] The disproportionate representation of racial minorities, the poor, and the disabled highlights another reason why education in juvenile detention is important—it disproportionately affects groups that are traditionally underrepresented in the political process.

B. Education in Juvenile Detention

1. Education Currently Provided

The education currently provided in some juvenile detention centers does not meet general state standards for public schools or the specific needs of incarcerated juveniles. There are no comprehensive statistics detailing the education currently provided in detention centers nationally, but anecdotal evidence, specific case studies, and audits suggest that there are serious deprivations within the juvenile detention system. For example, detention centers often only provide short, infrequent classes, and even these are often not based around a meaningful curriculum. Some detention centers do not have separate classrooms or libraries. Classroom materials are sparse and often not suited to the juvenile's grade level or needs. Teachers do not have to meet general qualification requirements, often do not have advanced degrees, are not trained

[33] Harriet R. Morrison & Beverly D. Epps, Warehousing or Rehabilitation? Public Schooling in the Juvenile Justice System, 71 J. Negro Educ. 218, 220–21 (2002).

[34] Leone et al., supra note 29, at 46; see also Peter E. Leone & Sheri Meisel, Improving Education Services for Students in Detention and Confinement Facilities, 17 Child. Legal Rts. J. 2, 3 (1997) (noting different findings for the percentage of students in juvenile detention that are learning disabled, including 42% in Arizona, 60% in Florida and Maine, 35.6% in a meta-analysis, and noting that this is three to five times the percentage in the general public school population); Morrison & Epps, supra note 33, at 224 (finding that 70% of children in southern correctional facilities qualified as disabled under the IDEA); Mary Magee Quinn et al., Youth with Disabilities in Juvenile Corrections: A National Survey, 71 Exceptional Child. 339, 342 (2005) ("[T]he number of youth identified and receiving special education services in juvenile corrections is almost four times higher (33.4%) than in public school programs.").

in special education, and are not instructed on how to teach in correctional facilities.[35]

The general inadequacy of the education provided in detention centers is exacerbated by the special considerations present in the juvenile detention context. The juvenile population served by these facilities has a disproportionate percentage of children with learning disabilities and a history of poor performance in school.[36] Studies have shown that while the median age of children confined to juvenile correction facilities is 15.5 years old, the average reading level is only that of a fourth-grader.[37] These factors, in addition to the extra security concerns in the correctional context, make education in juvenile detention centers especially difficult. However, the difficulties in educating these children do not excuse the lack of adequate educational services provided to them. Education in this context is still possible; studies have shown that incarcerated juveniles can make significant gains in education while in confinement. For example, intensive programs with low student-to-teacher ratios, programs that emphasize reading and literacy, and programs that celebrate the academic achievements of the students have all been successful.[38]

The specific challenges of educating delinquent youth are compounded by the fact that it is often unclear whether the state education agency or the juvenile justice department is responsible for educating children in juvenile detention.[39] Conflicts between these agencies make providing education especially difficult and result in

[35] See infra Subsection III.C.2 for a more detailed discussion about education currently provided in juvenile detention facilities.

[36] See Morrison & Epps, supra note 33, at 225; Open Society Institute, Research Brief No. 2, Education as Crime Prevention 2–3 (1997), http://www.prisonpolicy.org/scans/research_brief__2.pdf.

[37] Open Society Institute, supra note 36, at 2.

[38] See Leone et al., supra note 29, at 49; see also Coalition for Juvenile Justice, supra note 5, at 19–25 (describing success at Giddings State Home and School in educating violent offenders).

[39] See Bruce I. Wolford, Juvenile Justice Education: "Who is Educating the Youth" 4 (2000), available at http://www.edjj.org/Publications/educating_youth.pdf; Juvenile Justice Educational Enhancement Program, 2004 Annual Report to the Florida Department of Education 84 (2004), available at http://www.criminologycenter.fsu.edu/jjeep/research-annual-2004.php.

low accountability.[40] There is also a lack of coordination between public schools and correctional education programs which results in transition problems when juveniles enter and exit the juvenile justice system.[41] These disruptions in education have long-term effects and lead to higher drop-out rates.[42] As evidenced by the problems briefly canvassed here, the education currently provided often does not give children in juvenile detention a meaningful opportunity to pursue an education. In order to provide an adequate education to children in detention, reforms are needed at both the detention center level and the systemic level. The constitutional argument presented in this Note will focus on specific deficiencies, but the argument acknowledges that legislative reforms are also needed to deal with the structural problems in the current system.

2. Importance of Education in Juvenile Detention

Education is fundamentally important for all children because of the opportunities and skills it can provide. In addition to the inherent importance of education, there are concrete societal benefits to providing education in juvenile detention centers specifically. Education has been consistently linked with reduced recidivism rates.[43] Children who receive education while in juvenile detention are more likely to return to school after their release.[44] They are also more likely to eventually be employed.[45] The Coalition for Juvenile Justice estimates that, due to the high cost of incarceration, society

[40] See Michael T. Burk & James H. Keeley, Collaboration Between the School House and the Bunk House: An Effective Collaboration Protocol Between Independent Education and Institution Providers in a Juvenile Correctional Institution, 53 J. Correctional Educ. 70, 70 (2002); Leone et al., supra note 29, at 46, 49.

[41] James H. Keeley, Will Adjudicated Youth Return to School After Residential Placement? The Results of a Predictive Variable Study, 57 J. Correctional Educ. 65, 67 (2006).

[42] Id.

[43] See Open Society Institute, supra note 36, at 1, 4–5; see also Stephen J. Steurer et al., Three State Recidivism Study 39–41, 48–49 (2001), available at http://www.ceanational.org/PDFs/3StateFinal.pdf.

[44] See Thomas C. Blomberg et al., Juvenile Justice Education, No Child Left Behind, and the National Collaboration Project, Corrections Today, Apr. 2006, at 143, available at http://www.criminologycenter.fsu.edu/p/pdf/Juvenile_justice_corrections_today.pdf.

[45] Keeley, supra note 41, at 67 (finding that juvenile delinquents who complete their GEDs are three times as likely to eventually be employed than those who do not complete their GEDs); see also Leone et al., supra note 29, at 46–47.

saves as much as two million dollars for each juvenile who does not end up leading a life of crime.[46] Educating children in juvenile detention facilities could help both the children involved and society at large through long-term cost savings.

C. Applicable Statutes and Litigation

The two most important federal statutes that are directly applicable to the right to education in juvenile detention are the Individuals with Disabilities Education Act ("IDEA")[47] and the No Child Left Behind Act ("NCLBA").[48] The IDEA has been important in this context because it has been the basis for litigation involving education services for children with disabilities in juvenile detention.[49] The NCLBA is important because, among its requirements, it explicitly mandates that states receiving federal education funding must monitor and improve correctional education services. These two statutes provide nationally applicable standards that are relevant to the question at hand, but ultimately both are limited tools for reform.

1. The Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act,[50] originally passed in 1975, requires states that receive funding for students with disabilities to ensure that all eligible students receive a "free appropriate public education" in the "least restrictive environment."[51] Under the IDEA, the state has an obligation to identify

[46] Coalition for Juvenile Justice, 2001 Annual Report: Abandoned in the Back Row: New Lessons in Education and Delinquency Prevention ix (2001); see also Open Society Institute, supra note 36, at 6 (noting that the average cost of incarcerating an adult inmate is $25,000 per year, in contrast to the $2,500 annual cost of educating a juvenile in detention).

[47] 20 U.S.C. §§ 1400–82 (2000).

[48] 20 U.S.C. §§ 6301–7941 (Supp. V 2005).

[49] A regulation promulgated under § 504 of the Rehabilitation Act of 1973, as amended 29 U.S.C. § 794, guarantees a "free appropriate public education" (as does the IDEA) and is frequently used in conjunction with the IDEA, but this discussion will focus on the IDEA because dismissal of IDEA claims mandates dismissal of § 504 claims. 34 C.F.R. § 104.33(a) (2007). See Tunstall v. Bergeson, 5 P.3d 691, 706–07 (Wash. 2000). For a detailed comparison of the statutes, see Perry A. Zirkel, *An Updated Comparison of the IDEA and Section 504/ADA*, 216 Educ. L. Rep. 1 (2007).

[50] 20 U.S.C. §§ 1400–1482 (2000).

[51] 20 U.S.C. § 1412. The IDEA broadly defines disabled as a child:

and evaluate children with disabilities, and then to create an Individualized Education Program ("IEP") to meet the student's particular needs.[52] The IDEA also requires states to provide "related services," such as counseling, speech therapy, physical therapy, recreation, and other rehabilitation services.[53] These obligations apply in both the regular school context and the juvenile detention context.[54] Although this does not have direct bearing on the constitutional issues considered below, it suggests that, from a policy standpoint, Congress has determined that providing an adequate education to disabled juveniles while in detention is compatible with security needs.

Education services provided in juvenile detention often fall far short of IDEA requirements. For example, a study of southern correctional facilities demonstrated that while nearly seventy percent of children in correctional facilities qualified for special education services under the IDEA, only thirty percent received the required services.[55] Some correctional facilities do not have enough special education teachers;[56] they do not provide "related ser-

> (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3).

[52] Sue Burrell & Loren Warboys, Special Education and the Juvenile Justice System, Juv. Just. Bull. (U.S. Dep't of Justice, Office of Juv. Justice and Delinquency Prevention, Washington, D.C.), July 2000, at 2, available at http://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf.

[53] See Burrell & Warboys, supra note 52, at 4; Letter from Wan J. Kim, Assistant Attorney General, to the Honorable Robert L. Ehrlich, Governor of Md. 20 (Aug. 7, 2006), available at http://www.usdoj.gov/crt/split/documents/baltimore_juve_findlet_8-7-06.pdf [hereinafter Baltimore letter] (stating that 45% of Baltimore Center's youth qualified for IDEA services).

[54] 20 U.S.C. § 1412(a)(1)(A) (2000) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school."); see also Burrell & Warboys, supra note 52, at 2.

[55] See Morrison & Epps, supra note 33, at 224.

[56] Letter from R. Alexander Acosta, Assistant Attorney General, to the Honorable Janet Napolitano, Governor of Ariz. 18 (Jan. 23, 2004), available at http://www.juvenile.state.az.us/CRIPA/CRIPAReport.pdf [hereinafter Arizona letter] (describing a facility that employs only three teachers for eighty special education students); see also Morrison & Epps, supra note 33, at 224.

vices;"[57] they do not provide sufficient instruction time;[58] and they often do not perform required evaluations of children to determine whether they qualify for special education services under the IDEA.[59] The lack of coordination between schools and correctional facilities often results in delayed receipt of a student's IEP and therefore a delay in providing for the student's special needs.[60] Even when correctional facilities do receive a student's IEP, the student often does not receive the same level of services that she received in her previous school.[61] These inadequate services do not meet IDEA requirements.

Since 1975, plaintiffs have filed over thirty class actions under the IDEA challenging educational services provided to students with disabilities.[62] These suits have typically lasted years and often ended in settlements rather than court decisions. As a result, there are very few published court opinions.[63] Some IDEA challenges, however, have been successful in engendering broad reforms in juvenile correctional facilities, thereby benefiting children not cov-

[57] See Baltimore letter, supra note 53, at 23; Arizona letter, supra note 56, at 18–19.

[58] See Baltimore letter, supra note 53, at 21; Plainfield letter, supra note 7 (describing a situation where students in Intensive Treatment Unit receive no educational services in violation of the IDEA).

[59] See Arizona letter, supra note 56, at 17 (noting a facility where there is no disability screening of entering students). For juveniles who do not come directly from a school and do not already have an IEP, this is a significant failure under the IDEA. When IEPs are developed in the correctional facility they are often stated in general terms and do not conform to the specific guidelines of the IDEA. See Arizona letter, supra note 56, at 18 (describing IEPs containing only "generic and broadly stated goals"); Baltimore letter, supra note 53, at 22–23 (noting IEPs that "contained goals which cannot be objectively evaluated"); Plainfield letter, supra note 7, at 16 (detailing examples of IEPs containing "boilerplate" language only).

[60] Baltimore letter, supra note 53, at 20.

[61] See Baltimore letter, supra note 53, at 21–22; Plainfield letter, supra note 7, at 16. In these correctional facilities, some teachers were not even aware of which students had IEPs. See Baltimore letter, supra note 53, at 23; Plainfield letter, supra note 7, at 17.

[62] National Center on Education, Disability and Juvenile Justice, Class Action Litigation Involving Special Education Claims for Youth in Juvenile and Adult Correctional Facilities (2005), http://www.edjj.org/Litigation/litchartOct05.pdf; see also Patricia Puritz & Mary Ann Scali, Office of Juvenile Justice and Delinquency Prevention, Beyond the Walls: Improving Conditions of Confinement for Youth in Custody 17–18 (1998) (listing recent litigation).

[63] Puritz & Scali, supra note 62, at 17 (noting lack of published court opinions).

ered by the IDEA.[64] For example, in *Johnson v. Upchurch*, a group of disabled students brought suit under the IDEA because no special education services were provided at the Catalina Mountain Juvenile Institution.[65] The case was settled seven years later and the consent decree included broad reforms for juvenile detention centers throughout Arizona.[66] Similarly, in *Andre H. v. Sobol*, a group of disabled students brought suit against a New York City juvenile detention center because it did not comply with the IDEA. Years later, the parties settled the suit and agreed to create a "multidisciplinary team" to implement the provisions of the IDEA and to appoint a monitor to ensure compliance with the settlement agreement at the detention center.[67]

While litigation under the IDEA has been successful in some instances as an avenue for change, it is inherently limited because it only applies to students with disabilities.[68] Therefore, even though there is a disproportionately high percentage of children with disabilities in juvenile detention centers, IDEA litigation does not reach all children in these facilities. Claims based on the general right to education will have more far-reaching effects and will highlight the full scope of the problem. Even within the coverage of the IDEA, one of the major enforcement mechanisms—the withholding of funds by the federal government—does not appear to be a serious threat. Studies have noted that "[t]he Department of Education has never withheld funds from states that fail to provide adequate special education programs in their juvenile correctional facilities."[69]

[64] See, e.g., id. at 20 (discussing *Johnson v. Upchurch* and *Smith v. Wheaton*); Leone & Meisel, supra note 34, at 4–5 (same). Because both the *Upchurch* and *Wheaton* cases were settled before trial, no reporter citation is available for either case.

[65] Puritz & Scali, supra note 62, at 20.

[66] Id. Note that the Catalina Mountain Juvenile Institution in Arizona was investigated again for violations in 2004. See Arizona letter, supra note 56.

[67] Leone & Meisel, supra note 34, at 4.

[68] The IDEA also has a carve out that exempts adult correctional facilities from providing services to juveniles aged eighteen to twenty-one who were not diagnosed with a disability before being sentenced to an adult facility. Morrison & Epps, supra note 33, at 224.

[69] Leone & Meisel, supra note 34, at 5.

2. The No Child Left Behind Act

The No Child Left Behind Act,[70] originally passed in 2001, explicitly applies to juveniles in detention.[71] The NCLBA implements requirements for states that receive federal education funding. The "Adequate Yearly Progress" ("AYP") mandate requires all schools, including schools in juvenile detention centers, to evaluate student achievement in a number of areas.[72] However, a study found that at least nineteen states were not including juvenile justice schools in their AYP assessment.[73] The NCLBA also mandates that states ensure that all teachers are "highly qualified," meaning that (1) they must become fully certified or pass the State Teacher Licensing Examination, (2) they must demonstrate competence in each subject area they teach, and (3) new teachers must have at least a bachelor's degree.[74]

Despite these requirements, studies show that states are only "making minimal progress in implementing NCLBA requirements" in the juvenile detention context.[75] Some states are not providing technical assistance to low-performing juvenile justice education programs,[76] are not meeting AYP monitoring requirements,[77]

[70] 20 U.S.C. §§ 6301–7941 (Supp. V 2005).

[71] Id. § 6315(b)(2)(D) ("A child in a local institution for neglected or delinquent children and youth or attending a community day program for such children is eligible for services under this part."); see also Juvenile Justice Educational Enhancement Program, supra note 39, at 82. See generally Blomberg et al., supra note 44.

[72] These areas include:

> (1) to maintain and improve educational achievement; (2) to accrue school credits that meet State requirements for grade promotion and secondary school graduation; (3) to make the transition to a regular program or other education program operated by a local educational agency; (4) to complete secondary school (or secondary school equivalency requirements) and obtain employment after leaving the correctional facility or institution for neglected or delinquent children and youth; and (5) as appropriate, to participate in postsecondary education and job training programs.

20 U.S.C. § 6471.

[73] Juvenile Justice Educational Enhancement Program, supra note 39, at 87.

[74] Id. at 83.

[75] Id. at 96. The NCLBA mandates that states collect data on at least five "indicators of student outcome" to comply with the AYP mandate, but 37% of states collected fewer than three measures. Id. at 89–90.

[76] Id. at 94 (noting that seven states did not provide technical assistance to low-performing programs and eighteen states faced no consequences for low-performing programs).

and are not enforcing teacher qualification standards.[78] There have been very few consequences for these violations.[79] Courts have held that there is no private cause of action under the NCLBA;[80] the primary federal enforcement mechanism is the potential withholding of funds from non-complying states.[81] The NCLBA requirements, if met, would surely improve education in juvenile detention facilities. However, due to the lack of enforcement, the NCLBA has not had the desired impact.

Because of these inherent limitations in the IDEA and the NCLBA, individual claims brought under the state education clauses have the potential to be more effective and to accelerate change. There are also numerous state statutes and regulations that apply in the juvenile detention and education contexts. While these state laws may support education claims by juveniles in detention,[82] they are outside the scope of this Note. The substantive guarantees of adequacy that have been read into the state constitutions' education clauses apply regardless of these statutes and provide a robust right to education, as will be outlined below.

II. FEDERAL CONSTITUTIONAL CHALLENGES

Children in juvenile detention could attempt to bring claims based on the Equal Protection Clause and the Due Process Clause

[77] Id. at 87 (noting that nineteen states did not include juvenile justice schools in the AYP).

[78] Id. at 87–88 (noting states' differing assessments about their progress in implementing the highly qualified teacher requirement); see also Barbara A. Moody, Juvenile Corrections Educators: Their Knowledge and Understanding of Special Education, 54 J. Correctional Educ. 105, 105 (2003) (describing a study about teachers in Oregon who receive no special training to teach juvenile delinquents and are only required to hold the lowest form of a teaching license).

[79] Juvenile Justice Educational Enhancement Program, supra note 39, at 94. Eighteen states have imposed no state-implemented consequences for violations in detention centers.

[80] See, e.g., Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ., 269 F. Supp. 2d 338, 347 (S.D.N.Y. 2003); Fresh Start Acad. v. Toledo Bd. of Educ., 363 F. Supp. 2d 910, 916 (N.D. Ohio 2005).

[81] Kimberly A. Murakami, Annotation, Construction and Application of No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C.A. §§ 6301 et. seq.), 4 A.L.R. Fed. 2d 103, 113 (2005).

[82] See, e.g., Tommy P. v. Bd. of County Comm'rs, 645 P.2d 697, 704 (Wash. 1982) (holding on statutory grounds that state compulsory education law applies in juvenile detention).

of the U.S. Constitution to challenge the educational services provided to them, but it is unlikely that either of these claims would be successful.

A. Equal Protection

In *Brown v. Board of Education*, the Supreme Court proclaimed:

> "[E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[83]

These broad statements seemed to create the possibility of a federal right to education, but later cases revealed that the lasting impact of the decision has been with respect to racial classifications, not with respect to the right to education. For years after *Brown*, the Equal Protection Clause was used successfully in the desegregation context to challenge unequal education based on racial classifications. Despite the broad dicta in *Brown* and other Supreme Court opinions referring to the importance of education in our society,[84] the precedential value of *Brown* was ultimately limited to classifications based on race. The Supreme Court explicitly held that education is not a fundamental right under the U.S. Constitution in *San Antonio Independent School District v. Rodriguez*.[85]

Since education is not a fundamental right and juvenile delinquents are not a suspect class, the state's differential treatment of juveniles in detention would only be subject to rational basis scrutiny under traditional equal protection analysis. Incarcerated juveniles could, however, try to shape a claim based on the outlier case of *Plyler v. Doe*.[86] In *Plyler*, the Court struck down a Texas statute

[83] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[84] See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (listing Supreme Court opinions emphasizing the importance of education).

[85] Id. at 37, 44, 54–55 (applying rational basis scrutiny to Texas school funding scheme and upholding scheme).

[86] 457 U.S. 202 (1982).

that withheld state funds from school districts for the education of children of illegal aliens.[87] Contrary to precedent, the Court applied heightened scrutiny even though it held that undocumented resident aliens were not a suspect class and that education was not a fundamental right.[88] In so holding, the Court focused on the importance of education and the potential for the denial of education to permanently injure innocent children:

> [The statute] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. . . . In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State.[89]

In an attempt to fit their claim under *Plyler*, juvenile delinquents claiming a right to education could argue that they too are members of an "underclass."[90] As already noted, they are disproportionately minority, poor, and disabled. Denying them the right to education would similarly "foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."[91] This quasi-suspect class and quasi-fundamental right could fall under the *Plyler* precedent, but the Court could easily distinguish *Plyler* because juvenile delinquents are not wholly innocent like the children in *Plyler* were. Furthermore, it is not likely that the Court will extend *Plyler*, because, as the Court noted six years later in *Kadrmas v. Dickinson Public Schools*, "[w]e have not extended [*Plyler*] beyond the 'unique circumstances' that provoked

[87] Id. at 205, 230.

[88] The Court noted that the children were not a suspect class and there was not a fundamental right at stake, but required a "substantial" goal of the state. Id. at 223–24.

[89] Id.

[90] Id. at 219.

[91] Id. at 223.

its 'unique confluence of theories and rationales.'"[92] Therefore, even if they invoked *Plyler*, children in juvenile detention would not have a strong federal constitutional claim based on the Equal Protection Clause.

B. Substantive Due Process

Alternatively, children in juvenile detention could bring a substantive due process claim based on their general liberty interest in being free from unreasonable restraints. Although the Court does not often recognize affirmative obligations on the state, in *Youngberg v. Romeo* the Court held that due process required the state to provide minimally adequate training to a mentally retarded boy who was confined to the state mental institution.[93] The boy was institutionalized to keep him physically safe from harming himself because his mother could no longer provide sufficient care.[94] While in confinement, he suffered injuries from violent outbursts and as a result the doctors physically restrained him with soft shackles.[95] The boy's mother challenged these conditions of confinement as a violation of the Due Process Clause.

The Court held that the boy's liberty interests in "safe conditions" and "freedom from bodily restraint" were clearly protected by the Due Process Clause and were not forfeited because he was civilly committed.[96] The Court reasoned that restrictions on these rights must be justified by legitimate government interests and must be consistent with the purpose of confinement.[97] With surprising breadth, the Court went on to hold that the infringement of these liberty interests triggered an affirmative obligation for the

[92] 487 U.S. 450, 459 (1988) (citing the *Plyler* concurrence, 457 U.S. at 239 (Powell, J., concurring), and dissent, 457 U.S. at 243 (Burger, C.J., dissenting)). Even though the children were equally innocent in both *Kadrmas* and *Plyler*, the Court in *Kadrmas* distinguished *Plyler* on the grounds that the children in *Kadrmas* were not penalized for the illegal conduct of their parents when their parents refused to pay a fee for school bus service. Id.

[93] 457 U.S. 307 (1982).

[94] Id. at 309–10.

[95] Id. at 310–11.

[96] Id. at 307.

[97] Id. at 315–16, 324–25. The Court also recognized that these rights would be preserved in the punitive context as well. See infra Subsection III.C.2.b.

state to provide "training as may be required by these interests."[98] Elaborating on the requirement of "training," the Court stated:

> [T]he State is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.[99]

The Court linked the interest in training to the purpose of the boy's confinement—to keep him safe from harming himself. A strong reading of *Youngberg*, therefore, suggests that because the purpose of the boy's commitment was "to provide reasonable care and safety,"[100] the state was obligated to provide training to effectuate those interests.[101] This is the position that Justice Blackmun took in his concurrence, stating that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed," and therefore, when the state confines someone for "care and treatment" it is obligated to provide treatment.[102]

The argument for a claim to education based on *Youngberg* would be that juvenile delinquents are institutionalized for rehabilitation, and therefore, they are entitled to training (in the form of education) to effectuate that purpose. In the 1970s, a few courts found a federal right to education for juveniles in detention based on similar reasoning.[103]

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[98] Id. at 324.

[99] Id.

[100] Id.

[101] For a version of this argument applied to the general education context, see Note, A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process, 120 Harv. L. Rev. 1323 (2007).

[102] *Youngberg*, 457 U.S. at 325–26 (Blackmun, J., concurring). Chief Justice Burger explicitly rejected any affirmative right to training. Id. at 329 (Burger, C.J., concurring).

[103] See Nelson v. Heyne, 491 F.2d 352, 359 (1974) ("[S]everal recent state and federal cases, out of concern—based upon the *parens patriae* doctrine underlying the juvenile justice system—that rehabilitative treatment was not generally accorded in the juvenile reform process, have decided that juvenile inmates have a constitutional right to that treatment.").

It is not likely, however, that these claims will be widely successful. Generally speaking, courts are hesitant to impose affirmative obligations on the states and read unenumerated rights into the Due Process Clause. More specifically, as a doctrinal matter, there is a difference between the liberty interest at stake in *Youngberg* and the right to education. The right to be free from physical restraints is clearly fundamental under the U.S. Constitution, but the right to education is not.[104] The Court did not hold that there is a general right to treatment as suggested by Justice Blackmun in his concurrence. Rather, the right was triggered because the boy was in shackles, which infringed on his right to be free from unreasonable restraints; there is no corresponding infringement of a fundamental federal right in the juvenile detention context. It is not likely, therefore, that courts will generally find that due process imposes an affirmative obligation on the states to provide education to juveniles in detention. Furthermore, even if a federal due process right to education was recognized based on *Youngberg*, it would not be as robust as a right based on the state constitutional guarantee of education. The *Youngberg* Court held that due process required "minimally adequate training,"[105] but, as will be discussed below, state constitutional guarantees of education protect a broader right to a substantively adequate education.[106]

Ultimately, therefore, it is not likely that juvenile delinquents will have a strong federal claim to challenge the inadequacy of education provided in juvenile detention centers under the Equal Protection Clause or the Due Process Clause.

III. STATE CONSTITUTIONAL CHALLENGES

As has been discussed, statutory and federal constitutional challenges to the education currently provided in juvenile detention are insufficient—they are either inherently limited or unlikely to be

[104] The *Youngberg* Court noted that "the right to personal security constitutes a historic liberty interest protected substantively by the Due Process Clause" and the right to freedom from bodily restraints "always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." 457 U.S. at 315–16 (internal citations omitted). As discussed supra Section II.A, the right to education is not fundamental under the U.S. Constitution.

[105] 457 U.S. at 322.

[106] See infra Section III.B.

successful. Children in juvenile detention could bring stronger claims based on the right to education guaranteed by state constitutions. This Part first analyzes the only state supreme court decision that directly addresses a state constitutional challenge to education in juvenile detention. Then, this Part builds the argument for a state constitutional challenge based on the right to education in the school finance context and the balancing of constitutional rights in the confinement context.

A. Tunstall v. Bergeson

The only state supreme court that has directly considered a challenge to the education provided in juvenile detention under its state constitution is the Washington Supreme Court in *Tunstall v. Bergeson*.[107] Even though the reasoning in *Tunstall* is not binding on other states, it does give an indication of the mindset that courts might take in approaching these cases. In *Tunstall*, a class of inmates under age twenty-one challenged the lack of education during their incarceration as unconstitutional under the Washington Constitution[108] and as a violation of the Basic Education Act ("BEA").[109] The trial court granted summary judgment for the inmates, but the Washington Supreme Court reversed, finding no violation of the inmates' constitutional rights.[110]

After rejecting the plaintiffs' statutory claims, the court considered claims based on the Washington Constitution. First, the court considered adequacy claims based on Article IX of the Washington Constitution, which requires the state to "provide for a general and uniform system of public schools."[111] The court dismissed the claims of the inmates over age eighteen by holding that Article IX did not apply to inmates over the age of eighteen and therefore these inmates had no right to education. The court held that the term "children" within Article IX was limited to children under eighteen because Washington's compulsory education law only required children to attend school until age eighteen.[112]

[107] 5 P.3d 691 (Wash. 2000).
[108] Wash. Const. art. IX.
[109] Wash. Rev. Code Ann. §§ 28A.150.200–.150.310 (2006).
[110] *Tunstall*, 5 P.3d at 696, 702–04, 708.
[111] Id. at 702.
[112] Id. at 700–01.

The court then considered the rights of those inmates under age eighteen. The court held that these inmates had a constitutional right to education under Article IX, which was satisfied by the BEA. The court rejected the plaintiff's facial challenge because the state had undertaken to provide some educational services to inmates under the age of eighteen. The court held that for a statute to be unconstitutional on its face it must be "beyond a reasonable doubt that there is no set of circumstances in which [the BEA] could meet the constitutional minimum due under article IX."[113] The statute required that the correctional facility provide education to help inmates achieve a high school diploma.[114] Invoking the need for judicial deference in the face of a legislative decision—not wanting to "micromanage education in Washington"—the court held that this statute was sufficient on its face.[115] The court also rejected the inmates' as-applied challenge because they failed to provide specific facts demonstrating a violation.[116]

It is important to note, however, that the court explicitly rejected the argument that the children had forfeited their right to education by engaging in the conduct that resulted in their incarceration. The court stated:

> [T]he State contends that by engaging in conduct which compels their removal from the school system, the inmates have, by their own conduct and not through any failing of the State, disqualified themselves from the educational opportunities provided them. We find the State's arguments unpersuasive and find it unnecessary to deal with this issue further since the Legislature has seen fit to provide an educational program to DOC inmates.[117]

This is especially telling since these children were charged with serious crimes and housed in an adult criminal facility. Ultimately, the court held that "individuals under age 18 incarcerated in adult Washington State Department of Correction (DOC) facilities have

[113] Id. at 702.
[114] Id.
[115] Id. at 702–03.
[116] Id. at 703.
[117] Id. at 701.

a constitutional right to public education," and that this right was satisfied by the BEA.[118]

Next, the court considered equity claims based on the state's equal protection clause. The plaintiffs argued that the BEA was a violation of equal protection because it treated incarcerated youths differently than non-incarcerated youths without having a compelling government interest to justify the disparate treatment.[119] The court held that in order to apply strict scrutiny under the equal protection clause, it first needed to find that a fundamental right *had been infringed* or that a suspect class was involved. The court reasoned that since it already had found that the fundamental right to education, as defined by Article IX, had not been infringed, there was no need to apply strict scrutiny to the state's differential treatment with respect to that right.[120] For strict scrutiny to apply, it is not required that a fundamental right be *infringed*. Rather, in an equal protection challenge, strict scrutiny applies when a fundamental right *is at issue*—when there is state-imposed unequal treatment *with respect to* a fundamental right.

The court seemed to be motivated by a concern that applying heightened scrutiny in this case would mean that every law that implicates education would be subject to strict scrutiny.[121] This unease highlights the judiciary's concerns about institutional competence in this context. The court's odd reasoning, which led it to conclude that there was no equal protection violation, is perhaps an indication of the court's unwillingness to find a violation in the juvenile detention context. However, the court acknowledged that Article IX of the state constitution provides a right to education in the juvenile detention setting, which suggests that future as-applied

[118] Id. at 694.

[119] Id. at 703.

[120] The court reasoned that "[i]n other words, finding an infringement of the fundamental right is a necessary predicate to determining whether that right was *impermissibly* infringed." Id. at 704. The dissent strongly disagreed with the court's rationale on this point: "[T]he majority compounds its error by applying an incorrect constitutional analysis. . . . Properly stated, the threshold question is whether 'the allegedly discriminatory classification . . . *threatens* a fundamental right.'" Id. at 711 (Johnson, J., dissenting) (internal citations omitted).

[121] Id. at 704 n.21 ("The inmates' attempt to trigger a more stringent standard of review through the abstract invocation of a 'fundamental right to education' is insufficient. Taken to its logical extreme, the inmates' argument would subject *all* legislation involving *education* to strict scrutiny; this is inconsistent with prior precedent.").

challenges based on specific conditions in detention centers are plausible. Because of the posture of the claim as a facial challenge, the *Tunstall* court avoided the major issue of determining to what extent the right to education is outweighed by safety interests in juvenile detention. Moving away from the *Tunstall* decision, the rest of this Part outlines the basis for state constitutional claims and provides examples of specific potential challenges based on this theory.

B. The Right to Education Under State Constitutions

Every state constitution contains a clause requiring the state legislature to establish a free system of public schools for children residing within its borders.[122] Scholars have categorized these clauses by the strength of the language used in them.[123] Stronger education clauses use adjectives such as "efficient,"[124] "high quality,"[125] "uniform,"[126] and "thorough"[127] to describe the system of free public schools that the state must establish. Others simply require that the legislature establish public schools.[128] The states' education clauses have mainly been interpreted by courts in the context of school finance litigation. After the possibility of using the U.S. Constitution

[122] See Eric Blumenson & Eva S. Nilsen, One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education, 81 Wash. U. L.Q. 65, 103 n.161 (2003) (listing state constitutional provisions).

[123] See Gershon M. Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 Tex. L. Rev. 777, 815–16 (1985) (categorizing state education clauses into four categories); William E. Thro, The Role of Language of the State Education Clauses in School Finance Litigation, 79 Educ. L. Rep. 19, 23–25 (1993).

[124] Ark. Const. art. XIV, § 1; Del. Const. art. X, § 1; Ill. Const. art. X, § 1; Ky. Const. § 183; Md. Const. art. VIII, § 1; Pa. Const. art. III, § 14; Tex. Const. art. VII, § 1; W. Va. Const. art. XII, § 1.

[125] Ill. Const. art. X, § 1; Va. Const. art. VIII, § 1.

[126] Ariz. Const. art. XI, § 1; Colo. Const. art. IX, § 2; Ind. Const. art. VIII, § 1; Minn. Const. art. XIII, § 1; Nev. Const. art. XI, § 2; N.C. Const. art. IX, § 2; Or. Const. art. VIII, § 3; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1.

[127] Idaho Const. art. IX, § 1; Md. Const. art. VIII, § 1; Pa. Const. art. III, § 14; W. Va. Const. art. XII, § 1.

[128] Conn. Const. art. VIII, § 1; Kan. Const. art. VI, § 1; Haw. Const. art. X, § 1; La. Const. art. VIII, § 1; Me. Const. art. VIII, pt. 1, § 1; Miss. Const. art. VIII, § 201; N.Y. Const. art. XI, § 1; N.D. Const. art. VIII, § 1; Ohio Const. art. VI, § 3; Okla. Const. art. XIII, § 1; S.C. Const. art. XI, § 3.

to challenge disparities in school funding was ended in *Rodriguez*, litigants turned to state education clauses.[129]

Scholars have characterized the school finance litigation as two waves: the equity wave and the adequacy wave. In the first wave, equity suits were brought based on the same equal protection theory that the U.S. Supreme Court had rejected in *Rodriguez*, but plaintiffs relied on state constitutions as the basis for claiming that education is a fundamental right. Litigants claimed that (1) education is a fundamental right under the state constitution; (2) disparities in funding amounted to unequal treatment with respect to that fundamental right; and (3) since the disparities could not be justified by a legitimate government interest that satisfied the heightened scrutiny test, they were unconstitutional under the state's equal protection clause. Initially, suits were successful on this theory in California,[130] Connecticut,[131] West Virginia,[132] and Wyoming.[133]

Although many of these suits were initially successful, the equity rationale led to a principle of "fiscal neutrality,"[134] which proved difficult to implement in practice. Court orders of fiscal neutrality often resulted in a leveling down of expenditures in wealthier districts, rather than a leveling up in poorer districts. Fiscal neutrality

[129] As of December 2007, forty-five states had been subject to suits challenging the state's public school funding system based on the state constitution's education clause. See Molly A. Hunter, National Access Network, Litigations Challenging Constitutionality of K-12 Funding in the 50 States (December 2007), http://www.schoolfunding.info/litigation/In-Process-Litigations.pdf. As of December 2007, finance schemes had been declared unconstitutional in twenty-eight states and had been upheld in eighteen states. Molly A. Hunter, National Access Network, "Equity" and "Adequacy" School Funding Liability Court Decisions (2007), http://www.schoolfunding.info/litigation/equityandadequacytable.pdf.

[130] Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951–53 (Cal. 1976).

[131] Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977).

[132] Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

[133] Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333, 335 (Wyo. 1980). Reaching the same ultimate holding, the Arkansas Supreme Court found that the funding scheme failed under rational basis scrutiny in *Dupree v. Alma School District No. 30*, 651 S.W.2d 90, 93 (Ark. 1983).

[134] See John Dayton & Anne Dupre, School Funding Litigation: Who's Winning the War?, 57 Vand. L. Rev. 2351, 2359 n.26 (2004) (explaining the principle of fiscal neutrality first used in *Serrano II* under which "'tax burdens and tax efforts should be equalized among all districts' and 'equal tax effort should result in equal expenditures per pupil throughout the state, all other factors being equal'" (quoting National Education Association, Understanding State School Finance Formulas 5 (1987)) (errors preserved)).

as a goal was also conceptually flawed because educational inputs and outputs are not perfectly correlated—equal spending does not necessarily amount to equal education.[135] Perhaps as a result of the difficulties in implementing these early judgments, during the 1980s courts became less likely to rule for plaintiffs in equity suits. Many states held that education was not a fundamental right and upheld state school finance schemes under rational basis scrutiny.[136]

In the second wave, litigants shifted away from equity claims and began challenging state funding schemes as substantively inadequate under the state's education clause. Adequacy claims are based on the idea that the text of the state constitution's education clause creates a substantive standard that the state school system must meet. Courts have been more receptive to adequacy claims than equity claims.[137] Some scholars have argued that the success of adequacy suits was due to their concurrent timing with the standards-based education reform movement, which created concrete standards that could be used to define an adequate education.[138] These legislative standards alleviated institutional competence concerns and gave courts better guidance in determining violations and fashioning remedies.[139]

[135] Michael A. Rebell, Educational Adequacy, Democracy, and the Courts, *in* Nat'l Research Council, Achieving High Educational Standards for All: Conference Summary 218, 226–27 (Timothy Ready et al. eds., 2002). State funding schemes are typically based on revenue from local property taxes. In response to these decisions, many states enacted district power equalizing plans in an effort to equalize tax revenues, and some states mandated a leveling down of expenditures in wealthy districts, which was not popular politically.

[136] By 1988, fifteen state supreme courts had ruled against plaintiffs in equity suits. Id. at 227.

[137] Id. at 228 (finding that plaintiffs have prevailed in roughly two-thirds of adequacy suits brought before state high courts since 1989); see also Molly A. Hunter, National Access Network, School Funding "Adequacy" Decisions Since 1989 (May 2007), http://www.schoolfunding.info/litigation/adequacydecisions.pdf (reporting plaintiff victories in twenty out of thirty fully litigated cases).

[138] Rebell, supra note 135, at 228–30; see also Julius Chambers, Adequate Education for All: A Right, an Achievable Goal, 22 Harv. C.R.-C.L. L. Rev. 55, 61 (1987) ("[T]hese standards present us with an affirmative opportunity to define a right to a *minimally adequate education*."); William S. Koski, Educational Opportunity and Accountability in an Era of Standards-Based School Reform, 12 Stan. L. & Pol'y Rev. 301, 313 (2001).

[139] This movement directly responded to the concerns of many justices who had based their reluctance to find for the plaintiff in equity suits on the separation of powers argument that the court should not be running the school system. Once legislative

The adequacy conception was also more successful because it was necessarily limited to the context of education since it was directly linked to (and cabined by) the state's education clause. In contrast, equity suits were based on states' equal protection clauses, which could potentially be applied more broadly to a number of fundamental interests.[140] The adequacy rationale also allowed local school districts to retain control over their school financing.[141] The equity rationale and fiscal neutrality principle implied that all school districts must have the same fiscal inputs, but the adequacy rationale allowed courts to set a minimum standard that wealthy school districts could exceed as long as all school districts satisfied the minimum adequacy requirement.[142] As the Wisconsin Supreme Court stated in *Vincent v. Voight*, "[t]he adequacy approach also may be appealing because it does not threaten to lower the level of achievement in some districts in an effort to create equality."[143] The adequacy rationale offered the promise of

standards were in place it was easier for courts to rule in favor of plaintiffs and still maintain a judicial rather than legislative role in the process. See Vincent v. Voight, 614 N.W.2d 388, 407 (Wis. 2000) ("By grounding the standard in statutes . . . we defer to the legislature because it 'is uniquely equipped to evaluate and respond to such questions of public policy . . . .'" (quoting Kukor v. Grover, 436 N.W.2d 568, 583 n.14 (Wis. 1989)).

[140] For example, the New Jersey Supreme Court, in declining to decide an equal protection claim in *Abbott II*, referred to "the monumental governmental upheaval that would result if the equal protection doctrine were held applicable to the financing of education and similarly applied to all governmental services." Abbott v. Burke (*Abbott II*), 575 A.2d 359, 410 (N.J. 1990). See also Rebell, supra note 135, at 230.

[141] Comparing two opinions of the Court of Appeals of New York, that state's highest appellate court, highlights the importance of local control and the desirability of its preservation under an adequacy rationale. Compare Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982) (upholding scheme to preserve local control) with Campaign for Fiscal Equity, Inc. v. State (*Campaign II*), 801 N.E.2d 326, 369 (N.Y. 2003) (striking down funding scheme as inadequate, despite the fact that the court's "remedy also signals the demise of local control, a key component to the constitutionalization of New York's public school system").

[142] See William S. Koski & Rob Reich, When "Adequate" Isn't: The Retreat From Equity in Educational Law and Policy and Why It Matters, 56 Emory L.J. 545, 560–61 (2006) ("[A] constitutional floor of adequacy would permit some local districts to provide their children more than what the court would deem 'adequate' education. . . . The decision-making authority of well-to-do districts need not be curtailed simply because of a court order to the state that a poor school district be provided resources.").

[143] 614 N.W.2d at 407.

leveling funds up to an adequate level rather than leveling them down.

In adjudicating these disputes, courts needed to articulate what qualified as an adequate education. Courts pointed to two animating principles: an adequate education must enable students (1) to fulfill civic duties such as voting and serving on juries, and (2) to seek gainful employment.[144] Many courts have embraced these animating principles when determining whether the education provided is adequate, but have differed on the specific approaches to adjudicating educational adequacy. Some courts simply articulated general principles about the importance of education for functioning in society and did not mandate specific changes.[145] Other courts pointed specifically to the state education standards adopted by the

[144] Rebell, supra note 135, at 239. The Court of Appeals of New York held that a sound basic education required "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." *Campaign II*, 801 N.E.2d at 330 (quoting Campaign for Fiscal Equity v. State (*Campaign I*), 655 N.E.2d 661, 666 (N.Y. 1995)). The court went on to state that "function productively" implied adequate preparation to compete for jobs. Id. at 330–31. The North Carolina Supreme Court held that "[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate." Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997). The court then specifically enumerated skills that an adequate education should include, focusing on civic participation and the ability to compete for gainful employment. Id. at 255. The New Jersey Supreme Court held in *Abbott II* that the current funding scheme was inadequate because it did not allow children in the Abbott district to "participate fully as citizens and workers in our society." 575 A.2d at 408. The Wisconsin Supreme Court held that "[a]n equal opportunity for a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally." *Vincent*, 614 N.W.2d at 396. These values are the same as those that animated the U.S. Supreme Court in *Brown* when it stated that education "is the very foundation of good citizenship. Today it is a principal instrument in . . . preparing [children] for later professional training . . . ." Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[145] Under this approach, courts have declared the current system unconstitutional, retained jurisdiction, but have not specified what action needed to be taken to bring the system into compliance; if the new system was challenged again, then the court would evaluate it at that time. Matt Brooker, Comment, Riding the Third Wave of School Finance Litigation: Navigating Troubled Waters, 75 UMKC L. Rev. 183, 209 (2006). This preserved the traditional judicial function and allowed the legislature to prescribe prospective specific mandates. See also McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 554 n.92 (Mass. 1993) (leaving to the legislative branch the responsibility of "defining the specifics and the appropriate means to provide the constitutionally-required education").

legislature as defining an adequate education,[146] while other courts specifically listed capabilities that students must possess,[147] and still others defined adequacy relative to other schools within the state.[148]

As these suits have progressed and courts have continued to rely on the adequacy rationale, it has blended with the traditional equity rationale.[149] State courts often look to the education provided throughout the state to determine what quality of education is "adequate."[150] In some instances, courts have gone beyond what would have been required under an equity suit and have ordered increased spending above the level in wealthy districts, in order for underperforming and poor school districts to achieve the same quality of education.[151] This also reflects the understanding that monetary inputs and educational outputs are not strictly correlated. Underperforming schools often will require extra funding to attain the same standards as a well-functioning school.

Under the equity-as-adequacy approach, courts have extended the initial concept of a minimally adequate education by requiring states to fund the same facilities and programs in poor school districts that are available in wealthier districts. Rather than requiring

[146] See, e.g., Montoy v. State, 102 P.3d 1160, 1164 (Kan. 2005) ("[W]e need look no further than the legislature's own definition of suitable education to determine that the standard is not being met under the current financing formula."). One potential downside of determining constitutional adequacy based on state standards is that it potentially gives states the incentive to make standards lower so that the state school system will not be in violation of the constitutional mandate. However, see *Campaign II*, in which the Court of Appeals of New York held that state standards would not always be sufficient to satisfy the constitutional minimum. 801 N.E.2d at 355–56. See also Koski & Reich, supra note 142, at 564–65.

[147] See Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989); *McDuffy*, 615 N.E.2d at 554 (citing *Rose* for the capabilities a child must possess); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997) (same); see also Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979) (listing similar capabilities).

[148] New Jersey is one example. See *Abbott II*, 575 A.2d at 384.

[149] See Julie K. Underwood, School Finance Adequacy as Vertical Equity, 28 U. Mich. J.L. Reform 493, 517–18 (1995).

[150] For example, in *Campaign II*, the Court of Appeals of New York acknowledged that in *Levittown* it had held that the "Education Article guarantees not equality but only a sound basic education," but in evaluating whether the teaching was adequate in *Campaign II*, the court compared the pay, experience, certification, and turnover rate of teachers in the inadequate poor district with the same statistics in the rest of the state. 801 N.E.2d at 333 (internal citations omitted).

[151] For instance, the Arkansas Supreme Court noted that "equal opportunity is the touchstone for a constitutional system and not merely equalized revenues." Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 495 (Ark. 2002).

the same monetary inputs, courts have required the same *substantive* inputs, such as equally qualified teachers and equal facilities. The Montana Supreme Court reasoned that "wealthier school districts are not funding frills or unnecessary educational expenses. . . . [The] discrepancies in spending as large as the ones present in Montana translate . . . into unequal educational opportunities."[152] The New Jersey Supreme Court held that "in order to provide a thorough and efficient education in these poorer urban districts, the State must assure that their educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts, and that, in addition, *their special disadvantages must be addressed*."[153] Thus, as the concept of an adequate education has expanded to include equal educational opportunities, the rigid categories of adequacy and equity suits have broken down. The evolving rationales will be important for suits challenging the education provided in juvenile detention because an equity-as-adequacy rationale could support a claim for equal substantive inputs and arguably even funding to address the special needs of children in juvenile detention.

After finding an infringement or unequal treatment under these various doctrinal casts, courts have considered whether the infringement is justified under the appropriate standard of review. Although many courts have used absolute language when discussing the substantive guarantees of the state constitution in adequacy cases, it is not likely that this absolute language will translate into the juvenile detention context. Many courts have not articulated a standard of scrutiny to be used when the state's school funding system does not measure up to the substantive adequacy guarantees. Instead, courts have held that if the substantive guarantees are not met then the funding scheme is *necessarily* unconstitutional.[154] That

[152] Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989).

[153] *Abbott II*, 575 A.2d at 408 (emphasis added).

[154] See *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 495 ("Nevertheless, because we conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children, we conclude that it is unnecessary to reach the issue of whether a fundamental right is also implied. Many states, as we have already discussed, appear to get lost in a morass of legal analysis when discussing the issue of fundamental right and the level of judicial scrutiny. . . . The critical point is that the State has an absolute duty under our constitution to provide an adequate education to each school child. Like the Vermont and Arizona Supreme Courts, we

said, as with other rights that courts discuss in absolute terms, it is likely that these substantive guarantees could be outweighed by significant valid government interests. For example, as will be discussed further below, it is likely that the state's interest in providing safety to juveniles in detention would outweigh these substantive guarantees of adequacy.

C. The Right to Education in Juvenile Detention

1. The Text Applies, But Have Juvenile Delinquents Forfeited Their Right to Education?

The state constitutional guarantees of education provide for a free education system for *all children* residing within the state's borders.[155] Since the text does not exempt children in juvenile detention, it is plausible to argue that children in juvenile detention enjoy the same guarantee of education as other children in the state. Therefore, from a textual standpoint, the applicable court precedents from the school finance context that define the contours of the right to education should also apply in the juvenile detention context.

The main objection to this argument is that children in juvenile detention have forfeited their right to education. The state has not denied the child the right to an adequate education, but instead the child has given up the right to an adequate education by engaging in the activity that caused him to be adjudged delinquent. Some courts have invoked exactly this reasoning when considering whether a child who is suspended or expelled from school is entitled to an alternative education program.[156] For example, the Wyoming Supreme Court stated that "the fundamental right to an opportunity for an education does not guarantee that a student

are persuaded that that duty on the part of the State is the essential focal point of our Education Article and that performance of that duty is an absolute constitutional requirement.").

[155] See, e.g., Alaska Const. art. VII, § 1 ("open to all children of the State"); Colo. Const. art. IX, § 2 ("wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously"); Fla. Const. art. IX, § 1 ("for the education of all children residing within its borders"); Ind. Const. art. VIII, § 1 ("equally open to all"); Mont. Const. art. X, § 1 ("[e]quality of educational opportunity is guaranteed to each person of the state"); N.Y. Const. art. XI, § 1 ("wherein all the children of this state may be educated").

[156] See infra notes 188–99 and accompanying text for a more detailed discussion.

cannot temporarily forfeit educational services through his own conduct."[157] This argument is intuitively appealing, but it ultimately fails for two reasons: (1) the purpose of juvenile detention is rehabilitation, and therefore providing education is consistent with the purposes of confinement; and (2) even if the purpose of juvenile detention is to punish delinquents, it does not follow that they forfeit their right to education because, even in the punishment context, inmates do not forfeit all of their constitutional rights. Under both purposes, therefore, juveniles have not forfeited their constitutional right to education. These arguments will be addressed in turn.

a. Education Is Consistent with the Purpose of Confinement

The Purpose of Confinement is Rehabilitation. Initially, the purpose of the juvenile justice system was solely to rehabilitate juvenile offenders.[158] From its inception, the juvenile justice system has been fundamentally different from the adult criminal system. The creation of a separate system was meant to shield children from the harshness of criminal proceedings and to give juvenile courts the flexibility to craft treatment remedies suited to the best interests of the child.[159] Many states' juvenile codes contain a statement of purpose that highlights the importance of rehabilitation as an ideal for the juvenile justice system. For example, the Massachusetts Code states that "as far as practicable, [children brought before the court] shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings."[160]

[157] In re RM, 102 P.3d 868, 874 (Wyo. 2004). For a full discussion of the case, see O'Kelley H. Pearson, Case Note, Education Law—Fundamentally Flawed: Wyoming's Failure to Protect a Student's Right to an Education, *RM v. Washakie County School District Number One*, 102 P.3d 868 (Wyo. 2004), 6 Wyo. L. Rev. 587, 604 (2006).

[158] See Feld, supra note 14, at 695–96.

[159] Id. at 695.

[160] Mass. Gen. Laws Ann. ch. 119, § 53 (West 2003). The Massachusetts Supreme Court has interpreted this section as focusing on the rehabilitative ideal: "This court has often recognized the unique character of the Juvenile Courts as forums in which, to the extent possible, the best interests of the child serve to guide disposition. This rehabilitative goal applies equally to juveniles charged with the most serious offenses as to those charged with minor offenses." Police Comm'r v. Mun. Court, 374 N.E.2d 272, 287 (Mass. 1978).

Over the last twenty years, as juvenile crime has increased and there has been a political movement for authorities to "get tough" on juvenile offenders, these rehabilitative purposes have eroded somewhat and many juvenile justice systems have become more punitive in nature.[161] They have not changed so much, however, as to become the same as the adult criminal system, and they are still fundamentally based on rehabilitation. For example, the Indiana Code Statement of Purpose reflects both the historic ideal of rehabilitation and the emerging ideals of accountability and punishment. Its purposes include: (1) to "ensure that children within the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation;" (2) to "provide a juvenile justice system that protects the public by enforcing the legal obligations that children have to society and society has to children;" and (3) to "promote public safety and individual accountability by the imposition of appropriate sanctions."[162]

State and federal courts have also noted this change, but they continue to justify a disparity in procedural protections for juveniles by pointing to the rehabilitative nature of the juvenile justice system. The Supreme Court extended many procedural protections to juveniles charged with crimes in 1967 in *In re Gault*,[163] but then

[161] See Feld, supra note 14, at 692 (noting that "jurisdictional, jurisprudential, and procedural" changes have made juvenile courts more like adult criminal courts and that, in particular, sentencing is now more punitive and is often based on the severity of the offense and the juvenile's prior record rather than on the best interests of the child).

[162] Ind. Code Ann. § 31-10-2-1 (LexisNexis 2003). See also the West Virginia Code, which includes among its purposes to "[p]rovide a system for the rehabilitation of status offenders and juvenile delinquents." W. Va. Code Ann. § 49-1-1 (LexisNexis 2004). In interpreting this provision, the West Virginia Supreme Court has held that while rehabilitation is the first goal of the juvenile justice system, it is not the only goal; deterrence and protection of society are also appropriate objectives. See State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401, 410 (W. Va. 1980). See also New Jersey Code of Juvenile Justice, which states as its purpose: "Consistent with the protection of the public interest, to remove from children committing delinquent acts certain statutory consequences of criminal behavior, and to substitute therefor [sic] an adequate program of supervision, care and rehabilitation, and a range of sanctions designed to promote accountability and protect the public." N.J. Stat. Ann. § 2A:4A-21 (West 2007).

[163] 387 U.S. 1 (1967). See Barry C. Feld, The Constitutional Tension Between *Apprendi* and *McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts, 38 Wake Forest L. Rev. 1111, 1140–43 (2003).

curtailed this expansion of rights by denying the right to a jury trial to children charged with serious crimes in *McKeiver v. Pennsylvania*.[164] State courts have also continued to deny children the right to a jury in delinquency proceedings. For example, the Pennsylvania Superior Court noted the change in the purposes of the juvenile justice system, but held that juveniles do not have the right to a jury trial. The court stated:

> [T]he juvenile justice system has undergone a transformation over the past two decades in which there has been a move away from the rehabilitation and protection of juvenile offenders toward more punishment and correctional oriented policies. Nonetheless, we cannot conclude that a juvenile adjudication has, in essence, become the equivalent of an adult criminal proceeding. . . .
>
> While the principles and policies underlying our juvenile justice system have evolved, particular importance is still placed upon rehabilitating and protecting society's youth.[165]

Similarly, the Washington Supreme Court noted that despite recent changes, the juvenile justice system was still grounded on rehabilitation and was fundamentally different from the adult criminal system. Therefore, the court reasoned, juveniles did not have the right to a jury trial.[166] The Wyoming Supreme Court also highlighted the differences between the juvenile justice system and the adult criminal system when it rejected an equal protection challenge to a probation sentence by a juvenile. The court explained:

> Juvenile proceedings are designed to rehabilitate and protect the juvenile, not to punish him. These goals of rehabilitation and protection are reflected throughout the juvenile code. Proceed-

[164] 403 U.S. 528 (1971). See Feld, supra note 163, at 1143–50. Similarly, in cases challenging the conditions of confinement for juveniles, the U.S. Supreme Court has continued to emphasize the state's "*parens patriae* interest in preserving and promoting the welfare of the child . . . which makes a juvenile proceeding fundamentally different from an adult criminal trial." Schall v. Martin, 467 U.S. 253, 263 (1984) (internal citation and quotation marks omitted).

[165] In re J.F., 714 A.2d 467, 471, 475 (Pa. Super. Ct. 1998).

[166] State v. Schaaf, 743 P.2d 240, 243 (Wash. 1987) ("The fact that juveniles are accountable for criminal behavior does not erase the differences between adult and juvenile accountability.").

> ings in juvenile court are equitable as opposed to being criminal. Juveniles are not convicted; they are merely adjudicated delinquents. By treating juveniles more gently than it treats adults, the legislature is compensating for juveniles' inherent lack of experience and maturity.[167]

These legislative acts and judicial precedents make clear that rehabilitation is still an important—arguably the most important—purpose of the juvenile justice system. Even in states where rehabilitation is no longer the central purpose, as long as states continue to justify a disparity in treatment of juveniles in the name of rehabilitation, they must also respect the legal fiction of rehabilitation when it results in further protections for juveniles' rights, such as in the education context.

Valid Infringements When Purpose is Rehabilitation. To the extent that courts have recognized that the purpose of the juvenile justice system is rehabilitation, it is difficult to argue that juveniles have forfeited their right to education by entering the juvenile justice system. How could a child be deprived of an education in the name of rehabilitation? Education is central to rehabilitation and reintegration into society.[168]

Furthermore, a useful analogy can be drawn to the treatment of other constitutional rights in the non-punitive civil confinement context, where courts have held that constitutional rights may only be infringed when necessary for security or for reasons consistent with the purpose of confinement. For example, in *Youngberg v. Romeo*, the Supreme Court interpreted the federal Due Process Clause to place limits on restrictions of liberty in the civil confinement context.[169] The Court held that, in contrast to the punitive context, the restrictions must be related to the purpose of commitment and cannot be "tantamount to punishment."[170] Applying the *Youngberg* standard in the juvenile detention context, courts have held that "restrictions on [the juvenile's] liberty beyond his initial

[167] In re ALJ, 836 P.2d 307, 313 (Wyo. 1992).

[168] See supra notes 44–46 and accompanying text outlining the importance of education for rehabilitation.

[169] 457 U.S. 307, 315 (1982) ("The mere fact that [respondent] has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment.").

[170] Id. at 320.

incarceration must be reasonably related to some legitimate government objective—of rehabilitation, safety or internal order and security."[171] Even under this deferential standard that gives significant weight to professional judgment, courts have found constitutional violations based on overcrowding,[172] verbal abuse,[173] and the use of isolation for juveniles.[174]

State courts have used a similar balancing approach when considering challenges under their state constitutions. The Arizona Supreme Court explicitly adopted the *Youngberg* standard in *Large v. Superior Court*, when it considered a challenge to the forcible administration of anti-psychotic drugs under the state Due Process Clause.[175] Other state courts have granted mentally ill patients greater protection under the state Due Process Clause than the federal Due Process Clause.[176] Both state and federal constitutions have been interpreted to require a similar balancing test for restraints on liberty in the non-punitive confinement context—the restraints must be consistent with the purposes of confinement and justified by legitimate safety or security needs.[177] It is plausible to

[171] Santana v. Collazo, 714 F.2d 1172, 1180 (1st Cir. 1983). See also Alexander S. v. Boyd, 876 F. Supp. 773, 787 (D.S.C. 1995) ("[J]uveniles possess a clearly recognized liberty interest in being free from unreasonable threats to their physical safety. . . . The level of restraint to be used for each juvenile should be based upon some rational professional judgment as to legitimate safety and security needs.").

[172] *Alexander S.*, 876 F. Supp. at 795.

[173] R.G. v. Koller, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006).

[174] Id. at 1155–56 (holding that isolation was an "excessive, and therefore unconstitutional, response to legitimate safety needs of the institution" in the context of isolating lesbian, gay, and bisexual juveniles for their own protection). See also H.C. v. Jarrard, 786 F.2d 1080, 1085–86 (11th Cir. 1986) (holding that shoving a juvenile into a solitary confinement cell amounted to a violation of due process because it was not required to maintain discipline); Milonas v. Williams, 691 F.2d 931, 940 (10th Cir. 1982) (finding that use of "isolation rooms" violated the juveniles' Fourteenth Amendment rights).

[175] 714 P.2d 399, 405 (Ariz. 1986) (considering challenge under Article II, § 4 of the Arizona Constitution).

[176] See Myers v. Alaska Psychiatric Inst., 138 P.3d 238, 246–48 (Alaska 2006) (discussing state cases granting higher protections under state due process clauses than under the federal Due Process Clause).

[177] Many cases challenging restraints on liberty are brought under the federal Due Process Clause because under the Supremacy Clause all states are bound by it; unless the state due process protections are stronger than the federal protections, the court will rely on the U.S. Constitution. See, e.g., *Large*, 714 P.2d at 405 ("In construing the Arizona Constitution we refer to federal constitutional law only as the benchmark of minimum constitutional protection.").

argue that, because the purpose of juvenile detention is rehabilitation, the right to education should remain fully robust. It is much more likely, however, that courts will employ a balancing test, such as the one used in the liberty context, to accommodate the special needs of confinement and to give appropriate deference to the expertise of detention administrators. Even under a *Youngberg*-type balancing test, however, the juvenile's fundamental right to education may only be infringed for the juvenile's safety, the security of the facility and safety of others, or for rehabilitative purposes. Since education is not only consistent with the purposes of confinement, but is *necessary* to effectuate the rehabilitative purpose of juvenile detention, the only legitimate government interests under this analysis would be safety and security.[178]

b. Valid Limits on Fundamental Rights in the Punishment Context

Even if the purpose of juvenile detention is punishment, it does not follow that juveniles have forfeited their right to education. In the context of adult criminals, when a person is validly convicted of a crime, the state is justified in restraining his liberty. The state does not, however, have unfettered discretion to violate his constitutional rights. Just as incarceration is not carte blanche to restrain even an adult criminal's rights, it does not justify all intrusions on the right to education in the juvenile detention context. As the Sixth Circuit noted, "[p]risoners do not lose all of their constitutional rights when they enter a penal institution. Rather they retain all of their constitutional rights except for those which must be impinged upon for security or rehabilitative purposes."[179] Courts have consistently held that federal and state constitutional rights must

[178] This argument that the right to education may be infringed only for certain legitimate government interests is more limited than the federal due process argument discussed earlier. See supra Part II.B. The state constitutional argument is not for an affirmative right to training under the Due Process Clause, but is merely arguing that the state is not justified in *restraining* a right that is granted elsewhere in the constitution and that is wholly consistent with the purpose of confinement. In this context, the state's constitutional guarantee of education guarantees the right which must be balanced against the legitimate government interest in safety. In contrast, the former argument discussed, based solely on *Youngberg*, would be seeking an *affirmative* right to treatment under the Due Process Clause.

[179] Hanna v. Toner, 630 F.2d 442, 444 (6th Cir. 1980) (citing Jones v. Metzger, 456 F.2d 854, 855 (6th Cir. 1972)).

be balanced against security needs in the prison context. While courts have recognized their lack of institutional competence to deal with complex problems of prison administration, and have noted the need to defer to the expertise of prison officials, it is clear that even under the deferential federal standard in *Turner v. Safley*,[180] prisoners do not forfeit their constitutional rights upon entering prison. A prisoner's rights may be curtailed more than an ordinary citizen's, but they are not lost.

In the federal context, under *Turner*, when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is "reasonably related to legitimate penological interests."[181] The Supreme Court articulated four relevant factors for lower courts to consider: (1) a rational connection between the prison regulation and a legitimate government interest; (2) whether prisoners have an alternative means for exercising their right; (3) the effect that granting the right to inmates would have on guards, other inmates, and prison resources; and (4) whether there are alternative prison regulations available.[182] The Court later noted in *Overton v. Bazzetta* that "internal security" is "perhaps the most legitimate of penological goals."[183] This test has been used to analyze claims of freedom of speech, freedom of religion, freedom of association, equal protection, and access to courts.[184]

Some states, such as Pennsylvania, have explicitly adopted the *Turner* standard to analyze state constitutional rights in the prison context.[185] The federal standard of review, however, is not binding

[180] 482 U.S. 78 (1987).

[181] Id. at 89.

[182] Id. at 89–90. Note that the fourth factor is not a "least restrictive alternative" test but is just one factor to determine the reasonableness of the prison regulation. Id. at 91.

[183] 539 U.S. 126, 133–34 (2003) (holding that restrictions on visitation for prisoners with substance abuse problems did not violate due process).

[184] See Thirty-Fifth Annual Review of Criminal Procedure, 35 Geo. L.J. Ann. Rev. Crim. Proc. 929, 929–40 (2006) (listing cases upholding regulations and cases striking down regulations based on *Turner* standard in various contexts). It is important to note that while the *Turner* standard is deferential, it does not result in automatic approval of regulations and has been used to strike down prison regulations as in violation of prisoners' constitutional rights. Id. The Court has also sometimes used a less deferential standard in some contexts. See, e.g., Johnson v. California, 543 U.S. 499, 509 (2005) (applying strict scrutiny to an equal protection challenge).

[185] See Payne v. Commonwealth Dep't of Corr., 871 A.2d 795, 810 n.11 (Pa. 2005) ("[W]e agree with the Department that the standard set forth in *Turner v. Safley* is

on state courts interpreting state constitutions; it is merely a floor, and states are free to interpret their state constitutions as providing more protection. For example, the Massachusetts Supreme Court has used a higher standard of review than *Turner* when interpreting its guarantee of free exercise of religion in the prison context.[186] Broadly speaking, under both the federal and state constitutions, constitutional rights of prisoners are still valid in the prison context, but may be balanced against the state's legitimate interest in safety.

Under these standards, it is clear that the right to education would not be completely forfeited by juvenile delinquents just because they are confined in juvenile detention centers. Rather, even if they are being punished, their right to education would be balanced against the state's legitimate interests in prison safety and administration. Furthermore, as the court noted in *Brian B. v. Pennsylvania Department of Education*, education actually increases safety: "[b]ecause 'well run educational programs have incredible stabilizing effect[s] on institutional [i.e., inmate] populations,' prison education increases safety within prison walls as well—for both inmates and the public servants entrusted with their care."[187] While some infringements on the right to education would clearly be justified, it is equally certain that courts are mistaken when they hold that the right to education is forfeited by juveniles who commit delinquent acts. Both state and federal courts have held that fundamental constitutional rights apply even in the prison context when inmates are being punished. At the very least, therefore, infringements on the right to education would have to be jus-

equally applicable to the instant claim under the Pennsylvania Constitution."). Massachusetts has also adopted the *Turner* standard in some contexts. In *Cacicio v. Secretary of Public Safety*, the court analyzed an inmate's claim under Article 16 of the Declaration of Rights of the Massachusetts Constitution and held that "[w]hen such activities are involved, the analysis in *Turner v. Safley* . . . is called for, and, in this particular area, we have held that an inmate's Federal and State constitutional free speech and expression rights are subject to the same analysis." 665 N.E.2d 85, 92 (Mass. 1996).

[186] Rasheed v. Comm'r of Corr., 845 N.E.2d 296, 301 (Mass. 2006) ("[T]he Massachusetts Constitution is more protective of the religious freedoms of prisoners than the United States Constitution, and . . . the proper standard of review to be applied to the infringement of such freedoms is consequently more demanding.").

[187] 51 F. Supp. 2d 611, 636 (E.D. Pa. 1999) (citing Transcript of Trial at 12 (No. 96-7991)).

tified under a *Turner*-like standard of review and must be reasonably related to a legitimate government interest.

Some state courts have considered whether the state is required to provide alternative education programs for suspended and expelled students. These decisions serve as useful guideposts in determining how to balance a juvenile's constitutional right to education with the state's legitimate interests in safety and punishment. Courts in Wyoming,[188] Massachusetts,[189] and North Carolina[190] have held that alternative education programs are not required under the state constitution for suspended and expelled students.[191] In contrast, the West Virginia Supreme Court has held that the state constitutional right to education requires the state to provide alternative education for expelled students.[192] All of these courts recognized the legitimate government interests in school safety and discipline.[193] They justified the temporary deprivation of a student's right to education in order to protect other students' right to education.[194] This is consistent with the courts' recognition of a gov-

[188] In re RM, 102 P.3d 868, 877 (Wyo. 2004).

[189] Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1095 (Mass. 1995).

[190] In re Jackson, 352 S.E.2d 449, 456 (N.C. Ct. App. 1987).

[191] The Nebraska Supreme Court adopted similar reasoning in *Kolesnick v. Omaha Public School District*, 558 N.W.2d 807, 813 (Neb. 1997), when it held that a student's expulsion was constitutional. However, the plaintiff challenged his expulsion directly, and the provision of alternative education was not at issue.

[192] Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 914 (W. Va. 1996) ("[W]e find that the 'thorough and efficient' clause of Article XII, Section 1 of the West Virginia Constitution, requires the creation of an alternative program for pupils suspended or expelled from their regular educational program for a continuous period of one year for the sole reason of possessing a firearm or other deadly weapon at an educational facility.").

[193] See, e.g., *In re Jackson*, 352 S.E.2d at 455 ("A student's right to an education may be constitutionally denied when outweighed by the school's interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system."); Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 350 (W. Va. 1997) (noting the government's interests of "protection of students, teachers and other school personnel" and "the need to effectively deter other students from engaging in prohibited conduct").

[194] See, e.g., *In re RM*, 102 P.3d at 874 ("Educational services are provided with reasonable conditions because the Wyoming constitution requires that *all* students receive an equal opportunity to a quality education. The actual receipt of educational services is accordingly contingent upon appropriate conduct in conformity with state law and school rules." (citation omitted)); see also *Doe*, 653 N.E.2d at 1095 ("The right which [the student] does have is that of an equal opportunity to an adequate

ernmental interest in prison safety when inmates bring challenges based on infringement of their constitutional rights. Although not directly applicable to the constitutional issue, it is worth noting that many state legislatures require school districts to provide alternative education opportunities to suspended or expelled students. Therefore, these districts must have concluded that the government interest in safety is compatible with the provision of alternative educational services.[195]

Courts, however, have taken vastly different views on this issue. The West Virginia Supreme Court recognized these legitimate government interests, but held that only "in extreme circumstances and under a strong showing of necessity in a particular case, strict scrutiny and narrow tailoring could permit the effective temporary denial of all State-funded educational opportunities and services to a child removed from regular school."[196] In contrast, other courts held that the right to education was not fundamental in the school discipline context[197] or was categorically outweighed by the government's interest in safety.[198] These courts fundamentally underestimated the importance and lasting effects of even a temporary deprivation of education. Children are typically committed to juvenile delinquent centers only temporarily, but it is possible that a lack of services during the period of detention so undermines the detained child's educational progression so as to debilitate their opportunity to receive an adequate education once they return to

education, a right which she may lose by conduct seen to be detrimental to the community as a whole.").

[195] As of 2000, eleven states require school districts to provide alternative education opportunities to students who are suspended or expelled. See Advancement Project & the Civil Rights Project, Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline 12 (2000), http://www.advancementproject.org/reports/opsusp.pdf. Similarly, the IDEA requires school districts to continue to provide educational services to suspended or expelled disabled students. 20 U.S.C. § 1412(a)(1)(A) (2000).

[196] *Cathe A.*, 490 S.E.2d at 350–51. The court reasoned that if the student could be safely provided educational services in an alternative program then the state was required to provide them, regardless of whether the parents of the child could afford the services; increased expense alone was not enough to justify denying a child education.

[197] See Kolesnick v. Omaha Pub. Sch. Dist., 558 N.W.2d 807, 813 (Neb. 1997) ("We decline to hold, in the context of student discipline, that a student has a fundamental right to education, which would trigger strict scrutiny analysis whenever a student's misconduct results in expulsion for the interest of safety.").

[198] See *In re RM*, 102 P.3d at 876.

the regular school system. Therefore, even if the state could permissibly deny these children an education while they served their time in detention, if this undermines the right that they unquestionably possess once released, then their treatment while in detention would still be a violation of the state constitutional mandate. Courts allowing students to be suspended or expelled without alternative education have not addressed this distinction. Some of these cases, however, were brought before the adequacy rationale had been embraced by courts, and this argument is premised on the idea that a temporary deprivation can permanently deprive a child of an *adequate* education. Given the widespread acceptance of the adequacy rationale, it is likely that courts would be more open to these claims in the current legal climate.[199]

Even if one accepts the reasoning these courts use, the expulsion cases can be distinguished from a claim to an adequate education in the juvenile detention context on a number of grounds: (1) juveniles in detention have *no* alternative education options; (2) a juvenile's delinquent act did not necessarily disrupt the school context and pose a threat to the right to education of other students; and (3) if the justification is deterrence, juveniles in detention are arguably already being deterred from future delinquent acts by their confinement. Furthermore, there is evidence that zero tolerance policies and harsh punishments for violations of school rules actually hurt school safety and school discipline in the long-term.[200] Therefore, one can argue that deprivation of education as a form of increased punishment is not justified for deterrence or safety purposes.

Courts have consistently emphasized the importance of safety and legislative control over disciplinary procedures. These legitimate government interests are compatible with providing adequate education services to juveniles in detention. As has been shown, whether juvenile detention is characterized as rehabilitative or punitive, the state can only restrict a child's right to education when it has a legitimate safety or security interest at stake. The next Section will consider specific challenges based on this right.

[199] This argument is similar to the argument that has been accepted by courts in the preschool context. See James E. Ryan, A Constitutional Right to Preschool?, 94 Cal. L. Rev. 49, 78–81 (2006).

[200] See generally Advancement Project & the Civil Rights Project, supra note 195.

2. Specific Challenges Based on the Right to Education

Children in juvenile detention centers have a strong claim that they have a constitutional right to an adequate education even while in juvenile detention, unless that right is outweighed by a legitimate government interest in safety and security. As discussed earlier, courts have defined an adequate education both in terms of inputs and outputs; it is likely that the education currently provided in juvenile detention centers is inadequate on both grounds.[201] The conditions in some juvenile detention centers are so deplorable that they could be subject to broader civil rights challenges. In the correctional facilities that are not even supplying a safe and healthy environment, it is likely that no education is being provided at all; at such a facility, the educational inputs would certainly be deemed inadequate. However, even in correctional facilities that do provide some form of education, the education provided is often still deficient.

The strongest challenge would be to the lack of instruction time that students receive in juvenile detention centers. For example, the children in the segregated "Intensive Treatment Unit" at the Plainfield juvenile detention center receive almost no education for the duration of their stay, which sometimes lasts up to seventeen months.[202] Other children at Plainfield only receive half of the amount of instruction time required by Indiana law for seventh to twelfth graders.[203] Children awaiting trials as adults in the D.C. Jail receive no education.[204] In the High Plains Youth Center in Colorado, "[t]eacher-pupil interaction was 'limited'" and vocational classes were held only two times a week.[205] In the Baltimore City Juvenile Justice Center, school was often closed, education sessions were often cut short by hours, and entire units of juveniles were

[201] There is not currently data to support a claim based on outputs, such as student test scores, but if states begin to comply with the NCLBA, the AYP reports they are required to provide could provide the basis for an output-based claim.

[202] See Plainfield letter, supra note 7, at 2, 19–20 ("[Y]ouths remain on the unit all day with no school work or instruction. . . . [C]lasses in Cottage 13 are held erratically or not at all . . . .").

[203] Id. at 19 & n.15. There is also a delay upon arrival to this facility during which students do not receive any education for the first two weeks that they are in the juvenile detention center. Id. at 19.

[204] See Coalition for Juvenile Justice, supra note 5, at 4.

[205] See Human Rights Watch, supra note 1, at 38.

not given any instruction for days at a time.[206] A report to the California State Legislature noted that "all of the studied institutions are failing to provide the mandated four hours daily of educational instruction on a consistent basis."[207] Children cannot be said to receive an adequate education when they are not being educated at all. Some of the reduced instruction time may be due to legitimate security or rehabilitative needs, but these extreme and unprincipled deprivations would not be justified.

Confined children also have a strong claim because of the lack of qualified teachers and lack of a meaningful curriculum. Some detention centers only require teachers to hold the lowest form of teaching license, do not require any special training in correctional education, and do not have enough special education teachers.[208] In states that define an adequate education based on equal substantive inputs that meet the special needs of children, a plausible claim could be made that teachers in the juvenile detention context should be specially trained. This is exactly the rationale that the New Jersey Supreme Court embraced in *Abbott II* when it determined that "special disadvantages must be addressed" when educating children in poor school districts.[209]

The education that is provided in some detention centers often is not based around a meaningful curriculum and does not offer courses that a student could take in order to work towards a GED or high school diploma.[210] In the High Plains Youth Center, one teacher admitted to using the same book for all students, regardless

[206] Baltimore letter, supra note 53, at 21.

[207] Sele Nadel-Hayes & Daniel Macallair, Ctr. on Juvenile and Criminal Justice, Restructuring Juvenile Corrections in California: A Report to the State Legislature 12 (2005), http://www.cjcj.org/pdf/restructuring.pdf.

[208] Moody, supra note 78, at 105 (noting that teachers in Oregon youth corrections facilities are required to have only the lowest form of teaching license and no special training); see also Dimitria D. Pope & Sylvia Martinez, Tex. Youth Comm'n, Coke County Juvenile Justice Center Audit 10 (2007) (noting that school has curriculum based on computerized courses, but teachers are teaching subjects that they are not certified to teach and were not providing instruction to children in security unit); Arizona letter, supra note 56, at 18 (noting that the detention facility provided only three special education teachers for eighty special education students).

[209] Abbott v. Burke (*Abbott II*), 575 A.2d 359, 408 (N.J. 1990).

[210] See Plainfield letter, supra note 7, at 18; see also Nadel-Hayes & Macallair, supra note 207, at 23 (noting that some children in the juvenile justice system in California do not have access to GED preparation or other employment preparation programs).

of grade level, to "hit the middle ground."[211] Advanced students complained that their teachers were not able to help them with algebra or geometry and didn't know enough about the content of their assignments to discuss the work.[212] This sort of inadequate education clearly does not prepare students "to participate and compete in the society in which they live and work," as the North Carolina constitution, for example, requires.[213] In states that define an adequate education by similar substantive goals, the education provided in these detention centers would surely be inadequate and does not appear to be related to safety or security needs. The lack of a meaningful curriculum also undermines the long-term societal benefits of education. In order to reduce recidivism and increase employment, the education provided needs to give juveniles an incentive to return to school and the opportunity to seek employment upon release from detention.

Lastly, the physical facilities of the detention centers could frequently be challenged as inadequate. At the very least, detention centers could be required to have classrooms separate from the dormitories. As a result of overcrowding, facilities do not have enough classroom space and some have had to use dayrooms as dormitories.[214] It is difficult to imagine how a correctional facility could provide even a minimally adequate education without some facility dedicated to that purpose.

The claims briefly discussed here—insufficient instruction time, lack of a curriculum, unqualified teachers, and sub-standard facilities—highlight some of the gravest deficiencies in the current education provided in juvenile detention. Collectively, these problems illustrate that the current system provides merely for containment of juvenile delinquents rather than the education to which they are constitutionally entitled.

[211] See Human Rights Watch, supra note 1, at 38.

[212] Id. at 37.

[213] Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997).

[214] See Alexander S. v. Boyd, 876 F. Supp. 773, 791 (D.S.C. 1995) (noting that "dayrooms" were also used as dormitories); Abrams, supra note 6, at 1031 (noting "grossly overcrowded" detention facilities with "insufficient classroom space"); see also Burrell, supra note 20, at 6 (noting that 62% of juveniles in detention centers were in overcrowded facilities in 1995).

CONCLUSION

As has been outlined here, children in juvenile detention have a right to an adequate education under their state constitutions. They can challenge the adequacy of the education that their states are currently providing based on this right. If these claims are successful, it will be an important step in educational rights for all juveniles in detention that goes beyond what has already been achieved through IDEA special education litigation; state constitutional claims will properly focus attention on the general quality of education in juvenile detention centers.

The main counterarguments that plaintiffs will still face will be based on institutional competence concerns due to the complicated nature of education and security decisions in the juvenile detention context. Despite these concerns, however, the state education clauses have already been broadly interpreted. This argument is a logical extension of that line of cases and addresses a significant problem for an underrepresented group of children.

Plaintiffs can even garner political support for these claims if they link their arguments to the arguments that have recently been successful in expanding the right to education in the preschool context.[215] In the preschool context, plaintiffs have argued that not only do students in poor districts need preschool in order to eventually enjoy their right to an adequate education, but investing in preschool actually benefits society financially. Social science evidence has shown that preschool education leads to higher graduation rates and decreased crime rates.[216] Similarly, in the juvenile detention context, states will actually save money by providing children in juvenile detention with an adequate education. Studies have shown that education in juvenile detention is linked with reduced recidivism and increased employment. Therefore, states will likely receive a positive return on investments in the education of children confined in juvenile detention facilities.

Ultimately the success of these challenges will depend on the level of deprivation and the legitimate safety concerns in any given instance, but with the recent expansion of the state constitutional right to education in the preschool context, the time is ripe to chal-

[215] See generally Ryan, supra note 199.
[216] Id. at 50.

lenge the gross inadequacy of education in juvenile detention. Regardless of the outcome, there would be significant benefits to a suit that forces the state to justify the level of education that it currently provides to children in juvenile detention.