LEARNING FROM THEIR MISTAKES: EDUCATION FOR CHILDREN CONFINED IN ADULT FACILITIES

Introduction

Children in numerous states are denied education when confined in adult jails and prisons. This practice runs counter not only the provisions of state and federal statutes mandating education for children involved in the juvenile justice system, but to Supreme Court precedent on due process protections against denial of education. Although the Supreme Court has repeatedly recognized children’s reduced capacity and potential for rehabilitation in a criminal context,\(^1\) this logic has not reached the 7,500 children\(^2\) who remained locked in adult facilities daily across the United States. These facilities are ill-equipped to meet the unique needs of children who urgently require the benefit of a sound education to reach their potential to become productive members of society.

The majority of children in conflict with the law are confined in juvenile facilities, where statutes and administrative rules honor a clear legislative intent to afford confined youth high-quality instruction and a clear path back into the general classroom or job market upon their release. The principles of reduced culpability and potential for rehabilitation underlying the creation of a juvenile court system should govern services provided to youth no matter where they are detained. This paper is a proposal for a right to education for all children detained in adult facilities. Under the criteria established in *Goss v. Lopez*,\(^3\) I argue that children have a

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\(^1\) See *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that children under 18 ineligible for the death penalty on the basis of reduced culpability, capacity, and high potential for rehabilitation); *see also Graham v. Florida*, 130 S. Ct. 2011 (2010) (eliminating life without parole sentences for youth who committed non-homicide crimes, based upon a similar analysis).


\(^3\) 419 U.S. 565 (1975).
liberty and property interest in education which states arbitrarily infringe upon when they fail to provide academic enrichment to youth confined in the adult corrections system.

**Automatic Transfer Laws and Youth in Adult Criminal Courts**

The United States has dragged its heels in a global movement to offer protections to children involved in the criminal justice system based on their age, experience, and cognitive development.\(^4\) Although the United States pioneered the use of a separate juvenile court system, designed to rehabilitate rather than punish,\(^5\) by the late 1990s, every state had passed laws excluding certain categories of child-offenders from the juvenile court system.\(^6\) There are four methods by which a child’s case can be moved from juvenile to adult court.\(^7\) Statutory exclusion, or “automatic transfer,” laws mandate certain crimes which must be tried in adult criminal courtrooms.\(^8\) Judicial waiver grants juvenile court judges discretion to waive jurisdiction over a child’s case and transfer it to adult court.\(^9\) Some states grant prosecutors similar discretion to “direct file” in adult court.\(^10\) In addition to these provisions, 34 states have “Once An Adult, Always An Adult” (OAAA) laws, which stipulate that once a child has been tried in criminal court, any charges she faces in the future will be prosecuted in adult proceedings.\(^11\)

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\(^5\) David Brown and Sarah Maxwell, Barriers and Promising Approaches to Workforce and Youth Development for Young Offenders. **ANNIE E. CASEY FOUNDATION**, National Youth Employment Coalition, 2002 at 6. Available at http://www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid={98523A2D-F8E2-404F-B7EC-6D0DD96AF38A}

\(^6\) *Id.* at 7. By 1997, in the aftermath of the crack cocaine epidemic, 44 states and the District of Columbia passed laws simplifying automatic or discretionary transfer from juvenile to adult court.

\(^7\) Deitch, *supra* note 1, at 19.

\(^8\) *Id.*

\(^9\) *Id.*

\(^10\) *Id.*

\(^11\) *Id.*
There is little reliable data on the number of children tried or sentenced as adults throughout the United States, \textsuperscript{12} but every state allows juveniles to be tried as adults, and more than 20 states allow children as young at 7 years old to be tried in adult court.\textsuperscript{13} Studies over the last half decade suggest that juvenile court judges transfer around 80 cases of children 13 years and younger into adult criminal court yearly.\textsuperscript{14} These transfers occur not only for crimes of the person – but also for offenses like theft or burglary.\textsuperscript{15} The rules governing transfer are fluid at best and arbitrary at worst. Immense judicial and prosecutorial discretion often lands children charged with property crimes to face adult sanctions at a similar rate to juveniles accused of more serious offenses like sexual assault or murder.\textsuperscript{16}

Children facing trial in adult criminal court lose protection under the Juvenile Justice and Delinquency Prevention Act (JJDPA), a federal law which mandates strict requirements for facilities housing youth.\textsuperscript{17} Thus, children awaiting trial in direct file units and children serving adult sentences are offered no additional protections or programing to account for their age, developmental needs, or vulnerability among inmates.\textsuperscript{18} They are often integrated directly into the adult offender population and denied the recreational, therapeutic, and education services required in juvenile facilities.\textsuperscript{19} The American Bar Association, the American Jail Association, and numerous other professional organizations encourage implementing distinct systems and

\textsuperscript{12} A survey of local jails on a single day in 2007 counted 7,703 in adult facilities. Georgia leads the states in number of juveniles detained alongside adults, at a total of 1,100 juveniles in jail.


\textsuperscript{14} Id.

\textsuperscript{15} Id. \textit{See also} Deitch at 31. “While it is more likely for a young child to be adjudicated in adult court for a person offense than for any other type of crime, it is astonishing to note the variety of crimes for which they are considered transfer-worthy. The number of property offenses dealt with in the adult court [between 1995 and 2004] is nearly identical to the number of person offenses, and the number of public order crimes is more than half the number of person offenses.”

\textsuperscript{16} Deitch, at 30-31.

\textsuperscript{17} 42 U.S.C. §§ 5601-5681 (1974).


\textsuperscript{19} Deitch, at 7, 54. Although federal law generally calls for sight and sound separation between adults and juveniles, a loophole in the law eliminates this requirement for children awaiting trial or who have been tried as adults.
programs for youth who are confined, including access to high-quality educational programming. Without fulfilling these needs, youth are sentenced to more than a stint in adult confinement – they are sentenced to a lifetime of compromised capability due to gaps in their education.

**Access to Education in Adult Prisons**

The focus of adult prisons is punishment, rather than rehabilitation, and adult jails are intended as temporary housing for the accused. Yet in an era of clogged court dockets, pre-trial detention is often anything but temporary. In the United States, the average jail stay of an accused awaiting trial is approximately 300 days. A 2000 study of youth in prison reported 21 percent were held as adjudicated juvenile offenders or pretrial detainees, and 75 percent were serving adult sentences. Significantly, after these lengthy waiting periods, almost half of children who remain in adult facilities during trial do not ultimately receive adult sentences – many return to juvenile detention, and others serve no time at all. Their time in adult corrections is, then, “dead time,” during which the court considers longer-term options. Adult facilities make no attempt to use a child’s stay in jail as a chance to address his or her needs.

Reflecting on his time in an adult correctional facility, one child wrote:

> During the 72 days I spent in jail as a 17-year-old I was treated like a criminal even though I hadn’t been convicted of anything. I was bored everyday because we only had an hour in the exercise room twice per week…. “School,” if I went, which most of the time I didn’t because the guards forgot about me, wasn’t school at all … My future … will never be the same because of my time in jail.

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21 See, also, *The Socioeconomic Impact of Pretrial Detention*, The Soros Open Societies Foundation, 2011, at 16 (explaining that “The United States … has the world’s highest total number of pretrial detainees approximately 476,000), and the fourth-highest rate of pretrial detention (158 per 100,000)").


24 “Jailing Juveniles” at 4.

Adult correctional facilities provide inmates little access to special programming, education, or vocational opportunities: a 2007 survey of educational opportunities at adult jails reported 40% offer no educational services at all, 11% grant inmates some special education services and only 7% have vocational training courses available. These sparse offerings are wholly inadequate to keep children on track with their peers outside the criminal justice system.

Most children who enter the criminal justice system as adolescents have not yet graduated high school or earned a GED. Children with learning disabilities enter the system in disproportionate numbers. A survey of youth in juvenile detention facilities found that the average age of a detained child is 15.5 years, but the average reading level of those children is fourth grade. Yet even where facilities provide academic services, the quality is inadequate and inconsistent. A study of juvenile and adult facilities shows that only 17% of corrections education staff are fully certified to teach special education. Jails and prisons making an effort toward IDEA compliance most frequently offer only non-academic services to youth, such as speech or counseling. One Arizona County Jail touting access to education only offered three hours of instruction a day, and no opportunity to earn a high school diploma equivalent. A California Corrections Oversight Commission noted in a report that local jails provided little opportunity for rehabilitation because they offered “neither adequate classroom space, nor … minimum classroom instruction time at the Central Men’s Jail.”

**Goss v. Lopez and Access to Education**

26 *Id.*
27 “Jailing Juveniles” at 7.
30 *Id.*
31 *Id.*
32 “Jailing Juveniles” at 11.
Although the Federal Constitution creates no fundamental right to schooling, the Supreme Court has interpreted education to fall under the purview of liberty and property interests protect by the due process clause of the 14th Amendment.

In *Goss v. Lopez*, the Supreme Court extended procedural due process requirements to students facing short out of school suspensions. In that case, several students challenged suspensions from their public schools lasting up to ten days. The district court found such suspensions, when inflicted without a hearing, violated students’ due process rights. The school district’s appeal reached the Supreme Court. The appellant school district argued that without a Constitutional right at stake, no process was due in school discipline proceedings. The Court rejected this argument and extended notice and hearing requirements to short school suspensions. The Court predicated its decision upon a finding that depriving students’ access to education, even for a few days, infringes upon liberty and property interests protected by the Fourteenth Amendment.

The Fourteenth Amendment of the United States Constitution provides that no State shall “deprive any person of life, liberty, or property without due process of law.” In *Goss*, the Court found both liberty and property interests at stake when the State impedes a child’s access to education: “Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial” that a school could

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35 Id. at 581.
36 Id. at 565.
37 Id.
38 Id. at 572.
39 Id. at 579.
40 Id. at 576.
41 U.S. Constitution, Amendment XIV, §1.
summarily deny a child those benefits without procedure.⁴² Children in adult confinement while awaiting trial face similar, and perhaps more severe, deprivations of these interests, and states must not summarily deprive some of its neediest and most vulnerable youth of these basic entitlements.

**Education as a Property Interest**

In the context of due process, property includes a reasonable expectation of a government benefit, created not by the Constitution but by statutes, rules, or policies.⁴³ Property interests recognized under this interpretation include welfare for those who qualify,⁴⁴ a former inmates’ interest in maintaining paroled status,⁴⁵ and an interest in maintaining good-time credits for prisoners.⁴⁶ Each of these entitlements is rooted in state law or procedure, the government may not arbitrarily take them away. As for education, in *Goss* the Court held that students have a protected interest in public education because state law established a free public education to children between five and 21 years old, and enforced compulsory attendance until students reached a certain age.⁴⁷

Numerous state and federal statutes create an education entitlement for children in all fifty states, regardless of their confinement in a detention center. Every state constitution contains a clause requiring the state legislature to establish a free system of public schools for its children.⁴⁸ For children confined in adult correctional institutions, consistent access to an adequate education is a legitimate entitlement that should not be stripped on the basis of their placement in a particular type of facility. Children in conflict with the law maintain a reasonable

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⁴² *Goss*, 419 U.S. at 576.
⁴³ *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).
⁴⁷ *Goss* at 573.
⁴⁸ Twomey at 788.
expectation of education based in statutes, rules, and accepted practices of juvenile justice departments.

No Child Left Behind (NCLB), the federal law governing accountability for public schools, also governs school programs within the juvenile justice system.\textsuperscript{49} Federal funds directed toward facilities should provide youth in detention an opportunity to access the same level of academic content and meet the same achievement standards as children in neighborhood schools. Moreover, NCLB addressed the need for transition services and the risk of school dropout for children involved in juvenile and criminal justice.

Title I, part D of NCLB governs “Prevention and Intervention Plans for Children and Youth Who Are Neglected, Delinquent, or At-Risk.”\textsuperscript{50} The stated purposes of this part of the Act are:

(1) to improve educational services for children and youth in local and State institutions for neglected or delinquent children and youth so that such children and youth have the opportunity to meet the same challenging State academic content standards and challenging State student academic achievement standards that all children in the State are expected to meet;

(2) to provide such children and youth with the services needed to make a successful transition from institutionalization to further schooling or employment; and

(3) to prevent at-risk youth from dropping out of school, and to provide dropouts, and children and youth returning from correctional facilities or institutions for neglected or delinquent children and youth, with a support system to ensure their continued education.\textsuperscript{51}

Although the Act does not mention youth in adult corrections specifically, they meet the definition of the children targeted for intervention under the statute. Under NCLB, correctional

\textsuperscript{49} See ECS EDUCATION POLICY ISSUE SITE: Corrections Education. Available at \url{http://www.ecs.org/html/issue/asp?issueid=28}.


\textsuperscript{51} Id.
facilities seeking federal funds under this Act must partner with the Local Educational Agency (LEA) to ensure access to special education, support in vocational training and the ability to earn a high school diploma, support high academic achievement standards and alignment with state curricula, access to technology, and to employ highly qualified teaching staff with experience working with children who have unique behavioral and academic needs.52

Many youth in detention potentially fall under the protection of the Individuals with Disabilities Act, a federal law governing education of children with disabilities. Continued gaps in schooling due to placement in adult facilities or solitary confinement violate the requirements of IDEA. An estimated half of children in juvenile detention have a mental, physical, or learning disability.53 For youth with a disability enumerated under IDEA54, federal law guarantees a “free, appropriate education” which serves the child’s “unique needs” and prepares him or her for college, employment, and independent living.55 This “free, appropriate education” takes the form of special education services, provided at no cost to parents, which address the child’s needs as listed in his or her Individual Education Plan (IEP).56 The law also requires school districts to provide qualified children aged fourteen and older with “transition services” to prepare them for employment or other post-secondary school plans.57

In addition to providing academic accommodations for children with disabilities, IDEA restricts the amount of class time a child with an IEP may miss, for any reason. For example, the statute allows for only a very narrow set of circumstances under which a child with a disability

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54 These disabilities include mental retardation, hearing, speech, or language impairment, visual impairment, serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, or a specific learning disability.
55 See 20 U.S.C. §1400 et seq.
56 20 U.S.C. §1401(8).
57 Id. at §1401(30).
may be suspended or expelled from school. Before denying a child access to education as a response to his or her improper conduct, school officials must “prove their case” against the child in a hearing.\footnote{See, generally, 34 C.F.R. §§300.519-529; see also Joseph B. Tulman, Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth With Education-Related Disabilities Leads to The Disproportionate Representation in the Delinquency System, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 11 (2003).} In the hearing, teachers, parents, and other staff must conclude whether the alleged act was a manifestation of the child’s disability.\footnote{Id.}

In addition to the federal laws which lay the foundation for educational entitlement for youth, some states do have statutes and administrative procedures which call for academic opportunities within departments of correction, regardless of age. For instance, the Illinois Unified Code of Corrections requires D.O.C. facilities to provide academic programming “for all committed persons,” to grant them an “opportunity to attain the achievement level equivalent to the completion of the twelfth grade in the public school system in this State.”\footnote{730 ILCS 5/3-6(d)} Washington State has an even stronger provision specifically targeting children. The state code of education calls for “a program of education … for juvenile inmates [in] adult jail facilities,” and specifies that “the several school districts of the state for persons under the age of eighteen years who have been incarcerated in any adult jail,” must work with adult facilities to “conduct a program of education, including related student activities for inmates.”\footnote{WA ST 28A.194.010}

However, despite statutory authority to grant children confined in adult facilities access to academic programs, carrying out this charge presents logistical and safety concerns that discourage facilities from giving confined youth their educational dues.\footnote{See Katherine A. Carlson, Juveniles in Adult Jails: A Program Guide, OFFICE OF THE WASHINGTON SUPERINTENDENT OF PUBLIC INSTRUCTION (July, 2010), at 6. Available at http://www.k12.wa.us/ InstitutionalEd/pubdocs/EducatingJuvenilesInAdultJails.pdf.} At best, correctional institutions see schooling as a secondary concern requiring a bigger budget, new policies and
additional training for staff. Most programs, where available, are run by outside agencies or volunteers. Yet the difficulty of maintaining a property entitlement does not excuse the state from seeing it through.

Based on federal and state statutory authority, children have a legitimate expectation of education which states summarily deny youth confined in adult facilities. In the last twenty years, courts have interpreted academic losses that rise to the property deprivation analyzed in Goss. For instance, loss of educational credits triggers a right to procedural protection of property, as does discharge from elite to less-selective schools. The loss of valuable instruction time and a chance for remediation while confined in departments of correction should be similarly treated as a violation of children’s entitlement to schooling.

Education as a Liberty Interest

Liberty, as applied to the Fourteenth Amendment, also has a meaning that extends beyond a layperson’s use of the term. In Goss, the Court explained that due process protection for liberty interests extends to situations in which “a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him.” In a school context, the Court found that school suspensions could compromise students’ social standing among peers and teachers, as well as negatively impact job and college applications in the future.

Similarly, youth who face adult trials and sentencing stand to suffer undue consequences when denied access to education in confinement. A lack of high school diploma or G.E.D. upon release creates a crippling setback to youth seeking jobs. The connection between a lack of

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63 Id.
64 Warren Co. Bd. of Edu. v. Wilkinson, 500 So. 2d 455, 458 (Miss. 1986)
67 Id. at 575.
education and the likelihood of recidivism is well-documented. Studies show that higher graduation rates lead to increased public safety: the Justice Policy Institute found that a 5% increase in the male high school graduation rate would reduce nationwide spending on crime by up to $5 billion. Moreover, a one-year increase in the average amount of school attained in our nation would decrease violent crime by almost 30%. The Studies show that education decreases action upon impulse and risky behavior, and increases personal responsibility and social bonds. These are keys to a healthy and productive future for children upon their release. The long term stigma, in addition to social and employment consequences, of incarceration without educational access are significant, and extend well beyond those highlighted by the Goss Court’s analysis of a suspension’s negative effect on students.

Conclusion

In the last decade, two landmark Supreme Court decisions have cemented the notion that children cannot be equated with adults in a criminal justice context. Roper v. Simmons, established three categorical differences between adults and juveniles that protect juveniles from the death penalty. The newly published decision in Graham v. Florida, which bars life without parole for non-homicide cases involving juveniles, again relies on developmental differences to mitigate punishment to minors. Applying this rationale to punishment is not enough. If, by definition, juvenile defendants have compromised culpability and greater potential for rehabilitation, fairness demands that they be provided the tools to succeed upon their release.

69 Id.
71 543 U.S. 551 (2005)
72 130 S. Ct. 2011 (2010)
Denying children confined in adult facilities access to education sets an already vulnerable population up to fail.