

1-1-2019

## Truancy, Secure Detention, and the Right to Liberty

Amanda McNelly

*Suffolk University Law School*

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

---

### Recommended Citation

24 Suffolk J. Trial & App. Advoc. 112 (2018-2019)

This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact [dct@suffolk.edu](mailto:dct@suffolk.edu).

# TRUANCY, SECURE DETENTION, AND THE RIGHT TO LIBERTY

*A State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests. . .*<sup>1</sup>

-Chief Justice Burger

## I. INTRODUCTION

Francisco De Luna was thirteen when his father died, his mother worked long hours to compensate for the loss and support their family, and as a result, Francisco was unable to keep up with his school attendance.<sup>2</sup> Francisco was cited for truancy and compelled to appear in court.<sup>3</sup> He failed to appear in court and to pay the fine, and Francisco was sent to a secured detention facility for eighteen days.<sup>4</sup>

Compulsory education laws have faced contention since their inception.<sup>5</sup> However, despite constitutional challenges and carving out exceptions for very specific instances, these statutes are still commonplace in the United States today.<sup>6</sup> Although on their face the statutes appear as though they progress well-intentioned state interests, the punishment for violation of these statutes pose great risk for the mental health of the youth and improperly infringe upon their liberty interests.<sup>7</sup>

---

<sup>1</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (discussing challenge to compulsory education statute based on freedom of religion argument).

<sup>2</sup> See Dean Hill Rivkin, *TRUANCY PROSECUTIONS OF STUDENTS AND THE RIGHT [TO] EDUCATION*, DUKE FORUM FOR LAW & SOCIAL CHANGE, 139, 147 (2011), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1020&context=dfsc> (describing nontransparent legal contours of truancy).

<sup>3</sup> See *id.* (discussing Francisco's lack of attendance to warrant citation).

<sup>4</sup> See *id.* (illustrating severity of punishment for children not attending school).

<sup>5</sup> See *Yoder*, 406 U.S. at 239 (1972) (reviewing challenge to compulsory education statute based upon infringement on religious freedom).

<sup>6</sup> See *Compulsory Education Laws: Background*, FINDLAW, <https://education.findlaw.com/education-options/compulsory-education-laws-background.html> (last visited Nov. 19, 2017) (examining history and current state of compulsory education laws).

<sup>7</sup> See Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* JUSTICE POLICY INSTITUTE, [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf) (last visited Nov. 19, 2017) (studying effects of incarceration on mental health of youths).

When examining the data regarding the detrimental effects on the mental health of youths placed in secure detention, it is hard to imagine a state interest compelling enough to make this repercussion a viable option for truancy. This Note will examine the history of the compulsory education laws and the role of the justice system in relation to truancy. It will then turn to the data on mental health implications of secure detention and a strict scrutiny analysis of the states' interest weighted against the means by which these interests are being achieved.<sup>8</sup> Finally, this Note will survey the states currently implementing secure detention for violating a court order in relation to truancy, and propose a more mentally beneficial and legally constitutional means of achieving the state interest of reducing truancy rates.

## II. HISTORY

### *A. Compulsory Attendance and Truancy in the Justice System*

Implementing compulsory education dates back to ancient times.<sup>9</sup> Even before the Plato era of blooming ancient philosophy, Jewish custom required parents to provide their children with an education.<sup>10</sup> In the United States, Massachusetts was the first state to enact a compulsory education law in the year 1852.<sup>11</sup> The statute specified:

[e]very person who shall have any child under his control between the ages of eight and fourteen [sic] years, shall send such child to some public school within the town or city in which he resides, during at least twelve weeks, if the public schools within such town or city shall be so long kept, in each and every year during which such child shall be under his control, six weeks of which shall be consecutive. . . .<sup>12</sup>

---

<sup>8</sup> *See id.*

<sup>9</sup> *See Compulsory Education Laws: Background*, FINDLAW, <https://education.findlaw.com/education-options/compulsory-education-laws-background.html> (last visited Nov. 19, 2017) (surveying history of compulsory education).

<sup>10</sup> *See id.* (exemplifying origins of compulsory education through time).

<sup>11</sup> *See Nicky Hardenberg, Massachusetts Compulsory Attendance Statutes from 1852-1913*, MHLA (2003) <http://www.mhla.org/information/massdocuments/mglhistory.htm> (establishing Massachusetts as first state to recognize need for compulsory child education).

<sup>12</sup> *See id.*

The implementation of compulsory education has not been without objection.<sup>13</sup> In *Pierce v. Society of Sisters*,<sup>14</sup> the plaintiffs challenged a proposed Oregon statute which required “every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him ‘to a public school for the period of time a public school shall be held during the current year.’”<sup>15</sup> The plaintiffs were two alternative education corporations including a parochial school and a military academy.<sup>16</sup> The Court held that the statute improperly interfered with the business interest of both of the corporations and, therefore, was invalid.<sup>17</sup> Similarly, in *Yoder*, the respondents, members of the Amish religion, were convicted of violating a Wisconsin compulsory-attendance statute.<sup>18</sup> The Court held the impact the statute had on the respondent’s ability to practice their religion outweighed the state interest in compulsory education.<sup>19</sup> However, this finding was an exception for a limited group of people for whom the statute would severely infringe upon their religious freedom.<sup>20</sup> For as long as compulsory education laws have existed, there have been repercussions for violating them by way of truancy.<sup>21</sup> “Truancy is a child’s failure to attend school without a justification or excuse for the absence being communicated to school authorities.”<sup>22</sup> In most states, truancy is an offense punishable only to minors- or a status offense.<sup>23</sup> In fact, up until the 1960s and the 1970s, juveniles who were habitually truant were

---

<sup>13</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 205 (1972) (holding state interests did not outweigh right to religious freedom).

<sup>14</sup> 268 U.S. 510 (1925).

<sup>15</sup> See *id.* at 530 (1925) (holding statute invalid based upon possible interference with business interests of two corporations).

<sup>16</sup> See Philip B. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment’s Religion Clauses*, 75 W. VA. LAW REV. 213, 218 (1972) (discussing common law history of compulsory education and its statutory challenges).

<sup>17</sup> See *Yoder*, 406 U.S. at 207 (reviewing decision of Wisconsin Supreme Court convicting respondents of violating statute).

<sup>18</sup> See *id.* (explaining respondent, age fourteen and fifteen, did not attend school as required).

<sup>19</sup> See *id.* at 218 (finding law’s effect on religion was severe and inescapable).

<sup>20</sup> See Hardenberg, *Massachusetts Compulsory Attendance Statutes from 1852-1913*, MHLA (2003) <http://www.mhla.org/information/massdocuments/mglhistory.htm> (discussing past and current state of compulsory education).

<sup>21</sup> See *supra* note 2, at 140 (“Since the inception of universal compulsory education, the issue of truancy has defied easy solution.”).

<sup>22</sup> See BOUVIER LAW DICTIONARY (Wolters Kluwer Desk ed. 2012), available at LexisNexis (defining truancy).

<sup>23</sup> See Farah Z. Ahmad & Tiffany Miller, *The High Cost of Truancy*, CENTER FOR AMERICAN PROGRESS (Aug. 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/07/29113012/Truancy-report4.pdf> (detailing history of truancy legislation and judicial involvement in United States).

formally processed through the judicial system.<sup>24</sup> At that time, both the decision *In re Gault* and the Juvenile Justice and Delinquency Prevention Act of 1974, perpetuated a general shift away from formal processing and institutional confinement for truancy.<sup>25</sup> In *In re Gault*, the Court held that, in judicial proceedings, juveniles must be afforded the same rights as adults, and the Juvenile Justice and Delinquency Prevention Act of 1974 established core protections for juveniles within the justice system.<sup>26</sup> In 2002, the Juvenile Justice and Delinquency Prevention Act was amended “particularly for the purpose of permitting nonviolent juvenile offenders (including status offenders) to remain at home with their families as an alternative to incarceration or institutionalization.”<sup>27</sup> However, in roughly thirty states, judges may invoke a court order exception to the Deinstitutionalization of Status Offenders core requirement of the act.<sup>28</sup> “This exception allows judges to place a juvenile in a secure detention facility if the youth [. . . ] violated a valid court order.”<sup>29</sup> Essentially, this exception allows states to circumvent the provision of the act and commit youth to secure facilities as a result of truancy.<sup>30</sup> The states which have done away with secure detention as a repercussion for truancy have determined largely that there are less restrictive alternatives available, and that overall a child who violates a truancy order is not a delinquent and therefore should not be treated as such.<sup>31</sup>

---

<sup>24</sup> See *id.* at 1 (highlighting process associated with habitual truancy).

<sup>25</sup> See *id.*

<sup>26</sup> See Juvenile Justice and Delinquency Prevention Act of 1974, 93 Pub. L. No. 415, 88 Stat. 1109 (1974) (providing comprehensive coordinated approach to problem of juvenile delinquency, and for other purposes); see also *In re Gault*, 387 U.S. 1, 62 (1967) (finding person should be tried in accordance with all guarantees of Constitution).

<sup>27</sup> See Juvenile Justice and Delinquency Prevention Act § 233 (stating requirement of state plans).

<sup>28</sup> See *Truancy and the Use of Detention*, COLORADO DIVISION OF CRIMINAL JUSTICE, <https://www.colorado.gov/pacific/dcj/truancy-and-use-detention> (last visited Nov. 19, 2017) (discussing Colorado study which examined truancy and use of detention).

<sup>29</sup> See *id.* (explaining routes around statutory provisions for truancy).

<sup>30</sup> See *id.*

<sup>31</sup> See *S.G. v. Vurro*, 77 So. 3d 897, 898 (Fla. Dist. Ct. App. 2012) (citing FLA. STAT. ANN.) (“A child who violates a truancy order, however, is not a delinquent child . . . [a] delinquent contemnor may be punished by placement in secure detention, a child in need of services who commits a contempt of court may be placed in ‘a staff-secure shelter or a staff-secure residential facility solely for children in need of services,’ or if no such placement is available, in ‘an appropriate mental health facility or substance abuse facility for assessment’”); *In re In Interest of D.*, 110 Wis. 2d 168, (1983) (finding secure detention for violation of court invalid order because less restrictive means existed).

## III. FACTS

*A. Impact of Incarceration on Mental Health*

The impact of secure detention is detrimental to the mental health of the youth subjected to it.<sup>32</sup> According to studies, those incarcerated in their youth experience a two to four times higher suicide rate of the youth in the community.<sup>33</sup> The Office of Juvenile Justice and Delinquency Prevention reports that 11,000 youths engage in more than 17,000 acts of suicidal behavior in the juvenile justice system annually.<sup>34</sup> One study examined the prevalence of depression among incarcerated and non-incarcerated delinquents.<sup>35</sup> The prevalence of depressive disorders, according to diagnostic criteria of the DSM-III, was eighteen percent prevalence for incarcerated delinquents compared to only four percent for non-incarcerated adolescents.<sup>36</sup> Further, not only the prevalence but also the actual development of depression was studied.<sup>37</sup>

Of the 100 delinquents admitted consecutively to a detention center, 11 showed evidence of depression both during and before incarceration, while seven developed a depressive disorder in the center. With regard to specific symptoms, 100% of the depressed incarcerated adolescents were found to suffer from sleep difficulties, and 94% experienced disturbances of appetite.<sup>38</sup>

This study indicated that seven individual youths developed depression because they were subjected to incarceration.<sup>39</sup>

Another study conducted between 1992 and 1995 at a juvenile detention center found:

---

<sup>32</sup> See Holman & Ziedenberg, *supra* note 7, at 4 (surveying impacts of detention on youth and mental health).

<sup>33</sup> See Dale G. Parent et al., *Conditions of Confinement: Juvenile Detention and Corrections Facilities*, (1994), <https://www.ncjrs.gov/pdffiles1/ojdp/1FrontMat.pdf> (studying data about incarceration youth in juvenile detention facilities).

<sup>34</sup> See *id.* (analyzing results of study).

<sup>35</sup> See JH Kashani et al., *Depression among incarcerated delinquents.*, 3 PSYCHIATRY RESEARCH 185-91 (1980), <http://www.ncbi.nlm.nih.gov/pubmed/6947311> (utilizing DSM-III criteria to analyze depressive disorders among incarcerated and non-incarcerated delinquents).

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *id.* (summarizing results of study).

[w]hen the percentages of lifetime suicidal ideations of 31.6 percent for males and 51.1 percent for females is reviewed with the previous history of suicide attempts of 15.1 percent for males and 39.8 percent for females, it is clear that adolescents in a juvenile detention facility are at high risk for self-destructive behavior.<sup>40</sup>

Given all the detrimental effects that have been empirically proven, it has not been shown that the rate of criminal conduct is significantly reduced by subjecting these youths to such conditions.<sup>41</sup> In fact, it is likely that the incarceration for such a minor offense as violating a court order regarding compulsory attendance may actually be increasing rates of recidivism.<sup>42</sup> In a two year study of 414 adolescents, it was found that between poor parenting, gang membership, gun ownership and prior detention, prior detention is thirteen times more likely to lead to recidivism.<sup>43</sup>

A recent evaluation of secure detention in Wisconsin, conducted by the state's Joint Legislative Audit Committee reported that, in the four counties studied, seventy percent of youth held in secure detention were arrested or returned to secure detention within one year of release.<sup>44</sup> The researchers found that "placement in secure detention may deter a small proportion of juveniles from future criminal activity, although they do not deter most juveniles."<sup>45</sup> A strong factor that contributes to this increased rate of recidivism is the opportunity to make connections with and be influenced by other delinquents while the juveniles are in the secure facilities.<sup>46</sup>

Researchers at the Oregon Social Learning Center found that "congregating youth together for treatment in a group setting causes them to have a higher recidivism rate and poorer outcomes than youth who are not grouped together

---

<sup>40</sup> See D E Mac et al., *Psychological Patterns of Depression and Suicidal Behavior of Adolescents in a Juvenile Detention Facility*, 12 JOURNAL FOR JUVENILE JUSTICE AND DETENTION SERVICES J. FOR JUV. JUST. AND DETENTION SERVICES (1997), <https://www.ncjrs.gov/App/abstractdb/AbstractDBDetails.aspx?id=167146> (evaluating rate of suicide before and after being incarcerated at specific detention center).

<sup>41</sup> See Brent B. Benda et al., *Recidivism Among Adolescent Serious Offenders*, 28 CRIMINAL JUSTICE AND BEHAVIOR, SAGE J 588-613 (2001), <http://journals.sagepub.com/doi/10.1177/009385480102800503> available at "download full pdf" (examining predictors of recidivism in youthful offenders).

<sup>42</sup> See *id.* (discussing likelihood of recidivism in youths).

<sup>43</sup> See *id.* at 593-610 (describing method and results of study).

<sup>44</sup> See Holman & Ziedenberg, *supra* note 7, at 4 (examining risk associated with incarcerating juveniles).

<sup>45</sup> See *id.* at 4 (discussing research evaluation of counties).

<sup>46</sup> See *id.* at 5 (analyzing congregation of youth increase chances of re-offending).

for treatment. The researchers call this process ‘peer deviancy training,’ and reported statistically significant higher levels of substance abuse, school difficulties, delinquency, violence, and adjustment difficulties in adulthood for those youth treated in a peer group setting. The researchers found that ‘unintended consequences of grouping children at-risk for externalizing disorders may include negative changes in attitudes toward antisocial behavior, affiliation with antisocial peers, and identification with deviancy.’<sup>47</sup>

Studies are continually showing that the effects of incarcerating juveniles are detrimental, and to subject them to this type of psychological hazard as a result of truancy is certainly not a narrowly tailored, least restrictive solution.<sup>48</sup>

### *B. The Strict Scrutiny Standard*

In order for a statute to impede upon a fundamental right, it must first pass the strict scrutiny standard.<sup>49</sup> The Fifth Amendment establishes the right to liberty, stating that no person shall “be deprived of life, liberty, or property, without due process of law.”<sup>50</sup> This right, established in the Bill of Rights, has been extended to the states through the Due Process Clause of the Fourteenth Amendment.<sup>51</sup>

In regards to truancy, it is important to recognize that the state does have legitimate interests in enacting compulsory education laws, and ensuring their enforcement by enforcing the repercussions for violations of

---

<sup>47</sup> See *id.* at 5 (examining peer deviancy training with negative behavior of adolescents).

<sup>48</sup> See *id.* at 5 (discussing studies in California and Florida).

<sup>49</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (utilizing strict scrutiny standard for interference with fundamental rights). In *Skinner*, the Court examined a law centered on mandatory sterilization of what the Court referred to as habitual criminals, with an exception for white collar crimes. *Id.* The Court unanimously held that the act violated Equal Protection, and established the standard of strict scrutiny for a law which infringes upon a fundamental right- which here was the right to liberty. *Id.*

<sup>50</sup> U.S. CONST. Amend. V. (establishing fundamental right to liberty).

<sup>51</sup> See *Saenz v. Roe*, 526 U.S. 489, 525 (1999) (holding fundamental rights are incorporated by Fourteenth Amendment and apply to states). When dealing with civil rights and individual fundamental rights, the court will use strict scrutiny, and the state must demonstrate narrowly tailored means to pursue a compelling state interest. *Id.* As this case dealt with the right to travel, the state’s interest in the state saving money was not narrowly tailored with the durational residency requirement that was at issue. *Id.* The requirement interfered with the right to travel, which is a fundamental right because people need to travel to petition the courts, and that right was not outweighed by the state’s economic interest. *Id.*

these education laws. These interests include “preserving basic political and economic institutions as well as assuring that children are intellectually and socially prepared to become self-reliant members of society. . . [a] State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate.”<sup>52</sup> However, when applying the strict scrutiny standard courts must also question whether the means implemented are the least restrictive to achieve the goal of furthering the state’s interest.<sup>53</sup> In national studies analyzing the efficacy of programs designed to reduce truancy, there has been no overall consensus on an effective method.<sup>54</sup>

Further, as noted in the case of Francisco De Luna, there are often other underlying causes of the child’s truancy which would likely be better addressed by tutoring services, mental health counseling, and establishing a core support group.<sup>55</sup> Any of these alternatives would provide less restrictive means than secure detention to address truancy issues, and would likely avoid the negative mental health implications associated with juvenile incarceration as noted above.

#### IV. ANALYSIS

##### *A. Colorado’s Truancy Protocol*

In Colorado, the truancy protocol dictates that judicial truancy proceedings have two stages.<sup>56</sup> In the first stage, the court may seek an order to compel the child to attend school.<sup>57</sup> However, if the child fails to comply with the order, they then enter the second stage of proceedings.<sup>58</sup> In the second stage there is a contempt proceeding either to secure compliance with

---

<sup>52</sup> See *id.* (discussing compulsory education statute).

<sup>53</sup> See *People v. McKee*, 207 Cal. App. 4th 1325, 1335 (2012) (“Because petitioner’s personal liberty is at stake . . . the applicable standard for measuring the validity of the statutory scheme requires application of the strict scrutiny standard of equal protection analysis.”).

<sup>54</sup> See Myriam Baker et al., *Process and Implementation Outcomes*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2001), <https://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf> (reviewing progress of truancy reduction programs).

<sup>55</sup> See Class Action Complaint at 16, *De Luna v. Hidalgo County*, (No. 7:10-cv-00268) (discussing challenge to Texas statute resulting in incarceration for some circumstances in truancy petitions).

<sup>56</sup> See Pattie P. Swift *2016 Truancy Protocol- 12th Judicial District*, (2016) [hereinafter: “2016 Truancy protocol”], available at [https://www.courts.state.co.us/userfiles/file/court\\_probation/12th\\_judicial\\_district/truancy%20Protocol%20%26%20Forms/Truancy%20Protocol%2006\\_07\\_16.pdf](https://www.courts.state.co.us/userfiles/file/court_probation/12th_judicial_district/truancy%20Protocol%20%26%20Forms/Truancy%20Protocol%2006_07_16.pdf) (detailing truancy protocol for Colorado).

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

the order or to punish the violation-these are called “remedial and punitive contempt proceedings.”<sup>59</sup> The juvenile may be sentenced for indirect, punitive contempt if they “knowingly and willfully” violate the court order mandating attendance.<sup>60</sup> The sanctions may include jail for the parent, or juvenile detention for the student.<sup>61</sup>

### *B. Massachusetts’ Truancy Protocol*

In Massachusetts, an application for a child requiring assistance will be filed for a truant child, usually by a representative of the school or a parent.<sup>62</sup> After the application is filed, a preliminary hearing is held with the child, the child’s parents, a representative from the Department of Children and Families, and a representative from the Department of Youth Services present.<sup>63</sup> At the hearing, the case is either dismissed for lack of probable cause, the child is referred to informal assistance with a probation officer, or a fact-finding is scheduled.<sup>64</sup> Informal assistance is done under the supervision of a probation officer and may include psychological, educational, medical services.<sup>65</sup> If the case does not result in informal assistance and instead a fact finding hearing is scheduled, the person who filed the application for a child requiring assistance has the burden to present enough evidence for the judge to find, beyond a reasonable doubt, that the child does in fact require assistance.<sup>66</sup> The matter then moves to a disposition hearing, at which the judge takes into consideration the probation officer’s report from a conference held with the individuals involved in the application.<sup>67</sup> The judge will then decide whether to permit the child to remain in the home, place the child in the care of a relative, or place the child with the Department of Children and Families.<sup>68</sup> After 120 days, the court holds a disposition review hearing to determine the child’s progress in the current treatment program.<sup>69</sup>

---

<sup>59</sup> *See id.*

<sup>60</sup> *See id.* at 8.

<sup>61</sup> *See Swift, supra* note 58, at 5 (detailing sanctions).

<sup>62</sup> *See MASS. TRIAL. CT. ADMIN. OFF. HANDBOOK FOR PARENTS, LEGAL GUARDIANS AND CUSTODIANS IN CHILD REQUIRING ASSISTANCE CASES 2* (2012) [hereinafter “Handbook”] (discussing process of truancy court proceedings).

<sup>63</sup> *See id.* at 3 (describing preliminary hearing stage).

<sup>64</sup> *See id.* at 4.

<sup>65</sup> *See id.*

<sup>66</sup> *See id.* at 5 (discussing burden of proof in such proceedings).

<sup>67</sup> *See Handbook, supra* note 62, at 6-7 (detailing disposition hearing).

<sup>68</sup> *See id.* (discussing possible results of disposition hearing).

<sup>69</sup> *See id.* (detailing disposition review hearing).

### C. Future Movement for Mental Health Preservation

Given the various mental health implications of secure detention, it would be the most beneficial for the courts in every state to adopt a truancy system similar to the one employed in Massachusetts.<sup>70</sup> This type of multi-faceted intervention seems to be more effective to determine the root of the problem that is causing the truancy, and is more likely to have a positive effect on the child's mental health, rather than subjecting them to detention.<sup>71</sup> Traditionally, choices regarding a child's schooling have been left to the parents and the state, however, it is imperative that a child's mental health also be a determining factor in such choices, and recognized as having a significant impact as to the reasons behind a child's truancy.<sup>72</sup>

### D. Constitutional Challenge

In addition to potential mental health implications, the use of secure detention as a consequence for truancy may also violate the child's constitutional right of due process.<sup>73</sup> For a statute to survive a constitutional challenge based upon a fundamental right, it must pass a strict scrutiny test.<sup>74</sup> Therefore, the means by which the state is achieving their interest must be narrowly tailored, and the interest must be compelling.<sup>75</sup> By sentencing juveniles to secure detention, the state is interfering with their fundamental right of freedom.<sup>76</sup> Although a state's interest in education is certainly profound, as the education of youths perpetuates a more capable society, and therefore stimulates the economy, this interest is not found to be insurmountable when weighted against the fundamental right to freedom of religion.<sup>77</sup> The narrowly tailored standard has also been defined as the "least

---

<sup>70</sup> See Kashani et. al., *supra* note 34, at 185 (highlighting mental health implications of truancy protocols).

<sup>71</sup> See Swift, *supra* note 58 (discussing process of truancy proceedings)

<sup>72</sup> See Kashani et. al., *supra* note 34, at 185 (highlighting mental health implications of truancy protocols).

<sup>73</sup> See *Saenz*, 526 U.S. at 507-08 (holding fundamental rights are incorporated by Fourteenth Amendment and apply to states).

<sup>74</sup> See *id.* at 499 (establishing strict scrutiny test).

<sup>75</sup> See *id.*

<sup>76</sup> See Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [to] Education*. 3 Duke F.L. & SOC. CHANGE 139, 139-61 (2011) (discussing how states perpetuate their own educational interest and infringe juveniles' fundamental right to freedom).

<sup>77</sup> See *Yoder*, 406 U.S. at 214 (discussing challenge to compulsory education statute based on freedom of religion argument).

restrictive” alternative to achieve the state’s interest.<sup>78</sup> In truancy prosecutions, there are a number of alternative means to achieving compulsory attendance that would benefit the mental health of juveniles. Not only are there alternative options, but it has been shown that secure detention does not reduce recidivism of truancy issues, but rather increases the likelihood of youths committing more serious offenses.<sup>79</sup> Additionally, it is often not a case of defiance that leads to a child’s habitual truancy, but rather a mitigating factor such as family dynamics or an existing mental health issue.<sup>80</sup> Perhaps the most compelling and most obvious reason that this type of action fails the strict scrutiny test is that sending youths to secure detention does not resolve the truancy issue as they cannot attend their regularly required school while in secure detention.<sup>81</sup> Youths who have been in secure detention as a result of truancy have been shown to be over fourteen times less likely to graduate than those who have not been in secure detention for truancy.<sup>82</sup> Therefore, given that it does not directly deter truancy, decreases a youth’s likelihood of graduating, and often times punishes the youth for circumstances beyond their own control, secure detention as a punishment for habitual truancy is likely a violation of the constitutional right to liberty as it does not meet the standards of a strict scrutiny analysis.<sup>83</sup> Not only is the use of secure detention not the least restrictive alternative in achieving the state’s interest in children’s educations, it actually hinders the

---

<sup>78</sup> See *Skinner*, 316 U.S. at 541 (discussing constitutionality of compulsory sterilization statute using strict scrutiny test).

<sup>79</sup> See Benda, *supra* note 40 (examining predictors of recidivism in youthful offenders).

<sup>80</sup> See Class Action Complaint at 16, *De Luna v. Hidalgo County*, No. 7:10-cv-00268 (S.D. Tex. Jul. 26, 2010). (discussing challenge to Texas Statute resulting in incarceration for some circumstances in truancy petitions)

<sup>81</sup> See Rivkin, *supra* note 2, at 139-61 (discussing implications of truancy prosecutions).

<sup>82</sup> See *SECURE DETENTION FOR TRUANCY: IMPACTS ON COLORADO YOUTH ACADEMIC AND SOCIAL SUCCESS* NAT’L JUV. JUST. NETWORK (2016) available at [http://www.njjn.org/uploads/digital-library/CO\\_Truancy\\_Detention\\_FactSheet\\_Final\\_2016.pdf](http://www.njjn.org/uploads/digital-library/CO_Truancy_Detention_FactSheet_Final_2016.pdf) (discussing various factors contributing to and resulting from truancy detention). A publication by the Colorado division of Criminal Justice indicates that compared to the national averages, youths who are found to be truant and sentenced to secure detention are more likely to be youths of color, qualify for free or reduced lunches, and be non-native English speakers. *Id.*

This study integrated five-year datasets from education, child welfare, judicial, and juvenile justice. A total of 2,070 youths were identified as receiving court oversight for truancy in the 2010-2011 fiscal year. Cross system analyses examined this cohort over a five-year period to investigate predictors of secure detention and outcomes for youth with or without a secure detention for truancy. . . . Graduation was influenced by many factors, but detention was the strongest predictor. Youth who went to detention for truancy were 14.5 times less likely to graduate from high school than other Colorado youth found truant.

*Id.*

<sup>83</sup> See *In re In Interest of D.*, 327 N.W. at 691 (finding secure detention for violation of court order was invalid because less restrictive means existed); see also *Vurro*, 77 So. 3d at 898 (suggesting child who is habitually truant be given access to services).

facilitation of that interest.<sup>84</sup> It is because of these reasons that the states should focus their resources not on detaining juveniles in secure detention, but rather on providing services to the juveniles to help them cope with the factors that contribute to their inability to attend school.

## V. CONCLUSION

In conclusion, evidence shows that the use of divertive alternatives besides the use of secure detention are more beneficial to the mental health of juveniles, and imperative to reduce rates of recidivism. Additionally, abstaining from the use of secure detention and instead using treatment programs and services does not pose the same threat to the juveniles' fundamental right to liberty. In order to foster a more productive system for truancy, it is important to recognize the severe ramifications that secure detention has on the mental health of juveniles in the criminal justice system. The use of treatment and services would avoid these ramifications and likely result in a decreased level of truancy and overall reduction in the juvenile's interaction with the criminal justice system, which in turn would have an overall result of a decreased burden on the state.

*Amanda McNelly*

---

<sup>84</sup> See *Vurro*, 77 So. 3d at 898 (discussing effects of treatments of truant youths).