



A RIGHT TO LIBERTY

**Resources for Challenging the
Detention of Children**

NJDC | NATIONAL JUVENILE
DEFENDER CENTER

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Ensuring a child or young person remains out of detention prior to trial safeguards their right to liberty and the presumption of innocence. The National Juvenile Defender Center and its partners have launched the **Right to Liberty** project to advance children’s liberty interests at the individual level and in policy advocacy. We hope the resources included in these materials will be used to uphold the liberty interests of all youth. Please contact the National Juvenile Defender Center at inquiries@njdc.info for more information or assistance.

TABLE OF CONTENTS

A Right to Liberty: The Origin of Bail	4
Annotated Bibliography on Risks Associated with Incarceration	6
Increased Victimization	6
Increased Recidivism	7
School Dropout	9
Long-term Physical and Mental Health Issues	10
Sample Habeas Petition Challenging the Pretrial Detention of Children ..	11

A Right to Liberty: The Origin of Bail

According to the United States Supreme Court:

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.¹

At its essence, cash bail is a mechanism for ensuring a right to liberty. It provides for release, preserves the presumption of innocence by preventing any infliction of punishment on the accused prior to conviction, and allows the accused to assist in their defense through the identification of evidence and witnesses and through their unhampered access to counsel.² This is especially important in context of a child who has been charged with delinquent acts where “the child ‘requires the guiding hand of counsel at every step in the proceedings against him.’”³

At its origin in common law, bail was a surety—a pledge or assurance—to return to court and was not necessarily financial, though cash bail was not uncommon.⁴ The release of a client on their own recognizance with a promise to return to court and under certain restrictions, such as placing a young person on a curfew or requiring a young person to attend school,⁵ was often accepted by the court as a form of conditional release or bail. Whatever its terms, bail is designed to “address a single question: which conditions of release, if any, would ensure the defendant’s appearance for trial.”⁶

¹ *Stack v. Boyle*, 342 U.S. 1, 7 (1951).

² *Id.* at 3-9.

³ *In re Gault*, 387 U.S. 1, 36 (Fortas, J.) (1967) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

⁴ PRETRIAL JUSTICE INST., *THE HISTORY OF BAIL AND PRETRIAL RELEASE* 6 (2010), https://b3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf.

⁵ See, e.g., *Brill v. Gurich*, 965 P.2d 404, 408 (Okla. Crim. App. 1998).

⁶ Zina Makar, *Displacing Due Process*, 67 DEPAUL L. REV. 425, 437 (2018); 18 U.S.C.A § 3142(b), (c)(1)(A)-(B) (West 2008).

The use of cash bail in the criminal legal system—as one option of conditional release—was established for the sole purpose of ensuring the accused’s presence in court. However, when the bail amount is set at a figure higher than the amount reasonably calculated to fulfill this purpose, it is deemed excessive under the Eighth Amendment.⁷ The United States Supreme Court has determined factors that the court must consider when determining bail, including a consideration of the accused’s “financial condition.”⁸ It is when bail is set without consideration of a financial ability to pay that cash “bail has become a vehicle for systemic injustice,” resulting in thousands of persons being kept in jail for weeks or months following arrest—though not yet proven guilty—only because “they cannot afford to pay for their freedom.”⁹

Children . . . are effectively jailed because of their own poverty

This manifestation of bail continues to be used in juvenile court not as a mechanism for ensuring young people have a right to liberty, but as a means of ensuring that youth are kept behind bars without any finding of guilty. Children who are held on unaffordable bail are effectively jailed because of their own poverty, restricting normal adolescent development and eroding positive school, family, and community supports which are instrumental for development. For children who cannot afford the set bail amount, there is considerable pressure to give up their rights to trial and accept a plea agreement in order to gain their freedom, which often leads to unanticipated collateral consequences.

The intent behind bail is to safeguard a right to liberty, not to incur debt in exchange for release. This right to liberty is even more imperative in a juvenile legal system premised on rehabilitation and youth success. However, the way money bail has been implemented against youth and their families is all too often unjust, leading to erratic bail determinations and the perpetuation of racial and ethnic disparities in the juvenile legal system. Juvenile courts especially, should embrace practices that afford youth the “spirit of the procedure” that was intended to allow young people “to stay out of jail until a trial has found them guilty.”¹⁰

⁷ *United States v. Motlow*, 10 F.2d 657, 659 (7th Cir. 1926).

⁸ *In re Humphrey*, 601 P.2d 103, 108 (1979).

⁹ Testimony by Attorney General Robert F. Kennedy on *Bail Legislation: Hearing Before the Subcomms. On Constitutional Rights and Improvement in Judicial Machinery of the Sen. Jud. Comm.*, 88th Cong. 63-65, <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf>.

¹⁰ *Stack*, 342 U.S. at 7.

Annotated Bibliography on Risks Associated with Incarceration

The decisions to incarcerate or detain youth in facilities are often based on presumed risks youth pose to the community or themselves. However, these decisions fail to take into account the risks associated with incarceration of young people: increased victimization, recidivism, school drop-out, and long-term physical and mental health issues. These risks are magnified and compounded when youth have mental health disorders, trauma histories and/or special education needs. Given that the rate of mental health disorders, disabilities, and trauma are higher in incarcerated youth than in the general population,¹¹ it is important to consider the risks some of our most vulnerable youth face when making decisions about detention.

Increased Victimization

Nature and Risk of Victimization: Findings from the Survey of Youth in Residential Placement

The Survey of Youth in Residential Placement was conducted on a nationally representative sample of 7,073 juvenile justice-involved youth who were in custody in detention or other residential placements (including both pre-adjudication and post-adjudication facilities). It is one of the largest studies on the experiences of youth in custody in the United States. While the survey investigates many factors, this OJJDP Bulletin focuses on the assessment of rates of victimization. Among many findings, 29% of youth surveyed reported that they were assaulted or threatened with assault. Youth who reported being assaulted or threatened with assault reported an average of nine or more episodes. Additionally, 10% of youth surveyed reported that someone used force or threat of force to steal their personal property (i.e., robbery), and 46% of youth surveyed reported that their personal property was stolen when they were not present (i.e., theft). Especially of note is that 56% of youth surveyed experienced one or more types of violent victimization (i.e., robbery, physical assault, or sexual assault). The authors highlight the need for facilities to monitor the needs of youth most vulnerable to victimization while in custody.

Citation:

ANDREA J. SEDLAK ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NATURE AND RISK OF VICTIMIZATION: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT (2013), OJJDP JUV. JUST. BULL., <https://www.ojjdp.gov/pubs/240703.pdf>.

¹¹ Karen M. Abram et al., *Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 ARCHIVES GEN. PSYCHIATRY 403 (2004); Carly B. Dierkhising et al., *Trauma Histories Among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUR. J. PSYCHOTRAUMATOLOGY (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3714673/pdf/EJPT-4-20274.pdf>; Michael P. Krezmien et al., *Detained and Committed Youth: Examining Differences in Achievement, Mental Health Needs, and Special Education Status*, 31 EDUC. & TREATMENT CHILD. 445 (2008), https://orb.binghamton.edu/education_fac/1; Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133 (2002).

Sexual Victimization in Juvenile Facilities Reported by Youth, 2012

This report outlines findings of the National Survey of Youth in Custody, conducted by Westat for the Bureau of Justice Statistics in 2012. The survey records incidences of sexual victimization of youth in state and locally operated juvenile facilities that hold primarily adjudicated youth. The survey found that approximately 9.5% of youth in these facilities experienced one or more incidents of sexual victimization by another youth or staff person. Incidents occurred in the facility in the last 12 months, or since admission to the facility.

9.5% of youth experienced sexual victimization

Citation:

ALLEN J. BECK ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH (2012), <https://www.bjs.gov/content/pub/pdf/svjfry12.pdf>.

Increased Recidivism

Peer Contagion in Child and Adolescent Social and Emotional Development

This article is a review of research studies that explore the influence of peers on aggression and other problem behaviors in children and adolescents. The article reviews studies that explain the mechanisms through which peers can reinforce and perpetuate aggression and problem behavior in one another. Through mutual exchanges with peers in natural settings, children can unknowingly reinforce negative behaviors in one another due to the

children can inadvertently reinforce and promote one another's problem behaviors.

need to win over an "audience" or develop "companionship." The authors refer to this process as "deviancy training." For example, through sharing stories of an anti-social act, and receiving a positive response such as laughter, children can inadvertently reinforce and promote one

another's problem behaviors. This process of "deviancy training" is not only relegated to natural settings. The authors review research suggesting that congregating youth with problem behaviors together in a well-meaning intervention also runs the risk of creating an environment that promotes "deviancy training" and unintentionally increases the problem behaviors in children and adolescents, rather than decreases it.

Citation:

Thomas J. Dishion & Jessica M. Tipsord, *Peer Contagion in Child and Adolescent Social and Emotional Development*, 62 ANN. REV. PSYCHOL. 189 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3523739/>.

Iatrogenic Effect of Juvenile Justice

The purpose of this study was to determine whether intervention by the juvenile justice system in adolescence contributed to involvement in the criminal justice system as an adult. This was a longitudinal study that controlled for a number of variables, including impulsivity-hyperactivity, family income, verbal ability, negative peers, and parental supervision. Results indicated that youth who received more restrictive interventions (i.e., placement in facilities) when involved with the juvenile justice system, were more likely to be arrested as an adult. The authors suggest that juvenile justice systems should minimize the use of juvenile justice interventions that congregate youth into a single setting, as the peer effects in those settings may lead to an increase in problem behaviors rather than a decrease in problem behaviors. The authors use the term “iatrogenic” effect to explain this process where well-intended interventions have unintended negative consequences.

Citation:

Umberto Gatti et al., *Iatrogenic Effect of Juvenile Justice*, 50 J. CHILD PSYCHOL. & PSYCHIATRY 591 (2009).

Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders

This study calls into question the proposed benefits of residential facilities as a rehabilitative tool to reduce future offending, and raises some concerns that placement in a facility could increase future offending. The data was taken from the Pathways to Desistance project, a large longitudinal study of justice-involved youth from two major metropolitan areas. Findings revealed no difference in rates of future offending for youth placed in residential facilities as compared with youth placed in the community on probation. However, they did find a slight trend toward placement increasing rates of offending, but the effect was small and not statistically significant. Additionally, researchers found that longer lengths of stay in institutions did not necessarily reduce future rates of offending. This study is one of the more rigorous studies conducted on the impact of residential facilities on recidivism, in that it explored the impact of placement in a facility above and beyond many other risk factors that could have also impacted future offending. While the study did not find that placement in a facility significantly increases recidivism, it certainly casts doubt on the ability of facilities to prevent future offending, and raises the possibility that they may in fact increase future offending.

**facilities may
in fact increase
future offending**

Citation:

Thomas A. Loughran et al., *Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders*, 47 CRIMINOLOGY 699 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2801446/>.

School Drop Out

The Economic Value of Opportunity Youth

This study examines the economic burden that society incurs when youth fail to make a smooth transition from high school and some post-secondary education or training to the adult workforce. The authors refer to this population of youth as “opportunity youth” as they present an opportunity to contribute to society if provided the necessary supports. However, when such youth experience gaps in the transition from education to the workforce, their immediate and life-time earnings are negatively affected, and they may become an economic burden on society. The authors calculate a “future lifetime taxpayer burden of \$170,740” for each opportunity youth. Although not explicitly stated in this article, these findings have implications for the detention of youth. The decision to detain can disrupt and potentially derail a young person’s schooling, resulting in an immediate and long-term negative impact on educational and workforce outcomes.

Citation:

CLIVE R. BEFIELD ET AL., THE ECONOMIC VALUE OF OPPORTUNITY YOUTH (2012), <https://files.eric.ed.gov/fulltext/ED528650.pdf>.

Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood

The purpose of this study was to determine if arrest was related to dropping out of high school, taking into account individual, family, peer neighborhood, and school factors. Additionally, the authors wanted to ascertain *how* juvenile justice involvement could impact a young person’s educational outcomes. To answer this research question, the authors used a large longitudinal dataset that explored the characteristics of individuals, their families, schools and neighborhoods in Chicago, Illinois. Findings revealed that 73% of youth in the study who were arrested dropped out of high school, as opposed to only 51% among youth who were not arrested. The authors hypothesize that justice involvement disrupts students’ educational trajectories. They did not find that youth who were arrested had lower educational expectations, or were less attached to school, or lacked the support of peers. However, the authors did find that every youth in their study who was arrested and spent time in a juvenile detention facility dropped out of high school eventually. All youth who were arrested and not detained graduated high school. The authors suggest further

every youth who was arrested and spent time in a juvenile detention facility dropped out of high school eventually

research to help understand the mechanisms through which confinement can negatively impact school outcomes.

Citation:

David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 Soc. Educ. 36 (2013), <http://www.asanet.org/sites/default/files/savvy/journals/soe/Jan13SOEFeature.pdf/>.

Long-term Physical and Mental Health Issues

Does Incarcerating Young People Affect Their Adult Health Outcomes?

This study explores the relationship between youth incarceration and adult health outcome. The authors used data from the National Longitudinal Study of Adolescent Health to examine the relationship between cumulative incarceration as an adolescent (less than one month, one to 12 months, and more than 12 months), and several health outcomes as an adult (general health, functional limitations, depressive symptoms, and suicidal thoughts). Controlling for current health as an adolescent, findings revealed that those who were incarcerated for less than a month during adolescence, were more likely to have depressive symptoms as an adult. Additionally, those who experienced cumulative incarceration from one to 12 months as an adolescent, experienced worse general health outcomes as an adult. Finally, those who experienced more than one year of cumulative incarceration as an adolescent were more likely to have functional limitations, depressive symptoms, and suicidal thoughts as an adult. The authors warn of the potential health risks incarceration poses for adolescents and suggest that future research explore potential causal mechanisms through which adolescent incarceration impacts adult health outcomes.

Citation:

Elizabeth S. Barnert et al., *Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS 1 (2017), <https://pediatrics.aappublications.org/content/pediatrics/139/2/e20162624.full.pdf>.

Sample Habeas Petition Challenging the Pretrial Detention of Children

Because detention orders are not typically appealable, writs of habeas corpus are one way to push for a hearing to challenge the legality of the initial detention, when there are few or no other mechanisms for review. The sample at the below link is an example of a writ and supporting memorandum of law that juvenile defense attorneys might adapt in their own cases.

<https://njdc.info/sample-habeas-challenging-detention/>

FOR MORE INFORMATION

NJDC's Project to Reform Juvenile Cash Bail

For more information on NJDC's project to address the use of cash bail in juvenile courts and ensure that children's liberty interests are secure, please visit the below link. There, you will find other resources and information on reforming juvenile cash bail.

<https://njdc.info/our-work/juvenile-bail-reform/>



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