Casting off the Curse of God[1]: Litigation Versus Legislation and the Educational Rights of Youth in North Carolina's Adult Criminal Justice System*

INTRODUCTION

Consider the following scenario: A sixteen-year-old boy sits at a crowded high school lunch table. The boy's friends, continuing the childish game the group plays most days of the week, come up with a simple dare: successfully take a fifty-cent candy bar from the cafeteria without paying for it. The daily assignment of the dare is cyclical, and today happens to be the boy's turn. If he succeeds, he will be king for a day. If not, all will be forgotten as the dare circle continues tomorrow. Bowing to peer pressure, he accepts the challenge and sneaks by the cashier with a Snickers bar stuffed in his pocket. Unfortunately, the vice principal spots him, and since he has twice taken small items like this in the past—a sixty-cent package of cookies and a seventy-five-cent carton of milk—she has the school resource officer arrest him to teach him a lesson he has so far refused

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1. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 7, lines 70–71 (David Bevington ed., Pearson Educ., 6th ed. 2009) ("And, seeing ignorance is the curse of God,/ Knowledge, the wing wherewith we fly to heaven . . . .").

to learn.[2] In forty-eight of the fifty states, the worst fate that could befall the boy would be a brief trip through the juvenile justice system, with restitution, community service, or other alternative programming his likely consequence.[3] But in North Carolina, where the juvenile court's jurisdiction ended at his sixteenth birthday,[4] the boy will be considered an adult and could be charged with criminal larceny,[5] punishable by up to four months in prison.[6]

If you think the mere possibility of the above situation is absurd, you are not alone.[7] Critics of North Carolina's juvenile justice system have consistently expressed dissatisfaction with the young juvenile age since the system's inception in 1919,[8] but they have recently stepped up their efforts, persuading North Carolina legislators to introduce no fewer than seven bills over the past three legislative sessions that would reset the cutoff age between juvenile and adult jurisdiction to eighteen years old.[9] So far, however, none of those bills have passed. The most recent effort, Senate Bill 506,[10] died in committee at the close of the 2011-2012 legislative session.[11]

Some supporters of the raise-the-age bills are motivated at least in part by a belief that the existing juvenile justice system is patently unjust in a higher philosophical sense. For instance, former New Bern police chief Frank Palombo opened a press conference in support of raising the juvenile age by praising it as a way to save youths from

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2. This hypothetical was inspired by the case of a seventeen-year-old Cleveland County student who was arrested in October 2011 for taking a sixty-nine-cent bag of chips from his school cafeteria. Corey Friedman, *Teen Faces Theft Charge Over Stolen Doritos*, SHELBY STAR, Oct. 20, 2011, at 3A.

3. *See infra* Part I (comparing North Carolina's disciplinary approach to sixteen- and seventeen-year-old offenders with that of other states).

4. *See infra* note 60.

5. This is indeed what happened in the Cleveland County case. *See* Friedman, *supra* note 2.

6. *See* N.C. GEN. STAT. § 14-72 (2011) (defining theft of goods valued at less than a thousand dollars as a class 1 misdemeanor); *see also id.* § 15A-1340.23 (prescribing a sentence of up to 120 days for convictions of class 1 misdemeanors).

7. Ironically, stories of rank injustice like this one partially motivated the establishment of a separate juvenile justice system in North Carolina in the first place. In their history of the North Carolina juvenile system, Betty Gene Alley and John Thomas Wilson describe how two boys—one "sentenced to three years [in Raleigh Central Prison] for stealing a goose valued at ten cents," and the other given "three years of hard labor on the chain gang" for "stealing $1.30"—inspired a group of citizens to demand a separate correctional facility for youths. BETTY GENE ALLEY & JOHN THOMAS WILSON, NORTH CAROLINA JUVENILE JUSTICE SYSTEM: A HISTORY, 1868-1993, at 3 (1994).

8. *See infra* Part I for a brief history of the juvenile system and reform efforts.

9. *See infra* Part II for a discussion of legislative efforts to raise the age.

10. S.B. 506, 2011-2012 Gen. Assemb., Reg. Sess. (N.C. 2011), http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S506v1.pdf.

11. *See infra* Part II for further explanation of Senate Bill 506's substance.

"reckless" mistakes that would otherwise "saddle [them] for the rest of their lives."[12]

A second group of supporters argues from a more scientific basis, pointing out that the cognitive maturity (or lack thereof) of sixteen- and seventeen-year-olds in no way resembles that of adults. Researchers have found that "compared to adults, adolescent offenders' limitations in several areas of decision-making can make them less blameworthy than adult offenders."[13] Additional studies have demonstrated that adolescents—including sixteen- and seventeen-year-olds—are "relatively short-sighted, more focused on immediate gratification, more impulsive, and more vulnerable to peer pressure and coercion."[14] In other words, on the whole, adolescents are more likely to ignore the risky consequences of their actions, regardless of their individual cognitive maturities. According to Representative Marilyn Avila (District 40, Raleigh), a co-sponsor of Senate Bill 506, this innate impulsiveness means that sixteen- and seventeen-year-olds are "at the mercy of their brains" to such an extent that it is unfair for the law to treat them as adults when judging their culpability for crimes.[15]

A third group of raise-the-age supporters point to the fact that North Carolina is one of only two states that have set the maximum age of juvenile jurisdiction at sixteen (New York is the other), while ten others have set it at seventeen, and the vast majority—the thirty-eight remaining states and the District of Columbia—have set it at eighteen.[16] Tipping their hats to the scientific argument, these proponents argue that such a low blanket age results in an inability of the justice system to prescribe individualized plans that balance the twin considerations of punishment and rehabilitation. For example, former Supreme Court of North Carolina Justice Robert Orr, the

12. 1ncchild, *Chief Frank Palombo Supports Raising the Age In North Carolina*, YOUTUBE (Feb. 22, 2012), http://www.youtube.com/watch?v=kj_5CyqK2Po&feature=channel&list=UL; *see also Raise the Age Press Conference – June, 2011*, ACTION FOR CHILDREN (June 7, 2011), http://www.ncchild.org/event/raise-age-press-conference-june-2011 (describing the press conference).

13. Courtnye Lloyd & Lisa Berlin, *Research on Adolescent Development, Competence, and Character*, *in* JUVENILE OR ADULT? ADOLESCENT OFFENDERS AND THE LINE BETWEEN THE JUVENILE AND CRIMINAL JUSTICE SYSTEMS 13, 13 (Duke Univ. Ctr. for Child & Family Policy 2007).

14. *Id.*

15. 1ncchild, *Representative Marilyn Avila Supports Raising the Age in North Carolina*, YOUTUBE (Feb. 22, 2012), http://www.youtube.com/watch?v=sdjTzZIsE50.

16. YOUTH ACCOUNTABILITY PLANNING TASK FORCE, FINAL REPORT TO THE GENERAL ASSEMBLY OF NORTH CAROLINA 2 (2011), http://www.ncdjjdp.org/resources/pdf_documents/taskForce/YouthAccountabilityTaskForceFinalReport_January2011.pdf.

third speaker at the aforementioned raise-the-age press conference, gave an emotional account of a young male "from a classic disadvantaged background" who was caught up in a robbery while "in the wrong place, at the wrong time, with the wrong group of associates"[17]—implying that incarcerating the boy in an adult correctional facility was a woefully misguided response on North Carolina's part.[18] He suggests that extending juvenile jurisdiction to sixteen- and seventeen-year-olds would "avoid[] a destructive, one-size-fits-all punishment" and instead provide opportunities for rehabilitation, since "the juvenile system mandates that kids make restitution to their victims, be in frequent contact with court counselors and participate in assessments, rehabilitative services, mental health and substance abuse treatment, counseling and education."[19]

Whatever the merit of these general policy arguments, they have not yet persuaded a necessary majority of the North Carolina General Assembly to pass any raise-the-age bills.[20] Recognizing this reality—and skeptical that the General Assembly will be persuaded in the near future—this Comment explores the feasibility of a non-legislative approach to reform. Specifically, it attempts to move the juvenile justice battleground from the House floor to the courtroom, and argues that, regardless of their status as "adult offenders" and their placement in adult prison facilities, youths under the age of eighteen are legally entitled to certain benefits enjoyed by youths adjudicated and sentenced under the jurisdiction of the juvenile court. Consequently, it encourages reformers impatient with the dawdling legislative process to supplement their legislative lobbying efforts by litigating their way to substantive changes for youths in adult prisons. At the very least, this dual-pronged approach will put pressure on irresolute congressmen to work with reformers, and may even result in judicially-mandated improvements in the prison experience for young-adult offenders.

Realizing that there are potentially dozens of rights one could choose to litigate, this Comment will focus on the one that best compliments the policy arguments in favor of raising the age: the right to education. Raise-the-age supporters often point to lost education

17. 1ncchild, *ustice* [sic] *Robert Orr Supports Raising the Age in North Carolina*, YOUTUBE (Feb. 22, 2012), http://www.youtube.com/watch?v=ULnPiT6vyAs&feature=relmfu.

18. *See id.*

19. Robert F. Orr, Op-Ed., *Better for Justice, Better for Juveniles*, NEWS & OBSERVER (Raleigh, N.C.), May 16, 2011, at 7A.

20. *See infra* notes 79–88 and accompanying text.

as one of the negative consequences of sending youths to prison, arguing that non-educated former offenders have a much more difficult time securing steady, well-compensated employment after their release.[21] Additionally, the right to education is exceedingly viable; it has long been litigated at both the federal[22] and state[23] levels, giving it an undeniable legal pedigree that ensures the judiciary will take it seriously. And while the right to education has been extensively litigated in the public school context,[24] it has not been litigated with regard to prison reform, leaving its contours undefined in this context. Finally, it is a dynamic legal right from a technical perspective, amenable to both equality and adequacy claims and giving reformers multiple avenues to pursue.[25]

Analysis proceeds in four parts. Part I chronicles the development of the North Carolina juvenile justice system with respect to the juvenile age, and outlines the current statutory scheme. Part II explores the raise-the-age bills that have come before the General Assembly in recent years and argues that not only are they unlikely to pass, but that they will be inadequate, even if they do become law, in ensuring a proper education for sixteen- and seventeen-year-olds. Part III briefly discusses the state of federal and state constitutional jurisprudence regarding the right to education and decides on a state adequacy claim as the most likely educational claim to succeed in court. Part IV argues that while a litigation approach will likely prove difficult given the impressive educational programming currently offered to most youthful inmates in North Carolina, the current system still suffers from constitutional deficiencies. Specifically, a litigation-based approach remains viable because North Carolina Department of Correction policies fail to mandate sufficient programming, and the value of alternatives to the high school diploma has been diminishing.

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21. *See infra* notes 110–113 and accompanying text (discussing the ramifications of educational deficiencies among former criminal offenders).

22. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (holding that the right to equal educational funding is not a fundamental right under the Constitution's Equal Protection Clause); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[W]here the state has undertaken to provide [a public education, it] is a right which must be made available to all on equal terms.").

23. *See, e.g.*, Leandro v. State, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997); Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 610, 264 S.E.2d 106, 108 (1987).

24. *See infra* Part III.B.

25. For a technical discussion of the right to education, see *infra* Part III.B.

I. NORTH CAROLINA'S JUVENILE JUSTICE SYSTEM—A BRIEF HISTORY

The roots of the modern American juvenile justice system—with separate courts and facilities for juveniles and adults, procedural rules specific to juvenile proceedings, and the adoption of a rehabilitative ideal—go back to the late 1800s and the Progressive Era, a time period notable for widespread social reform movements led by the government and philanthropic elites.[26] Before the influence of the Progressive movement, the common law made no distinctions between adults and juveniles: children under the age of seven were exempt from any kind of criminal prosecution, anyone older than fourteen years old was eligible for criminal prosecution, and children between seven and fourteen were subject to prosecution if there was evidence that they could distinguish between right and wrong.[27] As the 1900s approached, Americans began to accept the idea that deleterious external home and social environments, rather than some internal tendency to malfeasance, caused youths to disobey the law.[28] In turn, states began to embrace the notion that rehabilitation, not punishment, was the key to dealing with juveniles since the negative effects of external environmental factors absolved juveniles from culpability for their actions and were presumably reversible.[29] Practically speaking, citizens began to "envision[] the juvenile court as a place in which fatherly judges could help guide both criminal and neglected youth to better lives."[30] This attitude manifested itself in a juvenile court system in which juveniles had practically no procedural rights—the judge, acting simply as a stand-in for the child's parents under the doctrine of *parens patriae*, could recommend whatever disposition he thought was in the best interest of the child.[31] Armed

26. *See* GUS MARTIN, JUVENILE JUSTICE: PROCESS AND SYSTEMS 38–43 (2005) (tracking the nineteenth century establishment of private "houses of refuge," which focused on "rehabilitation and reform" of troubled youth through vocational training; the rise of the so-called "child-savers," who removed youths from poor home conditions and placed them in reform schools; and early twentieth century manifestations of *noblesse oblige*).

27. *See* Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1472–73 (2008).

28. *See* MARTIN, *supra* note 26, at 43.

29. *See id.* at 44.

30. ANNE M. NURSE, LOCKED UP, LOCKED OUT: YOUNG MEN IN THE JUVENILE JUSTICE SYSTEM 6 (2010).

31. The Supreme Court summarized the Progressive Era attitude as follows:

> The right of the state . . . to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that

with this new philosophy, New York, Massachusetts, and Colorado passed embryonic laws partially incorporating Progressive Era ideals, but in 1899 Illinois became the first state to pass a complete juvenile justice statutory scheme.[32] The law classified youths younger than sixteen as "juvenile delinquents" instead of adult offenders[33] on the premise that the "needs and abilities of juveniles were . . . developmentally different from those of adults."[34]

Following suit, North Carolina adopted its own statute[35] twenty years later with the intent "to provide a special children's court based upon a philosophy of treatment and protection that would be removed from the punitive approach of criminal courts."[36] In furtherance of this goal, the act provided for minimal procedural requirements: all it required was that the judge hear the case and consider the "habits, surroundings, conditions, and tendencies of the child" in order to "render such order or judgment as [should] best conserve the welfare of the child and carry out the objects of [the] act."[37] In terms of age jurisdiction, the statute created a three-tiered framework. First, the juvenile court had exclusive jurisdiction over all youths younger than fourteen, regardless of the alleged crime.[38] Second, the juvenile court had presumptive jurisdiction over all youths between fourteen and sixteen who were accused of felonies with a maximum sentence of fewer than ten years in prison, but also had broad discretion to transfer those youths to superior (adult) court.[39] And third, children who were over fourteen and charged with

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> is, if the child is "delinquent"—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled. On this basis, proceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.

In re Gault, 387 U.S. 1, 17 (1967).

32. *See* NURSE, *supra* note 30, at 6; *see also* Illinois Juvenile Court Act of 1899, 1899 Ill. Laws 131 (codified as amended at 705 ILL. COMP. STAT. ANN. 405/1-2 (West 2007)).

33. *See* MARTIN, *supra* note 26, at 43–44.

34. LINDSAY BOSTWICK, ILL. JUVENILE JUSTICE COMM'N, POLICIES AND PROCEDURES OF THE ILLINOIS JUVENILE JUSTICE SYSTEM 1 (2010), http://www.icjia.state.il.us/public/pdf/ResearchReports/IL_Juvenile_Justice_System_Walkthrough_0810.pdf.

35. Act of Mar. 3, 1919, ch. 97, 1919 N.C. Sess. Laws 243.

36. ALLEY & WILSON, *supra* note 7, at 5.

37. § 9, 1919 N.C. Sess. Laws at 246.

38. *See* State v. Burnett, 179 N.C. 735, 739–41, 102 S.E. 711, 712–13 (1920) (construing the terms of the 1919 juvenile court statute); *see also* State v. Coble, 181 N.C. 554, 556, 107 S.E. 132, 133 (1921).

39. *See* § 9(f), 1919 N.C. Sess. Laws at 247 (providing that the juvenile's case should be heard in juvenile court "unless it appears to the judge of the Juvenile Court that the

a felony punishable by more than ten years, as well as any youth sixteen or older, were considered adults and tried in superior court.[40]

Over the following decades, North Carolina overhauled the juvenile code several times in response to changed state demographics and new constitutional jurisprudence relating to the rights of juveniles. The first major changes[41] came after the Supreme Court's 1966 and 1967 decisions in *Kent v. United States*,[42] which held that a Washington, D.C. statute establishing presumptive juvenile court jurisdiction also established a due process right for youths who were transferred to the adult system,[43] and *In re Gault*,[44] which held that "the [juvenile adjudication] hearing must measure up to the essentials of due process and fair treatment[] . . . which [are] part of the Due Process Clause of the Fourteenth Amendment of our Constitution."[45] These extraordinary cases completely repudiated the Progressive Era ideal of *parens patriae*, and while they stopped short of holding that juveniles were entitled to *every* procedural right enjoyed by adults, they made it clear that juveniles were guaranteed "the right . . . to receive both written notice of charges and advice of the right to the assistance of counsel, the privilege against self-incrimination, and the requirement that witnesses must testify under oath and be available for confrontation and cross-examination."[46]

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case should be brought to the attention of the judge of the Superior Court"); *see also Burnett*, 179 N.C. at 739, 102 S.E. at 712–13.

40. *See Burnett*, 179 N.C. at 741, 102 S.E. at 713. Interestingly, the original drafters of the 1919 statute intended for all youths under age eighteen to fall under the juvenile court's jurisdiction, but the maximum age was revised to cover only those youths under age sixteen before the bill's final passing. *See* Birckhead, *supra* note 27, at 1475–76.

41. Changes prior to the mid-1960s included the 1943 creation of a Board of Juvenile Correction to unite the previously distinct juvenile training schools and facilities, which had before been left to individual counties, and the 1960s creation of the district court system, which had consolidated authority to hear cases involving delinquent and neglected children and most family law issues. *See* ALLEY & WILSON, *supra* note 7, at 11–12, 33–36; *see also* Judicial Department Act of 1965, N.C. GEN. STAT. § 7A-1 (2011) (codifying this consolidated district court system).

42. 383 U.S. 541 (1966).

43. *See id.* at 558 ("The net, therefore, is that petitioner—then a boy of 16—was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the 'exclusive' jurisdiction of the Juvenile Court."); *see also* DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN: *IN RE GAULT* AND JUVENILE JUSTICE 57 (2011) (summarizing the *Kent* decision). However, it also cast serious doubt on the "Progressive Era rationale for the procedural informality of juvenile justice," opening the door for Gerald Gault to entreat the Supreme Court to broaden the scope of the decision. *Id.* at 57–58.

44. 387 U.S. 1 (1967).

45. *Id.* at 30–31.

46. TANENHAUS, *supra* note 43, at 99. Gerald Gault, by contrast, was removed from his family's home without notice to his parents that he was being taken into custody, was not told of the specific facts underlying the court's adjudication of delinquency, and was

In response to the two decisions, the North Carolina General Assembly added a number of procedural protections to the juvenile code.[47] The new code provided that youths aged fourteen or over who were charged with felonies and subject to transfer to adult court were entitled to a preliminary hearing to determine probable cause that would "provide due process of law and fair treatment to the child, including the right to counsel."[48] Youths who remained in the juvenile system after the transfer hearing were also protected, since the code specifically directed the district court judge to "protect the rights of the child and his parents" by ensuring "the right to written notice of the facts alleged in the petition, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination."[49] Aside from the procedural changes, the 1969 revision greatly expanded the range of substantive dispositions available to the juvenile system.[50] Court intake counselors now had the discretion to divert a juvenile case before it went to court and instead refer the juvenile to locally-available community resources if they found that it was in the juvenile's best interest.[51] In addition, juveniles could be committed to a youth detention facility[52] or be placed in one of a growing number of residential and non-residential community-based alternatives.[53]

The 1969 revisions began a trend of periodic revisions to the juvenile code that resulted in expanded procedural protections and extensive substantive changes. The 1979 amendments augmented the intake process for juveniles, requiring court counselors to make an initial finding regarding the truth or falsity of accusations against the juvenile, to determine whether the allegations "constitute[d] a delinquent or undisciplined offense," and to identify whether the

committed to the state without a transcript, recording, memorandum, or any record of the judicial proceedings other than that they took place. *See Gault*, 387 U.S. at 5–6. Justice Black was scathing in his indictment of the Arizona juvenile justice system at issue in *Gault*, noting that while "[t]he juvenile court planners envisaged a system that would practically immunize juveniles from 'punishment' for 'crimes' in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions[,] . . . this exalted ideal has failed of achievement since the beginning of the system." *Id.* at 60 (Black, J., concurring).

47. *See generally* MASON P. THOMAS, JUVENILE COURT REVISIONS BY THE 1969 GENERAL ASSEMBLY (1969) (discussing juvenile code alterations in their entirety).

48. Act of June 19, 1969, ch. 911, § 2, 1969 N.C. Sess. Laws 1047, 1050.

49. *Id.* at 1052.

50. *See* ALLEY & WILSON, *supra* note 7, at 53–62 (detailing the various legislative actions dealing with juvenile court authority in the mid-1970s).

51. *See id.* at 57–58.

52. *See id.* at 58–59.

53. *See id.* at 60; *see also* Mason P. Thomas, Jr., *Juvenile Corrections and Family Law*, POPULAR GOV'T, Sept. 1969, at 58, 61 (summarizing the relevant legislation).

juvenile needed to appear in court; if he did not, then counselors could refer the juvenile to "community resources."[54] The amendments also constructed "procedures for notice to the parents, for release to the parents, and for requesting a juvenile petition through the appropriate person," if a juvenile was taken into secure custody by the state.[55] Another overhaul in 1998 placed greater emphasis on the development and funding of "intermediate and community-level dispositions"[56]—i.e. dispositional alternatives, such as substitutes for incarceration, short of commitment to the state, like house arrest, a curfew, community service requirements, restitution, or placement in a group home.[57]

One might imagine, then, that a visitor from 1919 would not recognize the current juvenile justice system if he had a chance to see it. As shown above, the noble but misguided Progressive Era reforms—substantially lacking in procedural protections—have been replaced by attentive provisions for constitutionally-adequate process.[58] Substantively speaking, judges now have discretion to assign a wide range of dispositional alternatives to ensure that delinquent juveniles receive a rehabilitative program suited to what the court perceives as their needs.[59] However, our visitor would find one major characteristic very familiar: after ninety-three years, North Carolina still classifies sixteen- and seventeen-year-olds as adults,[60] an original feature of the 1919 juvenile justice statute that remains anachronistically stagnant.

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54. Mason P. Thomas, Jr., *Juvenile Corrections*, *in* NORTH CAROLINA LEGISLATION 1979, at 121, 122 (Joan Brannon & Ann Sawyer eds., 1979).

55. *Id.* at 125.

56. Janet Mason, *Juvenile Law*, *in* NORTH CAROLINA LEGISLATION 1998, at 107, 116 (John L. Saxon ed., 1998); *see also* Act of Oct. 22, 1998, ch. 202, § 1, 1998 N.C. Sess. Laws 695, 704 (implementing a "Juvenile Crime Prevention Council" to develop community-based alternatives).

57. *See* Mason, *supra* note 56, at 127.

58. *See supra* notes 35–37 and accompanying text.

59. *See supra* notes 52–53, 56–57 and accompanying text. Of course, advocates still argue that the juvenile justice system is far from perfect. *See, e.g.*, Tamar R. Birckhead, *Juvenile Justice Reform 2.0*, 20 BROOK. J. L. & POL'Y 15, 20–21 (2011) (arguing that recent Supreme Court decisions that have previously been hailed as "landmark[s]" have, in reality, failed to achieve the degree of reform that reformers have been seeking).

60. *See* N.C. GEN. STAT. § 7B-1501(7) (2011) (defining a "[d]elinquent juvenile" as "[a]ny juvenile who, while less than 16 years of age but at least 6 years of age, commits a crime or infraction under State law"); *id.* § 7B-1604 (noting that "[a]ny juvenile . . . who commits a criminal offense on or after [his] sixteenth birthday is subject to prosecution as an adult"); *see also id.* § 7B-1601 (granting the district court exclusive jurisdiction over delinquent juveniles).

II. LEGISLATIVE EFFORTS TO RAISE THE AGE[61]

The story of the General Assembly's intransigent refusal to raise the age of juvenile jurisdiction actually starts before the 1919 statute ever passed. As originally drafted, the statute included all youths under age eighteen within the confines of juvenile court jurisdiction, but the age was modified to sixteen before the bill became law.[62] In the 1950s, the General Assembly heard the opinion of several study commissions, each of which recommended (for different reasons) that the legislature raise the age to eighteen. The first was the Commission on Juvenile Courts and Correctional Institutions,[63] which was formed to study "(1) the problems relating to juvenile courts and commitment, confinement, and supervision of delinquent children and (2) all laws pertaining to delinquents, juvenile courts, training schools, reformatories, and other juvenile correctional institutions."[64] The Commission's hesitant recommendation that the legislature raise the jurisdictional ceiling successfully found its way into a 1955 bill, but—in what would become a common refrain—opponents objected that the state's already-crowded juvenile facilities could not handle such a substantial increase in population.[65]

In lieu of passing the bill, the General Assembly created the Governor's Youth Service Commission "to advise the governor on all matters related to the prevention, correction, and control of juvenile delinquency, and to suggest legislation."[66] That Commission criticized then-current policy, noting that only five other states considered sixteen-year-olds adults at the time,[67] and found that sixteen- and seventeen-year-old youths in trouble with the law were generally victims of an "idleness" gap in the legal system: school attendance was compulsory only up to age sixteen, but other laws prohibited youth from entering the workforce until age eighteen,[68] resulting in two years of unoccupied time in which they had plenty of opportunities to break the law. Nevertheless, the legislature remained unimpressed. Undeterred, the Youth Service Commission sought assistance from the National Probation and Parole Association, which

61. For a much more thorough exploration of raise-the-age efforts in North Carolina prior to 2008, see generally Birckhead, *supra* note 27.

62. *See id.* at 1475–76.

63. *See* ALLEY & WILSON, *supra* note 7, at 17.

64. *See id.*

65. *See* Birckhead, *supra* note 27, at 1481; *see also* ALLEY & WILSON, *supra* note 7, at 18 (noting the Commission concluded the General Assembly should only increase the age range when there was a facility to house sixteen- and seventeen-year-olds).

66. ALLEY & WILSON, *supra* note 7, at 21.

67. *See id.* at 22.

68. *See* Birckhead, *supra* note 27, at 1482.

conducted a scientific study that concluded "offenders under eighteen should not be considered as culpable or criminally responsible as adults because they are not yet fully [physiologically and psychologically] formed."[69] Remarkably, the General Assembly refrained from acting on any of the Commission's findings.

Over the next several decades, activists made sporadic pushes for age reform underpinned by one or more of the various arguments outlined above,[70] but legislators did more than just ignore these efforts—they apparently repudiated them. Instead of raising the age, the General Assembly lowered the minimum age at which a child could be considered a delinquent offender to six (from seven),[71] enacted a "once an adult, always an adult" provision to prevent youths convicted in the adult system from ever reentering the juvenile system,[72] clarified that a juvenile's felony case transferred to adult court brought with it any greater- or lesser-included offenses and any other offenses "based on the same act or transaction,"[73] and lowered the minimum age for transfer to adult court to thirteen years old.[74]

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69. *Id.* at 1484; *see also* ALLEY & WILSON, *supra* note 7, at 24 ("The report stated that the increase in knowledge of the functioning and development of the human mind showed the unreasonableness of classifying a sixteen- or seventeen-year-old youngster as an adult in connection with offenses against society." (internal quotation marks omitted)).

70. In 1971, for instance, the General Assembly again heard the argument that "[m]ost other states extended the juvenile court age up to eighteen years of age," but failed to pass a proposed raise-the-age bill. ALLEY & WILSON, *supra* note 7, at 46. And in 1985, would-be reformers "reiterated that older adolescents had an urgent need for more appropriate treatment[,] and . . . that adult prisons were 'inappropriate' for young people, as they were unequipped for treatment and rehabilitation." Birckhead, *supra* note 27, at 1487.

71. *See* Act of June 7, 1979, ch. 815, § 1, 1979 N.C. Sess. Laws 966, 969; Thomas, Jr., *supra* note 54, at 121. North Carolina's juvenile system still has jurisdiction over children as young as six. *See* N.C. GEN. STAT. § 7B-1501(7) (2011). This is the single lowest minimum age of juvenile jurisdiction in the United States. *See* Sarah Hammond, Nat'l Conference of State Legislators, Setting the Stage: Juvenile Justice History, Trends, and Statistics in North Carolina and the U.S. (Mar. 20, 2007) (PowerPoint presentation available at http://www.familyimpactseminars.org/s_ncfis03ppt_sh.pdf).

72. *See* § 1, 1979 N.C. Sess. Laws at 969. This provision is still in force: "A juvenile who is transferred to and convicted in superior court shall be prosecuted as an adult for any criminal offense the juvenile commits after the superior court conviction." N.C. GEN. STAT. § 1604(b) (2011).

73. Act of June 15, 1983, ch. 532, § 1, 1983 N.C. Sess. Laws 452, 452. Combining this provision with the "once an adult" provision above, one could imagine a situation in which a transferred youth is not convicted of the major crime for which he was transferred, but of a lesser crime that would not have resulted in a transfer had it been a stand-alone offense (i.e., he would have been kept in the juvenile system). Nevertheless, because he was convicted in the adult system of *some* crime, he will remain in the adult system regardless of his age and offense.

74. *See* Crime Control Act of 1994, ch. 22, § 25, 1994 N.C. Sess. Laws 62, 75 (passed in 1994 Extra Session).

And, importantly, they steadfastly maintained the juvenile age line at the sixteenth birthday.[75]

Over the past few years, however, community and legislative proponents have united in the most concentrated effort to raise the age in recent memory. Recent sessions of the General Assembly have witnessed a relative flurry of reform efforts, as lawmakers have submitted seven bills for legislative approval.[76] But of the seven, only four have passed the initial reading in their respective chambers,[77] and aside from Senate Bill 506, only one of these bills—the Youth Accountability Act, which aimed to establish yet another investigative task force to study the potential budgetary and administrative consequences of expanding the juvenile justice system—has ever made it to a second draft.[78] Senate Bill 506 made it to a second draft, but recently expired with the adjournment of the 2011-2012 legislative session.[79]

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75. *See* N.C. GEN. STAT. § 1604(b) (2011).

76. H.B. 632, 2011-2012 Gen. Assemb., Reg. Sess. (N.C. 2011), http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H632v1.pdf; S.B. 506, 2011-2012 Gen. Assemb., Reg. Sess. (N.C. 2011), http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S506v1.pdf; H.B. 1414, 2009-2010 Gen. Assemb., Reg. Sess. (N.C. 2009), http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H1414v1.pdf; S.B. 1048, 2009-2010 Gen. Assemb., Reg. Sess. (N.C. 2009), http://www.ncleg.net/Sessions/2009/Bills/Senate/PDF/S1048v1.pdf; S.B. 1445, 2007-2008 Gen. Assemb., Reg. Sess. (N.C. 2007), http://www.ncleg.net/Sessions/2007/Bills/Senate/PDF/S1445v1.pdf; S.B. 1078, 2007-2008 Sess. (N.C. 2007), http://www.ncga.state.nc.us/Sessions/2007/Bills/Senate/PDF/S1078v1.pdf; H.B. 492, 2007-2008 Gen. Assemb., Reg. Sess. (N.C. 2007), http://www.ncleg.net/Sessions/2007/Bills/House/PDF/H492v1.pdf.

77. N.C. H.B. 632; N.C. S.B. 506; N.C. H.B. 1414; N.C. H.B. 492.

78. *See* H.B. 1414, 2009-2010 Gen. Assemb., Reg. Sess. (Draft, N.C. Apr. 13, 2009), http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H1414v2.pdf.

79. Senate Bill 506, still in its first draft, expired when the legislative session was adjourned on November 7, 2011. S.J. Res. 793, 2011-2012 Gen. Assemb., Reg. Sess. (N.C. 2011) (adjourning the 2011 regular session on November 7, 2011), http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S793v2.pdf. However, in 2012, the General Assembly effectively revived the bill by inserting similar language from the expired Senate Bill 506 into Senate Bill 434, previous editions of which had been unrelated to juvenile justice. *See* S.B. 434, 2011-2012 Gen. Assemb., Reg. Sess., (Draft, N.C. June 20, 2012) (containing language similar to Senate Bill 506), http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S434v3.pdf. As a result, Senate Bill 506 effectively reached a "second draft." Senate Bill 434 expired with the adjournment of the legislative session on July 3, 2012. S.J. Res. 961, 2011-2012 Gen. Assemb., Reg. Sess. (N.C. 2012) (adjourning *sine die* the 2011 regular session on July 3, 2012), http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S961v2.pdf. To avoid confusion, this Comment addresses the bill as "Senate Bill 506" without explicit reference to Senate Bill 434. Senate Bill 434 does modify the language of the earlier Senate Bill 506 in certain ways. For example, it narrows the bill's scope to raise the age *only* for those juveniles accused of committing a misdemeanor, and does not affect the current statutory scheme for those accused of committing a felony. *Compare* S.B. 506, § 1.(a), 2011-2012 Gen. Assemb., Reg. Sess. (N.C. 2011) ("Any juvenile who, while less than 16 years and six months of age but at least 16 years of age, commits a crime or infraction under State law

The reason for so much legislative hostility to the raise-the-age efforts is difficult to pinpoint, but the two most commonly cited reasons are (1) concerns about cost[80] and capacity to handle a large influx of new entrants to the juvenile system,[81] and (2) a desire to maintain a "tough on crime" approach to older adolescent offenders.[82] Eddie Caldwell, the president of the North Carolina Sheriff's Association and an outspoken critic of raising the age, has complained that the current juvenile justice system is already hurting for funds, stating that "[b]efore we add more children to that system, we ought to provide adequate funding for the children who are currently in that system."[83] Several months later he gave a more telling interview to the Raleigh *News & Observer*, stressing that "[s]ome of these [youths] are career criminals who started terrorizing their neighborhoods when they were 12 and 13,"[84] while implying that the adult system is exactly the place for them to be.[85] Additionally, the Governor's Crime Commission has found that implementing the administrative and infrastructural changes necessary to handle more delinquents will require more than $79 million in up-front costs,[86] which might be unacceptable to Republicans in North Carolina's

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. . ."), *with* S.B. 434, § 1.(a), 2011-2012 Gen. Assemb., Reg. Sess., (Draft, N.C. June 20, 2012) ("Any juvenile who, while less than 16 years and six months of age but at least 16 years of age, commits a *misdemeanor* or infraction under State law . . ." (emphasis added)). However, these changes have no effect on this Comment's conclusion that raise-the-age advocates should incorporate targeted litigation into their reform efforts. If anything, the narrowing of Senate Bill 506 in an effort to gain more bipartisan support indicates that legislative reform efforts will require too high a sacrifice for minimal reform gains.

80. *See* GOVERNOR'S CRIME COMM'N, JUVENILE AGE STUDY: STUDY OF THE IMPACT OF EXPANDING THE JURISDICTION OF THE DEPARTMENT OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 6 (2009) [hereinafter CRIME COMM'N], http://www.ncgccd.org/pdfs/juvjus/Juvenile_Age_Study_Final_Report.pdf ("The cost per arrest is 50.1 percent higher in the juvenile system than it is in the adult system. Primary drivers of the difference in costs include the cost of supervision and the cost of secure placement.").

81. *See* Laura Leslie, *'Raise the Age' Falls Short*, @NC CAPITOL (June 28, 2012), http://www.wral.com/news/state/nccapitol/blogpost/11262596/.

82. *See infra* notes 84–85 and accompanying text.

83. Loretta Boniti, *Task Force's* [sic] *Works to Raise Juvenile Offender Age*, NEWS 14 CAROLINA (Jan. 14, 2011, 5:15 PM), http://triangle.news14.com/content/635393/task-force-s-works-to-raise-juvenile-offender-age.

84. Barry Saunders, *A Bag of Chips and the Law*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 24, 2011, at 1B.

85. *See id.*

86. CRIME COMM'N, *supra* note 80, at 6. The Commission also found that raising the age could actually be budget neutral or even result in a $7.1 million surplus with proper emphasis on reducing recidivism, but only over the long term, which does not help the state's budget situation in the near future. *See id.* at 4.

House of Representatives, who have a sizeable majority[87] and whose major goal this term has been to reduce the state budget and control deficits.[88] This "tough on crime" attitude and concerns about cost have effectively frozen the General Assembly when it comes to raising the juvenile age and have made the legislative process all but useless to would-be reformers.

In addition to criticizing the ineffectiveness of legislative-based reform, one might also argue that the raise-the-age bills are rather modest in their proposed alterations and would therefore leave much to be desired even if they did pass. Take, for example, Senate Bill 506. The bill's principal mechanism is an increase in the statutory age by six months per year for a period of four years, with a two-year planning and preparation stage, such that by July 1, 2018, "delinquent juvenile" would include youths between sixteen and eighteen years old.[89] But, to make the bill more palatable to skeptics (and potentially co-sponsors), its authors wrote in several exceptions to ensure that sixteen- and seventeen-year-old youths are still treated differently from youths under sixteen. For instance, the bill creates transfer laws specific to sixteen- and seventeen-year-olds that are far less favorable than those applicable to younger adolescents. Presently, the statute gives the district court judge discretion to transfer a juvenile to superior court "upon motion of the prosecutor or the juvenile's attorney or upon its own motion . . . if the juvenile was 13 years of age or older at the time [he] allegedly committed an offense that would be a felony if committed by an adult,"[90] with one exception: if the alleged felony is murder in the first degree (a Class A felony),[91] the judge has

87. *See NC House of Representatives Members*, N.C. GEN. ASSEMB., http://www.ncleg.net/gascripts/members/memberList.pl?sChamber=House (last visited Nov. 8, 2012) (showing that there were seventy-five Republicans in the House of Representatives for the 2011-2012 legislative session and only fifty-four Democrats).

88. *See, e.g.*, Mary Cornatzer, *Republican Budget Targets at Odds with Perdue's Proposal*, NEWSOBSERVER.COM BLOG (Raleigh, N.C.) (Feb. 23, 2011, 3:49 PM), http://projects.newsobserver.com/under_the_dome/republican_budget_targets_at_odds_with_perdues_proposal (" 'The spending targets announced today come at a time when decisive action is required to put North Carolina's fiscal house in order,' said Speaker Thom Tillis. 'The new majority in the General Assembly did not create this budget shortfall, but we were elected to fix it.' ").

89. *See* S.B. 506, 2011-2012 Gen. Assemb., Reg. Sess., §§ 1.(a)–.(d) (N.C. 2011), http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S506v1.pdf.

90. N.C. GEN. STAT. § 7B-2200 (2011).

91. Murder in the first degree is defined as "[a] murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon . . . , poison, lying in wait, imprisonment, starving, torture, or by . . . willful, deliberate, and premeditated killing, or . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, [or] burglary." *Id.* § 14-17.

no choice but to transfer the juvenile to adult court.[92] Senate Bill 506 circumscribes the judge's discretion even further in the case of sixteen- and seventeen-year-olds, mandating transfer to superior court "[i]f the juvenile was at least 16 years of age at the time [he] allegedly committed an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult."[93] This mandatory transfer provision applies unless (1) the prosecutor petitions the court to keep jurisdiction *and* (2) the "court makes a finding of extraordinary circumstances."[94]

To put the practical effects of these exceptions in perspective, consider that 365 youths aged sixteen and seventeen entered North Carolina's state prison in 2011.[95] Of these, eighty-three (22.7%) were convicted of a Class A through E felony.[96] In 2010, youths convicted of Class A through E felonies constituted ninety-eight of the 454 total sixteen- and seventeen-year-olds (21.5%) who entered the criminal justice system,[97] and in 2009 they numbered 151 out of 551 total entries (27.2%).[98] In other words, North Carolina can expect that in any given year, about 100 sixteen- and seventeen-year-olds (somewhere between one-fifth and one-fourth of that age group) will be convicted of felonies that could exclude them from the extended juvenile jurisdiction established by Senate Bill 506.[99] This is a substantial number of youth whose situations would not have changed even if the legislature had passed Senate Bill 506 without

92. *Id.* § 7B-2200(b).

93. N.C. S.B. 506, § 6.

94. *Id.*

95. *See* Automated Prison System Query, N.C. DEP'T OF CORR., http://webapps6.doc.state.nc.us/apps/asqExt/ASQ (click "Start Generating Reports"; select "Prison" and "Entries" for the dates "1-1-2011 thru 12-31-2011" and click "Define Report"; then select "Age Group, User-Defined" and click "Continue"; select both "16" and 17" and then "View Report") (last visited Nov. 8, 2012).

96. *See* Automated Prison System Query, N.C. DEP'T OF CORR., http://webapps6.doc.state.nc.us/apps/asqExt/ASQ (click "Start Generating Reports"; select "Prison" and "Entries" for the dates "1-1-2011 thru 12-31-2011" and click "Define Report"; then select "Age Group, User-Defined" and "Crime Class," then click "Continue"; select both "16" and 17" under the "Age" dialogue box, then select classes "A," "B," "B1 SS," "B2 SS," "C," "D," and "E" under the "Crime Class" dialogue box, and then "View Report") (last visited Nov. 8, 2012).

97. *See supra* notes 95–96 (selecting "1-1-2010 thru 12-31-2010" as the target dates).

98. *See supra* notes 95–96 (selecting "1-1-2009 thru 12-31-2009" as the target dates).

99. This percentage is essentially a rough approximation. The statistics above do not distinguish between repeat offenders who fall under "once an adult, always an adult" and first-timers, and they only reflect convictions resulting in prison terms, not the number of individuals adjudicated in total. However, since this Comment focuses on services received by the youths once they enter prison, an approximation based on prison population suffices.

modification, and who would therefore not have access to the benefits of the juvenile justice system.

It may be that this sort of compromise will make bills like Senate Bill 506 acceptable to a necessary majority of legislators,[100] but blanket mandatory transfer provisions hardly take into account any of the policy arguments advanced by reformers.[101] Cognitive immaturity may not discriminate between adolescents,[102] but the mandatory transfer laws do. Consider Jimmy, a hypothetical sixteen-year-old who made the unfortunate decision to join his friend Jake in breaking into a clothing store. If Jake (unbeknownst to Jimmy) brings his father's gun along, they will both likely be charged with robbery (a Class D felony)[103] and funneled into the adult system. If, on the other hand, Jake leaves the gun at home, they will likely be charged with breaking and entering (a misdemeanor)[104] and will take the juvenile track. Note that Jimmy's lack of sensibility is identical, yet the consequences are far more severe in the former scenario. This hypothetical supports Justice Orr's complaint that the current system is too indiscriminate—sending all sixteen- and seventeen-year-olds to the adult system even if they were simply "in the wrong place at the wrong time"[105]—since the General Statutes often charge accomplices with the same degree of felony as principals.[106] A better approach would call for discretionary, rather than mandatory, transfer provisions, which would allow the judge to make case-by-case judgments that take individual characteristics into account—something he is unable to do under the proposed bill. At the very least, a new statute should establish presumptive transfer provisions that either require the youth to show that he should be in the juvenile system, or require the state to show that he should not be.

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100. Indeed, Representative Marilyn Avila, a co-sponsor of Senate Bill 506, made sure to emphasize the mandatory transfer provisions for sixteen- and seventeen-year-olds when she spoke publicly in favor of the bill. *See* 1ncchild, *supra* note 15. Avila, a Republican from Raleigh, is a new addition to the House cohort in favor of raising the age. 2009's House Bill 1414, for example, was sponsored by four Democrats. *See* H.B. 1414, 2009-2010 Gen. Assemb., Reg. Sess. (N.C. 2009). Avila represents an apparently growing number of conservative congresspersons who would be willing to sign on to the effort provided that the bill contains some measures for treating older adolescents differently than other juveniles.

101. *See supra* notes 12–19, 62–69, and accompanying text.

102. *See* 1ncchild, *supra* note 15, and accompanying text.

103. *See* N.C. GEN. STAT. § 14-87 (2011).

104. *See id.* § 14-54(b). This conduct would be treated as a felony if the state proved any "intent to commit any felony or larceny" inside the store. *Id.* § 14-54(a).

105. 1ncchild, *supra* note 17.

106. *See, e.g.*, § 14-87 (providing that both the principal and any person "who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony").

In sum, the efforts of raise-the-age advocates have long been plagued by legislative intransigence, and the bills that have garnered enough initial interest to be introduced have consistently fallen short in their proposed changes to the juvenile code. It seems, then, that advocates need to take a different tack.

III. LITIGATION: A BETTER APPROACH?

Given the unpredictability of legislative whims and the probability that raise-the-age advocates will have to settle for minimal reforms in order to squeeze a compromise bill past the General Assembly, this Comment argues that it would be more effective to seek meaningful change to the juvenile justice system through litigation, rather than legislation. However, whereas legislative approaches alter entire statutory schemes and can modify or convey several rights at once, lawsuits generally focus on singular rights that have some sort of constitutional, statutory, or common law basis.[107] Consequently, devotees of a litigation strategy have several important

107. Of course, a litigation approach clearly has disadvantages compared to a full-fledged legislative expansion of juvenile jurisdiction. Indeed, the reform potential of a litigation approach is necessarily more limited because youths tried as adults almost certainly do not have colorable rights to every distinguishing characteristic of the juvenile justice system. For instance, judges are not likely to entertain claims that sixteen- and seventeen-year-olds have a *right* to alternative disposition options (like community service or house arrest rather than incarceration), even though they *would* have those options if they were legally classified as juveniles. *See, e.g.*, *Juvenile Justice System Flowchart*, N.C. DEP'T JUV. JUST. & DELINQ. PREVENTION, http://www.ncdjjdp.org/court_services/flowchart.html (last visited Nov. 13, 2012); *see also* N.C. GEN. STAT. § 7B-2506 (2011) (outlining the myriad dispositional alternatives available to juveniles). There simply is no independent constitutional, statutory, or common law right to alternative dispositions that anyone could litigate. Thus, while the rights-based approach might offer a chance at more expedient reform, it also comes with a lower ceiling regarding the substantive range of possible changes.

On the other hand (and somewhat paradoxically), a rights-based approach actually expands the number of people who stand to benefit from each reform achieved. This phenomenon occurs because North Carolina currently has a transfer law that *requires* the juvenile court to send youths thirteen and older to adult court when they are charged with a Class A felony, and *permits* the court to do so when they are alleged to have committed any other felony. *See id.* § 7B-2200. Additionally, North Carolina has a "once an adult, always an adult" statute, which provides that youths convicted in adult court can never return to the juvenile system, regardless of whether they are under the age of maximum juvenile jurisdiction when accused of a second crime, or if the alleged crime is merely a misdemeanor. *See id.* § 7B-1604(b). As discussed in Part II, the proposed raise-the-age bills leave these juvenile code provisions untouched, which means that youths between thirteen and eighteen transferred to the adult system would see no substantive benefits from the raise-the-age bills currently under consideration. Litigation-based reform, however, will likely result in benefits based on age or some other individual characteristic besides adjudicated status, and so has the potential to reach a wider population.

decisions to make: (1) exactly which right to litigate, (2) in which court to litigate, and (3) what legal strategy to pursue. This Comment ultimately supports a litigation strategy focusing on adequate educational opportunities under a federal right to education.

A. Which Right to Litigate?

In contemplating which right to litigate, reformers have the arduous task of translating their general complaints about the current juvenile justice system into specific legal challenges. This task requires identifying certain services, procedures, or substantive benefits provided to youths in the juvenile system but not to those in the adult system, and determining whether a right to those services, procedures, or benefits is solidly rooted in law and relatively likely to be recognized in court. For instance, youths in the juvenile system enjoy enhanced intake services, during which a court counselor determines whether their needs would be served better by a community-based resource, rather than a full-blown trial.[108] This may be the type of procedure that reformers would like for youths tried as adults to have access to because it is personalized to the youth's needs, but one would be hard-pressed to find a statute or constitutional clause guaranteeing that process to all youths under eighteen. Likewise, reformers may want youths in the adult system to have the same eligibility for dispositional alternatives that juveniles have—like restitution, community service, house arrest, or participation in a wilderness program.[109] Again, however, it would be difficult to establish a legal basis for arguing *entitlement* to what is basically a substantive perk in the juvenile system. Recognizing that many of the particular procedural and substantive benefits of North Carolina's juvenile justice system are simply the result of public policy that lives and dies by legislative impulse rather than by any sort of statutory or constitutional mandate, this Comment focuses instead on the right to education of youths in the adult system—a more viable, beneficial, and fundamental appeal than either of the two alternatives mentioned above.

Reformers have long been concerned about lost education when it comes to youth in the criminal justice system, because a lack of education is linked to recidivism,[110] lower future earnings[111] (and

108. *See* N.C. GEN. STAT. § 7B-1700 (2011).

109. *See id.* § 7B-2506.

110. *See, e.g.*, STEPHEN J. STEURER ET AL., OFFICE OF CORR. EDUC., U.S. DEP'T OF EDUC., THREE STATE RECIDIVISM STUDY 40 (2001), http://www.gpo.gov/fdsys/pkg/ERIC-ED465886/pdf/ERIC-ED465886.pdf (demonstrating that inmates in Maryland, Minnesota, and Ohio who received educational programming were reconvicted and re-

correspondingly-lower state tax revenues), and dramatically limited employment prospects.[112] Consequently, whatever correctional education these youth receive will likely prove invaluable over the long term on both an individual and societal level. This is a strong practical rationale for focusing on the right to education that also complements many advocates' worries that youths in adult facilities are not receiving the rehabilitative treatment and tools necessary to realign their futures.[113]

B. Where to Pursue the Right to Education, and How

1. The Federal Right to Education

It is important to note that both federal and state courts have thoroughly constrained the right to education, such that advocates wishing to use it as a tool for juvenile justice reform have limited options when sculpting the contours of a potential lawsuit. A plea for a constitutional right to education at the federal level, for example, is almost certain to fail, thanks to the Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*,[114] which held that while education is of "grave significance . . . both to the individual and to our society," the mere "importance of a service performed by the State does not determine whether it must be

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incarcerated at rates between five and ten percent lower than inmates who did not); *see also* Christine Ely, Note, *A Criminal Education: Arguing for Adequacy in Adult Correctional Facilities*, 39 COLUM. HUM. RTS. L. REV. 795, 806–09 (2008) (providing additional commentary on the value of correctional education for young inmates).

111. *See* STEURER ET AL., *supra* note 110, at 44 (reporting that former inmates in Maryland and Minnesota who received educational programming received a higher mean salary than those who did not).

112. *See* ANTHONY CARNEVALE ET AL., GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, HELP WANTED: PROJECTIONS OF JOBS AND EDUCATION REQUIREMENTS THROUGH 2018, at 13 (2010), http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/FullReport.pdf (predicting that between 2010 and 2018, the U.S. economy will have 46.8 million job openings—two-thirds of which will require at least some college education).

113. *See, e.g.*, Orr, *supra* note 19 (describing an "inherently bright and nice" youthful offender whose "irresponsible" and "[i]mmature" actions forced him to plead guilty to a felony charge, resulting in his current situation—"sit[ting] stoically in prison with a bleak future staring him in the face").

114. 411 U.S. 1 (1973). The *Rodriguez* plaintiffs were residents of San Antonio's poorest school district, *see id.* at 11–12, and contended that Texas's method of school finance resulted in wealth disparities that offended the Equal Protection Clause of the Fourteenth Amendment—either because the system impermissibly discriminated against a suspect class (the destitute), or because it impermissibly abridged a fundamental right to equal education guaranteed by the Constitution. *See id.* at 15–17. In rejecting the plaintiffs' claim in its entirety, the Supreme Court also rejected each of the two proffered arguments, holding that "neither the suspect-classification nor the fundamental-interest analysis [is] persuasive." *Id.* at 18.

regarded as fundamental for purposes of examination under the Equal Protection Clause."[115] Instead, the Court asks "whether there is a right to education explicitly or implicitly guaranteed by the Constitution,"[116] and in the case of education, the answer is "No" on both counts.[117]

Ten years later, the Court answered a slightly different question—namely, whether a constitutional right was infringed by Texas's practice of denying any sort of public education to the children of undocumented immigrants—in *Plyler v. Doe*.[118] Intriguingly, the Court reaffirmed that the right to education was not a fundamental constitutional right (which would subject Texas's action to "strict scrutiny"[119]), but found that it also was not merely a pedestrian right subject only to "rational basis" review and infringed only by completely arbitrary state action. Rather, after conceding that "[p]ublic education [was] not a 'right' granted to individuals by the Constitution," the Court backpedaled from *Rodriguez*'s hard line by acknowledging that "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[120] It is instead "necessary to prepare citizens to participate effectively and intelligently in our open political system,"[121] and its denial "present[s] [an] unreasonable obstacle to advancement on the basis of individual merit."[122] Consequently, its total denial triggers a sort of "intermediate" scrutiny, which demanded that Texas justify its policy by showing that it "furthers some *substantial* goal of the state."[123] Texas was unable to do this, so the Supreme Court condemned the practice as a violation of equal protection.[124]

Despite the result in *Plyler*, the common thinking among academics is that any hope for a fundamental federal right to

115. *Id.* at 30 (citation omitted).

116. *Id.* at 33–34.

117. *See id.* at 35. The plaintiffs had argued that education was a fundamental right "because it [was] essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote." *Id.* at 35. The Court disagreed, pointing out that the Constitution does not guarantee citizens "the most *effective* speech or the most *informed* electoral choice." *Id.* at 36.

118. *See* Plyler v. Doe, 457 U.S. 202, 205 (1982).

119. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 497–98 (1965) ("Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any 'subordinating [state] interest which is compelling' or that it is 'necessary . . . to the accomplishment of a permissible state policy.' " (alterations in original) (citations omitted)).

120. *Plyler*, 457 U.S. at 221 (citing *Rodriguez*, 411 U.S. at 35).

121. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

122. *Id.* at 222.

123. *Id.* at 224 (emphasis added).

124. *See id.* at 230.

education is dead.[125] *Rodriguez* appears to have definitively ended any belief that the Federal Constitution condemns disparate educational treatment, and one can easily distinguish *Plyler* by pointing out that Texas was not just providing unequal education in *Plyler*, but withholding it entirely.[126] In fact, *Rodriguez* appears to distinguish itself by pointing out that the plaintiffs were not arguing that Texas's education system "fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[127] Nevertheless, a few scholars have argued that *Plyler* and the dicta just quoted from *Rodriguez* imply that the door to a federal constitutional right based on *adequacy* of education, rather than *equity* of education, is still open.[128] Indeed, the Supreme Court itself has said as much, noting in dicta that "this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[129]

Regardless of the debatable existence of any loose ends in federal constitutional jurisprudence, scholars have identified a number of reasons not to take the issue of correctional education to the federal level. For one, the current Supreme Court has a "strict constructionist[]" bent that makes it more conservative than others when it comes to constitutional interpretation.[130] Accordingly, the Court will likely latch on to that portion of *Rodriguez* which acknowledged that the right to education is neither explicitly nor

125. *See, e.g.*, Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 756 (2008) ("[I]n light of the Supreme Court's recent rulings, . . . the federal courts do not appear to be the best forum for securing every student a quality education.").

126. *See Plyler*, 457 U.S. at 205.

127. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1972).

128. *See* Greenspahn, *supra* note 125, at 769 ("The [*Rodriguez*] Court implied that *some* level of education is required when it noted that the Constitution does not guarantee citizens 'the *most effective speech* or the *most informed* electoral choice.' "); *see also* Lauren N. Gillespie, Note, *The Fourth Wave of Educational Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989, 997 (2010) ("[T]he [*Rodriguez*] plaintiffs did not argue that the quality of education in Edgewood fell below a constitutionally protected minimum floor and that Texas had therefore failed to provide an adequate education.").

129. Papasan v. Allain, 478 U.S. 265, 285 (1986).

130. Greenspahn, *supra* note 125, at 778; *see also* Adam Liptak, *The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1 (noting that as of June 2010, a number of political scientists had labeled the Roberts Court "the most conservative one in living memory").

implicitly conveyed by the Constitution.[131] Additionally, the plaintiff class in any lawsuit would be youths convicted of crimes, which will hardly evoke the sympathy of the Supreme Court to the same extent as undocumented immigrants who are here in the United States illegally, but through no fault of their own.[132] Therefore, the Court is not likely to grant the benefit of the doubt that it bestowed on the plaintiff class in *Plyler*,[133] diminishing an already-slim chance of success.

2. The North Carolina State Right to Education

However, the best reason to avoid federal court might be that North Carolina's treatment of the right to education is thorough and amenable to litigants by comparison. As will be discussed below, state courts have already established the specific elements an educational program must contain in order to satisfy North Carolina's constitutional mandate; therefore, plaintiffs may litigate within a framework that has already been judicially vetted and approved. This framework is much more preferable than having to argue first for the existence of certain substantive standards before showing that the current system does not meet them.[134] The North Carolina Constitution mentions education twice. In article I, section 15, it establishes that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[135] Additionally, in article IX it provides for the establishment of a "[g]eneral and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students,"[136] directs the General Assembly to establish a compulsory attendance statute,[137] creates and empowers the State Board of Education,[138] and provides for elementary and secondary school funding.[139]

North Carolina courts have defined the scope of the constitutional right to education in great detail over the last several decades by stressing that children are entitled to an *adequate*, but not necessarily *equal*, education. In *Sneed v. Greensboro City Board of*

131. *See Rodriguez*, 411 U.S. at 35.
132. *See* Plyler v. Doe, 457 U.S. 202, 218–20 (1982).
133. *See supra* notes 118–124 and accompanying text.
134. This second (and more challenging) approach awaits anyone who is willing to try to revive educational claims at the federal level, since no framework currently exists. *See supra* Part III.B.1.
135. N.C. CONST. art I, § 15.
136. *Id.* art IX, § 2.
137. *See id.* § 3.
138. *See id.* §§ 4–5.
139. *See id.* §§ 6–7.

Education,[140] the Supreme Court of North Carolina established that the state constitution guarantees each pupil "equal access to participation in our public school system."[141] A few years later in *Britt v. North Carolina State Board of Education*,[142] the North Carolina Court of Appeals qualified that constitutional guarantee by rejecting a claim similar to that argued in *Rodriguez*. The plaintiffs contended that funding disparities inherent in the state's school finance scheme infringed upon students' rights to an education "substantially equal to that enjoyed by every other student in the State."[143] Rejecting the claim, the court noted that in the same section guaranteeing a "uniform" set of schools, the North Carolina Constitution permits "governing boards of units of local government . . . to 'use local revenues to add to or supplement any public school . . . program.' "[144] Since this clause would make no sense if children were entitled to "exactly equal educational opportunities,"[145] the court confirmed the ruling in *Sneed* that "[t]he fundamental right that is guaranteed by our Constitution . . . is to equal *access* to our public schools—that is, every child has a fundamental right to receive [some sort of] education in our public schools."[146]

Undeterred, equal education advocates seized the implication inherent in the *Britt* decision—that there was some sort of threshold that a school program had to meet before students could fairly be said to be "receiving an education" in the first place. In other words, advocates pushed the courts to acknowledge that there was a "minim[um] standard for a constitutionally adequate education,"[147] and argued in *Leandro v. State*[148] that many schools—with deteriorating buildings and infrastructure, poor teachers, and a majority of students flunking end-of-course exams—failed to meet it.[149] Surprisingly, the Supreme Court of North Carolina agreed, holding that the educational guarantees in the state constitution conferred a "right to a sound basic education"[150] even while confirming that they did not require "substantially equal funding or

140. 299 N.C. 609, 264 S.E.2d 106 (1980).
141. *Id.* at 618, 264 S.E.2d at 113.
142. 86 N.C. App. 282, 357 S.E.2d 432 (1987).
143. *Id.* at 285, 357 S.E.2d at 434. *Compare id.*, *with* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 15–16 (1973).
144. *Britt*, 86 N.C. App. at 288, 357 S.E.2d at 435 (quoting N.C. CONST. art. IX, § 2, cl. 2).
145. *Id.* at 288, 357 S.E.2d at 436.
146. *Id.* at 289, 357 S.E.2d at 436 (emphasis in original).
147. Leandro v. State, 346 N.C. 336, 342, 488 S.E.2d 249, 252 (1997).
148. *Id.*
149. *See id.* at 342–43, 488 S.E.2d at 252.
150. *Id.* at 345, 488 S.E.2d at 254.

educational advantages in all school districts."[151] The court continued by defining a "sound basic education" as:

> [O]ne that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.[152]

The court then suggested a variety of factors that trial courts might use to determine whether any given child was failing to receive a sound basic education, including but not limited to "[e]ducational goals and standards adopted by the legislature," how well the student performed on standard achievement tests, and "the level of the state's general educational expenditures and per-pupil expenditures."[153]

After *Leandro*, the Supreme Court of North Carolina had one more chance to refine the contours of the right to an adequate education. *Hoke County Board of Education v. State*[154] was *Leandro*'s sequel—the remanded case that determined whether the Hoke County educational system failed to meet the newly articulated standards. In holding that the educational programming was indeed deficient,[155] the court separated the various evidentiary yardsticks into *inputs*—"what the State and local boards provide to students attending public schools"—and *outputs*—measures of "student performance."[156] Inputs included "deficiencies pertaining to the

151. *Id.* at 349, 488 S.E.2d at 256.

152. *Id.* at 347, 488 S.E.2d at 255.

153. *Id.* at 355, 488 S.E.2d at 259–60.

154. 358 N.C. 605, 599 S.E.2d 365 (2004).

155. *See id.* at 647–48, 599 S.E.2d at 396. The court upheld the trial court's conclusions that "students in Hoke County are failing to obtain a sound basic education and that defendants have failed in their constitutional duty to provide such students with the opportunity to obtain [one]," but reversed the trial court's order that the state should also provide "pre-kindergarten services to 'at-risk' prospective enrollees." *Id.* Incidentally, the opinion was written by Justice Orr, now a major proponent of juvenile justice reform. *See supra* notes 17–19 and accompanying text.

156. *Hoke Cnty. Bd. of Educ.*, 358 N.C. at 623, 599 S.E.2d at 381.

educational offerings in Hoke County schools, and . . . deficiencies pertaining to the educational administration of Hoke County schools."[157] Outputs included "comparative standardized test score data [and] student graduation rates, employment potential, [and] post-secondary education success (and/or lack thereof)."[158] More specifically, the court determined that a given educational program will fail with regard to outputs if evidence shows that "'[students] are poorly prepared to compete on an equal basis in gainful employment and further formal education in today's contemporary society."[159] Since a large proportion of Hoke County graduates were "not qualified to perform even basic tasks that are needed for the jobs available,"[160] and since "Hoke County graduates '[were] generally not well prepared to go on to community college or into the university system,' "[161] the court concluded that education provided was clearly inadequate. However, in what could be a hurdle for sixteen- and seventeen-year-old inmates seeking judicial redress, the court preceded its holding with the proposition that " '[t]he courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides . . . children . . . a sound basic education,' and 'a clear showing to the contrary must be made before the courts may conclude that they have not.' "[162] This deference will be especially relevant in the prison context, where, unlike in schools, education is not the institution's primary goal. Courts will have to weigh the prison's educational offerings against its incarceration needs, and may be willing to give the prison more leeway in offering a non-standard educational program.

With the framework for establishing a constitutional violation fleshed out, this Comment will now address whether the educational programming offered to youth in North Carolina's adult prison is adequate. The basic questions we have to answer are simple: Has the state failed to provide youths in adult prisons with the opportunity to receive a sound basic education? And if so, "has the State demonstrated that its failure to provide such an opportunity is necessary to promote a compelling government interest . . . ?"[163]

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157. *Id.*

158. *Id.*

159. *Id.* at 627, 599 S.E.2d at 384 (citing trial court's order).

160. *Id.* at 628, 599 S.E.2d at 384 (citing trial court's order).

161. *Id.* at 629, 599 S.E.2d at 385 (citing trial court's order).

162. *Id.* at 622–23, 599 S.E.2d at 381 (quoting Leandro v. State, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997)).

163. *Id.* at 610, 599 S.E.2d at 373. The *Hoke* opinion includes a third prong which kicks in "if the State has failed to provide Hoke County school children with the opportunity for

IV. A SOUND BASIC EDUCATION IN THE PRISON EDUCATION CONTEXT

In North Carolina, all male felons between thirteen and eighteen years old enter the adult prison system through Western Youth Institution ("Western") in Burke County.[164] Given this, and given that males make up the vast majority of youth sentenced to adult prison terms,[165] this Comment focuses only on the educational programming offered at that institution. Western operates the prison system's largest school in terms of population[166] (with a day-to-day population of 300-350 students[167]), maintains a year-round school session,[168] and provides "diagnostic evaluations" to every inmate upon entry in order to determine educational placement.[169] Additionally, it cooperates with Western Piedmont Community College to offer General Educational Development (G.E.D.) programming.[170] In 2010-2011, 197 inmates received a G.E.D. certificate.[171]

Before engaging in the specifics of the *Leandro* analysis, there is one initial objection to address, which suggests that not only do sixteen- and seventeen-year-olds *not* have a right to education in the prison context, but they do not have a right to education in the non-prison context. The roots of this argument come from the landmark case *Mills v. Board of Education*,[172] in which a number of disabled students sued the school district for excluding them from school, arguing that the compulsory education statute provided them with a guaranteed right to attend school (i.e. the state could not make it a punishable offense to not attend school and then not allow students

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a sound basic education *and* failed to demonstrate that its public educational shortcomings are necessary to promote a compelling government interest." *Id.* The prong asks whether "the relief granted by the trial court correct[s] the failure with minimal encroachment on the other branches of government." *Id.* at 610, 599 S.E.2d at 373–74. There is no need to address this prong at this point in the analysis, because there is no trial court relief to consider. Essentially, this prong is only relevant once the trial court has actually issued an order, which is not the case here.

164. *See Western Youth Institution*, N.C. DEP'T PUB. SAFETY, http://www.doc.state.nc.us/dop/prisons/western.htm (last visited Feb. 3, 2012).

165. *See* Pierre Thomas & Jason Ryan, *U.S. Prison Population Hits All-Time High: 2.3 Million Incarcerated*, ABC NEWS (June 6, 2008), http://abcnews.go.com/TheLaw/story?id=5009270&page=1#.UGhlC0KVi2w (noting that 2.1 of the 2.3 million incarcerated persons (ninety-one percent) were males).

166. *See Western Youth Institution*, *supra* note 164.

167. Telephone Interview with Steve Moody, Principal, W. Youth Inst. (Jan. 20, 2012) (on file with the North Carolina Law Review).

168. *See id.*

169. *Western Youth Institution*, *supra* note 164.

170. *See id.*

171. Telephone Interview with Steve Moody, *supra* note 167.

172. 348 F. Supp. 866 (D.D.C. 1972).

to attend).[173] The corollary of this argument is that it does not hold for children outside the age of the compulsory education age, which in North Carolina is "between the ages of seven and 16 years [old]."[174] Since sixteen- and seventeen-year-olds are outside of this range, they have no right to education whether inside or outside prison walls. The major rebuttal to this contention is that *Mills* is not a North Carolina case, and is therefore not binding on North Carolina courts. However, the *Hoke* court set forth another rebuttal when it clearly contemplated that college-bound students were entitled to an adequate education: one of the court's major concerns was that Hoke County students performed quite poorly at the university level, and this concern demonstrated the court's presumption that upper-grade high school students had a cognizable constitutional right to education, regardless of whether they were covered by the state's mandatory school attendance statute.[175] And, at the very least, the right to education would apply to those youths under sixteen years old who are transferred to the adult system; this potential would make the litigation worth carrying on.[176]

Having dealt with this preliminary objection, this Comment now turns to the main *Leandro* inquiry: whether the inputs and outputs of Western's educational programming demonstrate that students are receiving a "sound basic education."

A. Inputs

Western's educational inputs are actually quite commendable and thorough. The prison mandates school enrollment for any inmate without a G.E.D. or high school diploma, regardless of age.[177] Additionally, the school staff is remarkably well qualified. Each full-time teacher is state certified to teach multiple subjects, and while the employees from Western Piedmont Community College do not have to be certified, Western prohibits them from teaching anyone under age sixteen.[178] In fact, inmates under age sixteen are barred from following the G.E.D. curriculum—they have to take traditional courses for school credit.[179] Moreover, the school has a state-certified principal, assistant principal, guidance counselor, psychologist, and a

173. *See id.* at 873–75.
174. N.C. GEN. STAT. § 115C-378(a) (2011).
175. *See* Hoke Cnty. Bd. of Educ. v. State, 358 N.C. 605, 629–30, 599 S.E.2d 365, 385–86 (2004).
176. *See supra* notes 20–25 and accompanying text.
177. *See* Telephone Interview with Steve Moody, *supra* note 167.
178. *See id.*
179. *See id.*

special-education coordinator, and abides by federal special education requirements.[180]

Although its teachers are qualified to teach traditional school subjects in a traditional setting, Western focuses almost exclusively on the G.E.D. curriculum.[181] According to Dr. Steve Moody, Western's principal, the G.E.D. curriculum offers inmates more flexibility than the standard curriculum, which is important when dealing with inmates who enter and exit prison at all times of the year and after variable amounts of time.[182] Additionally, the adaptable nature of the G.E.D. curriculum is such that inmates can finish the program at their own pace, whether in prison or not.[183] And, according to Dr. Moody, former inmates are much more likely to continue with G.E.D. classes than return to traditional schooling after release from prison, which was another important factor in the decision to focus on a non-diploma curriculum.[184]

Western's current educational programming is likely constitutionally adequate from an input standpoint, because the G.E.D. curriculum appears to meet *Leandro*'s standards both in theory and in practice. From a theoretical standpoint, the G.E.D. curriculum is specifically designed to impart "high school-level academic knowledge and skills,"[185] so it would be quite odd if it did not meet the *Leandro* standards for adequate educational inputs. Practically speaking, the educational program at Western includes adequate inputs because "every classroom [is] staffed with a competent, certified, well-trained teacher[,]" the school is "led by a well-trained competent principal[,]" and there is no evidence that the state has not "provided . . . the resources necessary to support the effective instructional program within that school so that the

180. *See id.*; *see also* Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1412(a)(1)–(4) (2006) (requiring states to provide a "free appropriate public education" and "full educational opportunity" to all disabled children, as well as an "individualized education program" ("IEP") that accounts for each child's specific disability).

181. *See* Telephone Interview with Steve Moody, *supra* note 167; *see also Western Youth Institution*, *supra* note 164 (emphasizing the importance of the G.E.D. program).

182. *See* Telephone Interview with Steve Moody, *supra* note 167. The G.E.D. requires students to pass a battery of five different tests: Language Arts-Reading; Language Arts-Writing; Mathematics; Science; and Social Studies. GEN. EDUC. DEV. TESTING SERV., G.E.D. TESTING FACT SHEET 1 (2007), http://www.nccommunitycolleges.edu/basic_skills/DocumentsLoad/GED_Testing_Program_Fact_Sheet_Fv2.pdf. Additionally, students have to achieve a cumulative score of 2250, as well as a minimum score of 410 (out of 800) on each test. *Id.*

183. *See* Telephone Interview with Steve Moody, *supra* note 167.

184. *See id.*

185. GEN. EDUC. DEV. TESTING SERV., *supra* note 182, at 1.

educational needs of all children . . . can be met."[186] Additionally, students actively enrolled in school take four classes a day in two ninety-minute blocks—a language arts/social studies block, and a math/science block,[187] so their actual classroom experience corresponds to the G.E.D.-tested subjects, which cover the important content of *Leandro*'s education standards.[188]

Nevertheless, there are a few input-related objections one might make. The most significant is that Western's mandatory educational minimums are completely voluntary—the Department of Correction's state-wide requirements require only that any inmate who tests at a fifth-grade level or below has to attend school for ninety days, and nothing more.[189] It is highly unlikely that a mere ninety days of schooling will remedy any degree of educational deficiency to the extent required by *Leandro*, and so a program meeting the bare minimum state standards will not pass constitutional muster.[190] And while it is admirable that Dr. Moody has chosen to exceed the required standards, the failure of the Department of Correction and General Assembly to adopt Western's minimums as a hard floor means that (1) any youth under eighteen who happens to be housed somewhere besides Western (either temporarily or due to a change in state incarceration policy) is not assured of receiving adequate inputs, and (2) Western's practice of offering adequate inputs has no immunity from state budget cuts or the whims of a future principal.

Second, Dr. Moody freely admits that the school does not have enough physical space to actively serve every eligible student at once,[191] so even though everyone may be technically enrolled, as a practical matter, not all inmates are in class full time. Specific data on this point is not publically available,[192] but one could easily imagine a

186. Hoke Cnty. Bd. of Educ. v. State, 358 N.C. 605, 636, 599 S.E.2d 365, 389 (2004); *see also id.* at 632, 599 S.E.2d at 387 (holding that the "general curriculum [and] teacher certifying standards . . . met the basic requirements for providing students with an opportunity to receive a sound basic education"); *supra* notes 155–161 and accompanying text (examining the *Leandro* analysis as it was applied in *Hoke County Board of Education*).

187. *See* Telephone Interview with Steve Moody, *supra* note 167.

188. *See supra* note 182 (describing the G.E.D. curriculum); *see also* Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (describing the substantive content necessary for a sound basic education, including literacy and knowledge of mathematics, science, and the humanities).

189. Telephone Interview with Steve Moody, *supra* note 167.

190. *See Hoke Cnty. Bd. of Educ.*, 358 N.C. at 641, 599 S.E.2d at 392 (finding that supports for at-risk students in Hoke County were inadequate).

191. *See* Telephone Interview with Steve Moody, *supra* note 167.

192. *See id.*

situation in which overcrowding reduces classroom time to such an extent that students can no longer fairly be said to be receiving adequate instruction (e.g., because even if the educational program is designed to meet *Hoke*'s standards, students are not in class enough to receive the benefits). By and large, though, the constitutional adequacy of current inputs suggests that inmate plaintiffs will likely have the most success by focusing on *Leandro*'s output requirements.

B. Outputs

Given Western's relatively robust inputs, the bulk of any claim that inmates are receiving an inadequate education must rest on the premise that Western's program fails to produce adequate outputs. A close look at the various factors outlined by *Hoke*—test scores, graduation rates, dropout rates, post-secondary education performance, and employment rates and prospects[193]—demonstrates that Western performs well in the output category, but there are enough potential pitfalls to justify a legal complaint.

This Part discusses the individual output measures delineated by *Hoke*, but since Western is not a traditional educational institution, not all of these particular output measures are applicable. For instance, Western's inmates cannot drop out of the education program once the prison has determined that they should be enrolled,[194] and since the prison can force them to attend school, the measure lacks any of the same meaning it carries in the grade school context.

1. Graduation Rates and Test Scores

"Graduation rate" is another measure that may be inapplicable to the prison context. Unlike with grade school, where there is a set curriculum and an accepted pace at which a student is expected to progress through grades, the G.E.D. curriculum has no timeframe; rather, it simply tests a number of different content areas without reference to how long it took to master them.[195] Consequently, a delay in obtaining a G.E.D. certificate does not reflect as negatively on a school's educational program as a failure to produce students who graduate with a high school diploma within the expected number of

193. *See Hoke Cnty. Bd. of Educ.*, 358 N.C. at 627, 599 S.E.2d at 384.

194. *See* Telephone Interview with Steve Moody, *supra* note 167.

195. *See* GEN. EDUC. DEV. TESTING SERV., *supra* note 182, at 1 (discussing the testing procedure for a G.E.D. without imposing timing requirements).

years.[196] Additionally, assuming that "obtaining a G.E.D." is equivalent to "graduating," Western is hamstrung by the reality that not all students may be incarcerated for a period of time long enough to complete the G.E.D. program.[197] Inmates' terms vary widely depending on their offense, and new inmates enter the prison every day,[198] so Western's efforts may not always bear fruit. Again, this failure of certain inmates to obtain certificates at Western does not implicate the same educational programming deficiencies as the failure to obtain a diploma from a public high school. And, even if the number of students obtaining certificates was considered a valid output by which to judge the success of a prison education system, Western performs admirably: according to Dr. Moody, 197 inmates obtained G.E.D. certificates in 2011, out of the 300 to 350 inmates who are enrolled in school at any given time.[199]

2. Post-Secondary Education and Job Performance

If there is any deficiency in Western's educational outputs, it is found in the low value of a G.E.D. relative to a high school diploma.[200] *Leandro* affirmed 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."[201] More and more studies, however, have determined that a G.E.D. is inadequate preparation for either a successful post-secondary educational experience or meaningful participation in the labor market. For instance, of the thirty-one percent of all G.E.D. certificate holders who enroll in a post-secondary institution, seventy-seven percent do not stay for more than one semester.[202] In North Carolina, G.E.D. certificate holders

196. Additionally, inmates can receive up to a week off their sentences for every month that they are enrolled in school, which provides an incentive for them to work slowly. *See* Telephone Interview with Steve Moody, *supra* note 167.

197. Dr. Moody estimates that it takes one to two months for inmates "who were reasonably good students" to complete all the G.E.D. requirements, but up to two years for inmates who read at a low level. *Id.*

198. *See id.*

199. *Id.* The school implements a system whereby students cannot sit for the actual G.E.D. examinations until they have successfully passed at least one practice exam. *See id.* Consequently, Western inmates have a ninety-seven-percent G.E.D. pass rate, *id.*, compared with the G.E.D. Testing Service's estimate that only sixty percent of graduating seniors would pass the test on their first try. GEN. EDUC. DEV. TESTING SERV., *supra* note 182, at 1.

200. *See infra* notes 202–209 and accompanying text.

201. Leandro v. State, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997).

202. James J. Heckman et al., *The G.E.D.* 35 (Nat'l Bureau of Econ. Research, Working Paper No. 16064, 2010), *available at* http://www.nber.org/papers/w16064.pdf?new_window=1 (reviewing the academic literature that has argued that the

are also often subject to threshold university admissions requirements, and may still be at a disadvantage even after meeting the bare minimum eligibility requirements.[203]

G.E.D. certificate holders face the same disadvantages when it comes to success in the workforce. For instance, even after their differing levels of latent cognitive ability are accounted for,[204] male G.E.D. holders' hourly wages average one percent *less* than those of high school dropouts, while high school diploma recipients earn 3.6% *more* per hour than dropouts.[205] At least one scholar has hypothesized that "high school graduates possess a valued trait not captured by an achievement test,"[206] and noted that "[t]erminal GEDs and uncredentialed dropouts have nearly identical distributions of noncognitive ability," while high school graduates have "substantially" more.[207] These noncognitive skills—including

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G.E.D. has minimal value in terms of labor market outcomes). These numbers are subject to the valid criticism that they assume direct causation between receipt of a G.E.D. and withdrawal after one semester, but, at the very least, they provide some support for the idea that G.E.D. recipients are generally unprepared.

203. *See* E-mail from Ashley T. Memory, Senior Assistant Dir. for Undergraduate Admissions, Univ. of N.C. at Chapel Hill (Feb. 3, 2012, 11:01 EST) (on file with the North Carolina Law Review). According to Ms. Memory, in order to meet minimum eligibility requirements, G.E.D. holders applying to the University of North Carolina at Chapel Hill must present one of the following:

> 1. [A]t least 30 total transferrable semester hours from an accredited college or university, with at least six hours in each of the following disciplines: English, math, social science, natural science, and foreign language . . . ; or
>
> 2. Completion of an [Associate in Arts] degree, [Associate in Science] Degree, or [Associate of Fine Arts] degree from a regionally-accredited two-years school; or
>
> 3. [S]tatus as a non-traditional applicant older than age 24.

Id. Even then, however, "admitted candidates typically present credentials that go well beyond the minimum." *Id.*

204. In other words, the study controls for base knowledge level, ensuring that the study is not just reflecting the fact that the G.E.D.-taking population may be less intellectually gifted to begin with.

205. Heckman et al., *supra* note 202, at 17. This statistic compares the earnings of "terminal" G.E.D. and high school diploma holders—that is, individuals who receive the certificate and do not go on to further schooling. *Id.*; *see also* Richard J. Murnane et al., *Who Benefits From Obtaining a G.E.D.? Evidence From High School and Beyond*, 82 REV. ECON. & STAT. 23, 24 (2000) (providing different earnings numbers, but still noting that "[t]he median hourly wage of males who reported obtaining a GED was seven percent higher than that of male dropouts without a GED and ten percent lower than that of males who reported earning a conventional high school diploma").

206. Heckman et al., *supra* note 202, at 19.

207. *Id.* at 28.

"motivation, self-esteem, reliability, among others"[208]—are "of equal or greater importance" than cognitive ability when it comes to maximizing hourly wages.[209] Given the disparities between the G.E.D. program and a standard high school curriculum in terms of both economic and cognitive benefits, raise-the-age reformers can make a fairly strong claim that Western is not meeting the *Leandro*/*Hoke* standard for a sound basic education due to its reliance on the G.E.D. curriculum.

C. *Likelihood of Winning a* Leandro *Claim*

The *Hoke* court clearly stated the standard of proof a plaintiff must meet to make a successful claim for the provision of an inadequate education:

> [T]he courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education[,] and a clear showing to the contrary must be made before the courts may conclude that they have not.[210]

Given the characteristics of Western's educational program, this "clear showing" will be very difficult for any plaintiff to make, but is not impossible. The state's interest in emphasizing a G.E.D. curriculum over a traditional high school curriculum is compelling given the various logistical constraints on prison education,[211] and it is relatively undisputed that obtaining a G.E.D. is much more beneficial than not receiving one.[212] On the other hand, there are major deficiencies in the rationale for emphasizing G.E.D. certificates over diplomas: the G.E.D.'s dubious value in advancing workplace and post-secondary education performance,[213] the G.E.D. program's

208. Mary Pilon, *GED Offers 'Minimal Value'*, WALL ST. J. BLOG (June 25, 2010, 5:00 AM), http://blogs.wsj.com/economics/2010/06/25/ged-offers-minimal-value (discussing the results of the Heckman study).

209. Heckman et al., *supra* note 202, at 32.

210. Hoke Cnty. Bd. of Educ. v. State, 358 N.C. 605, 623, 599 S.E.2d 365, 381 (2004) (quoting Leandro v. State, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997)) (internal quotation marks omitted).

211. *See supra* Part IV.A–B. Dr. Moody also noted several other factors in the prison's decision to focus on G.E.D. completion, including the fact that, for most inmates, the concept of the traditional school setting carries a negative connotation and dredges up bad memories. *See* Telephone Interview with Steve Moody, *supra* note 167.

212. *See* Murnane et al., *supra* note 205, at 24–25 (finding that high school dropouts with a G.E.D. fare better than high school dropouts without a G.E.D.).

213. *See supra* notes 200–205 and accompanying text.

failure to impart critical cognitive benefits,[214] and the fact that the robustness of Western's current educational program is due to the efforts of a dedicated staff, and not mandated by law or Department of Corrections policy.[215] On the whole, the prospect of winning a hypothetical lawsuit based on adequacy of education is slim, but given the legislative history discussed above, the chances of succeeding may be higher than the probability that the General Assembly will make progressive changes to the juvenile code.[216]

CONCLUSION

The failure of the General Assembly to bring North Carolina's juvenile code into line with that of forty-eight other states is unconscionable, and the fact that a North Carolina high school freshman could potentially receive a four-month term in an adult prison for stealing a candy bar is ludicrous. As the political climate stands today, however, the probability is low that juvenile code reform will garner the support and energy necessary to pass the General Assembly. Consequently, raise-the-age reformers should supplement their legislative efforts with alternative strategies, including a targeted litigation strategy that, if successful, could transform the adult prison experience of youths under eighteen into something more like the experience they would receive in a juvenile facility. As this Comment has pointed out, one of the most obvious differences between the adult and juvenile systems is the latter's focus on education, so litigation based on educational rights seems to be a good place to start. This Comment has pointed out that an education claim will be difficult to make because of the state's interests in treating adult offenders differently than juvenile delinquents, as well as the sad reality that incarcerated individuals have less freedom to exercise their rights. Nevertheless, there are major flaws in the state's approach toward educating its young adult offenders, and while the deleterious effects of these flaws have been minimized by the efforts of forward-thinking educators like Dr. Steven Moody, they have the potential to harm future prisoners if left to stand uncorrected.

In sum, this Comment suggests that raise-the-age reformers take advantage of the educational deficiencies in the adult prison system, using litigation as yet another weapon in the fight against North Carolina's antiquated approach to juvenile justice. Hopefully, this will attract a brighter spotlight to this currently-marginalized reform

214. *See supra* notes 206–209 and accompanying text.
215. *See supra* notes 178, 189, and accompanying text.
216. *See supra* notes 8–11 and accompanying text.

movement, and the state's incarcerated youth will receive the rehabilitation they need to become productive, valuable contributors to society.

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