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BANISHING SOLITARY: LITIGATING AN END TO THE SOLITARY CONFINEMENT OF CHILDREN IN JAILS AND PRISONS

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Abstract

The solitary confinement of children is remarkably commonplace in the United States, with the best available government data suggesting that thousands of children across the country are subjected to the practice each year. Physical and social isolation of 22 to 24 hours per day for one day or more, the generally accepted definition of solitary confinement, is used by juvenile detention facilities as well as adult jails and prisons to protect, punish and manage children held there. The practice is neither explicitly banned nor directly regulated by federal law. Yet there is a broad consensus that the practice places children at great risk of permanent physical and mental harm and even death, and that it violates international human rights law. Policymakers and judges in the U.S. are beginning to reevaluate the treatment of children in the adult criminal justice system, drawing from new insights and old intuitions about the developmental differences between children and adults. This welcome trend has only recently begun to translate into any systematic change to the practice of subjecting children to solitary confinement in adult jails or prisons, with significant reform in New York City at the leading edge. Despite the beginnings of a trend, there have been few legal challenges to the solitary confinement of children and there is a consequent dearth of jurisprudence to guide advocates and attorneys seeking to protect children in adult facilities from its attendant harms through litigation – or policymakers seeking to prevent or eliminate unconstitutional conduct. This article helps bridge this significant gap. It contributes the first comprehensive account of the application of federal constitutional and statutory frameworks to the solitary confinement of children in adult jails and prisons, with reference to relevant international law as well as medical and correctional standards. In doing so, this article seeks to lay the groundwork for litigation promoting an end to this practice.

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The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators . . . research [] confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.

- Associate Justice Kennedy, concurring in *Davis v. Ayala*

. . . developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.

- Associate Justice Kennedy, for the majority in *Graham v. Florida*

I. Introduction

At the close of the 2014 U.S. Supreme Court term, Associate Justice Anthony Kennedy made headlines with a concurrence calling, more or less directly, for litigators to bring challenges to the solitary confinement of persons deprived of their liberty in jails and prisons across the United States. In the United States, the Justice lamented, "the conditions in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest."[1] Kennedy highlighted the harm that can be caused by solitary confinement in particular, suggesting that, "[i]n a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."[2]

In his discussion of solitary confinement in *Davis v. Ayala* (notable in part because solitary confinement was not legally at issue in the case, nor was information about solitary confinement part of the record before the Court), Kennedy referenced the death of Khalief Browder.[3] Less than two weeks before the Court's opinion in *Davis* was issued, at age 22, Browder hung himself from a window in his family's New York City apartment.[4] Media reports,[5] like the concurrence,

[1] *Davis v. Ayala*, 576 U.S. ___ , slip op at p. 2-3 (2015) (Kennedy, J., concurring).
[2] *Id.* at 4.
[3] Id. at 3-4.
[4] Schwirtz & Winerip, *Man, Held at Rikers for 3 Years Without Trial, Kills Himself*, N. Y. TIMES, June 9, 2015, p. A18.

drew a connection between Browder's death and his having spent 800 days in solitary confinement during the more than 1,000 days Browder spent in jail starting at age 16 (and before charges against him were dropped).[6] The tragic suicide came as New York City was cementing major jail conditions reforms, which include a ban on the solitary confinement of children under 18 and a planned ban on the solitary confinement of young inmates ages 18 – 21 in the city's jails on Riker's Island.[7]

Justice Kennedy did not highlight that much of Browder's time in solitary confinement in an adult jail had been at ages 16 and 17, that is, while he was a child. Indeed, there is a significant jurisprudential gap with regard to conditions of confinement of adolescents under 18 held in adult jails and prisons (though Kennedy has led a major revolution in jurisprudence regarding the criminal sentencing of children[8]). Much as this practice has been the dark secret of the criminal justice system – widespread, but relatively unknown – the legality of the solitary confinement of children in adult jails and prisons has neither been directly considered by courts nor treated in any depth by the academy. This article seeks to help fill these gaps, providing a novel, detailed account of the constitutionality of solitary confinement. In short, this article argues that the unique harms (and risks of harm) to children, combined with the developmental and legal differences between children and adults, militate for unique standards for evaluating conditions of confinement for children in adult jails and prisons as well as for a constitutional prohibition on the solitary confinement of children in particular. This article also shows how international law

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[5] Including an Op Ed by the author. Kysel, *Solitary confinement makes teenagers depressed and suicidal*, WASHINGTON POST POSTEVERYTHING, June 17, 2015 *available at* https://www.washingtonpost.com/posteverything/wp/2015/06/17/solitary-confinement-makes-teenagers-suicidal-we-need-to-ban-the-practice/.
[6] Jim Dwyer, *A Life That Frayed as Bail Reform Withered*, N.Y. TIMES, June 10, 2015, p. A19.
[7] Winerip & Schwirtz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES, January 14, 2015, p. A1.
[8] *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S.Ct. 2011 (2010).

as well as medical and correctional standards are relevant to such legal challenges, and, in doing so, seeks to be a ready reference for litigators and judges wrestling with these issues.

This article proceeds in three sections. Section I introduces the issue, presenting both the legal and factual context in which children are subjected to solitary confinement in adult jails and prisons and the various points of consensus regarding how the practice is harmful and counterproductive. The section is organized to frame the issue and provide a range of resources to support litigation. Section II expounds the proposed constitutional theories for challenging the solitary confinement of children, with a particular attention to how to use international law and standards in parallel with and to bolster domestic law claims. This section frames theories for challenging pre-trial solitary confinement as a violation of substantive due process and challenging post-conviction solitary confinement as a violation on the ban on cruel & unusual punishment. Section III concludes.

A. Background: The Path to Solitary Confinement

Because solitary confinement has long been the dark secret of the criminal justice system, the legal and factual context in which children are held in adult jails and prisons and subjected to solitary confinement there is neither intuitive nor self-explanatory. In order to develop law, policy and precedent protecting young people from the harms of solitary confinement and clarifying the application of constitutional, international and statutory law to the practice, it is necessary to understand state charging and sentencing law and practice, and how officials use solitary confinement to manage children detained in jails and prisons.

How Do Children End up in Adult Jails and Prisons?

For most of the many decades since the advent of the juvenile justice system at the end of the nineteenth century, the vast majority of children[9] in conflict with the law in the United States generally had their cases heard and resolved in a system at least theoretically designed with them in mind.[10] These children, when adjudicated delinquent and committed to the care of the state following disposition, were generally held in detention facilities.[11] Most state judges have

[9] Throughout this article, I use the terms child or children to refer to individuals under age 18. This is the definition of child at international law. And the dividing line generally employed by the U.S. Supreme Court in cases considering the rights of children in conflict with the law. U.N. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) ("CRC"); *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S.Ct. 2011 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

[10] For a concise overview of the history of the juvenile justice system in the Untied States, *see*, RICHARD BONNIE, ROBERT JOHNSON, BETTY CHEMERS, & JULIE SCHUCK, EDS. REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH, National Academies Press 31 *et seq.* (2013). Note that, while both systems detain large numbers of children, this article focuses on conditions of confinement for children detained in adult jails and prisons and does not address conditions in juvenile facilities. Some numerical context (using 2010 data, the most recent year for which comparable data are available): the federal government estimates that in 2010, more than 1,600,000 children were arrested, that juvenile courts handled approximately 1,368,000 cases and that approximately 60,861 were held in juvenile detention facilities; Human Rights Watch and the ACLU estimate (using federal data) that 139,495 were held in adult jails and prisons (both of these later estimates may be low, given that they are projections based on daily population counts). DEP'T JUSTICE BUREAU OF JUSTICE STATISTICS, ARRESTS IN THE UNITED STATES, 1990-2010, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aus9010.pdf; SICKMUND, SLADKY, KANG, & PUZZANCHERA, DEP'T JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DELINQUENCY CASES IN JUVENILE COURTS, 2010 (2014) *available at* http://www.ojjdp.gov/pubs/243041.pdf; SICKMUND, SLADKY, KANG, & PUZZANCHERA, DEP'T JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, EASY ACCESS TO THE CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT (2013) *available at*: http://www.ojjdp.gov/ojstatbb/ezacjrp/ (cross-tabulating age and detention status and excluding youth 18 and older); HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 106 (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf. In a separate analysis based on 2007 data (the most recent year for which comparable data is available) from 34 states, Department of Justice researchers estimates that at least 189,000 children were charged with adult offenses – data from 21 states showed at least 14,000 transfers from the juvenile to the adult criminal justice system and another 175,000 cases of children charged as adults were derived from data from the 13 states set the age of criminal majority below 18 at that time. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf. *See also* REP. OF THE ATT'Y GEN.'S NAT'L TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, DEFENDING CHILDHOOD: PROTECT, HEAL, THRIVE, *supra* note 1.

[11] Juvenile delinquency proceedings are not criminal proceedings, though the Supreme Court has recognized the serious nature of the proceedings in extending a series of procedural protections. See, e.g. In re. Gault, 387 U.S. 1, 49-50 (1967).

historically had discretion to waive jurisdiction over certain individual cases, sending children to be tried in the adult criminal justice system. But until recent decades, when a range of other statutory mechanisms for transferring jurisdiction to adult courts were developed by state legislatures in bids to be 'tough on crime,' this mechanism was used infrequently. Beginning in the 1980s, this 'exception' expanded rapidly, diverting tens of thousands of children into the adult criminal justice system.[12] For this large group of children, being charged or sentenced as if adults generally has come to mean detention in adult jails and adult prisons.

The statutory mechanisms that can land a child in the adult criminal justice system form a complicated web. They vary significantly from state to state and, as applied, can vary greatly from one county or city to the next.[13] In many states, in addition to the discretion to waive a case into adult court, specific crimes are excluded from the jurisdiction of the juvenile justice system (including, in some cases, specific offenses for children of specific ages).[14] Some prosecutors have the discretion to decide whether to file charges (sometimes called "direct file" in adult court).[15] And in some states, once convicted for an adult offense, any subsequent conduct is

[12] By 1997 and starting in the 1980s, all states but three (Nebraska, New York, and Vermont) changed their laws to make it easier to try and sentence children in the adult criminal justice system. SNYDER & SICKMUND, DEPARTMENT OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 15 (1999), *available at* http://www.ncjrs.org/html/ojjdp/nationalreport99/toc.html.

[13] GRIFFIN, ET AL., DEPARTMENT OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING, https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf (2011) (containing a detailed review of various state charging and sentencing regimes). For an analysis of the variation in the use of one particular form of 'transfer,' prosecutorial 'direct file,' *see* HUMAN RIGHTS WATCH, BRANDED FOR LIFE: FLORIDA'S PROSECUTION OF CHILDREN AS ADULTS UNDER ITS "DIRECT FILE" STATUTE (2014) *available at*: http://www.hrw.org/sites/default/files/reports/us0414_ForUpload%202.pdf.

[14] GRIFFIN, ET AL., TRYING JUVENILES AS ADULTS 3 (noting that in 2011, 45 states allowed discretionary waiver and 29 had statutory exclusion mechanisms).

[15] GRIFFIN, ET AL., TRYING JUVENILES AS ADULTS 3 (noting that in 2011, 15 states gave prosecutors discretion to file at least some charges in either the juvenile justice or adult criminal justice system). For data regarding the varied use of prosecutorial discretion to charge children as adults in one state, Florida, *see* HUMAN RIGHTS WATCH, BRANDED FOR LIFE: FLORIDA'S PROSECUTION OF CHILDREN AS ADULTS UNDER ITS "DIRECT FILE" STATUTE (2014) *available at*: http://www.hrw.org/sites/default/files/reports/us0414_ForUpload%202.pdf.

necessarily addressed in adult court (this legal fiction is termed "once an adult always an adult").[16] While in most parts of the country, criminal adulthood begins at 18, ten U.S. states have an age of criminal majority below 18; meaning that *all* 17 year olds or, in New York and North Carolina (the states with the lowest age of blanket criminal jurisdiction), all 16 and 17 year olds, are treated as if adults by default.[17] Once a child is charged with an adult offense, most states have no mechanism to transfer jurisdiction *back* to the juvenile justice system or to blend a sentence of confinement in both the juvenile justice and adult criminal justice systems.[18] There is an astounding lack of data regarding these prosecutions, but general agreement that the cases of tens of thousands of the more than one million children arrested each year are processed in the adult criminal justice system.[19]

An adult charge or conviction usually brings detention in adult facilities. The laws in forty-nine states permit the detention of those charged with adult offenses in adult facilities; the laws of nineteen states require it.[20] Only a handful of states have mechanisms in place that allow the incarceration of children convicted of an adult offense in other than adult facilities.[21] Thus, in

[16] GRIFFIN, ET AL., TRYING JUVENILES AS ADULTS 3 (noting that in 2011, 34 states prosecuted children as adults once they were convicted of a prior adult offense).
[17] Butts & Roman, *John Jay College of Criminal Justice Research & Evaluation Center, Line Drawing: Raising the Minimum Age of Criminal Court Jurisdiction in New York* 5 (2014) *available at*: http://johnjayresearch.org/rec/files/2014/02/linedrawing.pdf.
[18] GRIFFIN, ET AL., TRYING JUVENILES AS ADULTS 3 (noting that in 2011, 18 states gave criminal court judges the ability to impose a blended sentence, while 14 states also gave juvenile courts the ability to do so).
[19] GRIFFIN, ET AL., TRYING JUVENILES AS ADULTS 18-19 (noting that only *thirteen* states report the total number of cases in which children are prosecuted as adults and only one state, California, provides processing outcomes; this data suggests that about three-quarters resulted in a conviction and, of those, approximately 8 in 10 were incarcerated in jail or prison as a result).
[20] HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 108 (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf (based on an analysis of statutes in force in 2012).
[21] GRIFFIN, ET AL., TRYING JUVENILES AS ADULTS 3 (noting that in 2011, 18 states gave criminal court judges the ability to impose a blended sentence, involving incarceration in the juvenile justice system following an adult conviction).

many jurisdictions, children accused of crimes in the adult system serve pre-trial detention in jails, and, upon conviction, serve their sentences in either jail or in prison. The federal criminal justice system also has a mechanism for treating children as if they were adults in specific circumstances.[22] While no federal statute has been interpreted to prohibit detaining children in *state* custody charged with or convicted of felonies in adult jails and prisons, *federal* law *does* prohibit holding children who are in the (federal) custody of the Attorney General in adult facilities under federal authority.[23]

There is also very little systematic data about how many children are detained in jails and prisons in the United States as a result of this morass of sentencing and detention law and practice. Research by the Department of Justice suggests that a significant proportion of young people held in adult jails pre-trial do not end up in prison after conviction (either because their case is dismissed, because they are not sentenced to time in prison or because they turn 18).[24] Analysis of the best national data available suggests that tens of thousands of children each year are held in adult jails and only a few thousands in state prisons.[25]

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[22] 18 U.S.C. 5032 (3) (specifying that the Attorney General may certify for criminal prosecution as if adults children age thirteen and above who commit certain felonies, including some crimes of violence).

[23] 42 U.S.C. 5601 et seq. This statute, the Juvenile Justice and Delinquency Prevention Act, has not been interpreted by the Department of Justice (on penalty of a state losing a portion federal justice funding) to prohibit the detention of children charged with or convicted of felonies in state criminal justice systems from being detained in adult jails and prisons. 42 U.S.C 5633(a)(11) (2006); CAMPAIGN FOR YOUTH JUSTICE, FACT SHEET: JAIL REMOVAL AND SIGHT AND SOUND CORE PROTECTIONS, *available at* http://www.campaignforyouthjustice.org/documents/FactSheet-JailRemovalandSightandSoundcoreprotections.pdf (last visited Mar. 5, 2013). The Bureau of Prisons is, however, prohibited from housing children, including those charged with federal felony offenses. 18 U.S.C. 5039 (2012), *available at* http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-partIV-chap403-sec5040.pdf; BUREAU OF PRISONS, PROGRAM STATEMENT 5216.05, JUVENILE DELINQUENTS (1999), *available at* http://www.bop.gov/policy/progstat/5216_005.pdf.

[24] ATT'Y GEN.'S NAT'L TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, REP. OF THE ATT'Y GEN.'S NAT'L TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, DEFENDING CHILDHOOD: PROTECT, HEAL, THRIVE 178 (2012), *available at* http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf; DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

[25] Analyzing recent federal data derived from "snap-shot" data about daily populations, Human Rights Watch and the ACLU estimated that in each year from 2008 to 2010, more than 120,000 children were held in adult jails and

How Do Children End up in Solitary Confinement in Adult Jails and Prisons?

Solitary confinement is generally defined as 22 or more hours of physical and social isolation per day.[26] Most commentators agree that solitary confinement is the ubiquitous form of physical and social isolation used in adult detention settings and that it has come to be chief among a very small number of institutional responses to non-conforming behavior or characteristics in jail and prison settings.[27]

Research suggests that jail and prison officials generally manage children in much the same way that they manage adults, including using solitary confinement.[28] Children in adult correctional settings are subjected to solitary for three reasons – to punish, to manage and to treat.[29] Correctional officials in adult jails and prison settings generally resort to solitary confinement when faced with individuals who violate facility rules; who are deemed to need protection or to

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prisons. HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 101-106 (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf.

[26] This is, for example, the definition used by the United Nations Special Rapporteur on Torture. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 77, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Mendez), *available at* http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf.

[27] *See, e.g. Vera Institute of Justice, Written Testimony of Michael Jacobson Before the United States Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Human Rights* (2012) *available at* http://www.vera.org/files/michael-jacobson-testimony-on-solitary-confinement-2012.pdf.

[28] *See generally* HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf.

[29] HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf. The use of solitary confinement in juvenile facilities generally mirrors its use in adult jails and prisons, though other, shorter, forms of isolation are more commonly used as an alternative or in addition to the stark isolation that constitutes solitary confinement. THE AMERICAN CIVIL LIBERTIES UNION, ALONE AND AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES (2013) https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf

pose a threat to others; or who are require serious medical or mental health treatment.[30] There is no national, systematic data on the use of solitary confinement on children but the best available data suggest that thousands are subjected to the practice each year.[31]

US Law Regarding the Solitary Confinement of Children

There is no case law suggesting how the constitution applies to the solitary confinement of children in adult jails and prisons (though there is jurisprudence considering the isolation of adults and a few cases regarding the isolation of children in juvenile facilities). The constitutionality of the practice is discussed in Section II, *infra*. No state prohibits the solitary confinement of children in adult jails and prisons by statute. At the time of writing, three states – New York, Mississippi and Montana – currently impose or are in the process of imposing some limitations on the use of solitary confinement in adult prisons statewide – though not in adult jails – pursuant to agreements reached and reforms implemented following litigation.[32] Most

[30] *See, generally* The American Civil Liberties Union, Written Statement of the American Civil Liberties Union *Before the United States Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Human Rights* (2014) https://www.aclu.org/sites/default/files/assets/aclu_testimony_for_solitary_ii_hearing-final.pdf.

[31] HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf. There is also no national, systematic data on the use of solitary confinement in the juvenile justice system, but the data that is available suggests both that it is widely used and that some state systems place some limitations on the practice. THE AMERICAN CIVIL LIBERTIES UNION, ALONE AND AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES (2013) https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf; *Weiss, Kraner, Fisch, Lowenstein Sandler, LLP, 51-Jurisdictiono Survey of Solitary Confinement Rules in Juvenile Justice Systems* (2013) *available at*: http://www.lowensteinprobono.com/files/Uploads/Documents/solitary%20confinement%20memo%20survey%20--%20FINAL.pdf.

[32] *See* Consent Decree, C.B., et al. v. Walnut Grove Corr. Facility, No. 3:10-cv-663 (S.D. Miss. 2012) (prohibiting solitary confinement of children); Settlement Agreement, Raistlen Katka v. Montana State Prison, No. BDV 2009-1163 (Apr. 12, 2012), *available at* http://www.aclumontana.org/images/stories/documents/litigation/katkasettlement.pdf (limiting the use of isolation and requiring special permission); Tania Karas, *State Agrees to Limit Solitary for Juvenile Inmates*, N.Y. L. J., Oct. 30, 2014, *available at* http://www.newyorklawjournal.com/id=1202675020802/State-Agrees-to-Limit-Solitary-for-

recently, a standard-setting body in New York City issued new standards banning the solitary confinement for children under 18 and for young adults aged 18 – 21 on Rikers Island, one of the largest jails complexes in the country.[33] By contrast, no provision of any federal statute or federal administrative regulations prohibits solitary confinement in juvenile detention facilities, jails or prisons.[34]

Regulations implementing the Prison Rape Elimination Act (PREA) do include provisions regulating the use of isolation.[35] With regard to adult jails and prisons, the regulations require that adult facilities maintain sight, sound and physical separation between "youthful inmates" and adults and that to comply with the regulations officials should use their "best efforts" to avoid placing children in isolation.[36] The regulations also require that any young person separated or isolated in an adult facility must receive, absent exigent circumstances, daily large-muscle exercise, any legally-required special education services, and, to the extent possible,

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Juvenile-Inmates?slreturn=20150018201937. Benjamin Weiser, *New York State in Deal to Limit Solitary Confinement*, N.Y. TIMES, Feb. 19, 2014, *available at* http://www.nytimes.com/2014/02/20/nyregion/new-york-state-agrees-to-big-changes-in-how-prisons-discipline-inmates.html?_r=0. There are a handful of states that limit or otherwise regulate the solitary confinement of children in juvenile facilities (a few ban it as a means of discipline), though it is still only a small minority of states. THE AMERICAN CIVIL LIBERTIES UNION, ALONE AND AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES (2013) https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf; *Weiss, Kraner, Fisch, Lowenstein Sandler, LLP, 51-Jurisdictiono Survey of Solitary Confinement Rules in Juvenile Justice Systems* (2013) *available at*: http://www.lowensteinprobono.com/files/Uploads/Documents/solitary%20confinement%20memo%20survey%20--%20FINAL.pdf.

[33] Michael Winerip and Michael Schwirtz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.S. TIMES, Jan. 13, 2015, *available at* http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html?_r=0.

[34] 42 U.S.C. 5601 et seq.. *See also supre* note X and accompanying text.

[35] The regulations include detailed requirements for the prevention, detection, and investigation of sexual abuse in both adult and juvenile correctional facilities. *See* US Dep't of Justice, *Press Release: Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape* (May 17, 2012), *available at* http://www.justice.gov/opa/pr/2012/May/12-ag-635.html (providing a summary of regulations).

[36] 28 C.F.R. § 115.14 (2012), *available at* http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf.

access to other programming and work opportunities.[37] There is as yet no data indicating whether these regulations have had any impact on the use of solitary confinement of youth in jails or prisons nationwide.

Although no court has ruled squarely on the merits of an Eighth Amendment conditions challenge to the solitary confinement of children in an adult prison, a few courts in recent decades have determined that the solitary confinement of children in the juvenile justice system violates the substantive due process clause of the Fifth and Fourteenth Amendments.[38] In addition, the Special Litigation Section of the U.S. Department of Justice has repeatedly stated that prolonged periods of isolation are not appropriate for youth,[39] including in investigations of

[37] *Id*. These regulations are strangely different with regard to juvenile facilities, requiring that any young person separated or isolated in a juvenile facility as a disciplinary sanction or protective measure must receive daily large-muscle exercise, access to legally-mandated educational programming or special education services, daily visits from a medical or mental health care clinician, and, to the extent possible, access to other programs and work opportunities. *Compare* 28 C.F.R. § 115.378(b) (2012), *available at* http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf.

[38] *See, e.g. D.B. v. Tewksbury*, 545 F. Supp. 896 (D. Or. 1982); *Feliciano v. Barcelo*, 497 F. Supp. 14, 35 (D.P.R. 1979); *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D.Miss. 1977); *Pena v. N.Y. State Div. for Youth*, 419 F. Supp. 2013 (S.D.N.Y. 1976); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D.Ind. 1972); *Morales v. Turman*, 364 F. Supp. 166 (E.D.Tex. 1973); *Lollis v. N.Y. State Dept. of Soc. Svcs.*, 322 F. Supp. 473 (S.D.N.Y. 1970); *Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972). A few recent notable cases have included claims related to isolation in the context of the juvenile and adult criminal justice systems, but have not yet resulted in a ruling addressing Eighth Amendment protections for children. *Lisa Lobe as guardian for K.J. et al. v. Judd*, No. 8:12-cv-00568 (M.D. Fl. Filed Mar. 21, 2012) (complaint) *available at* http://www.splcenter.org/sites/default/files/downloads/case/PolkComplaint.pdf ; *C.B., et al. v. Walnut Grove Authority*, No. 3:10cv663, ¶ IV(c)(1) (S.D. Miss. filed Feb. 3, 2012) (Consent decree), *available at* http://www.aclu.org/files/assets/68-1_ex_1_consent_decree.pdf; *Troy D. & O'Neill S. v. Mickens*, No. 1:10-cv-02902 (D.N.J. filed Dec. 15, 2011) (complaint) *available at* http://www.jlc.org/system/files/case_files/Troy%20Second%20Amended%20Complaint.pdf?download=1; *Doe et al., v. Montana*, No. 6:2010cv00006 (Mont. 1st Dist. Ct. filed Jan. 26, 2010) (Complaint), *available at* http://www.aclu.org/files/assets/2009-12-16-DoevMontana-Complaint.pdf; *I.R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155 (D.Haw. 2006).

[39] In its most recent case, the Department of Justice sought a Temporary Restraining Order against the State of Ohio, leading to a strong settlement. DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS, *Justice Department Settles Lawsuit Against State of Ohio to End Unlawful Seclusion of Youth in Juvenile Correctional Facilities*, http://www.justice.gov/opa/pr/2014/May/14-crt-541.html. *See* also Letter from Robert L. Listenbee, Administrator, US Department of Justice, to Jesselyn McCurdy, Senior Legislative Counsel, American Civil Liberties Union 1 (Jul. 5, 2013), *available at* https://www.aclu.org/sites/default/files/assets/doj_ojjdp_response_on_jj_solitary.pdf; Letter from Thomas E. Perez, Assistant Att'y Gen., to Hon. Mitch Daniels, Governor, State of Indiana, Investigation of the Pendleton Juvenile Correctional Facility 8 (Aug. 22, 2012), *available at* http://www.justice.gov/crt/about/spl/documents/pendleton_findings_8-22-12.pdf (Finding excessively long periods

both juvenile and adult facilities (although the Department has neither banned this practice for youth in the custody of its Bureau of Prisons, nor has it issued clear guidance prohibiting the practice in juvenile facilities, jails or prisons across the country). U.S. Attorney General Eric Holder, Jr. has also recently stated that "solitary confinement can be dangerous, and a serious

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of isolation of suicidal youth. Stating that, "the use of isolation often not only escalates the youth's sense of alienation and despair, but also further removes youth from proper staff observation. . . . Segregating suicidal youth in either of these locations is punitive, anti-therapeutic, and likely to aggravate the youth's desperate mental state."); Letter from Thomas E. Perez, Assistant Att'y Gen., to Hon. Chairman Moore, Leflore County Board of Supervisors, Investigation of the Leflore County Juvenile Detention Center 2, 7 (Mar. 31, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/LeFloreJDC_findlet_03-31-11.pdf (Finding that isolation is used excessively for punishment and control, and the facility has unfettered discretion to impose such punishment without process); Letter from Thomas E. Perez, Assistant Att'y Gen., to Hon. Michael Claudet, President, Terrebonne Parish, Terrebonne Parish Juvenile Detention Center, Houma, Louisiana 12-13 (Jan.18, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/TerrebonneJDC_findlet_01-18-11.pdf (Finding excessive use of isolation as punishment or for control – at four times the national average – and that the duration of such sanctions is far in excess of acceptable practice for such minor violations, and violates youths' constitutional rights and stating, "Isolation in juvenile facilities should only be used when the youth poses an imminent danger to staff or other youth, or when less severe interventions have failed."); Letter from Thomas E. Perez, Assistant Att'y Gen., to Hon. Mitch Daniels, Governor, State of Indiana, Investigation of the Indianapolis Juvenile Correctional Facility, Indianapolis, Indiana 21-22 (Jan. 29, 2010), *available at* http://www.justice.gov/crt/about/spl/documents/Indianapolis_findlet_01-29-10.pdf (Finding that facility subjected youth to excessively long periods of isolation without adequate process and stating, "generally accepted juvenile justice practices dictate that [isolation] should be used only in the most extreme circumstances and only when less restrictive interventions have failed or are not practicable."); Letter from Grace Chung Becker, Acting Assistant Att'y Gen., to Yvonne B. Burke, Chairperson, Los Angeles County Board of Supervisors, Investigation of the Los Angeles County Probation Camps 42-45 (Oct. 31, 2008), *available at* http://www.justice.gov/crt/about/spl/documents/lacamps_findings_10-31-08.pdf (Finding inadequate supervision of youth isolated in seclusion or on suicide watch); Letter from Wan J. Kim, Assistant Att'y Gen., to Marion County Executive Committee Members and County Council President, Marion County Juvenile Detention Center, Indianapolis, Indiana 10-12 (Aug. 6, 2007), *available at* http://www.justice.gov/crt/about/spl/documents/marion_juve_ind_findlet_8-6-07.pdf (Finding that isolation practices substantially departed from generally acceptable professional standards and that use of isolation was excessive and lacked essential procedural safeguards and stating, "Regardless of the name used to describe it, the facility excessively relies on isolation as a means of attempting to control youth behavior" and that ‚Based on the review of housing assignments in January and February 2007, on any given day, approximately 15 to 20 percent of the youth population was in some form of isolation."); Letter from Bradley J. Scholzman, Acting Assistant Att'y Gen., to Hon. Linda Lingle, Governor, State of Hawaii, Investigation of the Hawaii Youth Correctional Facility, Kailua, Hawaii 17-18 (Aug. 4, 2005), *available at* http://www.justice.gov/crt/about/spl/documents/hawaii_youth_findlet_8-4-05.pdf (Finding excessive use of disciplinary isolation without adequate process); Letter from Alexander Acosta, Assistant Atty Gen., to Hon. Jennifer Granholm, Governor, State of Michigan, CRIPA Investigation of W.J. Maxey Training School, Whitmore Lake, MI 4-5 (Apr. 19, 2004), *available at* http://www.justice.gov/crt/about/spl/documents/granholm_findinglet.pdf (Finding excessive use of isolation for disciplinary purposes, often without process and for arbitrary reasons and durations.); Letter from Thomas E. Perez, Assistant Att'y Gen., to Janet Napolitano, Governor, State of Arizona, CRIPA Investigation of Adobe Mountain School and Black Canyon School in Phoenix, Arizona; and Catalina Mountain School in Tuscon, Arizona (Jan. 23, 2004), *available at* http://www.justice.gov/crt/about/spl/documents/ariz_findings.pdf (Finding that youth are kept in isolation for extended and inappropriate periods of time that fly in the face of generally accepted professional standards.).

impediment to the ability of juveniles to succeed once released."[40] Unfortunately, although taken together these suggest a growing consensus within the U.S. Department of Justice that the solitary confinement of children is unconstitutional, it is far from a declaration that the practice *is* in fact against the law.

B. The Consensus Against Solitary Confinement

While there is a lack of statutory law, regulation and judicial precedent addressing the solitary confinement of children in adult jails and prisons, there is a broad (and broadening) recognition that the practice can severely damage youth and an established consensus that isolation is inconsistent with good practices for safely managing and caring for children in detention contexts. This consensus is vital to litigation challenges, particularly (and as discussed in greater detail below) where disproportionality or departures from professional standards are looked to by courts to establish a constitutional violation.

The Developmental Differences Between Children and Adults

During adolescence, the body changes significantly. Boys and girls grow physically – gaining height, weight, and muscle mass, pubic and body hair; girls begin menstrual periods, and boys'

[40] DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS, *Attorney General Holder Criticizes Excessive Use of Solitary Confinement for Juveniles with Mental Illness* (2014), *available at* http://www.justice.gov/opa/pr/2014/May/14-ag-509.html; Ian Kysel, Ban Solitary Confinement for Youth in the Care of the Federal Government , THE HILL (Apr. 11, 2013), *available at* http://thehill.com/blogs/congress-blog/judicial/293395-ban-solitary-confinement-for-youth-incare-of-the-federal-government; Letter from The American Civil Liberties Union et al. to Eric H. Holder, Jr., Attorney General, US Department of Justice, (Oct. 11, 2013).

voices change.[41] The adolescent brain goes through dramatic structural growth and change during the teens and into the twenties. The major difference between the brains of teenagers and those of young adults is the development of the frontal lobe.[42] The frontal lobe is responsible for cognitive processing, such as planning, strategizing, and organizing thoughts and actions.[43] Researchers have determined that one area of the frontal lobe, the dorsolateral prefrontal cortex, is among the last brain regions to mature, not reaching adult dimensions until a person is in his or her twenties.[44] This part of the brain is linked to "the ability to inhibit impulses, weigh consequences of decisions, prioritize, and strategize."[45] As a result, teens' decision-making processes are shaped by impulsivity, immaturity, and an under-developed ability to appreciate consequences and resist environmental pressures.[46]

The Harm Caused by the Solitary Confinement of Children

There has been no rigorous scientific research on the impact of solitary confinement or other forms of long-term isolation on children in detention (which means there is no research directly applying the neuroscience research discussed above to the impact of isolation). There is some limited research suggesting that solitary confinement harms children in ways that are unique and

[41] Sedra Spano, Stages of Adolescent Development, ACT FOR YOUTH UPSTATE CENTER FOR EXCELLENCE (May 2004), http://www.actforyouth.net/resources/rf/rf_stages_0504.pdf; Adolescent Development, NAT'L INSTS. OF HEALTH, http://www.nlm.nih.gov/medlineplus/ency/article/002003.htm.
[42] Laurence Steinberg et al., The Study of Development Psychopathology in Adolescence: Integrating affective neuroscience with the study of context, in DEVELOPMENTAL PSYCHOPATHOLOGY 710 (DANTE CICCHETTI & DONALD J. COHEN EDS., 2d ed. 2006).
[43] *Id.*; Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 ANNALS N.Y. ACAD. SCI. 83 (2004), available at http://intramural.nimh.nih.gov/research/pubs/giedd05.pdf.
[44] Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, supra note xxix, at 1021.
[45] *Id.*
[46] Matthew S. Stanford et al., Fifty Years of the Barratt Impulsiveness Scale: An Update and Review, 47 PERSONALITY & INDIVIDUAL DIFFERENCES 385 (2009); Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 BEHAV. SCI. & L. 741, 744-745 (2000).

more extreme than adults, given their age and developmental differences. Paired with research regarding adults in solitary confinement, there is a general consensus that solitary confinement is particularly harmful to children.

In 2012, Human Rights Watch and the ACLU published the first national report to analyze the issue (a report that I authored). The report presented evidence that the practice harms youth, based on interviews and correspondence with scores of young people across the country who had been subjected to solitary confinement in jails and prisons. It found that solitary confinement carried heightened risk of psychological, developmental and physical harm.

Young people told HRW and ACLU researchers about experiencing depression, fits of rage, acts of self-harm and suicide attempts.[47] The last is no surprise, as there is widespread agreement that suicide is highly correlated with solitary confinement among youth in juvenile and adult facilities (with some of the most disturbing and recent data drawn Rikers Island).[48] This research also documented barriers to care and programming in adult jails and prisons. Adult facilities have little, if any, age-differentiated services or programming, but the report found that once young people are placed in solitary confinement in any detention setting they are more likely to be cut

[47] HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 23-32 (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf.

[48] Homer Venters et al., Solitary Confinement and Risk of Self-Harm Among Jail Inmates, 104 Am. J. Pub. Health 442 (2014), *available at* http://ajph.aphapublications.org/doi/full/10.2105/AJPH.2013.301742; LINDSAY M. HAYES, DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE SUICIDES IN CONFINEMENT: A NATIONAL SURVEY (2009), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/213691.pdf; Seena Fazel, Julia Cartwright, et al., *Suicide in Prisoners: A systematic review of Risk Factors*, 69 J. CLIN. PSYCHIATRY 1721 (2008), *available at* http://www.ncbi.nlm.nih.gov/pubmed/19026254; Christopher Muola, US DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/shsplj.pdf.

off (or have greater difficulty accessing) whatever resources are available.[49] This denial of programming generally included being prevented from going to school or participating in any similar activity that promotes growth or change.[50] Finally, given that physical isolation is a core feature of solitary as practiced (teens in many jurisdictions told researchers about being allowed to exercise only in small metal cages, alone, a few times a week), the research suggests that it is also unhealthy for growing bodies.[51]

The differences between children and adults noted above likely make young people more vulnerable to harm as well as disproportionately affected by the trauma and deprivations of solitary confinement and isolation. Extensive research on the impact of isolation has shown that adult prisoners generally exhibit a variety of negative physiological and psychological reactions to conditions of solitary confinement.[52] However, as noted, there has been no systematic study of the effects of solitary confinement or other forms of isolation on growing brains and bodies – in spite of its widespread use on children. Because of their heightened vulnerability due to their developmental differences, the American Academy of Child and Adolescent Psychiatry has

[49] HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 41-47 (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf.
[50] HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 41-47 (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf.
[51] HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 37-40 (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf.
[52] Studies have suggested that these symptoms include: hypersensitivity to stimuli; perceptual distortions and hallucinations; increased anxiety and nervousness; revenge fantasies, rage, and irrational anger; fears of persecution; lack of impulse control; severe and chronic depression; appetite loss and weight loss; heart palpitations; withdrawal; blunting of affect and apathy; talking to oneself; headaches; problems sleeping; confusing thought processes; nightmares; dizziness; self-mutilation; and lower levels of brain function, including a decline in EEG activity after only seven days in solitary confinement. See THE AMERICAN CIVIL LIBERTIES UNION, ALONE AND AFRAID n. 13 – n. 31 and accompanying text (2013), *available at* https://www.aclu.org/files/assets/Alone and Afraid COMPLETE FINAL.pdf.

concluded that adolescents are in particular danger of adverse reactions to prolonged isolation and solitary confinement and has recommended a ban on these practices.[53]

Domestic Corrections Standards Regarding Solitary Confinement

Standards and good practices for caring for and managing children in detention facilities all prescribe limits on the use of physical and social isolation that are starkly at odds with practices used by adult jails and prisons. Broadly speaking, such standards differentiate between physical and social isolation that is used as an extremely limited, short intervention to help a child manage current acting out behavior and practices used to separate children from other detainees which do not involve significant physical and social isolation.

The Juvenile Detention Alternatives Initiative (JDAI), a foundation-funded project focused on improving conditions of confinement in juvenile detention settings, prohibits isolation as a punishment but allows its use "as a temporary response to behavior that threatens immediate harm to the youth or others," only after less-restrictive techniques are utilized, only for as long as necessary and with direct, one-to-one supervision by staff.[54] If the perceived need for continued

[53] AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, POLICY STATEMENTS: SOLITARY CONFINEMENT OF JUVENILE OFFENDERS (Apr. 2012), *available at* http://www.aacap.org/cs/root/policy_statements/solitary_confinement_of_juvenile_offenders. The statement also distinguishes between the use of isolation to punish, which is unacceptable, and the use of brief interventions, which are acceptable (these include "time-outs," which may be used as a component of a behavioral treatment program and "seclusion," an emergency procedure which should be used for the least amount of time possible for the immediate protection of the individual). *Id*.

[54] JUVENILE DET. ALT. INITIATIVE, JUVENILE DETENTION ALTERNATIVES INITIATIVE (JDAI) FACILITY ASSESSMENT 2014 UPDATE Standard VII(B) (2014), *available at* http://www.aecf.org/m/resourcedoc/aecf-juveniledetentionfacilityassessment-2014.pdf. This largely mirrors another set of standards, issued by the Performance Based Standards Initiative, which advises, "isolating or confining a youth to his/her room should be used only to protect the youth from harming himself or others and if used, should be brief and supervised." PBS LEARNING INST., REDUCING ISOLATION AND ROOM CONFINEMENT 2 (2012), *available at* http://pbstandards.org/uploads/documents/PbS_Reducing_Isolation_Room_Confinement_201209.pdf. A set of

isolation extends beyond four hours, JDAI standards require that the child be either returned to a unit with other children, evaluated by medical staff to determine whether transfer to a specialized medical or mental health facility is required, or diverted to a special (congregant) program where they can be managed with an individual plan that involves in-person supervision by staff, among other things.[55] Though JDAI prohibits isolation as a punishment (there is increasing recognition that children are better and more safely managed using a rewards-based approach), a range of older standards permitted children to be confined to their room for period, though the practice is capped at an absolute and set maximum, such as 24 or 72 hours.[56]

Medical and Educational Standards Regarding Isolation of Children

National standards for caring for and managing children in medical and mental health facilities as well as in educational environments also prohibit the use of solitary confinement, permitting the use of physical and social isolation only in extremely limited circumstances. In short, in other

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Department of Justice standards issued in 1970 "[i]solation is a severe penalty to impose upon a juvenile, especially since this sanction is to assist in rehabilitation as well as punish a child … After a period of time, room confinement begins to damage the juvenile, cause resentment toward the staff, and serves little useful purpose." DEP'T JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE Standard 4.52 Commentary (1980), *available at* http://catalog.hathitrust.org/Record/000127687.

[55] JUVENILE DET. ALT. INITIATIVE, JUVENILE DETENTION ALTERNATIVES INITIATIVE (JDAI) FACILITY ASSESSMENT 2014 UPDATE Standard VII(B) (2014), *available at* http://www.aecf.org/m/resourcedoc/aecf-juveniledetentionfacilityassessment-2014.pdf. The American Correctional Association similarly suggests that young people who need to be separated from others because they need "special management" be given *more* staff attention, not less: "[they] should benefit from an individualized and constructive behavior management plan that allows for individualized attention." AM. CORR. ASS'N, PERFORMANCE BASED STANDARDS JUVENILE CORR. FACILITIES 51 (4th ed. 2009) (Standard 4-JCF-3C-01).

[56] For example, the DOJ Standards for the Administration of Justice suggest that "room confinement of more than twenty-four hours should never be imposed" while the American Correctional Association suggests that DEP'T JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE Standard 4.52 Commentary (1980), *available at* http://catalog.hathitrust.org/Record/000127687. The American Correctional Association set the limit at 5 days while noting that children in disciplinary room confinement should be afforded living conditions and privileges earned that approximate those available to the general population and be visited at least once each day by personnel from administrative, clinical, social work, religious, and/or medical units, during which staff must actually enter the room for the purpose of discussion or counseling. AM. CORR. ASS'N, PERFORMANCE BASED STANDARDS JUVENILE CORR. FACILITIES 52 (4th ed. 2009) (Standards 4-JCF-3C-03; 4-JCF-3C-04).

contexts in which state officials care for and manage children (including, in the case of medical facilities, where they house them), isolation is very strictly regulated and viewed as inconsistent with the best interests of the child.

In recent decades, the medical and mental health communities have come to proscribe extended isolation as an intervention, preferring instead limited, shorter uses of isolation referred to as 'seclusion.' The Children's Health Act of 2000, which protects the rights of residents of any health care facility that receives federal funds[57] strictly limits the use of involuntary locked isolation (seclusion) by prohibiting disciplinary isolation or isolation used for the purposes of convenience and allowing locked isolation only (1) to ensure the physical safety of the resident, a staff member, or others and (2) upon the written order of a physician or licensed practitioner that specifies duration.[58] The American Academy of Child and Adolescent Psychiatry also has standards strictly limiting the use of seclusion in the context of mental health treatment.[59]

[57] Children's Health Act of 2000, Pub. L. 106-310, 114 Stat. 1101 § 591(a) (2000), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-106publ310/pdf/PLAW-106publ310.pdf.

[58] *Id*. at § 591(b). Regulations implementing the health and safety requirements of the Social Security Act also strictly limit the use of involuntary isolation (or "seclusion") in medical facilities. 42 C.F.R. 482.13 (2012) (implementing 42 U.S.C. 1395x § 1861(e)(9)(A)), *available at* http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=5ba18485f8033f30fb496dba3e87c626&rgn=div8&view=text&node=42:5.0.1.1.1.2.4.3&idno=42.) The regulations similarly prohibit involuntary isolation used for coercion, discipline, convenience or retaliation and allow involuntary isolation only (1) when less restrictive interventions have been determined to be ineffective, (2) to ensure the immediate physical safety of the patient, staff member, or others, and (3) must be discontinued at the earliest possible time. 42 C.F.R. 482.13(e) (2012). These regulations limit involuntary isolation to a total maximum of 24 hours and limit individual instances of involuntary isolation to 2 hours for children and adolescents age 9 to 17. 42 C.F.R. 482.13(e)(2)(8) (2012).

[59] AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, PRACTICE PARAMETER FOR THE PREVENTION AND MANAGEMENT OF AGGRESSIVE BEHAVIOR IN CHILD AND ADOLESCENT PSYCHIATRIC INSTITUTIONS, WITH SPECIAL REFERENCE TO SECLUSION AND RESTRAINT 55 (2002), *available at* http://www.aacap.org/galleries/PracticeParameters/JAACAP_SR_2002.pdf. In the therapeutic context, the AACAP opposes the use of seclusion except (1) to prevent dangerous behavior to self or others, disruption of the treatment program, or serious damage to property; and (2) only after less restrictive options have failed or are impractical. *Id.* These standards also state that seclusion should never be used as a punishment or for the convenience of the program and should only be implemented by trained staff. *Id.*

In the context of educational facilities (not in detention contexts), there are a range of state policies, laws and practices regarding the use of involuntary isolation for young people.[60] Indeed, the U.S. Department of Education has issued a set of general guidelines[61] for the use of involuntary isolation in schools, stating that isolation should not be used as a punishment or convenience and is appropriate only in situations where a child's behavior poses an imminent danger of serious physical harm to self or others, where other interventions are ineffective and should be discontinued as soon as the imminent danger of harm has dissipated.[62]

International Law and Standards Regarding Solitary Confinement

In stark contrast with the lack of positive law limiting the use of solitary confinement in the United States, there is broad agreement that the practice violates international human rights laws and standards.

International law long has recognized that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[63] The International Covenant on Civil and Political Rights (ICCPR), which

[60] *See generally,* DEP'T OF EDUCATION, SUMMARY OF SECLUSION AND RESTRAINT STATUTES, REGULATIONS, POLICIES AND GUIDANCE, BY STATE AND TERRITORY (2010) *available at* http://www.pbis.org/common/pbisresources/publications/SeclusionRestraint_summary_ByState.pdf*;* JESSICA BUTLER, HOW SAFE IS THE SCHOOLHOUSE?:AN ANALYSIS OF STATE SECLUSION AND RESTRAINT LAWS AND POLICIES (Autism National Committee, 2012), *available at* www.autcom.org/pdf/howsafeschoolhouse.pdf.
[61] DEP'T OF EDUCATION, RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 11-23 (2012), *available at* www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf.
[62] DEP'T OF EDUCATION, RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 12-13 (2012), *available at* www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf.
[63] United Nations Declaration on the Rights of the Child, adopted November 20, 1959, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959). This early resolution on the rights of the child, adopted unanimously by the General Assembly in 1959 is reflected subsequent United Nations and regional human rights treaties and other international instruments. For example, the American Convention on Human Rights ("Pact of San José, Costa Rica"), Article 19, provides "Every minor child has the right to the measures of protection required by

the United States ratified in 1992, reflects the international consensus that children have special status under international law. Consistent with this status, the ICCPR affords children heightened measures of protection and obligates states to treat them differently from adults when they come into conflict with the law and in particular to prioritize their rehabilitation.[64]

The ICCPR also requires that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[65] Both the ICCPR and the Convention Against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which the United States has also ratified, prohibit torture and other forms of cruel,

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his condition as a minor on the part of his family, society, and the state." O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)

[64] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 ("ICCPR") Arts. 10, 14 (entered into force Mar. 23, 1976) (ratified by U.S. June 8, 1992). The ICCPR emphasizes age-differentiated, positive measures for child offenders and education, rehabilitation, and reintegration over punishment. *See also*, U.N. Hum. Rts. Comm., *General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial,* U.N. Doc. CCPR/C/GC/32 ¶ 42 (2007) ("Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14 of the Covenant. In addition, juveniles need special protection."); Convention on the Rights of the Child art. 40(1) (referring to the objective of "promoting the child's reintegration and the child's assuming a constructive role in society."); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) ¶¶ 1.2, 26.1, *adopted by* G.A. Res. 40/33 (1985); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, ¶¶ 3, 79, *adopted by* G.A. Res. 45/113 (1990). Regional standards on the administration of justice and on deprivation of liberty explicitly incorporate guarantees recognizing and protecting child status. For example, the preamble to the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas "tak[es] into account the principles and provisions enshrined in," among other instruments, the ICCPR, the Convention against Torture, the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), the United Nation Rules for the Protection of Juveniles Deprived of their Liberty, and other UN standards on deprivation of liberty. Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, OEA/Ser/L/V/II.131 Doc. 26 (2008) pmbl. *See also* African Charter on the Rights and Welfare of the Child art. 17(3), OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999 ("essential aim of treatment of every child . . . shall be his or her reformation, re-integration into his or her family and social rehabilitation"); African Youth Charter art. 18(d) ("induction programmes for imprisoned youth that are based on reformation, social rehabilitation and re-integration into family life"), *available at* http://www.au.int/en/sites/default/files/AFRICAN_YOUTH_CHARTER.pdf (viewed Mar. 7, 2014); African Charter art. 17; Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, GA Res. 65/230 annex, ¶ 26; G.A. Res. 65/213 (2010), ¶ 15; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa princ. O(m) ("shall promote the child's rehabilitation"), *available at* http://www.achpr.org/instruments/fair-trial/ (viewed Mar. 7, 2014); Council of Europe, Committee of Ministers, Recommendation No. R(87)20 (adopted 17 September 1987) pmbl. ("the penal system for minors should continue to be characterised by its objective of education and social reintegration").

[65] ICCPR, Art. 10(1).

inhuman or degrading treatment or punishment (CIDT).[66] Evaluating whether treatment rises to the level of torture or CIDT, requires consideration of the victim's age, legal status and individual and developmental characteristics.[67] In other words, a wider range of treatment is considered inconsistent with the obligation of states to provide children with special measures of protection than with regard to adults (and more than is prohibited under current U.S. domestic law). Significantly, the Senate in providing its advice and consent to ratification of the ICCPR and the President when ratifying the ICCPR reserved for the United States the ability to treat juveniles as adults in "exceptional circumstances."[68] Similarly, in ratifying both the ICCPR and CAT, the United States entered an understanding that purports to limit the prohibitions on torture and CIDT such that they would be co-extensive with the protections offered by the fifth, fourteenth and eighth amendments.[69]

[66] ICCPR, art. 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113 ("CAT") Art. 16 (entered into force Jun. 26, 1987) (ratified by U.S. Oct. 21, 1994).

[67] See, e.g. UN Human Rights Committee, General Comment 9, Article 10 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 (1994). See also Note [52] supra and accompanying text.

[68] U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 paras. I. (5) (daily ed., April 2, 1992) ("…the United States reserves the right, in exceptional circumstances, to treat juveniles as adults.").

[69] U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 paras. 3, 5 (daily ed., April 2, 1992) ("[T]he United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States"); U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 para. 1 (daily ed., Oct. 27, 1990) ("[T]he United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States"). There is some persuasive evidence that the U.S. intended this reservation to be quite limited, so as to note swallow the rule – particularly because the U.S. delegation introduced the treaty language in Article 14 requiring that procedures for juvenile persons take into account their age and the desirability of their rehabilitation during negotiations. MARC BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 307 (The Netherlands: Martinus Nijhoff Publishers, 1987).

While signed but not yet ratified by the United States (it is the most widely-ratified human rights treaty), the Convention on the Rights of the Child (CRC) also recognizes the obligation of states to provide children with special measures of protection, among other core obligations.[70] The UN Treaty Body which interprets the CRC has concluded that punitive solitary confinement of children is a form of cruel, inhuman or degrading treatment that violates the CRC.[71] A range of other international standards developed in relation to children who come into conflict with the law specifically condemn the solitary confinement of children – for any duration – as cruel, inhuman or degrading treatment and, under certain circumstances, torture. These instruments include the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) and The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Beijing Rules).[72]

Based on these international laws and standards, the harmful physical and psychological effects of solitary confinement and the particular vulnerability of children to the practice, the Office of the U.N. Special Rapporteur on Torture has twice called for the abolition of solitary confinement of persons under age 18.[73]

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[70] Convention on the Rights of the Child (CRC), opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) ("CRC"). Article 37 of the Convention on the Rights of the children provides a number of protections for children in conflict with the law including protections of the right to liberty and the protections of the rights of children deprived of their liberty. *Id*. The United States signed the CRC in 1995 but has not ratified. As discussed in greater detail below, the U.S. Supreme Court has cited the CRC in the context of its interpretation of the meaning of the Eighth Amendment prohibition on cruel and unusual punishment.

[71] U.N. Comm. on the Rights of the Child, 44th Sess., General Comment 10, Children's rights in juvenile justice, U.N. Doc. CRC/C/GC/10 (2007).

[72] U.N. Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112, Annex, 45 U.N. GAOR Supp. (No. 49A) at 201, U.N. Doc. A/45/49 (Dec. 14, 1990) ("The Riyadh Guidelines").

[73] Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 78-85, Annex (Istanbul Statement on the Use and Effects of Solitary Confinement), U.N. Doc A/63/175 (July 28, 2008) (by Manfred Nowak), *available at* http://www.unhcr.org/refworld/pdfid/48db99e82.pdf; Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Rep. of the Special Rapporteur on*

II. Constitutional Challenges to the Solitary Confinement of Children

The Supreme Court has never directly considered how the U.S. Constitution applies to challenges of conditions of confinement for children held in adult jails or in adult prisons. The Court has, however, considered how the constitution's protections apply to adults in jails and in prisons and has recently decided a string of cases extending heightened protections to children in the context of crime and punishment. These latter cases underscore the relevance of developmental differences between children and adults to the scope of the constitution's protections. This Section will explore the consequences of these developments and then present theories for novel 8th Amendment challenges to the solitary confinement of children held after conviction in adult jails and prisons and for novel 5th and 14th Amendment challenges to the solitary confinement of children held pre-trial in adult jails. While novel, these theories have a sound basis in law and are buttressed by the various points of consensus discussed in Section I.

Whether, when – and how – the physical and social isolation of children violates the constitution will vary from case to case, in part because different bodies of law apply to conditions challenges made on behalf of pre-trial detainees and to those who are held post-conviction.

The Fifth and Fourteenth Amendment protections against deprivation of liberty without due process of law have been held to establish the constitutional protections generally applicable to conditions of confinement for children in juvenile facilities as well as for adults detained in jail

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Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 77, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Mendez), *available at* http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf.

before conviction.[74] The Eighth Amendment protections against cruel and unusual punishment have been held to establish the constitutional protections applicable to conditions of confinement of adults following conviction for crimes (whether they are held in jail or in prison).[75] A small number of federal courts have ruled that solitary confinement and isolation practices used in juvenile facilities are unconstitutional,[76] but few courts have considered this issue recently.[77] There have been a few recent successful challenges to the solitary confinement of adults, including class actions challenging the solitary confinement of persons with mental disabilities;

[74] *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (holding that conditions of confinement for adults held in pretrial federal detention facilities must conform to the substantive due process standards of the Fifth Amendment, under which "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); *Schall v. Martin*, 467 U.S. 253, 269 (1984) (treating conditions claims brought by juveniles detained pre-adjudication under the Fourteenth Amendment and stating that, "it is axiomatic that "[d]ue process requires that a pretrial detainee not be punished")(c*iting Bell*, 441 U.S., at 535, n. 16). As discussed below, some courts considering conditions of confinement challenges in the context of juvenile detention facilities have applied both the Substantive Due Process protections as well as the prohibition against Cruel and Unusual punishment to conditions claims of post-adjudication youth. *Morgan v. Sproat*, 432 F.Supp. 1130, 1135 (S.D.Miss. 1977).

[75] *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Estelle v. Gamble*, 429 U.S. 97, 102-103 (1976). *See also Brown v. Plata*, 131 S.Ct. 1910, 1928 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment … To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates may actually produce physical 'torture or a lingering death … Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.) (Internal citations omitted). However, as discussed in greater detail below, there are disagreements over the application of the Eighth Amendment to juveniles held in juvenile facilities after being adjudicated delinquent (and not convicted of a criminal offense), rather than substantive due process alone. *Compare Morales v. Turman*, 562 F.2d 993, 998 n.1 (5th Cir. 1977) (applying the Eighth Amendment to post-adjudication juvenile facilities) *with Morgan v. Sproat*, 432 F.Supp. 1130, 1135 (S.D.Miss. 1977) (post-adjudication youth protected by both Fourteenth and Eighth Amendments). Notably, the Supreme Court has described the juvenile justice system as "rooted in social welfare philosophy rather than in the *corpus juris*," casting doubt on whether such a functional analysis would result in direct application of the Eighth Amendment to post-adjudication juveniles. *Kent v. United States*, 383 U.S. 541, 554-55 (1966) (describing the objective of the juvenile justice system "to provide measures of guidance and rehabilitation for the child and protection for society and not to fix criminal responsibility, guilt and punishment.").

[76] These cases have been decided on both substantive due process and Eighth Amendment theories. *See, e.g.* , *D.B. v. Tewksbury*, 545 F.Supp. 896, 905 (D.Or.1982) (ruling that "[p]lacement of younger children in isolation cells as a means of protecting them from older children' violates plaintiffs' Due Process rights under the fourteenth amendment."); *Inmates of Boys' Training School v. Affleck*, 346 F.Supp. 1354 (D.C.R.I.1972); *Lollis v. N.Y. State Dep't of Soc. Servs.*, 322 F.Supp. 473, 480-82 (S.D.N.Y.1970).

[77] *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155-56 (D. Haw. 2006) (Concluding that, "The expert evidence before the court uniformly indicates that long-term segregation or isolation of youth is inherently punitive and is well outside the range of accepted professional practices… Defendants' practices are, at best, an excessive, and therefore unconstitutional, response to legitimate safety needs of the institution."); *Hughes v. Judd*, 8:12–cv–568–T–23MAP, 2013 WL 1821077 (M.D.Fl. 2013); *Troy D. and O'Neill S. v. Mickens et al*., Civil Action No.: 1:10-cv-02902-JEI-AMD (D. N.J. 2013).

some of these cases could have a significant impact on similar challenges to the use of solitary confinement on children in adult jails or prisons.[78] However, to date, no Supreme Court or Circuit Court case has directly considered or applied this case-law in assessing the constitutionality of solitary confinement of children in adult jails or prisons.[79]

A. New Trends in Jurisprudence on Children in Conflict with the Law

Recent Supreme Court decisions on the treatment of children in the criminal justice system leave no doubt that the developmental differences between children and adults are constitutionally significant. Driven in part by the science discussed in Section I, *supra*, the Court has made clear that young people are less deserving of the most severe punishments (banning the death sentence in *Roper v. Simmons*; the sentence of life without parole for non-homicide offenses in *Graham v. Florida*, and, in *Miller v. Alabama*, any mandatory sentence of life without parole). Beyond these

[78] For example, the ACLU and Prison Law Office are currently litigating a class action lawsuit on behalf of all prisoners in the custody of the Arizona Department of Corrections, including a proposed subclass that includes a subclass of all prisoners who or might in the future be subjected to isolation. *Parsons v. Ryan*, Third Amended Complaint, available at https://www.aclu.org/files/assets/gamez_v_ryan_final_complaint.pdf. This subclass has been certified and the certification has been upheld by the 9th Circuit. *Parsons v. Ryan*, No. 13-16396 D.C. No. 2:12-cv-00601-NVW (9th Cir. 2014). Analysis of federal data suggests that Arizona has in recent years has housed children in its adult jails and adult prisons. HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 103-106 (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf (including maps showing Arizona and a chart indicating that on June 30, 2010, Arizona held 131 children in its state prisons). Note that recent litigation challenging the solitary confinement of adults in New York, *Peoples v. Fischer*, and a subsequent case involving a young inmate, *Cookhorne v. Fischer*, look likely to result in a major reduction of the use of solitary confinement for children. *Peoples v. Fischer*, Case 11-CV-2694 § 2 (S.D.N.Y. 2014) (stipulation) *available at* http://www.nyclu.org/files/releases/Solitary_Stipulation.pdf. *See also* Tania Karas, *State Agrees to Limit Solitary for Juvenile Inmates*, N.Y. L. J., Oct. 30, 2014, *available at* http://www.newyorklawjournal.com/id=1202675020802/State-Agrees-to-Limit-Solitary-for-Juvenile-Inmates?slreturn=20150018201937.

[79] There have been recent challenges to solitary practices in a few state prison systems, in New York, Mississippi and Montana, and while the results were significant (including a consent decree radically restructuring the Mississippi prison system's response to youth and one significantly limiting isolation in New York State prisons), neither resulted in a ruling evaluating the constitutionality of the practice. This is also not to say that children in adult jails and prisons have not been impacted by rulings regulating the solitary confinement of adults, given the hundreds of thousands of children who have been held in adult jails and prisons in recent decades.

cases, which all addressed the constitutionality of sentencing of persons below 18, the Court also referenced these differences in its recent analysis of when an interrogation is 'custodial' for Fifth Amendment purposes, in *J.D.B. v. North Carolina*.[80] As will be discussed at greater length below, elements of the Court's reasoning in these key cases can be employed to challenge the solitary confinement of children in adult jails and prisons. Together, these cases support extending heightened Constitutional protections to conditions of confinement challenges brought by children housed in adult jails and prisons.

Perhaps the most important feature of the Court's recent jurisprudence on children in conflict with the law is the central role that the developmental and neurobiological differences between children and adults play in the Court's analysis.[81] The Court has relied on a number of specific characteristics that follow from these differences between children and adults, for example that their decision-making skills and cognitive abilities of youth are fundamentally different than adults;[82] that children are more vulnerable than adults to peer and family influences;[83] and that

[80] *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S.Ct. 2011 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012); *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011) (citing Roper and Graham in the context of custodial interrogations under the Fifth Amendment).

[81] *Miller v. Alabama*, 132 S.Ct. 2455, 2464, 2464 n. 5 (2012) (citing *Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010) and *Brief for American Psychological Association et al. as Amici Curiae 3*) (noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" and that "the evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

[82] *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005) (describing the "susceptibility of juveniles to immature and irresponsible behavior."); *Graham v. Florida*, 130 S.Ct. 2011, 2034 (2010) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)) (describing their "lack of maturity and [] underdeveloped sense of responsibility."); *Miller v. Alabama*, 132 S.Ct. 2455, 2458 (2012) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)) (describing that these characteristics "lead[] to recklessness, impulsivity, and heedless risk-taking."); *Miller v. Alabama*, 132 S.Ct. 2455, 2467 (2012) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) and *Johnson v. Texas*, 509 U.S. 350, 368 (1993)) (describing youth as "more than a chronological fact" – but "a time of immaturity, irresponsibility, impetuousness[,] and recklessness.").

[83] *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (stating that youth are marked by "vulnerability and comparative lack of control over their immediate surroundings."); *Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)) (describing youth as "more vulnerable or susceptible to negative influences and outside pressures."); *Miller v. Alabama*, 132 S.Ct. 2455, 2458 (2012) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)) (noting this susceptibility extends to "their family and peers."); *Miller v. Alabama*, 132 S.Ct. 2455,

children have greater capacity for change and reform.[84] As will be discussed further below, these specific, developmentally- and neuro-biologicallly-determined differences have an important bearing on the constitutionality of subjecting youth to solitary confinement, such as when their past behavior or predicted future behavior is cited as a justification for solitary confinement or when placement in solitary confinement deprives them of educational programming, recreation, rehabilitative programming and meaningful contact with their family, loved ones, and other role models. These same hallmarks of youth also place the consequences of any inhibition on growth and development caused by solitary confinement in stark relief.

While the Court's jurisprudence in this area has predominantly turned on the conclusion that "the differentiating characteristics of youth are universal," there is powerful language that recognizes the relevance of characteristics of sub-groups of children or individual children to Constitutional analysis. For example, the Court has specifically discussed children with a history of trauma and abuse, children with a history of drug abuse, and children with mental health problems in analyzing the disproportionality of certain sentences.[85] In the context of interrogations, the Court has described there being a "wealth of characteristics and circumstances" attendant to age that are relevant to the decision-making (and constitutional scrutiny of actions) of state actors,

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2458, 2464 (2012) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)) (describing children's "lack the ability to extricate themselves from horrific, crime-producing settings.").

[84] *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (describing how youth "struggle to define their identity."); *Miller v. Alabama*, 132 S.Ct. 2455, 2467 (2012) (citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993)) (stating that the "signature qualities" of youth are all "transient."); *Graham v. Florida*, 130 S.Ct. 2011, 2030 (2010) (describing how youth have a "capacity for change," and that they are therefore "in need of and receptive to rehabilitation.").

[85] *Miller v. Alabama*, 132 S.Ct. 2455, 2468-2469 (2012) (discussing "physical abuse" and "neglect" (with regard to Miller) as well as "family background" and "immersion in violence" with regard to Jackson as among those factors which would be legally significant for individuated decision-making); *Miller v. Alabama*, 132 S.Ct. 2455, 2462 (2012) (discussing "regular use of drugs and alcohol" by Miller as well as childhood in a family environment with a parent who "suffered from alcoholism and drug addiction" as among those factors which would be legally significant for individuated decision-making); *Miller v. Alabama*, 132 S.Ct. 2455, 2462 (2012) (discussing Miller's history of suicide attempts as among those factors which would be legally significant for individuated decision-making)

including the "background and mental and emotional development of a youth defendant."[86] The Court's discussion of individual characteristics of children or of subclasses of children also has important consequences for challenges to the constitutionality of subjecting youth to solitary confinement, including when state actors fail to consider relevant characteristics, specific needs (such as for treatment and accommodation) or specific vulnerabilities (such as to re-traumatization) before or during placement of children in solitary confinement. This language also opens the door for consideration of a range of characteristics to illustrate the harm or risk of harm posed by solitary confinement to individual children.

B. Eighth Amendment Challenges

Given the lack of a distinct Eighth Amendment conditions jurisprudence for children in adult jails and prisons, there is an important opportunity for litigators and the judicial branch to contribute to the inevitable development of case law that directly incorporates analysis of age and the attendant characteristics and vulnerabilities of youth via challenges to solitary confinement.[87]

[86] *J.D.B. v. North Carolina,* 131 S.Ct. 2394, 2404 (2011); *Miller v. Alabama*, 132 S.Ct. 2455, 2467-2468 (2012).
[87] These arguments are not entirely new. Other advocates have urged the development of an Eighth Amendment conditions jurisprudence, including with regard to solitary confinement. Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J. L. & SOC. CHANGE 285, 321 (2012) ("These differences also cannot be ignored when evaluating the conditions under which children are incarcerated. While the Constitution may tolerate the solitary confinement of adult inmates, for example, the isolation of children for weeks or months at a time recalls a Dickensian nightmare, which offends our evolving standard of decency and human dignity. Children's unique needs for educational services, physical and behavioral health services, and appropriate interactions with nurturing caregivers to ensure their healthy development raises special challenges – but also place special obligations on those responsible for their confinement.").

This section will present two strains of Eighth Amendment jurisprudence, discussing ways in which they might be adapted to address the solitary confinement of children in adult jails and prisons, including a proposed framing. I then discuss the utility of incorporating international law and standards as well as the medical and corrections consensus regarding solitary confinement in the context of Eighth Amendment challenges.

Framing Challenges to Solitary Confinement

There is a large body of Eighth Amendment jurisprudence addressing prison conditions. In challenges to the solitary confinement of children confined in jails or prisons post-conviction, advocates must grapple with a number of complex questions posed by that case law. Fortunately, the recent jurisprudence on children in conflict with the law in the United States, discussed above, creates new opportunities to extend and adapt the conditions jurisprudence to children.

The Supreme Court has explained that constitutional protections related to the conditions of confinement of persons post-conviction derive from the recognition that "prisoners retain the essence of human dignity inherent in all persons" and the fact that, through incarceration, "society takes from prisoners the means to provide for their own needs."[88] Thus "a prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity" and conditions of confinement that provide for these basic needs are constitutionally-required.[89]

[88] *Brown v. Plata*, 131 S.Ct. 1910, 1928 (2011)
[89] *Brown v. Plata*, 131 S.Ct. 1910, 1928 (2011). *See also*, *DeShaney v. Winnebago County Dept. of Social Svcs.*, 489 U.S. 189, 199-200 (1989) ("When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general

These sources of state constitutional obligations – the dignity of prisoners and custodial context – are powerful and straightforward. With regard to conditions of confinement for children who have been convicted of a crime, an issue not considered in the development of this jurisprudence, given the Court's recognition of the developmental differences between children and adults, the contours of the Eighth Amendment's protections must necessarily differ for children. In short, given the unique legal status, developmental differences and vulnerability of children, analysis of what conditions of confinement are incompatible with the dignity of child prisoners and analysis of what conditions meet the constitutional requirement to provide "basic sustenance" for growing bodies and brains (whether it relates to nutrition, physical exercise or programming and education) must certainly return different results than such analysis for similarly situated adult prisoners.

Finally, to this discussion of the interests that animate the scope of Eighth Amendment conditions protections for children, it is worth considering an additional interest that has driven some of the Court's older jurisprudence on children in the juvenile justice system: the notion that children, "by definition, are not assumed to have the capacity to take care of themselves … and are assumed to be the subject to the control of their parents."[90] This has led the Court to suggest in its substantive due process case law that when the state detains and cares for a child in conflict with the law in the juvenile justice system, "the State has a *parens patraie* interest in preserving

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wellbeing . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g. food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment…").

[90] *Shall v. Martin*, 467 U.S. 253, 265 (1984).

and promoting the welfare of the child."[91] It is certainly important to limit this doctrine from erasing the child prisoner's status as a rights-holder (the state's *parens patraie* interest should yield to the consideration of the best interests of the child), but it is worth noting that this doctrine heightens the burden on the state to provide for and promote the welfare of children in their care in prisons.

Prisoners, including child prisoners, "are sent to prison as punishment, not *for* punishment."[92] Given the Court's recognition of the differences between children and adults sentenced to time in prison, litigators should argue for recognition, and courts should construe, that the Eighth amendment imposes an obligation on prison officials to preserve and promote the welfare of child prisoners – either as a requirement rooted in their basic dignity, as a part of the requirement to provide for their basic sustenance or as an independent, *parens patraie* interest that is uniquely applicable to child prisoners held in the criminal justice system. All three of these can be seen to drive recognition of an Eighth Amendment standard that applies differently to children than to adults – and holds jail and prison officials to a higher standard when it comes to children.

Surmounting Deliberate Indifference

[91] *Shall v. Martin*, 467 U.S. 253, 263 (1984) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982).
[92] *Gordon v. Faber,* 800 F.Supp. 797, 800 (N.D.Iowa 1992), *aff'd,* 973 F.2d 686 (8th Cir.1992), cited in *Madrid v. Gomez*, 889 F.Supp. 1146, 1245 (N.D. Cal. 1995). But see, *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) ("To the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.")

The standard for evaluating when conditions of confinement violate the Eighth Amendment is the compound requirement that, in response to (a) an objectively serious harm, state actors must have exhibited (b) deliberate indifference.[93]

The objectively serious harm aspect of the Eighth Amendment test requires that the act or omission by a state official either "result in the denial of the minimal civilized measures of life's necessities" or "pos[e] a substantial risk of serious harm."[94] This requirement poses fewer difficulties for litigators seeking to challenge solitary confinement. There is strong agreement among experts that solitary confinement poses a risk of substantial mental and physical suffering and is highly correlated with an increased rate of suicide among children and adults.[95] In addition to research evidence and expert testimony regarding the risk of serious harm, including death, litigators are likely to be able to adduce evidence of harm, ranging from denial of services and programming necessary for healthy growth and development to evidence of self-harm, disassociation, and the like.

The subjective, deliberate indifference, aspect of this test generally requires that a constitutional challenge show that a state official "knows of and disregards an excessive risk to inmate health or safety" and that the official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [or she] must also draw the inference."[96] In short, "failure to alleviate a significant risk that he [or she] should have

[93] *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Estelle v. Gamble*, 429 U.S. 97, 102-103 (1976).
[94] *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).
[95] See section X supra and accompanying footnotes.
[96] *Farmer v. Brennan,* 511 U.S. 825, 837 (1994).

perceived but did not," according to the Court, "cannot under our cases be condemned as the infliction of punishment" in violation of the Eighth Amendment.[97]

This requirement undoubtedly poses the greatest difficulty for litigators and courts generally, and in particular with regard to the solitary confinement of children. However, the Supreme Court has also repeatedly recognized that some risks of harm are objectively so great that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."[98] Thus litigators will need both to develop a detailed record of the range of facts known to officials suggesting the serious risk of harm associated with the solitary confinement of youth as well as to emphasize that the broad range of serious risk is so significant as to be obvious – as the Court puts it in Pelzer, "The obvious cruelty of inherent in this practice should have provided [officials] with some notice that their [] conduct violated Hope's constitutional protection against cruel and unusual punishment"[99] – thus satisfying an inference of subjective, deliberate indifference against officials.[100]

In addition to adapting their arguments to this general standard, litigators and courts should also seek to clarify the application of this legal standard – developed in litigation regarding conditions of confinement for adults – in the unique context of its application to children. Indeed, as

[97] *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
[98] *Farmer v. Brennan*, 511 U.S. 825, 842. *See also Hope v. Peltzer*, 536 U.S. 730, 738 (2002) ("We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious.").
[99] *Hope v. Peltzer*, 536 U.S. 730, 745 (2002).
[100] The Court's decision in *Hope v. Pelzer* contains additional language that is readily adaptable to the solitary confinement of children – even for short periods: "As the facts are alleged by Hope, the Eighth Amendment violation is obvious. Any safety concerns had long since abated by the time petitioner was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison. He was separated from his work squad and not given the opportunity to return to work. Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation." *Hope v. Peltzer*, 536 U.S. 730, 738 (2002).

suggested above, the Court's recent jurisprudence on children in conflict with the law supports arguments for the development of a modified standard that applies differently to children. The Court's reasoning in the Fifth Amendment context, in *J.D.B.*, for example, differentiating between a standard for determining when a child is in custody versus one for determining when an adult is in custody, shows two ways in which the standard might shift.

First, *J.D.B.* supports re-interpreting the second, objective, prong of the test to require that when conditions of confinement pose an objectively serious risk of harm *to children*, account should be taken of their developmental differences and status as children in assessing the risk. As Justice Sotomayor concluded in analyzing, in *J.D.B.*, a custodial interrogation that took place in a school, "were the court precluded from taking J.D.B.'s youth into account, it would be forced to evaluate the circumstances here through the eyes of a reasonable person of average years . . . Neither officers nor courts can reasonably evaluate the effect of objective circumstances, that, by their nature, are specific to children."[101] The harm and risk of harm posed to children subjected to solitary confinement in adult jails and prisons is similarly specific to their vulnerability and developmental differences. Thus litigators should argue for, and courts should embrace, a re-casting the objective conditions test along these lines.

Second, the totality of the Court's recent jurisprudence on children in conflict with the law might support the proposition that "children cannot be viewed simply as miniature adults"[102] when it comes to the application of Eighth Amendment protections regarding conditions of confinement. The fact that children need services and programming in order to continue healthy growth and

[101] *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2405 (2011).
[102] *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2404 (2011).

development must necessarily distinguish the constitutional minimum standards for managing and caring for child prisoners from those for adults. Thus, as Marsha Levick and colleagues have argued,

> the standard for conditions cases applied to juveniles should be appropriately tailored to their developmental status, and not simply a reiteration of adult standards. To incorporate developmental status into the existing structure for conditions claims, a juvenile deliberate indifference standard would require courts to consider: (1) the seriousness of the harm in light of juvenile vulnerability; and (2) the intent of the correctional official in light of the heightened duty to protect juveniles.[103]

Solitary confinement places youth at such a substantial and objectively serious risk of harm. Officials who subject youth to this practice in spite of their heightened duty and these obvious risks are (constructively) deliberately indifferent to this risk.

Learning from Challenges Protecting Adults with Mental Disabilities

Another relevant area of jurisprudential development is the growing set of cases finding unconstitutional the placement of persons with serious mental disabilities in solitary confinement.[104] These cases have turned on lower courts first accepting the claim that solitary

[103] Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J. L. & SOC. CHANGE 285, 321 (2012).

[104] There are a growing number of lower court decisions on this issue. *See, e.g. IPAS v. Commissioner* 2012 WL 6738517 (S.D.Ind. 2012); *Jones'El v. Berge*, 164 F.Supp. 2d 1096 (W.D.Wis. 2001) (granting preliminary injunction ordering removal of seriously mentally ill prisoners from supermax prison); *Ruiz v. Johnson*, 37 F. Supp. 2d. 855, 915 (S.D. Tex. 1999), rev'd on other grounds, *Ruiz v. Johnson*, 243 F.3d 941 (5th Cir. 2001), adhered to on remand, *Ruiz v. Johnson*, 154 F. Supp. 2d 975 (S.D.Tex. 2001) ("Conditions in TDCJ-ID's administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiff's class made up of mentally-ill prisoners); *Coleman v. Wilson,* 912 F. Supp. 1282, 1320-21 (E.D.Cal. 1995); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D.Cal. 1995); *Casey v. Lewis*, 834 F. Supp. 1477, 1549-50 (D.Ariz. 1993); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (holding that evidence of prison officials' failure to screen out from SHU 'those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there' states an Eighth amendment claim).

confinement places persons with mental disabilities at an objectively serious risk of harm, and then on evidence that prison officials had knowledge of this risk when subjecting prisoners to solitary confinement. *Madrid* is illustrative: "For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequence serious enough, that we have no hesitancy in finding that the risk is plainly unreasonable."[105] Thus successful cases have included lengthy analysis of conditions for, and serious harm experienced by, persons with mental disabilities subjected to solitary confinement – and evidence that medical and correctional staff knew of these diagnosis and harms. Again, *Madrid*: "subjecting individuals to conditions that are "very likely" to render them psychotic or otherwise inflict a serious mental illness or seriously exacerbate an existing mental illness can not be squared with evolving standards of humanity or decency, especially when certain aspects of those conditions appear to bear little relation to security concerns. A risk this grave—this shocking and indecent—simply has no place in civilized society."[106]

It is reasonable to assert that, like adults with mental disabilities placed in solitary confinement, child prisoners, whose brains and bodies are still developing, also face such a heightened risk for suffering very serious or severe injury to their mental health in solitary confinement as to render the practice *per se* unconstitutional for children.[107]

[105] *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D.Cal. 1995) (discussing the already mentally ill as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression) (internal citations omitted).
[106] *Madrid v. Gomez*, 889 F. Supp. 1146, 1266 (N.D.Cal. 1995)
[107] This interpretive move evokes the parallels between the *Roper* court's abolition of the death penalty for children and the *Atkins* court's abolition of the death penalty for persons with intellectual disabilities. *Compare Roper v. Simmons*, 543 U.S. 551 (2005) *with Atkins v. Virginia*, 536 U.S. 304 (2002). Just as mental disabilities in *Atkins* and child status in *Roper* make the death penalty unconstitutional for these groups, as classes, so too should solitary confinement be construed as to be constitutionally off-limits.

The Merits of Proportionality

A final area of jurisprudence that can be leveraged to support Eighth Amendment challenges to the solitary confinement of children is the long tradition of proportionality analysis that has animated evaluations of when state action is inconsistent with "contemporary standards of decency."[108] This includes both death penalty jurisprudence and the use of proportionality concepts in the conditions area.[109]

The Supreme Court has now twice applied a proportionality analysis to term-of-year sentencing challenges involving children.[110] The Court first applied the categorical analysis it had traditionally reserved for its death-penalty jurisprudence (i.e., assessing the constitutionality of a particular type of sentence as it applies to an entire class of offenders) to a term-of-year sentence in *Graham v. Florida*.[111] That decision was based on the "fundamental differences" between children and adults as demonstrated by "developments in psychology and brain science."[112] Mirroring *Roper*, *Graham*'s analysis turns not on the category of crimes committed but on the

[108] *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).
[109] Since *Weems*, cases challenging sentencing – both the death sentence and term-of-years sentences – have relied on proportionality arguments to seek to show that a sentence was unconstitutionally disproportionate for a particular offense or class of offenders, with mixed results. *See, e.g. Harmelin v. Michigan*, 501 U.S. 957 (1991) (employing proportionality analysis but not finding a term of year sentence unconstitutional); *Trop v. Dulles*, 356 U.S. 86 (1958) (employing proportionality analysis and finding a sentence including denaturalization unconstitutional). Yet, as the Court in Graham stated, "The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 U.S. 48, 59 (2010).
[110] *Graham v. Florida*, 130 S.Ct. 2011 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012). See also, *Roper v. Simmons*, 543 U.S. 551 (2005).
[111] By applying a categorical rule to a term-of-years sentence, the Graham Court rejected the narrow proportionality principle that it had applied to life without parole sentences for adults and instead embraced the categorical analysis it had utilized in Roper to evaluate punishment of juveniles in the context of the death penalty. *Graham,* 130 S. Ct. at 2031-33; see also Id. at 2037 (Roberts, C.J., concurring in the judgment). *See Roper v. Simmons*, 543 U.S. 551 (2005) (holding that execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by Eighth and Fourteenth Amendments)
[112] Graham, 130 S. Ct. at 2026. Hence, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." Id.

category of offender.[113] To determine whether a sentencing practice is categorically unconstitutional under the Eighth Amendment, *Graham* prescribes a two-step analysis. First, the Court must determine whether there is a national consensus against the sentencing practice at issue, measured by objective indicia of society's standards as expressed in both legislative enactments and actual sentencing practices.[114] The Court must then exercise its own independent judgment to determine whether the punishment in question violates the Constitution, guided by controlling precedent and the Court's understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose.[115]

In its jurisprudence on the sentencing of children, after analyzing the state legislative landscape and sentencing practices involved, the Court, in its exercise of its independent judgment, turned to proportionality analysis, focusing closely on the penological justifications for the sentences, evaluating retribution, deterrence and incapacitation. Notably, the Court also considered international law and standards in its exercise of its own independent judgment.

In *Roper*, the Court found the juvenile death penalty disproportionate, stating: "retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity," and that "the same characteristics that render juveniles less culpable than adults [namely the, "susceptibility of juveniles to immature and irresponsible behavior;" their "vulnerability and comparative lack of control over their immediate surroundings;" and "the reality that juveniles

[113] Graham, 130 S. Ct. at 2023-24 ("[T]his case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.").
[114] See Graham, 130 S. Ct. at 2022-23; see also Kennedy v. Louisiana, 554 U.S. 407, 433-34 (2008).
[115] Graham, 130 S. Ct. at 2022 (citations omitted). The Court recently reaffirmed this approach in Hall v. Florida, 134 S. Ct. 1986, 1999-2000 (2014) ("That exercise of independent judgment is the Court's judicial duty").

struggle to define their identity"] suggest as well that juveniles will be less susceptible to deterrence."[116]

In *Graham*, the Court similarly analyzed the disproportionality of the sentence of life without parole for non-homicide offenses, stating, (a) "retribution does not justify imposing the second most severe penalty on the less culpable juvenile non-homicide offender;" (b) "in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence;" (c) "a life without parole sentence [labels a juvenile incorrigible and] improperly denies the juvenile offender a chance to demonstrate growth and maturity;" and finally, (d) "[b]y denying the defendant the right to reenter the community, the State makes an irrevocable judgment about the person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability … [f]or juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident."[117]

In *Miller*, the Court likewise emphasized the mismatch between the severity of the penalty of mandatory life without parole and the penological goals, noting that because, "'an offender's age . . . is relevant to the Eighth Amendment' and … 'criminal procedure laws that fail to take defendants' age into account at all would be flawed,'" sentencing schemes that prevent

[116] *Roper v. Simmons*, 543 U.S. 551, 553, 570 (2005).
[117] *Graham v. Florida*, 130 S.Ct. 2011, 2028, 2030 (2010).

consideration of the individual characteristics of youth before imposing a life without parole sentence for homicide offenses are disproportionate and thus unconstitutional.[118]

In each of these cases, the Court weighed the penological justifications underlying each sentence at issue and suggested that the developmental characteristics and vulnerabilities of children *as a class* made such sentences unconstitutionally disproportionate (either in all cases or when mandatory) and therefore violated contemporary standards of decency.

Outside of sentencing challenges, proportionality analysis has not figured prominently in the Court's Eighth Amendment jurisprudence. However, dicta in a few Supreme Court opinions in conditions of confinement challenges suggests that notions of proportionality have long animated the analysis of conditions of confinement. The Court's suggestion that "conditions must not involve the wonton and unnecessary infliction of pain"[119] has been the touchstone for the development of the subjective element of the contemporary test for evaluating conditions of confinement (deliberate indifference).[120] But the Court has repeatedly invoked notions of proportionality, including as a basis for what has come to be seen as the objective element – a substantial risk of harm. Thus, in *Rhodes*, the Court affirms that conditions may not be "grossly disproportionate to the severity of the crime warranting imprisonment."[121] More commonly, the concept of proportionality, and more specifically harm in *excess* of penological justifications, is invoked as a limiting analytic. Thus in *Estelle* the Court states that denial of medical care is impermissible because "it may result in pain and suffering which no one suggests would serve

[118] *Miller v. Alabama*, 132 S.Ct. 2455, 2463, 2466, 2469 (2012).
[119] *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).
[120] *See, e.g.*, *Farmer v. Brennan,* 511 U.S. 825, 834 (1994).
[121] *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

any penological purpose."[122] But the Court has also more directly invoked it to clarify the scope of the Constitution's protections. In *Farmer*, the Court describes "rape or violence among prison inmates" as something which "serves absolutely no penological purpose," and cites to *Gregg v. Georgia* for the proposition that "the Eighth Amendment prohibits all punishment, physical and mental, which is 'totally without penological justification'" and further characterizes "such brutality" as "the equivalent of torture," which is "offensive to any modern standard of human dignity."[123] In short, at least in dicta, the Supreme Court repeatedly invoked concepts of disproportionality to characterize when conditions of confinement can go beyond the pale.

A number of lower court decisions on conditions of confinement have much more directly invoked proportionality.[124] For example, a recent Second Circuit case, *People v. Fischer*, is a hopeful example of this trend. In an order granting, in relevant part, a motion for reconsideration, *Peoples* states that "prison officials were arguably put on sufficient notice that a sentence of three years of SHU [Special Housing Unit] confinement for a non-violent infraction

[122] *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).
[123] *Farmer v. Brennan*, 511 U.S. 825, 852-53 (1994) (citing *Greg v. Georgia*, 428 U.S. 153, 183 (1976)) (other citations omitted).
[124] *See Smith v. Coughlin*, 748 F.2d 783, 87 (2d. Cir. 1984) (holding that "SHU confinement is not cruel and unusual unless it is totally without penological justification, grossly disproportionate, or involve[s] the unnecessary and wanton infliction of pain."). *See also LeBron v. Artus*, 2007 WL 2765046 at *7 (N.D.N.Y. 2007) (finding that sanction of loss of two years good time for assault might violate Eighth Amendment if "grossly disproportionate," but finding no violation and citing *Fortuna v. Coughlin*, 222 A.D.2d 588, 588, 636 N.Y.S.2d 640 (2d Dep't 1995) (finding that penalties of 180 days in the SHU and one year's loss of good time were not so disproportionate to the offense . . . as to *shock one's sense of fairness*) (emphasis added)). In a discussion of this issue, John Boston & Dan Manville, PRISONERS' SELF-HELP LITIGATION MANUAL, 124 (4th Ed. 2010), cites a number of cases employing various iterations of proportionality review specifically with regard to challenges of terms of solitary confinement as excessive. *Pearson v. Ramos*, 237 F.3d 881, 885 (7th Cir. 2001) (stating that court "continue[s] to recognize" norm of proportionality); *Adams v. Carlson*, 368 F. Supp. 1050, 1053 (E.D.Ill. 1973) (sixteen months' segregation excessive for involvement in a work stoppage), on remand from 488 F.2d 619 (7th Cir. 1973); *Black v. Brown*, 524 F. Supp. 856, 858 (N.D.Ill. 1981) (eighteen months' segregation excessive for running in the yard), *aff'd in part and rev'd in part*, 688 F.2d 841 (7th Cir. 1982); *Hardwick v. Ault*, 447 F.Supp. 116, 125- 26 (M.D.Ga. 1978) (indefinite segregation held per se disproportionate); *Fulwood v. Clemmer,* 206 F. Supp. 370, 379 (D.D.C. 1962) (two years' segregation excessive for disruptive preaching).

of prison rules could well be found to be grossly disproportionate and, therefore, in violation of the Eighth Amendment."[125]

To date, no court has directly leveraged the recent sentencing jurisprudence for children into the conditions area.[126] But, given the centrality of concepts of proportionality to various strains of proportionality analysis, including at the margins of conditions analysis, developing an Eighth Amendment challenge to solitary confinement framed in terms of proportionality (in the alternative in parallel with or as part of a more traditional conditions argument) could breathe new life into challenges to extreme conditions of confinement.[127]

Such proportionality arguments can best be framed in two ways in the context of a challenge to solitary confinement. First, that due to the developmental differences between children and adults, and the unique vulnerability of children as a class, solitary confinement is grossly disproportionate for children *per se*. Second, that solitary confinement of children is grossly disproportionate to any legitimate penological objective with regard to the management of children in a penal setting. This latter argument will vary depending on the purpose for which solitary confinement was imposed in a given case (or across a given class).

[125] *Peoples II*, 2012 WL 24052593 at *4 (S.D.N.Y. 2012).
[126] To date, federal case law invoking *Roper, Graham* and *Miller* have predominantly focused on issues related to directly interpreting the application of those cases in the sentencing context (i.e. questions of retroactivity; de facto vs. de jure life without parole; mandatory life sentences based in part on sentences for crimes committed while juveniles, etc.). *See, e.g. U.S. v. Hoffman*, 710 F.3d 1228 (11th Cir. 2013) (stating that *Miller* does not suggest that an adult offender who has committed prior crimes as a juvenile should not receive a mandatory life sentence as an adult after committing a further crime as an adult); *Silva v. McDonald*, 891 F. Supp.2d 1116 (C.D. Cal. 2012) (refusing to extend logic of *Graham* and *Miller* to a sentence of life *with* the possibility of parole after 40 years); *In Re. Morgan*, 2013 WL 1499498 (11th Cir. 2013) (holding *Miller* not retroactive); *Adair v. Cates*, 2012 WL 4846263 (C.D. Cal. 2012) (discusses *Miller* in dismissing claim that age, bipolar disorder and drug addition of a 19-year old supported an Eighth Amendment sentencing challenge).
[127] For another take on this argument see, Alex Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53 (Jan. 2009).

The Role of International Law and Standards

The broad international consensus in support of a prohibition the solitary confinement of children, in law and in standards, can be used to bolster Eighth Amendment challenges to the practice. U.S. courts have long recognized international law and practice as a persuasive source of authority for questions arising under the U.S. Constitution.[128] The Supreme Court has repeatedly looked to international and comparative law in its analysis of the Eighth Amendment's prohibition of cruel and unusual punishment, including in its specific application to children as a measure of "contemporary standards of decency."[129]

In *Roper*, in the context of its exercise of its independent judgment, the Court indicated that it looked "to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[130] In *Graham*, the Court also affirmed the relevance of international law to the interpretation of the Eighth Amendment protections applicable to children. In its analysis of the constitutionality of juvenile life without parole laws, the Court examined the practices of other countries in sentencing children, as a continuation of the Court's "longstanding practice in noting the global consensus against the sentencing practice in question."[131] The Court concluded that international law, agreements and practices are "relevant to the Eighth Amendment … because the judgment

[128] For a long and excellent exegesis of this phenomena see Sarah Cleveland, *Out International Constitution*, 31 Yale J. Int'l. L. 1 (2006).
[129] *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).
[130] *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 102-103 (1958) (plurality opinion)).
[131] *Graham v. Florida*, 130 S.Ct. 2011, 2032 (2010).

of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it."[132]

As discussed in greater detail above, international law and standards are unequivocal on the issue of solitary confinement: International law prohibits anyone below 18 years of age from being subjected to solitary confinement, and condemns the practice as a form of cruel, inhuman or degrading treatment or punishment.[133]

International law on the use of solitary confinement of children can thus be invoked directly as relevant to the determination of whether a particular form of punishment is in line with "evolving standards of decency" and thus compliant with the Eighth Amendment. International law and standards can also be invoked to demonstrate a consensus that solitary confinement poses a substantial risk of a serious harm to a child.

The Role of the Emerging Domestic Consensus

The domestic consensus and standards on the solitary confinement of children can also be used to more effectively frame an Eighth Amendment challenge. The Supreme Court has repeatedly

[132] *Graham*, 130 S.Ct. 2011, 2034 (2010).
[133] The prohibition is reflected in two human rights treaties that impose binding international obligations on the United States and the Convention on the Rights of the Child, which the United States has signed but not ratified. *See*, ICCPR, Arts. 10, 14(4); CAT, Arts. 2, 16; CRC, Art. 37; General Comment 10, para. 89 (interpreting Art. 37 to prohibit solitary confinement as a form of discipline). See also, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 78-85, Annex (Istanbul Statement on the Use and Effects of Solitary Confinement), U.N. Doc A/63/175 (July 28, 2008) (by Manfred Nowak) *available at* http://www.unhcr.org/refworld/pdfid/48db99e82.pdf. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 77, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Mendez) *available at* http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf. See also infra notes X – X. ..

relied on domestic medical and psychological standards in assessing contemporary standards of decency.

In *Roper*, the Court references the "scientific and sociological studies respondent that his *amici* cite" to confirm the death penalty as a disproportionate form of punishment for children as a class under any legitimate penological objective.[134] In *Graham*, the Court references the growing body of neuroscience research cited by *amici*: "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[135] And in *Miller*, the Court again references the importance of scientific evidence to affirm what, "every parent knows:" "[o]ur decisions rested not only on common sense . . . but on science and social science as well . . . we [have] noted that developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds . . . [and] we reasoned that those findings . . . both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed."[136] More recently in the Eighth Amendment context, though not in a case involving a child, in *Hall v. Florida* the Court went further, stating that scientific consensus can "inform [the Court's] determination [of] whether there is a consensus that instructs how to decide" specific constitutional questions.[137]

[134] Roper, 543 U.S. 551, 569-73 (2005).
[135] Graham, 560 U.S. 48, 68 (2010).
[136] *Miller*, 132 S.Ct. 2455, 2564-65 (2012) (citations omitted).
[137] *Hall v. Florida*, 134 S.Ct. 1986, 1993- 1996 (2014) (Discussing the prohibition on the execution of adults with intellectual disabilities: "[t]o determine if Florida's cutoff rule is valid, it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holdings of *Atkins*. This, in turn leads to a better understanding of how the legislative policies of various States, and the holdings of state courts, implement the *Atkins* rule."). This has not been without controversy. Id. at 2002, 2005 (Alito, J. dissenting) ("[T]he Court strikes down a state law based on the evolving standards of *professional societies,* most notably the American Psychological Association . . . [u]nder our modern Eighth Amendment Cases

The role that scientific research and medical consensus has played in the Court's recent Eighth Amendment jurisprudence paves the way for this same consensus to be invoked in challenges to solitary confinement to highlight how the practice is inconsistent with evolving standards of decency. As with international law and standards, the consensus should be invoked to demonstrate that solitary confinement poses a substantial risk of a serious harm to children and, how extreme the practice is, for purposes of assessing proportionality. In light of the consensus, it is not hard to imagine a court concluding, as did the District Court in *Madrid* with regard to prisoners with mental health problems, that "it is inconceivable that any representative portion of our society would put its imprimatur on a plan to subject [children] to [solitary confinement]."[138]

C. Fourteenth Amendment Challenges

Much of the public rhetoric on the solitary confinement of children invokes the Eighth Amendment's prohibition against cruel and unusual punishment.[139] Yet, as earlier discussed, the vast majority of children in adult facilities who are at risk of being placed in solitary confinement are held in pre-trial detention. Conditions of confinement for these children must comply with the higher standards imposed on the detaining authority the substantive due process guarantees of the Fifth and Fourteenth Amendments, not Eighth Amendment standards.[140]

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what counts are our society's standards – which is to say, the standards of the American people – not the standards of professional associations, which at best represent the view of a small professional elite").

[138] *Madrid v. Gomez*, 889 F.Supp. 1146, 1266 (1995).

[139] *See, e.g.,* AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, POLICY STATEMENTS: SOLITARY CONFINEMENT OF JUVENILE OFFENDERS (Apr. 2012), *available at* http://www.aacap.org/cs/root/policy_statements/solitary_confinement_of_juvenile_offenders.

[140] Note that for this reason it is important to avoid pursuing 8th Amendment challenges in contexts in which the 5th and 14th Amendment apply – substituting the 8th Amendment (although it is commonly done by courts) risks further eroding the substantive due process standard.

This section will present three strains of Fifth and Fourteenth Amendment jurisprudence, discussing ways in which they might be adapted to address the solitary confinement of children in adult jails and prisons. I then discuss the utility of incorporating international law and standards and the broad and growing domestic consensus against the use of solitary confinement, relevant to Fifth and Fourteenth Amendment challenges.

Framing Challenges to Solitary Confinement

While legally innocent one cannot be punished under the penal law. Eighth Amendment scrutiny is thus appropriate "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions."[141] For this reason, conditions challenges brought by adults held before trial and juveniles held in the juvenile justice system, pre-adjudication, are generally analyzed under the Fifth or Fourteenth Amendment protections of substantive due process.[142] Moreover, because juvenile adjudications are not criminal prosecutions, the majority of courts also analyze conditions challenges brought by juveniles held post-adjudication under the Constitution's protections of substantive due process - rather than the

[141] *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). See also *Id*. at 670 n. 39, 671 n. 40 (Stating that "the Court has never held that all punishments are subject to Eighth Amendment scrutiny" and that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.").

[142] *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (holding that conditions of confinement for adults held in pretrial federal detention facilities must conform to the substantive due process standards of the Fifth Amendment, under which "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); *Schall v. Martin*, 467 U.S. 253, 269 (1984) (treating conditions claims brought by juveniles detained pre-adjudication under the Fourteenth Amendment and stating that, "it is axiomatic that "[d]ue process requires that a pretrial detainee not be punished")(c*iting Bell*, 441 U.S., at 535, n. 16).

Eighth Amendment. The Supreme Court has yet to weigh in on this issue.[143] There is, therefore, a range of jurisprudence regarding substantive due process which is relevant to the solitary confinement of children held pending trial in adult jails.

As with the Eighth Amendment, the protections of the due process clause are in large part derived from the state's affirmative obligations and duties with regard to safety and well-being triggered by deprivation of liberty. This is known as the 'special relationship' doctrine: "When the state takes a person into its custody and holds him [or her] there against his [or her] will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[144] As under the Eighth Amendment, the Court has suggested that this in part turns on the fact that detention, "by the affirmative exercise of [State] power" "renders

[143] *But see Ingraham v. Wright*, 430 U.S. 651, 669 n. 73 (1977) (stating "some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment. We have no occasion in this case, for example, to consider whether or under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protections of the Eighth Amendment"). Notably, the Supreme Court has described the juvenile justice system as "rooted in social welfare philosophy rather than in the *corpus juris*," casting doubt on whether such a functional analysis would result in direct application of the Eighth Amendment to post-adjudication juveniles. *Kent v. United States*, 383 U.S. 541, 554-55 (1966) (describing the objective of the juvenile justice system "to provide measures of guidance and rehabilitation for the child and protection for society and not to fix criminal responsibility, guilt and punishment."). Circuits differ in whether they treat conditions challenges under substantive due process alone, under substantive due process and the Eighth Amendment, or the Eighth Amendment alone. *Compare Morales v. Turman*, 562 F.2d 993, 998 n.1 (5th Cir. 1977) (applying the Eighth Amendment to post-adjudication juvenile facilities) *with Morgan v. Sproat*, 432 F.Supp. 1130, 1135 (S.D.Miss. 1977) (post-adjudication youth protected by both Fourteenth and Eighth Amendments). Note that because the majority of children in detention and therefore at risk of being subjected to solitary confinement are either in juvenile facilities or pre-trial adult facilities, it is important to avoid pursuing a straight 8th Amendment challenge. Indeed, given that the 5th and 15th Amendments are more protective, bringing 8th Amendment challenges for children held pre-trial or pre-adjudication risks further narrowing the substantive due process protections for adults ***and children*** in pre-trial facilities (by affirming the 8th Amendment standard) and also risks excluding juveniles in post-disposition detention (after being adjudicated delinquent) from its protections (by doing the same).

[144] *DeShaney v. Winnebago Cty. Dept. Soc. Svcs.*, 109 U.S. 189, 199-200 (1989).

[an individual] unable to care for himself [or herself]."[145] Thus if the state "fails to provide for his [or her] basic human needs … it transgresses the substantive limits on state action."[146]

The Supreme Court has yet to determine the precise nature and scope of protection afforded by substantive due process to children in the juvenile justice system or held pending trial in adult jails. In particular, the Court has not considered whether the obligation to protect the "general well-being" of children includes an obligation to promote healthy growth or development or in appropriate cases, rehabilitation. In civil detention contexts, in *Youngberg v. Romeo*, the Court has stated that a limited, affirmative duty of "training as may be reasonable in light of [an individual's] liberty interests in safety and freedom from unreasonable restraints" – in order to avoid infringement on those interests.[147] Although *Youngberg* arises outside of the juvenile justice or adult criminal systems, it suggests that substantive due process may place affirmative obligations on state officials (akin to the obligation to provide training in *Youngberg*) to ensure that core elements of a child's liberty interest – the interest in being safe and the interest in begin free from unreasonable restraint – are guaranteed when they have been deprived of their liberty but while they remain legally innocent of any offense. Thus while it may be uncontroversial that, "[w]hen a person is institutionalized – and wholly dependent on the State[,] … a duty to provide

[145] *DeShaney v. Winnebago Cty. Dept. Soc. Svcs.*, 109 U.S. 189, 200 (1989).
[146] *DeShaney v. Winnebago Cty. Dept. Soc. Svcs.*, 109 U.S. 189, 200 (1989) ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.")
[147] *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). *See also A.M. ex rel. J.M.K. v. Luzerne County Juvenile Det. Ctr.,* 372 F.3d 572, 584 (3d Cir. 2004) ("There appears to be no dispute between the parties that A.M. has a liberty interest in his personal security and well-being, which is protected by the Fourteenth Amendment."); *Milonas v. Williams,* 691 F.2d 931, 942 (10th Cir.1982) ("A person involuntarily confined by the state to an institution has the right to reasonably safe conditions of confinement, the right to be free from unreasonable bodily restraints, and the right to such minimally adequate training as reasonably may be required by these interests.").

certain services and care does exist," it is unclear what precise content this duty might carry with regard to children in conflict with the law – and particularly children in adult jails.[148]

In addition to the Constitution, state and federal statutes establish rights and privileges for children in the juvenile justice system and, to a lesser extent, the adult criminal justice system, that impose affirmative obligations on state officials. These rights and privileges may encompass statutory rights to rehabilitation, to education, and to a healthy environment. Deprivation of these rights and privileges in a particular case may help in providing content to the type of care and training arguably required by substantive due process.

The final strain in the jurisprudence on children deprived of their liberty in the juvenile justice system relevant to the substantive due process analysis is the notion that children, "are assumed to be the subject to the control of their parents."[149] Therefore, the Court has suggested, when state officials deprive children of their liberty, "the State has a *parens patraie* interest in preserving and promoting the welfare of the child." [150] *Parens Patraie* is not entirely uncontroversial, as it suggests a certain lack of autonomy that is at odds with case law affirming autonomy.[151] Yet, given the wealth of evidence that children deprived of their liberty at a formative time of their development require treatment and care that differs from that which is required to provide for the basic welfare of fully-grown adults awaiting trial, this interest is worth highlighting in the detention context.

[148] *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982).
[149] *Shall v. Martin*, 467 U.S. 253, 265 (1984).
[150] *Id.* at 263 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982).
[151] *Hodgson v. Minnesota*, 543 U.S. 551 (2005) (Finding that juveniles are mature enough to decide whether to obtain an abortion without parental involvement.)

The Prohibition on Punishment

The test for evaluating when conditions of confinement for adults held in adult jails violates substantive due process is well-established. In *Bell v. Wolfish*, the Supreme Court held that although adults held in pre-trial detention may be subjected to the regular conditions and restrictions imposed by the detention facility, they "may not be *punished* prior to an adjudication of guilt."[152]

The Court held that conditions and restrictions constitute such unconstitutional "punishment" when there is a manifest intent to punish, or when conditions are "arbitrary or purposeless" or "excessive" in relation to a legitimate government objective, such as the effective management of the facility and the safety and security of staff and detainees.[153] While this seems quite deferential, when citing *Bell* in the juvenile context, the Supreme Court advised some caution: "the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment."[154]

Re-framing the limit placed on punishment in terms of proportionality – unconstitutional excess – between the conduct/conditions challenged and provision for the safety and security of detainees creates a significant opportunity for litigators challenging the solitary confinement of

[152] *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (emphasis added).
[153] *Bell v. Wolfish,* 441 U.S. 520, 539, 540 & n.23(1979). (The court has also noted that deference is in order: "In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.").
[154] *Schall v. Martin*, 467 U.S. 263 (1984) (citing *Bell v. Wolfish*, 441 U.S. at 535 n.16.) ("Even given, therefore, that pretrial detention [of children] may serve legitimate regulatory purposes, it is still necessary to determine whether the terms and conditions of confinement under [the statute] are in fact compatible with those purposes.").

children. In particular, the Court's recent jurisprudence on children in conflict with the law provides persuasive authority for the consideration of individual and developmental characteristics of youth in any challenge.[155] This case law also suggests that at least some of these characteristics should be seen to be objectively apparent to jail officials.[156] The rationale provides a legal basis on which to argue that the solitary confinement of children detained pending trial in adult jails is excessive to any legitimate purpose and therefore amounts to unconstitutional punishment.

Departure from Standards

Most litigation challenging conditions of confinement of children in the juvenile justice system evaluates the substantive due process limits using a standard from another civil detention context: involuntary commitment in the mental health context. There, the Court has held that detainees' "liberty interests in safety and freedom from bodily restraint" entitle them to freedom from "unreasonable restraint."[157] Conditions of confinement are seen to impose such a restraint when, in light of "professional judgment, practice or standards," they constitute "a substantial departure from accepted professional judgment, practice, or standards."[158]

Several lower courts have considered challenges to solitary confinement practices of children under the Fifth and Fourteenth Amendment. For example, in *R.G. v. Koller*, plaintiffs, LGBTi

[155] *See supra* Section II A and accompanying footnotes.
[156] A*J.D.B. v. North Carolina*, 564 U.S. __ Slip Op. at 17 (2011) ("[i]n short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.").
[157] *Youngberg v. Romeo*, 457 U.S. 307, 321, 323 (1982).
[158] *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

youth held in a Hawaii juvenile facility after having been adjudicated delinquent in the juvenile justice system, challenged their solitary confinement.[159] The district court concluded that "the expert evidence before the court uniformly indicates that long-term segregation or isolation of youth is inherently punitive and is well outside the range of accepted professional practices."[160]

As discussed, the Supreme Court has relied on the science of adolescent development to illustrate the bounds of acceptable state sentencing regimes, and lower courts have relied on similar research in challenges to conditions of confinement.[161] These same findings, and consensus among experts professional organizations and standards may also be relied upon to demonstrate that solitary confinement, as practiced in adult jails, is well beyond the range of accepted professional practices – and thus constitutes unconstitutional punishment.

Shocks the Conscience

Another strand of Substantive Due Process jurisprudence that may be drawn on are those cases that consider the limits of permissible government conduct outside of the detention context, where "the touchstone of due process is protection of the individual against arbitrary action of government."[162]

[159] 415 F. Supp. 2d 1129, 1155 (D.Haw. 2006).
[160] *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155 (D.Haw. 2006) (Citing various expert declarations: "Roush Decl. ¶¶ 12–13 (noting that social isolation is recognized as "inherently punishing" and that "[p]unishing a ward in order to protect that ward from the harmful actions of others is not an acceptable correctional practice for juveniles"); Miesner Decl. ¶ 11 ("Prolonged isolation or seclusion is punitive in nature and can cause serious psychological consequences."); Griffis Decl. ¶ 12 ("Such segregation practice is not generally accepted and falls outside of professional standards").) Indeed, one expert opined that HYCF may be the only juvenile facility in the country that employs this practice. (Griffis Decl. ¶ 12)").
[161] See Section II B. supra and accompanying footnotes.
[162] *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).

In *County of Sacremento v. Lewis*, a case evaluating government conduct during a police car chase, the Court held, applying the substantive due process standard, that conduct is "fundamentally arbitrary in the constitutional sense" and violates this "substantive … limit" when it "shocks the conscience" and "violates the decencies of civilized conduct."[163] The Court noted that, while some "conduct intended to injure in some way *unjustifiable by any government interest* is the sort of official action most likely to raise to conscience shocking level," in other circumstances, "when the point of the conscience shocking is reached when injuries are produced … following from something more than negligence but less than intentional conduct[,] … [will be] a matter for closer calls."[164]

This reasoning could be applied to an assessment (in the alternative in parallel with or as part of a more traditional substantive due process argument) of whether solitary confinement "shocks the conscience." At the very least, the standard can be used to bolster the way in which notions of proportionality animate evaluating violations of the Fifth and Fourteenth Amendment. In the appropriate case, the solitary confinement of children should be argued to be unjustifiable by any government interest.

The Role of the Emerging Domestic Consensus

Evidence regarding good-practices and the opinions of correctional experts and professional groups are directly relevant to the substantive due process analysis and should be incorporated into substantive due process challenges. With regard to the *Bell* standard, the significant and

[163] *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998).
[164] *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998) (citing *Rochin v. California*, 342 U.S. 165, 172-173 (1952)) (emphasis added).

growing national consensus that solitary confinement is inconsistent with good practices for managing children deprived of their liberty can be adduced (including through expert testimony and adducing reforms implemented by other jurisdictions) to show that its use for children is so excessive with regard to the government's objective as to constitute unconstitutional punishment. With regard to the case law protecting children from unreasonable restraint, the consensus can help demonstrate how starkly solitary confinement as so often practiced in adult jails is well beyond the range of accepted professional practices. Finally, the consensus can bolster claims (particularly in the egregious cases that are all too common in adult jails) that solitary cannot be justified by any legitimate government interest – and shocks the conscience.

The Role of International Law and Standards

International human rights law and standards are unquestionably relevant to the Eighth Amendment, and in particular the protections it affords children.[165] There is no equivalently rich history of invoking international law in the exposition of substantive due process protections. However, the internationally-recognized prohibition on subjecting children to solitary confinement may be used to illustrate the ways in which solitary confinement of children cannot be justified by any legitimate penological objective (and thus constitutes punishment), how it departs from accepted professional standards (and thus constitutes unreasonable restraint) and that it is unjustifiable by any government interest (and thus shocks the conscience).[166]

[165] *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).
[166] For an interesting discussion of citation to international law in an area now covered by the Fourteenth Amendment, in *Pennoyer v. Neff*, see Sarah Cleveland, *Out International Constitution*, 31 Yale J. Int'l. L. 1, 50 (2006).

III. Conclusion

The legality of the solitary confinement of children in adult jails and prisons has been the subject of almost no sustained attention – in spite of it being a practice that has impacted the lives, health and well-being of thousands of children in recent years. The public, judges and lawyers are beginning to turn their attention to systematic reform of jail and prison conditions. This article is the first to offer a sustained treatment of this practice, demonstrating the availability of a range of constitutional theories for promoting a ban on this practice. In particular, this article has shown that the solitary confinement of children in adult jails and prisons should be seen to fail both Eighth and Fourteenth Amendment tests for conditions of confinement. Additionally, this article has shown how litigators and judges can make use of a significant body of international law as well as domestic correctional and medical standards relating to the use of physical and social isolation. In the future, reformers seeking to ensure that children held in jails and prisons designed to hold adults can use these new tools to promote legal standards that reflect the developmental and legal differences between children and adults and the concomitant risk of harm posed by solitary confinement.