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 legislation. Yet there is a broad consensus that the practice places children at great risk of permanent physical and mental harm, and that it violates international human rights law and standards. Lawmakers, policymakers, and judges across the United States 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 recent executive action by President Obama and significant reform in New York City at the leading edge. Despite the beginnings of a trend, there have been very 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

∞ Staff Attorney, American Civil Liberties Union of Southern California. Research for this article was completed with the generous support of a Dash/Muse Fellowship at the Georgetown Law Human Rights Institute, a Plumer Visiting Fellowship at St. Anne's College and an Associate Membership at Nuffield College, University of Oxford. From 2011-2013, the author contributed to the work of Human Rights Watch and the American Civil Liberties Union on the solitary confinement of children as the Aryeh Neier Fellow. The author would like to thank Steven M. Watt for his significant engagement in the development of the arguments presented here as well as Amy Fettig, Alex A. Reinert and Kim Brooks Tandy for their comments on earlier drafts of this article. Finally, the author would like to thank Naz Ahmad for her research assistance as well as the staff of the NYU Review of Law & Social Change, and particularly, Samuel Steinbock-Pratt and Eliza Vasconcellos, for their contributions. The views presented here along with any errors or omissions are the author's alone.

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 . . . [R]esearch still 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, No. 13-1428, slip op. at 2, 4 (June 18, 2015).

> *[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.*
>
> – Associate Justice Kennedy, writing for the majority in Graham v. Florida, 560 U.S. 48, 68 (2010).

I.
INTRODUCTION

At the close of the 2014 United States 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.[1] 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."[2] Justice 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."[3] This discussion was notable, in part, because solitary confinement was not at issue in the case, nor was information about solitary confinement part of the record before the Court.

1. *See* Davis v. Ayala, No. 13-1428 (June 18, 2015) (Kennedy, J., concurring).
2. *Id.* at 2–3.
3. *Id.* at 4.

In his *Davis* concurrence, Justice Kennedy referenced the death of Kalief Browder.[4] Less than two weeks before the Court's opinion in *Davis* was issued, at age twenty-two, Browder hanged himself from a window in his family's New York City apartment.[5] Media reports drew a connection between Browder's death and the 800 days he spent in solitary confinement starting at age sixteen (while detained pre-trial on Rikers Island and until the charges against him, for allegedly stealing a backpack, were dropped).[6] The tragic suicide came shortly after New York City approved a ban on the solitary confinement of all inmates aged twenty-one or younger.[7]

Justice Kennedy did not highlight Browder's young age during the time he spent in solitary confinement in an adult jail—in other words, the fact that he was a child.[8] Perhaps this was due to the reality that there is a significant jurisprudential gap with regard to conditions of confinement of adolescents under age eighteen held in adult jails and prisons.[9] The legality of the solitary confinement of children in adult jails and prisons—a widespread but relatively unknown practice—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 detailed account of the constitutionality of solitary confinement of children. In short, this article argues

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4. *Id.* at 3–4.

5. Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html.

6. *See, e.g.*, Jim Dwyer, *A Life That Frayed as Bail Reform Withered*, N.Y. TIMES (June 10, 2015) http://www.nytimes.com/2015/06/10/nyregion/after-a-shocking-death-a-renewed-plea-for-bail-reform-in-new-york-state.html. This also included an Op Ed by the author. Ian M. Kysel, *Solitary confinement makes teenagers depressed and suicidal*, WASH. POST (June 17, 2015), https://www.washingtonpost.com/posteverything/wp/2015/06/17/solitary-confinement-makes-teenagers-suicidal-we-need-to-ban-the-practice/.

7. Michael Winerip & Michael Schwirtz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 13, 2015) http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html.

8. Throughout this article, I use the terms child or children to refer to individuals under the age of eighteen. This is the definition of "child" in international law and practice. *See* U.N. Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. Age eighteen is also the dividing line generally employed by the U.S. Supreme Court in cases considering the rights of children. *See generally* Montgomery v. Alabama, No. 14-280, slip op. (Jan. 25, 2016) (holding that the rule announced in Miller v. Alabama was a substantive rule and thus applied retroactively); Miller v. Alabama, 132 S. Ct. 2455 (2012) (holding unconstitutional mandatory sentences of life without parole for offenses committed before age eighteen); Graham v. Florida, 560 U.S. 48 (2010) (holding unconstitutional sentences of life without parole for nonhomicide offenses committed before age eighteen); Roper v. Simmons, 543 U.S. 551 (2005) (holding unconstitutional the death penalty for offenses committed before age eighteen).

9. Justice Kennedy has, however, helped cement a major shift in jurisprudence regarding the criminal sentencing of children. *See, e.g.*, Graham v. Florida, 560 U.S. 48 (2010) (holding that sentences of life without parole may not be imposed for nonhomicide offenses committed by juveniles); Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty may not be imposed for offenses committed by juveniles).

that the unique harms (and risks of harms) to children, combined with the developmental and legal differences between children and adults, call for unique standards for evaluating conditions of confinement for children in adult jails and prisons, and for a constitutional prohibition on the solitary confinement of children in particular. This article also shows how international law, medical standards, and correctional standards are relevant to legal challenges to the solitary confinement of children. In doing so, this article seeks to be a ready reference for litigators, judges, and others wrestling with these issues.

This in no way should be viewed to imply that the solitary confinement of adults is constitutional, or to minimize the particularly harmful or widespread use of long term solitary confinement of adults[10]—but rather to suggest that there are both practical and jurisprudential reasons for viewing children as different from adults when it comes to evaluating how the constitution protects them when they are deprived of their liberty in adult jails and prisons. Likewise, the development of a conditions jurisprudence for children in jails and prisons should not be read to endorse the practice of detaining children with adults or treating them as adults. If anything, rather, recognizing the state's obligations to children in this context in constitutional case law might in actuality contribute to limiting all of these practices.

This article proceeds in three Parts. The remainder of Part I presents the legal and factual context in which children are subjected to solitary confinement in adult jails and prisons, as well as the points of consensus regarding how the practice is harmful, counterproductive, and violative of international law and standards. This Part is organized to frame the issue and also to provide a range of resources to support litigation. Part II expounds proposed constitutional theories for challenging the solitary confinement of children, with a particular attention to using international law and standards in parallel with, and to bolster, domestic law claims. This Part articulates constitutional theories for challenging pre-trial solitary confinement of children as a violation of substantive due process and for challenging post-conviction solitary confinement of children as a violation of the ban on cruel and unusual punishment. Part III concludes, arguing that workable alternatives to this widespread use of solitary confinement necessarily requires a ban on the solitary confinement of children.

A. Background: The Path to Solitary Confinement

Because solitary confinement has long been the dark secret of the criminal justice system, the circumstances in which children are held in adult jails and prisons and subjected to solitary confinement there is neither intuitive nor self-

10. A recent study estimated that as many as 100,000 people are in solitary confinement in the United States. *See* Yale Law School Arthur Liman Public Interest Program and the Association of State Correctional Administrators, *Time in Cell: The Liman-ASCA 2014 National Survey of Administrative Segregation in Prison* ii (Aug. 2015), http://mediad.publicbroadcasting.net/p/wnpr/files/201509/asca-liman_administrative_segregation_report_revised_aug_27_2015.pdf.

explanatory. In order to develop law and precedent protecting young people from the harms of solitary confinement and clarifying the constitutionality of the practice, it is necessary to consider state charging and sentencing law and practice, as well as how officials use solitary confinement to manage children detained in jails and prisons.

1. How Do Children End up in Adult Jails and Prisons?

For most of the period since the juvenile justice system was developed at the end of the nineteenth century, the vast majority of children in conflict with the law in the United States had their cases heard and resolved in a system that was, at least in theory, designed with them in mind.[11] These children, when adjudicated delinquent and committed to government care following disposition, were generally held in juvenile detention facilities.[12]

For much of the twentieth century, juvenile courts had discretion to waive jurisdiction over certain individual cases, sending children to be tried in the adult criminal justice system.[13] Beginning in the 1980s, however, state legislatures enacted a number of mechanisms to increase the number of children tried in the adult criminal justice system.[14] Between 1992 and 1997, forty-five states passed laws facilitating the transfer of juvenile cases into the adult system.[15] For this

11. For a concise overview of the history of the juvenile justice system in the United States, see REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 31–47 (Richard Bonnie, Robert Johnson, Betty Chemers, & Julie Schuck eds., 2013). While the adult criminal and juvenile justice 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: the federal government estimates that in 2010, more than 1,600,000 children were arrested. HOWARD SNYDER, U.S. DEP'T OF JUSTICE, ARRESTS IN THE UNITED STATES 1990–2010, at 2 tbl.1 (2012), http://bjs.ojp.usdoj.gov/content/pub/pdf/aus9010.pdf. That same year, juvenile courts handled approximately 1,368,000 cases, CHARLES PUZZANCHERA & CRYSTAL ROBSON, U.S. DEP'T OF JUSTICE, DELINQUENCY CASES IN JUVENILE COURTS 2010, at 2 (2014), http://www.ojjdp.gov/pubs/243041.pdf. Approximately 60,000 juveniles were held in juvenile detention facilities, Melissa Sickmund, Easy Access to the Census of Juveniles in Residential Placement, U.S. DEP'T OF JUSTICE, http://www.ojjdp.gov/ojstatbb/ezacjrp/ (last visited Feb. 29, 2016) (cross-tabulating age and detention or commitment status in 2010 for youth below the age of eighteen). Human Rights Watch and the American Civil Liberties Union then estimate (in a report I authored) that 139,495 juveniles were detained in adult jails and prisons that year. 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) [hereinafter GROWING UP LOCKED DOWN], http://www.hrw.org/sites/default/files/reports /us1012ForUpload.pdf.

12. Juvenile delinquency proceedings are not criminal proceedings (hence the common term "disposition" rather than conviction), though the Supreme Court has recognized the serious nature of the proceedings and extended a number of procedural protections to them. *See, e.g.*, In re Gault, 387 U.S. 1, 41, 55–57 (1967) (holding the rights to counsel, to confrontation, and against self-incrimination applicable to delinquency proceedings).

13. *See* HOWARD SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 86 (1999), https://www.ncjrs.gov/html/ojjdp/nationalreport99/chapter4.pdf.

14. *Id.* at 88.

15. *Id.* at 89.

large group of children, being charged and/or sentenced as if they are adults generally has come to mean deprivation of liberty 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; practices can even vary greatly from one county or city to the next.[16] In many states, in addition to the discretion to "waive" or "transfer" a case into adult court, certain crimes are excluded from the jurisdiction of the juvenile justice system (including, in some cases, specific offenses for children of particular ages).[17] Some states grant prosecutors the ultimate discretion to decide whether to file charges in adult court (sometimes called "direct file"), as opposed to filing in the juvenile justice system.[18] And, in some states, once convicted for an adult offense, any subsequent conduct in conflict with the law is necessarily addressed in adult court—a legal fiction perversely termed "once an adult, always an adult."[19]

In most of the country, criminal adulthood begins at age eighteen, but ten U.S. states currently treat sixteen or seventeen as the age of criminal majority.[20] 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.[21] There is an astounding lack of data regarding these charging practices, but even the limited information available indicates that as many as tens of thousands of children are processed in the adult criminal justice system each year.[22]

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16. PATRICK GRIFFIN, SEAN ADDIE, BENJAMIN ADAMS & KATHY FIRESTONE, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 3 (2011) (comparing various state juvenile charging and sentencing regimes).

17. *Id.* (indicating that in 2011, forty-five states allowed discretionary waiver and twenty-nine statutorily excluded certain offenses from the juvenile system).

18. *Id.* (indicating that in 2011, fifteen states gave prosecutors discretion to file at least some charges in either the juvenile justice or adult criminal justice system). For an analysis of how one state's direct file law is used, see generally HUMAN RIGHTS WATCH, BRANDED FOR LIFE: FLORIDA'S PROSECUTION OF CHILDREN AS ADULTS UNDER ITS "DIRECT FILE" STATUTE (2014), http://www.hrw.org/sites/default/files/reports/us0414_ForUpload%202.pdf.

19. GRIFFIN, ADDIE, ADAMS & FIRESTONE, *supra* note 16, at 3 (indicating that in 2011, thirty-four states prosecuted children as adults once they were convicted of a prior adult offense).

20. JEFFREY A. BUTTS & JOHN K. ROMAN, *Line Drawing: Raising the Minimum Age of Criminal Court Jurisdiction in New York* 5 (2014), http://johnjayresearch.org/rec/files/2014/02/linedrawing.pdf. There are some signs that suggest that this number may soon shrink. *New York Teenagers Dumped in Adult Jails*, N.Y. TIMES (May 21, 2016), http://www.nytimes.com/2016/05/22/opinion/new-york-teenagers-dumped-in-adult-jails.html?ref=opinion&_r=0 (discussing recent developments to "raise the age" in Louisiana and New York).

21. GRIFFIN, ADDIE, ADAMS & FIRESTONE, *supra* note 16, at 3.

22. *Id.* at 18–19 (reporting over 5,000 non-judicial transfers in 2007 based on data from only six states); *see also* REP. OF THE ATT'Y GEN.'S NAT'L TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, DEFENDING CHILDHOOD: PROTECT, HEAL, THRIVE 190 (2012), http://www.justice.gov/sites/default/files/defendingchildhood/cev-rpt-full.pdf (indicating that 200,000 children are prosecuted as adults every year).

For children, an adult charge or conviction usually results in detention in adult facilities. As of 2012, the laws of forty-eight states permitted the detention of children charged with adult offenses in adult facilities; the laws of fourteen states required it.[23] Most of these states do not have mechanisms that allow the incarceration of children convicted of an adult offense anywhere other than adult facilities.[24] Thus, in many jurisdictions, children accused of crimes in the adult system serve pre-trial detention in jails, and, upon conviction, serve their sentences in jails or prisons.[25] The federal criminal justice system also has a mechanism for prosecuting children as if they are adults in specific circumstances.[26] While no federal statute has been interpreted to prohibit states from detaining children charged with or convicted of felonies in adult jails and prisons, federal law does prohibit holding children who are in the custody of the Attorney General in federal adult facilities.[27]

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 charging, sentencing, and detention law and practice. The available data and research 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 eighteen).[28] Analysis of the best national data available suggests that in recent

23. *See* Brief for Human Rights Watch as Amicus Curiae at 35, Henry Hill v. United States, INTER-AM. COMM'N. H.R. (Case No. 12.866,) (March 19, 2014), https://www.hrw.org /sites/default/files/related_material/2014_US_JLWOPamicus.pdf; *see also* CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS AND PRISONS 17 (2007), http://www.campaign4youthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf (reporting that two-thirds of juveniles detained pre-trial are held in adult jails). *See also* GROWING UP LOCKED DOWN, *supra* note 11, at 108 tbl.5.

24. GRIFFIN, ADDIE, ADAMS & FIRESTONE, *supra* note 16, at 3 (indicating that in 2011, eighteen states gave criminal court judges the ability to impose a sentence involving incarceration in the juvenile justice system following an adult conviction).

25. *See* GROWING UP LOCKED DOWN, *supra* note 11, at 108 tbl.5; Brief for Human Rights Watch as Amicus Curiae, *supra* note 23, at 35.

26. *See* 18 U.S.C. § 5032 (2012) (specifying that the Attorney General may certify for federal criminal prosecution children aged thirteen and above who commit certain offenses or when the state juvenile system lacks or refuses jurisdiction).

27. The Bureau of Prisons is prohibited from housing children, including those charged with federal felony offenses. *See* 18 U.S.C. 5039 (2012); BUREAU OF PRISONS, PROGRAM STATEMENT 5216.05, JUVENILE DELINQUENTS 3 (1999), http://www.bop.gov/policy/progstat/5216_005.pdf. The Juvenile Justice and Delinquency Prevention Act directs states, as a condition of receiving some federal funding, not to house juveniles with adults on the basis of delinquency adjudications. 42 U.S.C 5633(a)(12) (2006). This provision has not been interpreted by the Department of Justice to prohibit the detention of children charged with or convicted of state felonies in adult jails and prisons. *See* CAMPAIGN FOR YOUTH JUSTICE, FACT SHEET: JAIL REMOVAL AND SIGHT AND SOUND CORE PROTECTIONS 1, http://www.campaignforyouthjustice.org/documents/FactSheet-JailRemovalandSightandSoundcoreprotections.pdf.

28. Jolanta Juszkiewicz, *To Punish a Few: Too Many Youth Caught in the New of Adult Prosecution*, 26 (Oct. 2007) http://www.campaignforyouthjustice.org/documents /to_punish_a_few_final.pdf. *See also* GRIFFIN ET AL., *supra* note 16.

years, at any given time, tens of thousands of children each year are held in adult jails, while only a few thousand children are held in state prisons.[29]

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

Solitary confinement is commonly defined as twenty-two or more hours of physical and social isolation per day.[30] Solitary confinement is the ubiquitous form of physical and social isolation used in adult detention settings and has come to be chief among a small number of institutional responses to non-conforming characteristics or behaviors in jails and prisons.[31]

Research suggests that jail and prison officials generally manage children detained there in much the same way that they manage adults, including using solitary confinement.[32] Children in adult correctional settings are subjected to solitary confinement for three categories of reasons—to punish, to manage, and to treat.[33] Officials in adult jails and prisons frequently resort to solitary confinement when faced with individuals who violate facility rules, who are

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29. 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 prison. GROWING UP LOCKED DOWN, *supra* note 11, at 102–106 (note estimates included at Tables 1–4).

30. *See* Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 26, U.N. Doc. A/66/268 (Aug. 5, 2011), http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf; United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) Rule 44 U.N. Res. A/C.3/70/L.3 (September 2015), https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

31. *See* VERA INST. OF JUSTICE, WRITTEN TESTIMONY OF MICHAEL JACOBSON BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS 1 (2012) http://www.vera.org/files/michael-jacobson-testimony-on-solitary-confinement-2012.pdf.; Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104 (2010), http://www.jaapl.org/content/38/1/104.full.pdf+html; 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 1 (2012), https://www.aclu.org/files/assets/aclu_testimony__for_solitary_confinement_hearing-_final.pdf. For perhaps the most comprehensive recent research on the prevalence of the use of solitary confinement in U.S. prisons, see Yale Law School Arthur Liman Public Interest Program and the Association of State Correctional Administrators, *Time in Cell: The Liman-ASCA 2014 National Survey of Administrative Segregation in Prison* (Aug. 2015), http://mediad.publicbroadcasting.net/p/wnpr/files/201509/asca-liman_administrative_segregation_report_revised_aug_27_2015.pdf.

32. *See* GROWING UP LOCKED DOWN, *supra* note 11, at 3.

33. *Id.* at 48. The use of solitary confinement in juvenile facilities often 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. *See* THE AMERICAN CIVIL LIBERTIES UNION, ALONE AND AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES 2 (2014), https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf (report researched and drafted by author).

deemed to need protection or to pose a threat to others, or who require serious medical or mental health treatment.[34] 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.[35]

3. U.S. Law Regarding the Solitary Confinement of Children

There is no case law applying the federal constitution 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 Part II. 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 developing some limitations on the use of solitary confinement in adult prisons statewide (though not in adult jails) pursuant to agreements reached following litigation.[36] Recently, a rule-making body in New York City issued new standards banning solitary confinement for children and limiting it for young adults aged eighteen to twenty-one on Rikers Island, one of the largest jails in the country.[37] By contrast, no provision of any federal statute prohibits solitary confinement in juvenile detention facilities, jails, or prisons. In early 2016, President Obama announced that his administration would end the solitary confinement of children in the custody of the Federal Bureau of Prisons—a major development, though one with limited immediate impact.[38]

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34. *See* 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 2–3 (2014), https://www.aclu.org/sites/default/files/assets/aclu_testimony_for_solitary_ii_hearing-final.pdf.

35. *See* IAN KYSEL, WRITTEN STATEMENT OF IAN KYSEL BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS 2 (2014) available at http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/opportunities/upload/Ian-Kysel-Solitary-Confinement-Hearing-Testimony-FINAL.pdf (summarizing data regarding the solitary confinement of children in the United States), NATALIE J. KRANER, NAOMI D. BARROWCLOUGH, CATHERINE WEISS & JACOB FISCH, 51-JURISDICTION SURVEY OF SOLITARY CONFINEMENT RULES IN JUVENILE JUSTICE SYSTEMS 2 (2015); http://www.lowensteinprobono.com/files/Uploads/Documents/solitary%20confinement%20memo%20survey%20—%20FINAL.pdf.

36. *See* Consent Decree at 9, C.B. v. Walnut Grove Corr. Auth., No. 3:10-cv-663 (S.D. Miss. Mar. 25, 2012) (prohibiting solitary confinement of children); Settlement Agreement at 2–3, Katka v. Montana, No. BDV 2009-1163 (D. Mont. Apr. 12, 2012) (limiting the use of isolation); Benjamin Weiser, *New York State in Deal to Limit Solitary Confinement*, N.Y. TIMES, Feb. 19, 2014, http://www.nytimes.com/2014/02/20/nyregion/new-york-state-agrees-to-big-changes-in-how-prisons-discipline-inmates.html?_r=0 (prohibiting isolation as a means of punishing children).

37. Michael Winerip & Michael Schwirtz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES, Jan. 13, 2015, 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.

38. Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html. *See also*, Beth

Federal regulations implementing the Prison Rape Elimination Act (PREA) do include provisions regulating the use of isolation.[39] 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 officials should use their "best efforts" to avoid placing children in isolation.[40] 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 access to other programming and work opportunities.[41] There is as yet no data indicating whether these regulations have had any impact on the solitary confinement of youth in jails or prisons nationwide.[42]

No court has ruled squarely on the merits of an Eighth Amendment or a Fifth or Fourteenth Amendment conditions challenge to the solitary confinement of children in an adult jail or prison. A few courts in recent decades have held that specific instances of solitary confinement of children in the juvenile justice system constituted cruel and unusual punishment in violation of the Eighth Amendment or violated the Fourteenth Amendment's guarantee of due process.[43] In addition, the Special Litigation Section of the U.S. Department of

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Schwartzapfel, *There are Practically No Juveniles in Federal Prison – Here's Why*, THE MARSHALL PROJECT (Jan. 27, 2016), https://www.themarshallproject.org/2016/01/27/there-are-practically-no-juveniles-in-federal-prison-here-s-why#.uyYCPzu1B.

39. The regulations include many detailed requirements for the prevention, detection, and investigation of sexual abuse in both adult and juvenile correctional facilities. For a summary of the regulations, see Press Release: Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape, U.S. DEP'T OF JUSTICE (May 17, 2012), http://www.justice.gov/opa/pr/2012/May/12-ag-635.html.

40. 28 C.F.R. § 115.14 (2012), http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf.

41. *Id.* These regulations are (inexplicably) slightly 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), *with* 28 C.F.R. § 115.14 (2012), http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf.

42. For resources on implementation prepared by the National Prison Rape Elimination Act Resource Center, see Youthful Inmate Implementation, NATIONAL PREA RESOURCE CENTER, http://www.prearesourcecenter.org/training-technical-assistance/prea-in-action/youthful-inmate-implementation (last visited March 6, 2016).

43. *See, e.g.*, D.B. v. Tewksbury, 545 F. Supp. 896, 905 (D. Or. 1982); Feliciano v. Barcelo, 497 F. Supp. 14, 35 (D.P.R. 1979); Morgan v. Sproat, 432 F. Supp. 1130, 1140 (S.D. Miss. 1977); Pena v. N.Y. State Div. for Youth, 419 F. Supp. 203, 207 (S.D.N.Y. 1976); Nelson v. Heyne, 355 F. Supp. 451, 456–57 (N.D. Ind. 1972); Morales v. Turman, 364 F. Supp. 166, 174 (E.D. Tex. 1973); Lollis v. N.Y. State Dept. of Soc. Svcs., 322 F. Supp. 473, 482–83 (S.D.N.Y. 1970); Inmates of Boys' Training Sch. v. Affleck, 346 F. Supp. 1354, 1366–67 (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 judicial ruling addressing Eighth Amendment protections for children. *See* Complaint, K.J. v. Judd, No. 8:12-cv-00568 (M.D. Fl. filed Mar. 21, 2012), http://www.splcenter.org/sites/default/files/downloads/case/PolkComplaint.pdf; Consent Decree at ¶ IV(c)(1), C.B. v. Walnut Grove Auth., No. 3:10cv663

Justice has repeatedly stated that prolonged periods of isolation are not appropriate for youth, which includes investigations of both juvenile and adult facilities (as noted, President Obama recently announced that the Department was banning this practice for youth in the custody of its Bureau of Prisons, though it has not issued clear guidance prohibiting the practice in juvenile facilities, jails, or prisons across the country).[44] Former U.S. Attorney General

(S.D. Miss. filed Feb. 3, 2012), http://www.aclu.org/files/assets/68-1_ex_1_consent_decree.pdf; Complaint, Troy D. v. Mickens, No. 1:10-cv-02902 (D.N.J. filed Dec. 15, 2011), http://www.jlc.org/system/files/case_files/Troy%20Second%20Amended%20Complaint.pdf?download=1; Complaint, Doe v. Montana, No. 6:2010cv00006 (D. Mont. filed Jan. 26, 2010), http://www.aclu.org/files/assets/2009-12-16-DoevMontana-Complaint.pdf; *cf.* R.G. v. Koller, 415 F. Supp. 2d 1129, 1155–58 (D. Haw. 2006) (concluding that plaintiffs were likely to succeed in their claims that solitary confinement of juveniles violated substantive due process). For a compelling treatment of litigation theories for challenging solitary confinement in the juvenile justice system (written by an expert who has successfully done just that), see generally Kim Brooks Tandy, *Do No Harm: The Enhanced Application of Legal and Professional Standards in Protecting Youth From the Harm of Isolation in Youth Correctional Facilities*, 34 CHILDREN'S LEGAL RTS. J. 143 (2014).

44. In a recent case, the Department of Justice even sought a Temporary Restraining Order against Ohio, leading to a strong settlement to substantially reduce the use of solitary confinement. *See* Justice Department Settles Lawsuit Against State of Ohio to End Unlawful Seclusion of Youth in Juvenile Correctional Facilities, DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS (May 21, 2014), http://www.justice.gov/opa/pr/2014/May/14-crt-541.html. The Justice Department has repeatedly expressed the view that the solitary confinement of juveniles is dangerous and can be unconstitutional. *See, e.g.*, Letter from Robert L. Listenbee, Adm'r. U.S. Dep't of Justice, to Jesselyn McCurdy, Senior Legis. Counsel, American Civil Liberties Union 1 (Jul. 5, 2013), 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 Ind., Investigation of the Pendleton Juvenile Corr. Facility 8 (Aug. 22, 2012), http://www.justice.gov/crt/about/spl/documents/pendleton_findings_8-22-12.pdf; Letter from Thomas E. Perez, Assistant Att'y Gen., to Hon. Chairman Moore, Leflore Cnty. Bd. of Supervisors, Investigation of the Leflore Cnty. Juvenile Det. Ctr. 2, 7 (Mar. 31, 2011), http://www.justice.gov/crt/about/spl/documents/LeFloreJDC_findlet_03-31-11.pdf; Letter from Thomas E. Perez, Assistant Att'y Gen., to Hon. Michael Claudet, President, Terrebonne Par., Terrebonne Par. Juvenile Det. Ctr., Houma, Louisiana 12–13 (Jan.18, 2011), http://www.justice.gov/crt/about/spl/documents/TerrebonneJDC_findlet_01-18-11.pdf; Letter from Thomas E. Perez, Assistant Att'y Gen., to Hon. Mitch Daniels, Governor, State of Ind., Investigation of the Indianapolis Juvenile Corr. Facility, Indianapolis, Ind. 21–22 (Jan. 29, 2010), http://www.justice.gov/crt/about/spl/documents/Indianapolis_findlet_01-29-10.pdf; Letter from Grace Chung Becker, Acting Assistant Att'y Gen., to Yvonne B. Burke, Chairperson, L.A. Cnty. Bd. of Supervisors, Investigation of the L.A. Cnty. Prob. Camps 42–45 (Oct. 31, 2008), http://www.justice.gov/crt/about/spl/documents/lacamps_findings_10-31-08.pdf; Letter from Wan J. Kim, Assistant Att'y Gen., to Marion Cnty. Exec. Comm. Members and Cnty. Council President, Marion Cnty. Juvenile Det. Ctr., Indianapolis, Ind. 10–12 (Aug. 6, 2007), http://www.justice.gov/crt/about/spl/documents/marion_juve_ind_findlet_8-6-07.pdf; Letter from Bradley J. Scholzman, Acting Assistant Att'y Gen., to Hon. Linda Lingle, Governor, State of Haw., Investigation of the Haw. Youth Corr. Facility, Kailua, Haw. 17–18 (Aug. 4, 2005), http://www.justice.gov/crt/about/spl/documents/hawaii_youth_findlet_8-4-05.pdf; Letter from Alexander Acosta, Assistant Atty Gen., to Hon. Jennifer Granholm, Governor, State of Mich., CRIPA Investigation of W.J. Maxey Training School, Whitmore Lake, MI 4–5 (Apr. 19, 2004), http://www.justice.gov/crt/about/spl/documents/granholm_findinglet.pdf; Letter from Thomas E. Perez, Assistant Att'y Gen., to Janet Napolitano, Governor, State of Ariz., CRIPA Investigation of Adobe Mountain Sch. and Black Canyon Sch. in Phoenix, Ariz.; and Catalina Mountain Sch. in

Eric Holder, Jr. also recently stated that "[s]olitary confinement can be dangerous, and a serious impediment to the ability of juveniles to succeed once released."[45] This sentiment was then echoed by President Obama.[46] Although taken together these suggest a growing consensus within the federal executive that the solitary confinement of children is unlawful, it is unfortunately far from a declaration that the practice is in fact against the law or unconstitutional—particularly in adult facilities—and is not yet supported by clear constitutional jurisprudence.

B. The Consensus Against Solitary Confinement

While there is a lack of statutory law, regulations or constitutional jurisprudence 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. The established consensus is 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 evaluated by courts to determine whether a constitutional violation has occurred.

1. The Developmental Differences Between Children and Adults

During adolescence, the body changes significantly. Children grow physically—gaining height, weight, muscle mass, as well as pubic and body hair; menstrual periods begin and voices change.[47] In addition, the teen brain undergoes major structural change and development during the late teens and through the early and even mid-twenties.[48] One of the most significant differences between the brains of adolescents and adults relates to the growth of the prefrontal cortex.[49] This part of the brain plays a central role in high-level

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Tuscon, Ariz. 17–19 (Jan. 23, 2004), http://www.justice.gov/crt/about/spl/documents/ariz_findings.pdf.

45. Attorney General Holder Criticizes Excessive Use of Solitary Confinement for Juveniles with Mental Illness, DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS (2014), http://www.justice.gov/opa/pr/2014/May/14-ag-509.html.

46. Barack Obama, *Why We Must Rethink Solitary Confinement*, WASHINGTON POST, Jan. 25, 2016, https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html

47. *See* Sedra Spano, *Stages of Adolescent Development*, ACT FOR YOUTH UPSTATE CENTER FOR EXCELLENCE 2 (May 2004), http://www.actforyouth.net/resources/rf/rf_stages_0504.pdf; Adolescent Development, NAT'L INST. OF HEALTH, http://www.nlm.nih.gov/medlineplus/ency/article/002003.htm.

48. CLEA MCNEALY & JAYNE BLANCHARD, THE TEEN YEARS EXPLAINED: A GUIDE TO HEALTHY ADOLESCENT DEVELOPMENT 22 (2009), http://www.jhsph.edu/research/centers-and-institutes/center-for-adolescent-health/_includes/_pre-redesign/Interactive%20Guide.pdf.

49. *See* Laurence Steinberg, Ronald E. Dahl, Daniel Keating, David Kupfer, Ann S. Masten & Daniel S. Pine, *The Study of Development Psychopathology in Adolescence: Integrating*

processing, such as strategizing, planning, and organizing actions and thoughts.[50] Recent neuroscience research, using functional magnetic resonance imaging technology, has determined that one area of the brain in particular, the dorsolateral prefrontal cortex portion of the frontal lobe, is among the last brain regions to reach maturity; this area does not reach adult dimensions until the twenties.[51] The prefrontal cortex is responsible for "the ability to inhibit impulses, weigh consequences of decisions, prioritize, and strategize."[52] Because of the interaction between cognitive and psychosocial factors in juvenile development, the decision-making skills and abilities of adolescents are thus defined by immaturity, impulsivity, and an under-developed ability to appreciate consequences and resist environmental pressures.[53]

2. 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. This means that there is no research directly applying the neuroscience research discussed above (which admittedly is more focused on decision-making than on trauma) to the physical and social isolation of children in detention settings. There has, however, been some limited research suggesting that solitary confinement harms children in ways that are more extreme than the harm to adults, given their age and developmental differences.[54] Pairing this research with research regarding adults in solitary confinement supports the general consensus that solitary confinement is particularly harmful to children.[55]

In 2012, Human Rights Watch (HRW) and the ACLU published the first national report to analyze the issue (a report that I authored).[56] The report

Affective Neuroscience with the Study of Context, DEVELOPMENTAL PSYCHOPATHOLOGY 710, 714, 720, 725 (Dante Cicchetti and Donald J. Cohen eds., 2d ed. 2006).

50. *Id.* at 725; *see also* Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 80-82 (2004), https://www.researchgate.net/profile/Jay_Giedd/publication/8457361_Geidd_JN_Structural_magnetic_resonance_imaging_of_the_adolescent_brain_Ann_N_Y_Acad_Sci_1021_77-85/links/0046351b08f042fdc8000000.pdf.

51. Giedd, *supra* note 50, at 83.

52. *Id.*

53. *See* 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, 757 (2000).

54. *See* Fatos Kaba, Andrea Lewis, Sarah Glowa-Kollisch, James Hadler, David Lee, Howard Alper, Daniel Selling, Ross MacDonald, Angela Solimo, Amanda Parsons & Homer Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 444–45 (2014), http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742 (reporting that inmates younger than eighteen were more likely to commit acts of self-harm in solitary confinement).

55. *Cf.* Solitary Confinement of Juvenile Offenders, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Apr. 2012), https://www.aacap.org/aacap/policy_statements/2012/solitary_confinement_of_juvenile_offenders.aspx (supporting limited use of seclusion for adults but opposed the practice for juveniles).

56. GROWING UP LOCKED DOWN, *supra* note 11.

presented evidence that solitary confinement harms youth, based on interviews and correspondence with scores of young people across the country who had been subjected to the practice in jails and prisons. While not employing rigorous sampling or scientific technique, it found that solitary confinement carried heightened risk of psychological, developmental, and physical harm.[57] Young people told HRW and ACLU researchers about experiencing depression, fits of rage, acts of self-harm, and suicide attempts.[58] Other research has demonstrated that suicide is highly correlated with solitary confinement among youth in confinement.[59] Research by HRW and ACLU also documented barriers to care and programming in solitary confinement in adult jails and prisons.[60] Adult facilities have few, 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 off from (or have greater difficulty accessing) whatever resources are available.[61] This denial of programming generally included being prevented from going to school or participating in any similar activity that promotes growth or change.[62] Finally, teens in many jurisdictions spoke about being allowed to exercise only in small metal cages, alone, a few times a week; the research suggests that this is unhealthy for growing bodies.[63]

The differences between children and adults noted above likely make young people more vulnerable to harm and put them at risk of being disproportionately affected by the trauma and deprivations of solitary confinement and isolation. Research on the impact of isolation has shown that adult prisoners often exhibit a variety of negative physiological and psychological reactions to conditions of solitary confinement.[64] However, as noted, there has been no systematic study

57. *Id.* at 23, 37, 41.

58. *Id.* at 23–32.

59. LINDSAY M. HAYES, DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE SUICIDES IN CONFINEMENT: A NATIONAL SURVEY 27 (2009), https://www.ncjrs.gov/pdffiles1/ojjdp/213691.pdf ("Data from this national survey of juvenile suicide in confinement appear to show a strong relationship between juvenile suicide and room confinement—62 percent of victims had a history of room confinement before their death and 50 percent of victims were on room confinement status at the time of their death."). Isolation also increases the risk of suicide for adult prisoners. *See also* Kaba, Lewis, Glowa-Kollisch, Hadler, Lee, Alper, Selling, MacDonald, Solimo, Parsons & Venters, *supra* note 54; *cf.* S. Fazel, J. Cartwright, A. Norman-Nott & K. Hawton, *Suicide in Prisoners: A Systematic Review of Risk Factors*, 69 J. CLIN. PSYCHIATRY 1721, 1726 (2008) (reporting that confinement in a single cell is strongly associated with suicide).

60. GROWING UP LOCKED DOWN, *supra* note 11, at 41–47.

61. *Id.* at 43, 46.

62. *Id.* at 43.

63. *Id.* at 37–39.

64. 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;

specifically evaluating the effects of solitary confinement or other forms of isolation on developing brains and bodies—in spite of its widespread use on children.[65] Because of their heightened vulnerability and developmental immaturity, though, the American Academy of Child and Adolescent Psychiatry has concluded that adolescents are in particular danger of adverse reactions to prolonged isolation and solitary confinement and has recommended a ban on these practices.[66]

3. 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-term intervention to help a child manage current, acting-out behavior and those practices used to separate children from other detainees and which do not involve significant physical and social isolation. In other words, separation of groups of individuals in a detention facility does not require physical and social isolation.

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dizziness; self-mutilation; and lower levels of brain function, including a decline in EEG activity after only seven days in solitary confinement." THE AMERICAN CIVIL LIBERTIES UNION, ALONE AND AFRAID 4 & nn.13–31 (2013), https://www.aclu.org/files/assets/AloneandAfraidCOMPLETE FINAL.pdf (summarizing research on the solitary confinement of adults).

65. It is worth noting that such a systematic study, given the available information, may not be possible under ethics rules regulating research involving human subjects, as it would violate the principle of beneficence. Under prevailing research ethics principles, the principle of beneficence comprises two general rules: do no harm and maximize possible benefits and minimize possible harms to research subjects. *See, e.g.*, National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects Research 4-5 (Apr. 18, 1979) *available at* http://www.fda.gov/ohrms/dockets/ac/05/briefing/2005-4178b_09_02_Belmont%20Report.pdf. These principles have been incorporated into legal requirements regarding human subjects research binding on institutions which receive federal funding. In respect of prolonged physical and social isolation of children, it is thus likely that a researcher applying these principles would determine that the medical and mental health consensus regarding the harms associated with such practices are so clear as a general matter such as to outweigh the benefit of any research specifically investigating the effects of particular practices in a custodial environment. And would determine that it is therefore not legally-permissible to proceed with the research. This may even extend to studies involving "natural experiments" comparing the practices of different facilities. Of course, research ethics are particularly stringent when it comes to research involving children or prisoners, casting further doubt on the prospect of such research being undertaken. In sum, it seems unlikely that a study could legally be undertaken that would provide direct evidence of the harm of the solitary confinement practices described in this article on children.

66. Solitary Confinement of Juvenile Offenders, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, *supra* note 55. The statement distinguishes between the use of isolation to punish, which is always unacceptable, and the use of brief interventions, which are suggested to be acceptable in limited circumstances. 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.*

For example, 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 suggested above, 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 only with direct, one-to-one supervision by staff.[67] If the perceived need for continued 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.[68] Though JDAI prohibits isolation as a punishment under any circumstances, a range of other, less recent standards permitted children to be confined to their room for periods of time, though the practice was frequently capped at an absolute maximum, such as twenty-four or seventy-two hours.[69] None of these standards permit solitary confinement in the manner that it is employed in jails and prisons.

4. Medical and Educational Standards Regarding Isolation of Children

National standards for caring for and managing children in medical and mental health facilities and in educational environments also regulate the use of

67. JUVENILE DET. ALT. INITIATIVE, JUVENILE DET. FACILITY ASSESSMENT 6, 177 (2014), 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 that "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." *See* PBS LEARNING INST., REDUCING ISOLATION AND ROOM CONFINEMENT 2 (2012), http://pbstandards.org/uploads/documents/PbS_Reducing_Isolation_Room_Confinement_201209.pdf.; *see also* DEP'T JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMIN. OF JUVENILE JUSTICE, Standard 4.52 (1980), http://catalog.hathitrust.org/Record/000127687 (recommending that room isolation be used "only when no less restrictive measure is sufficient to protect the safety of the facility and the persons residing or employed therein" and usually for no more than one hour).

68. *See* JUVENILE DET. ALT. INITIATIVE, *supra* note 67, at 178. The American Correctional Association similarly suggests that young people who need to be separated from others because they require "special management" be given more staff attention, not less. *See* AM. CORR. ASS'N, PERFORMANCE BASED STANDARDS JUVENILE CORR. FACILITIES 51, Standard 4-JCF-3C-01 cmt. (2009).

69. For example, DOJ Standards for the Administration of Justice suggest that "room confinement of more than twenty-four hours should never be imposed." DEP'T JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 67. The American Correctional Association sets the limit of room confinement at five days, requires that children in disciplinary room confinement be afforded living conditions and privileges that approximate those available to the general population, and requires that personnel enter the room to visit the child at least once per day. AM. CORR. ASS'N, *supra* note 68 at 65, Standards 4-JCF-3C-03, 4-JCF-3C-04 (2009).

physical and social isolation. Such standards permit the use of physical and social isolation only in extremely limited circumstances.[70]

In recent decades, the medical and mental health communities have come to prohibit extended isolation as a therapeutic intervention, preferring instead limited, extremely short uses of isolation (measured in minutes, not hours). The Children's Health Act of 2000, which protects the rights of residents of any health care facilities that receive federal funds, strictly limits the use of involuntary locked isolation in medical settings by prohibiting disciplinary isolation or isolation used for the purposes of convenience.[71] Locked isolation is permitted only "to ensure the physical safety of the resident, a staff member, or others" and upon the written order of a physician or licensed practitioner for a specified duration.[72] The American Academy of Child and Adolescent Psychiatry also recommends strictly limiting the use of seclusion in the context of mental health treatment for children.[73]

In the context of educational facilities, there are a range of state policies, laws, and practices regarding the use of involuntary isolation for young people.[74] The U.S. Department of Education has issued a set of general guidelines for the use of involuntary isolation in schools, which state that isolation should not be

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70. *See, e.g.*, Children's Health Act of 2000, Pub. L. No. 106-310 § 591, 114 Stat. 1101 (2000), http://www.gpo.gov/fdsys/pkg/PLAW-106publ310/pdf/PLAW-106publ310.pdf (permitting the use of seclusion in health facilities which receive federal funds only for safety purposes and only on the written order of a physician), U.S. DEP'T OF EDUCATION, RESTRAINT AND SECLUSION: RESOURCE DOCUMENT iii (2012), http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf ("The principles make clear that restraint or seclusion should never be used except in situations where a child's behavior poses imminent danger of serious physical harm to self or others, and restraint and seclusion should be avoided to the greatest extent possible without endangering the safety of students and staff.").

71. Children's Health Act, *supra* note 70, § 591(a).

72. *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. These regulations prohibit involuntary isolation imposed for coercion, discipline, convenience or retaliation and require that seclusion be utilized only when less restrictive interventions have been determined to be ineffective; that it only be used to ensure the immediate physical safety of the patient, staff member, or others; and that it be discontinued at the earliest possible time. 42 C.F.R. § 482.13(e) (2012).

73. 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 15S–17S (2002), http://www.jaacap.com/article/S0890-8567(09)60552-9/pdf. In the therapeutic context, the AACAP opposes the use of seclusion except to prevent dangerous behavior to self or others, disruption of the treatment program, or serious damage to property, and only after less restrictive options have failed or become impractical. *Id.* at 14S. 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.* at 15S.

74. *See generally* JESSICA BUTLER, AUTISM NATIONAL COMMITTEE, HOW SAFE IS THE SCHOOLHOUSE?: AN ANALYSIS OF STATE SECLUSION AND RESTRAINT LAWS AND POLICIES 12–14 (2012), http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf (reporting that twenty-five states as of 2015 had meaningful protections for all children against the use of seclusion and thirty-five had protections for children with disabilities).

used as a punishment or for convenience, is appropriate only in situations where a child's behavior poses an imminent danger of serious physical harm to self or others and where other interventions are ineffective, and should be discontinued as soon as the imminent danger of harm has dissipated.[75] In sum, in various contexts in which state officials care for and manage children, isolation is very strictly regulated and viewed as inconsistent with the best interests of the child.

5. International Law and Standards Regarding Solitary Confinement

In stark contrast with the lack of domestic law limiting the use of solitary confinement in jails and prisons in the United States, but consistent with the standards developed by domestic professional associations and experts, there is broad agreement that the practice violates international human rights law.

International law has long recognized that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection."[76] The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, reflects the international consensus that children have special status under international law.[77] 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 to prioritize their rehabilitation in particular.[78]

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75. U.S. DEP'T OF EDUCATION, RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 12–13 (2012), www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf.

76. G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, at 19 (Nov. 20, 1959). This early resolution on the rights of the child is reflected in 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") provides that "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." Organization of American States, American Convention on Human Rights, art. 19, July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

77. International Covenant on Civil and Political Rights, art. 24, Dec. 16, 1966, S. Exec. Rep. 102−23, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by U.S. June 8, 1992) [hereinafter ICCPR] (guaranteeing to every child "the right to such measures of protection as are required by his status as a minor"). *See also id.* at art. 10 (requiring that juveniles in the penal system be separated from adults and given age-appropriate treatment); *Id.* at art. 14 (requiring that criminal procedures for cases involving juveniles promote the child's rehabilitation).

78. *Id.* at arts. 10, 14; *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, ¶ 42, U.N. Doc. CCPR/C/GC/32 (Jul. 9-27, 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), ¶¶ 26.1–26.2, adopted by G.A. Res. 40/33 (1985) (emphasizing the goal of rehabilitation for incarcerated juveniles); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, ¶ 79, adopted by G.A. Res. 45/113 (1990); 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, ¶¶ 26–27. Regional standards on the

The ICCPR also requires that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[79] 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, inhuman or degrading treatment or punishment (CIDT).[80] Evaluating whether treatment rises to the level of torture or CIDT in respect of the treatment of any individual requires consideration of the victim's age, legal status, and individual and developmental characteristics.[81] International law therefore guarantees a higher degree of protection for children than for adults. As discussed above, it is also more protective then current domestic United States law. Significantly, when the United States ratified the ICCPR, it did so subject to the reservation that juveniles might be treated as adults in "exceptional circumstances."[82] Similarly, in ratifying both the ICCPR and CAT, the United States purported to limit the prohibitions on torture and CIDT to the protections already offered by the Fifth, Eighth, and Fourteenth Amendments to the Constitution.[83]

The Convention on the Rights of the Child (CRC), the most widely-ratified human rights treaty, also recognizes the obligation of governments to provide children with special measures of protection.[84] The United States has signed but not (yet) ratified the CRC. The U.N. treaty body, which interprets the CRC, the Committee on the Rights of the Child, has concluded that punitive solitary confinement of children violates the prohibition against cruel, inhuman, or

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administration of justice also emphasize the necessity of special protections for children and the importance of rehabilitation and re-entry. *See, e.g.*, African Charter on the Rights and Welfare of the Child arts. 17(1), (29, 1999); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa princ. O(m); Council of Europe, Committee of Ministers, Recommendation No. R(87)20, pmbl. (adopted Sept. 17, 1987)

79. ICCPR, *supra* note 77, art. 10(1).

80. ICCPR, *supra* note 77, art. 7; *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art.16, Dec. 10, 1984, 1465 U.N.T.S. 85, 113 (entered into force Jun. 26, 1987) (ratified by U.S. Oct. 21, 1994) [hereinafter CAT].

81. *See, e.g.*, Juan Mendez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶¶ 69-70, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015); Juan Mendez (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, ¶ 71, U.N. Doc. A/66/268 (Aug. 5, 2011).

82. U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-0, § I(5) (daily ed. Apr. 2, 1992).

83. *Id.* at § I(3); U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CONG. REC. S17486-01, § I(1) (daily ed. Oct. 27, 1990).

84. *See generally* 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) [hereinafter CRC]. Article 37 of the CRC provides a number of protections for children in the criminal justice system, including a prohibition on CIDT. *Id.* at art. 37. 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.

degrading treatment or punishment.[85] Other international standards governing children who come into conflict with the law specifically condemn the solitary confinement of children—for any duration—as cruel, inhuman, or degrading treatment or punishment and, under certain circumstances, torture.[86] 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 called for the abolition of solitary confinement of children.[87]

This Part has shown that, despite a striking lack of domestic federal constitutional, statutory, or regulatory authority regarding solitary confinement in jails and prisons, there is a broad consensus opposing the practice. This consensus is reflected in a body of domestic standards governing the management of children in medical, educational, and detention settings, as well as in unequivocal international law and standards. This normative and expert authority can be leveraged by litigators in support of constitutional challenges to solitary confinement.

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 prisons and has recently decided a series 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.[88] This Part will explore the consequences of these developments and present theories for Eighth Amendment challenges to the post-conviction solitary confinement of children in adult jails and prisons as well as Fifth and Fourteenth Amendment challenges to the pre-trial solitary confinement of children held in adult jails. While the theories developed below are novel in important ways, they have a sound basis in law and are buttressed by the various points of consensus

85. Children's Rights in Juvenile Justice ¶ 89, U.N. Comm. on the Rights of the Child, 44th Sess., General Comment 10, U.N. Doc. CRC/C/GC/10 (2007)[hereinafter General Comment 10].

86. United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, ¶ 67, G.A. Res. 45/113, annex, 45 U.N. GAOR, Supp. No. 49A at 204, U.N. Doc. A/45/49 (Dec. 14, 1990); United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) Rule 44 U.N. Res. A/C.3/70/L.3 (Sept. 2015),

87. Juan Mendez (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), http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf.

88. *See* Elizabeth S. Scott, *Children Are Different*, OHIO ST. J. CRIM. L. 71, 89 (2013) ("[T]he principle that 'children [or adolescents] are different' potentially has Eighth Amendment and other constitutional implications . . . [and] may be invoked to challenge conditions of confinement . . . ").

discussed in Part I. Whether, when, and how the physical and social isolation of children violates the Constitution will vary from case to case, for strategic reasons but also because different bodies of law apply to conditions challenges made on behalf of pre-trial detainees and post-conviction prisoners.

The Fifth and Fourteenth Amendment guarantees against deprivation of liberty without due process of law establish the constitutional protections generally applicable to conditions of confinement for children in juvenile facilities, as well as for adults detained in jail before conviction.[89] The Eighth Amendment guarantee against cruel and unusual punishment establishes the constitutional protections applicable to conditions of confinement of adults following conviction for crimes, whether they are held in jail or in prison.[90] A small number of federal courts have ruled that solitary confinement and isolation practices used in juvenile facilities are unconstitutional,[91] but few courts have considered this issue in recent decades.[92] There have also been a number of recent successful challenges to the solitary confinement of adults, including class actions challenging the solitary confinement of persons with mental disabilities; some of these cases could have a significant impact on similar challenges to the solitary confinement of children in adult jails or prisons.[93] However, to date,

89. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) (holding that conditions of federal pretrial detention for adults must conform to the 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, 263–64 (1984) (applying the *Bell* standard to challenges to conditions of state pretrial detention of juveniles in the juvenile justice system).

90. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 832 (1994); Wilson v. Seiter, 501 U.S. 294, 297 (1991); Estelle v. Gamble, 429 U.S. 97, 103–04 (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."). However, as discussed in greater detail below, there are disagreements over the application of the Eighth Amendment to conditions of confinement for juveniles held in juvenile facilities after being adjudicated delinquent (and not convicted of a criminal offense). Notably, the Supreme Court has described the goals of the juvenile justice system as "to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." Kent v. United States, 383 U.S. 541, 554 (1966). It is therefore not clear jurisprudentially whether juvenile adjudications are "punishment" for the purposes of the Eighth Amendment. *Compare* R.G. v. Koller, 415 F. Supp. 2d 1129, 1152 (D. Haw. 2006) (concluding that due process standard governs conditions challenges by juveniles who have been adjudicated delinquent but not convicted of crimes), *with* Troy D. v. Mickens, 806 F. Supp. 2d 758, 772 (D.N.J. 2011) (concluding that Eighth Amendment governs such claims).

91. 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 on due process grounds); Inmates of Boys' Training Sch. v. Affleck, 346 F. Supp. 1354, 1366–67 (D.R.I. 1972) (ruling on both Eighth Amendment and due process grounds); Lollis v. N.Y. State Dep't of Soc. Servcs., 322 F. Supp. 473, 482–83 (S.D.N.Y. 1970) (ruling on Eighth Amendment grounds).

92. *See, e.g.*, R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Haw. 2006); Hughes v. Judd, No. 8:12–cv–568–T–23MAP, 2013 WL 1821077 (M.D. Fl. Mar. 27, 2013), report and recommendation adopted as modified, 2013 WL 1810806 (M.D. Fl. Apr. 30, 2013); Troy D. v. Mickens, 806 F. Supp. 2d 758 (D.N.J. 2011).

93. 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,

neither the Supreme Court nor any Circuit Court case has directly considered or ruled on the constitutionality of solitary confinement of children in adult jails or prisons.[94]

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

Recent Supreme Court decisions have established that the developmental differences between children and adults are constitutionally significant. Driven in part by the science discussed in Part I, above, the Court has made clear that young people are categorically not deserving of the most severe punishments.[95] These cases have chiefly addressed the constitutionality of sentencing persons whose crimes were committed before the age of eighteen, but the Court has also referenced the unique qualities of children in its recent analysis of when an interrogation is "custodial" for Fifth Amendment purposes.[96] As discussed below, elements of the Court's reasoning in these cases can be employed to support challenges to the solitary confinement of children in adult jails and prisons. Together, these cases support extending heightened constitutional standards to evaluating conditions of confinement challenges brought by children housed in adult jails and prisons.

A central focus of the Court's recent jurisprudence on children in conflict with the law has been the developmental and neurobiological differences between children and adults.[97] The Court has relied on a number of specific

including a proposed subclass that includes all prisoners who are or might in the future be subjected to isolation (note that this mainly includes children). *See* Parsons v. Ryan, 754 F.3d 657, 662 (9th Cir. 2014) (affirming certification); *see also* Third Amended Complaint, Gamez v. Ryan, No. CV-10-2070-PHX-JWS (MEA) (D. Ariz. Mar. 6, 2012), https://www.aclu.org/files/assets/gamez_v_ryan_final_complaint.pdf. Recent litigation challenging the solitary confinement of adults in New York looks likely to result in a major reduction of the use of solitary confinement for children. *See* Stipulation at 3, Peoples v. Fischer, No. 11-CV-2694 (S.D.N.Y. 2014), http://www.nyclu.org/files/releases/Solitary_Stipulation.pdf.

94. Although beyond the scope of this article, it is important to note one of the most significant barriers to the development of successful challenges to solitary confinement of youth in jails and prisons: the Prison Litigation Reform Act (PLRA). Children encounter serious difficulties in pursuing internal, administrative complaint mechanisms to satisfy the PLRA's exhaustion requirement. For an overview of the challenges posed by the PLRA, see Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 152–54 (2008). *See also* HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 29–34 (2009), https://www.hrw.org/sites/default/files/reports/us0609webwcover.pdf.

95. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012) (banning mandatory life without parole for offenses committed by juveniles); Graham v. Florida, 560 U.S. 48 (2010) (banning life without parole for nonhomicide offenses committed by juveniles); Roper v. Simmons, 543 U.S. 551 (2005) (banning the death penalty for offenses committed by juveniles).

96. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 & n.5 (2011) (citing *Roper* and *Graham*).

97. *See Miller*, 132 S. Ct. at 2464 (2012) (noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds") (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)); *see id.* at 2464 n.5 ("The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s

characteristics that follow from these differences between children and adults. For example, the case law states that children's decision-making skills and cognitive abilities are less developed than those of adults.[98] Moreover, the case law emphasizes children tend to be more vulnerable than adults to peer and family influences,[99] also have a greater capacity for change and reform.[100] These specific developmental and neurobiological differences have an important bearing on the constitutionality of subjecting youth to solitary confinement—including, for example, when past behavior or predicted future behavior is cited as a justification for solitary confinement, or when placement in solitary confinement deprives children of educational programming, recreation, and meaningful contact with loved ones. These hallmarks of youth place the consequences of any suppression of growth and development which is associated with 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,"[101] there is powerful language from the Court that recognizes the constitutional relevance of characteristics of sub-groups of children or of individual children. For example, the Court has specifically discussed children's experience with trauma and abuse, drug use, and mental health problems in analyzing the disproportionality of life without parole sentences.[102] The Court's discussions of individual characteristics of children, or of subclasses of children, could have important implications for framing challenges to the constitutionality of subjecting youth to solitary confinement, including in circumstances in which state actors fail to consider relevant characteristics, specific needs (such as for

conclusions have become even stronger.") (citing Brief for American Psychological Association et al. as Amici Curiae 3).

98. *See Roper*, 543 U.S. at 570 (describing the "susceptibility of juveniles to immature and irresponsible behavior"); *Graham*, 560 U.S. at 72 (quoting *Roper*, 543 U.S. at 569) (describing juveniles' "lack of maturity and . . . underdeveloped sense of responsibility"); *Miller*, 132 S. Ct. at 2458 (stating that these characteristics "lead to recklessness, impulsivity, and heedless risk-taking"); *see id.* at 2467 (describing youth as "a time of immaturity, irresponsibility, impetuousness[,] and recklessness").

99. *See Roper*, 543 U.S. at 570 (stating that youth are marked by "vulnerability and comparative lack of control over their immediate surroundings"); *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569–70) (describing youth as "more vulnerable or susceptible to negative influences and outside pressures"); *Miller*, 132 S. at 2458 (noting this susceptibility extends to "their family and peers" and that children "lack the ability to extricate themselves from horrific, crime-producing settings").

100. *See Roper*, 543 U.S. at 570 (2005) (describing how youth "struggle to define their identity"); *Miller*, 132 S. Ct. at 2467 (2012) (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)) (stating that the "signature qualities" of youth are "transient"); *Graham*, 560 U.S. at 74 (describing how youth have a "capacity for change" and that they are therefore "in need of and receptive to rehabilitation").

101. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2397 (2011).

102. *Miller*, 132 S. Ct. at 2468–2469 (2012) (discussing juvenile's "physical abuse" and "neglect" as well as "family background" and "immersion in violence"); *see id.* at 2469 (discussing juvenile's use of drugs and alcohol and his parent's alcoholism and drug addiction); *Id.* (discussing juvenile's history of suicide attempts).

treatment and accommodation), or specific vulnerabilities (such as to re-traumatization) before placing children in solitary confinement. This language also opens the door for reference to a range of individual characteristics to illustrate the harm or risk of harm posed by solitary confinement to individual children or subclasses of children.

B. Eighth Amendment Challenges

Litigators and judges should and can contribute to the development of case law regarding the solitary confinement of children that incorporates analysis of age and the attendant vulnerabilities of youth.[103] This Part 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. It then discusses the utility of incorporating international law and standards, as well as the domestic medical and corrections consensus, regarding solitary confinement into litigation challenges.

1. Framing Challenges to Solitary Confinement

There is a large body of Eighth Amendment jurisprudence addressing post-conviction jail and prison conditions for adults. The recent jurisprudence on children in conflict with the law in the United States, discussed above, creates new opportunities to extend and adapt this conditions jurisprudence to children. The Supreme Court has stated that constitutional protections related to conditions of confinement following a criminal conviction stem from the recognition that "[p]risoners retain the essence of human dignity inherent in all persons" and that, through incarceration, "society takes from prisoners the means to provide for their own needs."[104] Thus, "[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."[105] The

103. These arguments are not entirely new. Other advocates have urged the development of an Eighth Amendment conditions jurisprudence, including with specific reference to solitary confinement. *See* Marsha Levick, Jessica Feierman, Sharon Messenheimer Kelley, Naomi E.S. Goldstein & Kacey Mordecai, *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 raise special challenges—but also place special obligations on those responsible for their confinement.").

104. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011).

105. *See id.*; *see also* DeShaney v. Winnebago Cty. Dept. of Soc. Svcs., 489 U.S. 189, 199–200 (1989) ("[W]hen 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 wellbeing. . . . [W]hen 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

Constitution requires that conditions of confinement provide for these basic needs.

These sources of constitutional obligations—the dignity of prisoners and custodial context—are powerful and straightforward. The Court's recent recognition of the developmental differences between children and adults must necessarily mean that the contours of the Eighth Amendment's protections differ for children convicted of crimes. Given the unique status and vulnerability of children, analysis of what conditions of confinement are constitutionally incompatible with the dignity of child prisoners—or constitutionally required in order to provide children with "basic sustenance" (whether it relates to nutrition and physical exercise, programming and education, or medical and mental health care)—must certainly return different results than such analysis for otherwise similarly situated adult prisoners.

Finally, it is worth noting an additional legal interest that has driven some of the Court's older jurisprudence on children in the juvenile justice system: the notion that "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves."[106] The Court has stated that when a child is detained in the juvenile justice system, "the State has a *parens patriae* interest in preserving and promoting the welfare of the child."[107] It is equally important to recognize that this doctrine is in an important sense limited by a child's status as a rights-holder (and thus that the state's obligation or interest in child welfare should reflect consideration of the best interests of the child). Despite any potential tension, this doctrine can be used to emphasize the heightened burden on the state to provide for and promote the welfare of children in the care of their prisons.

The courts have recognized that prisoners (including child prisoners) "are sent to prison as punishment, not *for* punishment."[108] Given the Court's recent jurisprudence regarding the differences between children and adults sentenced to time in prison, litigators should argue that the Eighth Amendment imposes an obligation on prison officials to preserve and promote the welfare of child prisoners—as a requirement rooted in their basic humanity and dignity, whether as a part of the requirement to provide for their basic sustenance, or as an independent interest that is uniquely applicable to caring for child prisoners growing up in the criminal justice system. All three of these can be construed as

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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 and the Due Process Clause.").

106. Schall v. Martin, 467 U.S. 253, 265 (1984).

107. *Id.* at 263 (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

108. Gordon v. Faber, 800 F. Supp. 797, 800 (N.D. Iowa 1992) (quoting Tyler v. Black, 811 F.2d 424, 435 (8th Cir. 1987), *aff'd*, 973 F.2d 686 (8th Cir. 1992)). *But see* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) ("[Prison] conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.").

animating an Eighth Amendment standard that applies differently to children than it does to adults, as well as holding jail and prison officials to a higher standard when it comes to the treatment of child prisoners.

2. Surmounting Deliberate Indifference

The standard for evaluating when conditions of confinement violate the Eighth Amendment is the dual requirement that, in response to (1) an objectively serious harm, state actors must have exhibited (2) deliberate indifference.[109] The "objectively serious harm" aspect of the Eighth Amendment test requires that the act or omission by a state official "pos[e] a substantial risk of serious harm."[110] This requirement presents comparatively fewer difficulties for litigators seeking to challenge solitary confinement. As discussed in Part I, there is strong agreement among experts that solitary confinement poses a significant risk of substantial mental and physical suffering.[111] In addition to research evidence and expert testimony regarding the risk of serious harm (including of death by suicide), litigators are likely to be able to adduce evidence of harms experienced in solitary confinement, ranging from denial of services and programming necessary for healthy growth and development to evidence of self-harm and other challenges.[112]

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," meaning "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 must also draw the inference."[113] In short, "an official's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment" in violation of the Eighth Amendment.[114]

This requirement undoubtedly poses the greatest difficulty for litigators (and for judges), particularly with regard to the solitary confinement of children. However, the Supreme Court has recognized that some risks of harm are objectively so great that "a factfinder may conclude that a prison official knew of

109. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 834 (1994); Wilson v. Seiter, 501 U.S. 294, 303 (1991); Estelle v. Gamble, 429 U.S. 97, 102–03 (1976).

110. *Brennan*, 511 U.S. at 834.

111. *See supra* Part I.B.2.

112. *See, e.g.*, GROWING UP LOCKED DOWN, *supra* note 11, at 26 (citing interview with Marvin Q., "I wish I had better words—I was really, really lonely. . . . I [would] try to put covers on my head—make . . . like it's not there. Try to dissociate myself . . . I don't think they should do that to a juvenile. It's impossible for any person to cope with anything like that. I couldn't help myself.").

113. *Brennan*, 511 U.S.at 837.

114. *Id.* at 838.

a substantial risk from the very fact that the risk was obvious."[115] Thus, litigators will need to develop a detailed record of the range of facts known to officials which suggest the serious risk of harm associated with the solitary confinement of youth. In addition, litigators must emphasize that the risk is so significant as to be obvious, justifying an inference of subjective, deliberate indifference.[116]

In addition to adapting their arguments to this general standard, litigators and courts should also seek to clarify the application of this legal standard, which was, of course, developed in litigation regarding conditions of confinement for adults, to the unique context of incarcerated children. In other words, lawyers should argue for a different standard. As suggested above, the Court's recent jurisprudence on children in the criminal justice system supports arguments for the development of a modified standard. In *J.D.B. v. North Carolina*, for example, the Court endorsed a different constitutional standard for determining when a child is in custody for Fifth Amendment purposes.[117] This shows two ways in which the standard for challenges to conditions of confinement might also be adapted for children.

First, *J.D.B.* supports re-interpreting the objective prong of the test to require only evaluation of whether conditions of confinement pose an objectively serious risk of harm to children. Account should be taken of developmental differences and their status as children in assessing this risk. As the Court noted in analyzing a custodial interrogation of a child, "courts can account for [the] reality [that children are more susceptible to pressure] without doing any damage to the objective nature of the custody analysis."[118] The heightened harm, and risk of harm, posed to children subjected to solitary confinement in adult jails and prisons is thus obvious, based on their vulnerability and developmental differences. Litigators should argue for, and courts should embrace, an understanding of the objective conditions test that takes child status into account.

Second, the Court's recent jurisprudence on children in conflict with the law might support the proposition that "children cannot be viewed simply as

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115. *See id.* at 842; *see also* Hope v. Pelzer, 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.").

116. *See Pelzer*, 536 U.S. at 745 ("The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment."). *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." *Id.* at 738.

117. 131 S. Ct. 2394, 2406 (2011).

118. *J.D.B.*, 131 S. Ct. at 2403.

miniature adults"[119] 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 development, it should be argued, must necessarily distinguish the constitutional minimum standards for managing and caring for child prisoners from the standards applicable to adults. Thus, as Marsha Levick, Jessica Feierman, Sharon Messenheimer Kelley, Naomi E.S. Goldstein, and Kacey Mordecai have argued,

> [T]he 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.[120]

Solitary confinement places youth at a substantial and objectively serious risk of harm. Officials who subject youth to this practice despite their heightened duty towards children and these obvious risks of harm should be argued to be constructively deliberately indifferent to this risk.

3. Learning from Challenges to the Solitary Confinement of Adults with Psychosocial Disabilities

Another area of jurisprudential development relevant to the solitary confinement of children is the growing set of cases finding unconstitutional the placement of persons with serious psychosocial disabilities in solitary confinement.[121] These cases have turned on lower courts first accepting the claim that solitary confinement places persons with psychosocial disabilities at an objectively serious risk of harm, and then on evidence that prison officials

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119. *Id.* at 2404.

120. Levick, Feierman, Kelley, Goldstein & Mordecai, *supra* note 103, at 312.

121. *See* Madrid v. Gomez, 889 F. Supp. 1146, 1265–66 (N.D. Cal. 1995) (finding that solitary confinement created objectively serious risk of harm as to sub-class of prisoners with serious mental illnesses, although not as to prisoners generally); Ruiz v. Johnson, 154 F. Supp. 2d 975, 984–86 (S.D. Tex. 2001) (finding that solitary confinement "violated the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the U.S. Constitution, as to the plaintiff class generally and to the subclass of mentally ill inmates housed in such confinement"); Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125 (W.D. Wis. 2001) (granting preliminary injunction ordering removal of seriously mentally ill prisoners from supermax prison); *see also* Ind. Protection and Advocacy Serv. Comm'n v. Commissioner, No. 1:08–cv–01317–TWP–MJD, 2012 WL 6738517, at *23 (S.D. Ind. Dec. 31, 2012); Coleman v. Wilson, 912 F. Supp. 1282, 1320–21 (E.D. Cal. 1995); Casey v. Lewis, 834 F. Supp. 1477, 1549–50 (D. Ariz. 1993); Langley v. Coughlin, 715 F. Supp. 522, 540–41 (S.D.N.Y. 1988). Note that the case law uses the term mental illness or serious mental illness, rather than mental disability or psychosocial disability.

had knowledge of this risk when subjecting prisoners to solitary confinement.[122] *Madrid* is illustrative: "For these inmates, placing them in [solitary confinement] is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly unreasonable."[123] Thus, successful cases have included lengthy analysis of conditions for, and serious harm experienced by, persons with psychosocial disabilities subjected to solitary confinement, and evidence that medical and correctional staff knew of these diagnoses and harms. Faced with this evidence, courts have ruled favorably. As one stated, "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 cannot 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."[124]

It is reasonable for litigators and courts to assert that, like adults with psychosocial disabilities, 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 and physical health in solitary confinement as to render the practice categorically unconstitutional for children.[125]

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122. While this Part focuses on how the body of case law challenging the solitary confinement of adults with mental disabilities might be employed to support the articulation of an Eighth Amendment conditions standard that is addressed to evaluating conditions of confinement for children, it is important to note that there are powerful statutory challenges which can be brought to the solitary confinement of child or adult jail detainees or prisoners under the Americans with Disabilities Act and the Rehabilitation Act. For one articulation of how subjecting adults with mental disabilities to solitary confinement can violate both, see Letter from Thomas E. Perez, Assist. Att'y Gen., U.S. Dept. J. & David J. Hickton, U.S. Att'y to the Governor Tom Corbett, Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation (May 31, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson_findings_5-31-13.pdf; Letter from Jocelyn Samuels, Acting Assist. Att'y Gen., U.S. Dept. J. & David J. Hickton, U.S. Att'y to the Governor Tom Corbett, Investigation of Pennsylvania Department of Corrections' Use of Solitary Confinement on Prisoners with Serious Mental Illness and/or Intellectual Disability (Feb. 24, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/02/25/pdoc_finding_2-24-14.pdf.

123. *Madrid*, 889 F. Supp. at 1265 (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).

124. *Id.* at 1266.

125. This argument evokes the parallels between the abolition of the death penalty for children in *Roper* and the abolition of the death penalty for persons with intellectual disabilities in *Atkins*. *Compare* Roper v. Simmons, 543 U.S. 551 (2005), *with* Atkins v. Virginia, 536 U.S. 304 (2002). Although *Atkins* dealt with intellectual disability, rather than serious mental disability, the core point is that courts should be willing to recognize the special vulnerabilities of children in the same way that they recognize the special vulnerabilities of discrete groups of adults.

4. 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 proportionality analysis used to evaluate when state action is inconsistent with "evolving standards of decency."[126] Proportionality has chiefly been used in sentencing cases, but also has application to challenges to conditions of confinement.[127] Constitutional Eighth Amendment proportionality analysis comes in two varieties. In the first, a court considers the proportionality of a particular sentence for a particular person and asks whether that sentence is "grossly disproportionate" to the offense.[128] In the second, the "categorical" approach, a court considers whether the punishment is constitutionally disproportionate as applied to an entire class of offenders.[129]

The Supreme Court has now twice applied a categorical proportionality analysis to life without parole sentencing challenges involving children.[130] *Graham v. Florida* represented the first time the Court applied a categorical analysis outside of the death penalty context.[131] That decision was based on the "fundamental differences" between children and adults as demonstrated by "developments in psychology and brain science."[132] Mirroring *Roper*, *Graham's* analysis turns not on the category of crimes committed but on the category of

126. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

127. Since Weems v. United States, 217 U.S. 349 (1910), cases challenging sentencing—the death sentence, life without parole, and term-of-years sentences—have relied on proportionality arguments 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, 997, 1004 (1991) (Kennedy, J., concurring) (concluding, contrary to the plurality, that the Eighth Amendment "encompasses a narrow proportionality principle" but that petitioner's life without parole sentence for cocaine possession was not disproportionate). The Court has stated that "[t]he concept of proportionality is central to the Eighth Amendment," Graham v. Florida, 560 U.S. 48, 59 (2010), suggesting that the concept is appropriately applied to conditions challenges as well as sentencing challenges. For an overview of lower court decisions applying proportionality analysis to conditions of confinement challenges, see *infra* nn.148–150 and accompanying text.

128. *Graham*, 560 U.S. at 59–60.

129. *Id.* at 60–61.

130. Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48 (2010). In *Montgomery v. Alabama*, the Court ruled that this was a substantive and not procedural change and therefore applied retroactively. Montgomery v. Alabama, No. 14-280, slip op. (Jan. 25, 2016).

131. By applying a categorical rule to a term-of-years sentence, the *Graham* Court rejected the narrow individual proportionality analysis that it had applied to life without parole sentences for adults and instead embraced the categorical analysis it had utilized in Roper v. Simmons, 543 U.S. 551 (2005), to evaluate punishment of juveniles in the context of the death penalty. *Compare Graham*, 560 U.S. at 61–62 (concluding that categorical proportionality analysis was appropriate), *with Id.* at 86 (Roberts, C.J., concurring) (concluding that individual proportionality analysis was appropriate, but that life without parole sentence was constitutionally disproportionate given Graham's juvenile status and the nature of his offense).

132. *Graham*, 560 U.S. at 68. 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.* (quoting *Roper*, 543 U.S. at 570).

offender.[133] To determine whether a sentencing practice is categorically unconstitutional under the Eighth Amendment, *Graham* prescribes a two-step analysis. First, the Court indicates that it 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.[134] The Court must then use "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.[135]

In its jurisprudence on the sentencing of children, the Court has used proportionality analysis to evaluate sentences against their penological justifications—retribution, deterrence, incapacitation, and rehabilitation.[136] Notably, the Court has considered international law and standards in its exercise of its own independent judgment.[137]

In *Roper*, the Court found the juvenile death penalty disproportionate to the penological justifications, stating that "[r]etribution 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 suggest as well that juveniles will be less susceptible to deterrence."[138]

In *Graham*, the Court similarly analyzed the disproportionality of the sentence of life without parole for non-homicide offenses, stating that "retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender" and that "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."[139] The Court further rejected the justification of incapacitation, because "[a] life without parole sentence [labels a juvenile incorrigible and] improperly denies the juvenile offender a chance to demonstrate growth and maturity."[140] Finally, the Court noted that a sentence of life without parole is diametrically opposed to the

133. *Id.* at 61 ("This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.").

134. *See id.* (quoting *Roper*, 543 U.S. at 563); *see also* Kennedy v. Louisiana, 554 U.S. 407, 433–34 (2008) ("reviewing the authorities informed by contemporary norms" to evaluate the constitutionality of capital punishment for rape of a child).

135. *See id.* (citations omitted). The Court recently reaffirmed this approach in Hall v. Florida, 134 S. Ct. 1986, 2000 (2014) ("That exercise of independent judgment is the Court's judicial duty.").

136. *See infra* nn.133–134 and accompanying text.

137. *See infra* nn.149–154 and accompanying text.

138. *Roper*, 543 U.S. at 571.

139. *Graham*, 560 U.S. at 72.

140. *Id.* at 73.

goal of rehabilitation. "By 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. . . . For 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."[141]

In *Miller*, the Court likewise emphasized the mismatch between the severity of the penalty of mandatory life without parole and its penological goals, holding that sentencing schemes that prevent consideration of the individual characteristics of youth before imposing a life without parole sentence "pose[] too great a risk of disproportionate punishment" and are thus unconstitutional.[142] 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 relevance to the Court's analysis of the constitutional limits of prison conditions. For example, the Court's suggestion that "conditions must not involve the wanton and unnecessary infliction of pain"[143] (i.e., be disproportionate) has been the touchstone for the development of the subjective "deliberate indifference" element of the contemporary test for evaluating conditions of confinement.[144] But the Court has also invoked notions of proportionality in the context of the objective "substantial risk of harm" element. Thus, in *Estelle*, the Court stated that denial of medical care is impermissible because "it may result in pain and suffering which no one suggests would serve any penological purpose."[145] Similarly, in *Rhodes*, the Court affirmed that conditions may not be "grossly disproportionate to the severity of the crime warranting imprisonment."[146] In *Farmer*, the Court describes "gratuitously allowing the beating or rape of one prisoner by another" as "serv[ing] no legitimate penological objective."[147] In sum, the Supreme Court

141. *Id.* at 74.

142. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

143. Rhodes v. Chapman, 452 U.S. 337, 347 (1981). The very question of whether a prison condition is "necessary" invites an examination of the penological justifications for the condition.

144. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 834 (1994).

145. Estelle v. Gamble, 429 U.S. 97, 103 (1976).

146. *Rhodes*, 452 U.S. at 347.

147. *Farmer*, 511 U.S. at 833 (quoting Hudson v. Palmer, 458 U.S. 517, 548 (1984) (Stevens, J., concurring in part and dissenting in part)).

has repeatedly invoked concepts of disproportionality to evaluate the constitutionality of conditions of confinement.

A number of lower court decisions on conditions of confinement have also invoked proportionality, and much more directly.[148] A recent federal district court case, *Peoples v. Fischer*, is a hopeful example of this trend.[149] In an order granting, in relevant part, a motion for reconsideration, the District Court in *Peoples* stated that, "prison officials were arguably put on sufficient notice that a sentence of three years of [Special Housing Unit] confinement for a non-violent infraction of prison rules could well be found to be grossly disproportionate and, therefore, in violation of the Eighth Amendment."[150]

To date, no federal court of appeals has directly imported the recent sentencing jurisprudence for children into decisions addressing conditions of confinement.[151] But given the centrality of proportionality to various strains of Eighth Amendment analysis, framing the issue in terms of proportionality could breathe new life into challenges to extreme conditions of confinement, particularly for children.[152] Such proportionality arguments are best framed in two ways when challenging conditions of solitary confinement. First, due to the

148. *See, e.g.*, Smith v. Coughlin, 748 F.2d 783, 787 (2nd Cir. 1984) (stating that restraints on inmates violate the Eighth Amendment if they are grossly disproportionate, are without penological justification, or involve unnecessary infliction of pain); Pearson v. Ramos, 237 F.3d 881, 885 (7th Cir. 2001) (stating that courts "continue to recognize" norm of proportionality, including in the conditions context). For decisions finding solitary confinement to be disproportionate in violation of the Eighth Amendment, see Adams v. Carlson, 368 F. Supp. 1050, 1053 (E.D. Ill. 1973) (finding that sixteen months' segregation was excessive for involvement in a work stoppage); Black v. Brown, 524 F. Supp. 856, 858 (N.D. Ill. 1981) (finding that eighteen months' segregation was excessive for running in the yard), *aff'd in part and rev'd in part without opinion*, 688 F.2d 841 (7th Cir. 1982); Hardwick v. Ault, 447 F. Supp. 116, 125–26 (M.D. Ga. 1978) (finding indefinite segregation to be disproportionate both categorically and as compared with severity of infraction); Fulwood v. Clemmer, 206 F. Supp. 370, 379 (D.D.C. 1962) (finding that two years' segregation was excessive for racial preaching); *see also* JOHN BOSTON & DAN MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL 169–176 (4th ed. 2010) (discussing judicial responses to conditions challenges to solitary confinement of adults and citing relevant cases).

149. 898 F. Supp. 2d 618 (S.D.N.Y. 2012).

150. *Id.* at 626.

151. Federal case law invoking *Roper*, *Graham* and *Miller* has 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).

152. For another take on the application of proportionality to conditions challenges, see Alex Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53 (2009).

developmental differences between children and adults and the unique vulnerability of children as a class, solitary confinement is categorically grossly disproportionate for children. Second, solitary confinement of children is grossly disproportionate to any legitimate penological objective with regard to the management of children—generally or with respect to a particular child or subclass of children—in a penal setting. This second approach will vary depending on the purpose of the solitary confinement condition in a given case (or across a given subclass).[153]

These proposed Eighth Amendment theories can be applied in different ways depending on the circumstances. Any challenge will necessarily respond to the interests, individual characteristics, and vulnerabilities of the individual plaintiff or group of plaintiffs. It will also respond to the conditions of confinement in a given prison or prison system and the case law in the relevant circuit. Litigators will certainly engage different aspects of the proportionality analysis proposed above, as well as the other areas of Eighth Amendment jurisprudence presented. In some cases, litigators will no doubt argue to invalidate state conduct only as applied to one or a few plaintiffs, narrowly framed. In other cases, litigators will be able to argue for a categorical rule, seeking a ban on solitary confinement for all children, or for an entire sub-group of particularly vulnerable children. Given the paucity of jurisprudence, the strength of international law and standards, and the emerging domestic consensus, there are good reasons to pursue the latter, whenever possible.

5. The Role of International Law and Standards

The broad international consensus in support of a prohibition on the solitary confinement of children 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.[154] The Supreme Court has repeatedly looked to international and comparative law as a measure of "evolving standards of decency" in its analysis of the Eighth Amendment's prohibition of cruel and unusual punishment.[155]

In *Roper*, the Court looked "to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth

153. When considering asserting proportionality principles in the context of conditions of confinement, some might be concerned that notions of proportionality have no limiting point—that they could be extended to suggest that any treatment experienced by a child in adult jails and prisons, or even the mere fact of detention, is in every case constitutionally disproportionate. Yet proportionality analysis does contain its own limiting principle: proportionality analysis evaluates, on the one hand, the set of legitimate state interests, practices, and obligations in the context of confinement, and, on the other hand, the individual and developmental characteristics of a child or of children with respect to the treatment to which they are subjected.

154. For an in-depth explanation of this rich jurisprudential history, see generally Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L. L. 1 (2006).

155. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 102–103 (1958) (plurality opinion) (citing foreign consensus as support for the proposition that denationalization is a cruel and unusual punishment).

Amendment's prohibition of 'cruel and unusual punishments.'"[156] In *Graham*, the Court reaffirmed the relevance of international law to the interpretation of the Eighth Amendment protections applicable to children.[157] In its analysis of the constitutionality of juvenile life without parole, the Court continued its "longstanding practice in noting the global consensus against the sentencing practice in question" by examining foreign sentencing laws and practices for children.[158] The Court concluded that international law, agreements, and practices are "relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment 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."[159]

As discussed in greater detail above, international law prohibits the imposition of solitary confinement on anyone below eighteen years of age and condemns the practice as a form of cruel, inhuman, or degrading treatment or punishment.[160] International law and standards 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 comports with "evolving standards of decency" as required by the Eighth Amendment.[161] International law and standards can also be invoked to show a consensus that

156. Roper v. Simmons, 543 U.S. 551, 575 (2005) (citing Trop v. Dulles, 356 U.S. 86, 102–103 (1958) (plurality opinion)).

157. Graham v. Florida, 560 U.S. 48, 80 (2010).

158. *Id.*

159. *Id.* at 82.

160. The prohibition is reflected in two human rights treaties that impose binding international obligations on the United States, as well as the Convention on the Rights of the Child, which the United States has signed but not ratified. *See* ICCPR, *supra* note 77, art. 7 (prohibiting torture and cruel, inhuman, or degrading treatment or punishment); *Id.* at arts. 10(3), 14(4) (requiring special protections for juveniles accused of or punished for crimes); CAT, *supra* note 80, arts. 2, 16 (prohibiting torture and cruel, inhuman, or degrading treatment or punishment); CRC, *supra* note 84, at art. 37(a) (prohibiting the use of torture and cruel, inhuman, or degrading treatment or punishment against children); General Comment 10, *supra* note 85, ¶ 89 (interpreting CRC article 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, annex at 25 (Istanbul Statement on the Use and Effects of Solitary Confinement), U.N. Doc A/63/175 (July 28, 2008), http://www.unhcr.org/refworld/pdfid/48db99e82.pdf (suggesting that solitary confinement be absolutely banned from use on children); 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), http://solitaryconfinement.org/uploads /SpecRapTortureAug2011.pdf (opining that solitary confinement of children is cruel, inhuman, or degrading treatment or punishment in violation of the ICCPR and CAT).

161. The author has argued elsewhere that litigators should cite to ratified non-self-executing human rights treaties, such as the ICCPR, as persuasive authority to promote the development of domestic constitutional jurisprudence which is consistent with U.S. international human rights treaty obligations. Ian M. Kysel, *Domesticating Human Rights Norms in the United States: Considering the Role and Obligations of the United States Government as Litigant*, 46 GEO. J. INT'L. L. 1009 (2015).

solitary confinement poses a substantial risk of serious harm to a child for the purpose of making a proportionality argument.

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

In *Roper*, the Court referenced "scientific and sociological studies" to confirm that the death penalty is a disproportionate form of punishment for children as a class.[162] In *Graham*, the Court described how "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[163] In *Miller*, the Court again referenced the importance of "science and social science" to their Eighth Amendment analysis and "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."[164] More recently in the Eighth Amendment context, though not in a case involving a child, the Court went further, stating that it was "proper to consider the psychiatric and professional studies" on the issue at hand because scientific consensus "informs [the Court's] determination [of] whether there is a consensus that instructs how to decide" specific constitutional questions.[165]

The roles that scientific research and medical consensus have played in the Court's recent Eighth Amendment sentencing jurisprudence pave the way for this same consensus to be invoked in challenges to solitary confinement. Scientific and professional consensus can highlight how the practice of solitary confinement 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 serious harm to children. The consensus can also be used to show how the practice does not serve legitimate penological or therapeutic goals for purposes of assessing proportionality. In light of this consensus, it is not hard to imagine a court concluding, as did the district court in *Madrid* with regard to adult prisoners with mental health problems, that "it is inconceivable that any representative portion of our society

162. *Roper*, 543 U.S. at 569.

163. *Graham*, 560 U.S. at 68.

164. Miller v. Alabama, 132 S. Ct. 2455, 2464–65 (2012) (citations omitted).

165. Hall v. Florida, 134 S. Ct. 1986, 1993 (2014). The use of scientific and professional standards to evaluate the requirements of the Eighth Amendment has been criticized by some Justices. *See, e.g.*, *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. . . . Under our modern Eighth Amendment cases, 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 views of a small professional elite.").

would put its imprimatur on a plan to subject [children] to [solitary confinement]."[166]

C. Fourteenth Amendment Substantive Due Process Challenges

Many public pronouncements on the solitary confinement of children invoke the Eighth Amendment's prohibition against cruel and unusual punishment.[167] 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 in jails.[168] Conditions of confinement for these children must comply with the substantive due process guarantees of the Fifth and Fourteenth Amendments, rather than Eighth Amendment standards. Given that substantive due process generally offers greater protection (i.e., can establish a lower threshold for demonstrating unconstitutional conduct) than the guarantee against cruel and unusual punishment, it is important to avoid pursuing Eighth Amendment challenges in contexts in which the Fifth and Fourteenth Amendments apply. [169]

This Part will present three strains of Fifth and Fourteenth Amendment jurisprudence, discussing ways in which the interpretation of substantive due process protections might be adapted to address the solitary confinement of children in adult jails and prisons. It then discusses the utility of incorporating international law and standards, as well as the broad and growing domestic consensus against the use of solitary confinement, into Fifth and Fourteenth Amendment challenges to the practice.[170]

1. Framing Challenges to Solitary Confinement

A person cannot be subjected to criminal punishment prior to being adjudicated guilty of a crime.[171] Punishments imposed after such adjudications

166. Madrid v. Gomez, 889 F. Supp. 1146, 1266 (N.D. Cal. 1995).

167. *See, e.g.*, Solitary Confinement of Juvenile Offenders, AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, (2012), https://www.aacap.org/aacap/policy_statements/2012/solitary_confinement_of_juvenile_offenders.aspx.

168. *See supra* Part I.A.1.

169. A court that erroneously denies relief to a pretrial detainee under the Eighth Amendment standard creates bad case law for futures challenges to conditions of confinement.

170. Consideration of the protections that procedural due process might offer against solitary confinement is beyond the scope of this article. In many circumstances, the procedures under which children are subjected to solitary confinement might be challenged as constitutionally inadequate. Litigators might argue that children are entitled to greater procedural protections, incorporating the unique vulnerabilities of youth, given the enormous risks associated with solitary confinement and the harm of erroneous deprivation of liberty. The Department of Justice has suggested this logic may be applicable to solitary confinement. *See* Letter from Christopher Cheng to Stuart Nathan, Investigation of Balt. City Det. Ctr. at 3 (Feb. 19, 2015) http://www.justice.gov/sites/default/files/crt/legacy/2015/03/12/bcdc_comp_2-19-15.pdf (stating that juveniles are entitled to greater procedural protections than adult prisoners).

171. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979).

are evaluated under the Eighth Amendment, while impositions of punishment prior to formal adjudications of guilt are analyzed under the Due Process clause.[172] For this reason, condition challenges brought by adults and children held before trial (or other adjudication) have generally been analyzed under the Fifth or Fourteenth Amendment protections of substantive due process.[173] Moreover, because juvenile adjudications are not criminal prosecutions, courts also analyze conditions challenges brought by juveniles held post-adjudication under substantive due process rather than the Eighth Amendment; the Supreme Court has yet to weigh in on this issue.[174] There is 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 scope of the protections of the due process clause for pretrial detainees are in large part derived from the state's affirmative obligations and duties with regard to safety and well-being triggered by the deprivation of an individual's liberty. "[W]hen 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 well-being."[175] Because the detention "renders [an individual] unable to care for himself," if the state "fails to provide for his basic human needs . . . it transgresses the substantive limits on state action."[176] The state's "affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty"—triggers the protection of the Due Process Clause.[177]

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172. *See id.* at 535 n.16 ("Due Process requires that a pretrial detainee may not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be 'cruel and unusual' under the Eighth Amendment."); *see also* Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977); Kingsley v. Hendrickson, 576 U.S. __, slip op. at 10–11 (2015) ("[P]retrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'").

173. *See* Schall v. Martin, 467 U.S. 253, 269 (1984) (analyzing conditions claims brought by juveniles detained pre-adjudication under the Fourteenth Amendment).

174. *But see Ingraham*, 430 U.S. at 669 n.37 (1977) (citation omitted) ("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 protection of the Eighth Amendment."). Circuits differ in whether they treat conditions challenges under substantive due process, the Eighth Amendment, or both. *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) (applying both Fourteenth and Eighth Amendments to post-adjudication youth). As noted above, there are strategic reasons for arguing for application of the more expansive protections of the Fifth and Fourteenth Amendment to children deprived of their liberty, most basically because an adjudication is not a criminal conviction as a matter of law.

175. DeShaney v. Winnebago Cty. Dept. Soc. Svcs., 109 U.S. 189, 199–200 (1989).

176. *Id.* at 200.

177. *Id.*

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 the adult criminal justice system. 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 and development or, in appropriate cases, rehabilitation. In *Youngberg v. Romeo*, a case involving civil detention, the Court stated the committed individual was entitled to "minimally adequate training," meaning "such training as may be reasonable in light of [her] liberty interests in safety and freedom from unreasonable restraints."[178] Although *Youngberg* arises outside of the juvenile justice or adult criminal systems, it suggests that, in the appropriate case, substantive due process may be argued to place affirmative obligations on government officials to ensure that core elements of a pretrial detainee child's liberty interest are guaranteed—including the interest in being safe, in being free from unreasonable restraint, and in some level of services or programming to promote growth and development. Thus, while it may be clear that, "[w]hen a person is institutionalized—and wholly dependent on the State . . . a duty to provide certain services and care does exist," it is unclear what precise content this duty might be held by courts to carry with regard to children in adult jails.[179]

The final strain of the jurisprudence on children deprived of their liberty in the juvenile justice system relevant to the substantive due process analysis of solitary confinement is the notion that children "are assumed to be subject to the control of their parents."[180] Therefore, in other contexts, the Court has suggested that, when state officials deprive children of their liberty, "the State has a *parens patriae* interest in preserving and promoting the welfare of the child."[181] As noted above, *parens patriae* is not entirely uncontroversial, as it suggests a certain lack of autonomy that would be construed to be at odds with case law affirming children's rights.[182] Yet this state interest is worth highlighting in the detention context because it strengthens the claims that the state is required to provide children deprived of their liberty with treatment and care that exceeds what is needed by and provided to adults.

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178. Youngberg v. Romeo, 457 U.S. 307, 322 (1982); *see also* Milonas v. Williams, 691 F.2d 931, 942 (10th Cir. 1982) (citation omitted) ("A person involuntarily confined by the state to an institution retains liberty interests that are protected by the due process clause of the fourteenth amendment. Such person has the right to . . . such minimally adequate training as reasonably may be required by these interests.").

179. Youngberg v. Romeo, 457 U.S. 307, 317 (1982).

180. Schall v. Martin, 467 U.S. 253, 265 (1984).

181. *Id.* at 263 (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

182. Invocation of legal authority that stresses the State's parens patriae obligations and interests with respect to children's welfare carries some risk of producing bad decisions that undercut children's fundamental rights. For a case which illustrates the stakes and complexity of the state interest v. autonomy and rights dichotomy see generally, Hodgson v. Minnesota, 543 U.S. 551 (2005) (discussing the right of minors to obtain abortions, with or without parental consent and with or without judicial bypass).

2. The Prohibition on Punishment

Although adults held in pre-trial detention may, as a matter of constitutional law, be subjected to the regular conditions and restrictions imposed by the detention facility, they "may not be *punished* prior to an adjudication of guilt."[183] Accordingly, the test for evaluating when conditions of confinement for adults held before conviction violate substantive due process is whether the conditions amount to punishment. The Supreme Court has held that conditions and restrictions amount to unconstitutional "punishment" when there is an expressed 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.[184] Corrections officials are, as a matter of law, considered to be experts in maintaining security and order, and courts generally defer to their expert judgment.[185] While this seems quite deferential, the Supreme Court has cautioned that "the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment."[186]

Framing the constitutional question in this way—as whether the challenged conditions of confinement are disproportionate to the legitimate interests served—creates a significant opportunity for litigators challenging the solitary confinement of children in adult jails to develop a new constitutional standard. 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 such challenge.[187] This case law also suggests that at least some of these characteristics should be seen to be objectively apparent to jail officials.[188] These developments 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 in violation of substantive due process.

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183. Bell v. Wolfish, 441 U.S. 520, 535 (1979) (emphasis added).

184. *Id.* at 538–40.

185. *Id.* at 540 n.23.

186. Schall v. Martin, 467 U.S. 263, 269 (1984). "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." *Id.*; *see also* Kingsley v. Hendrickson, 576 U.S. __, slip op. at 8 (2015) ("[I]n the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" (quoting *Bell*, 441 U.S. at 561)).

187. *See supra* Part II.A.

188. *See* J.D.B. v. North Carolina, 131 S. Ct. 2394, 2407 (2011) ("In 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.").

3. Departure from Standards

Most litigation challenging conditions of confinement of children in the juvenile justice system evaluates the substantive due process requirements by drawing a comparison to another civil detention context: involuntary commitment related to mental health. There, the Court has held that detainees' entitlements to "reasonable conditions of safety and freedom from unreasonable restraints" are violated when conditions of confinement constitute "a substantial departure from accepted professional judgment, practice, or standards."[189] As a result, a number of lower courts have considered professional guidance in deciding challenges to solitary confinement practices of children under the Fifth and Fourteenth Amendment. For example, in *R.G. v. Koller*, three youth (a 17 year-old male-to-female transgender girl, an 18 year-old lesbian, and an 18 year-old boy perceived to be gay) challenged their solitary confinement in a Hawaii juvenile facility after having been adjudicated delinquent and held in the juvenile justice system.[190] The district court concluded that "long-term segregation or isolation of youth is inherently punitive and is well outside the range of accepted professional practices."[191]

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.[192] This consensus among expert professional organizations alongside international law and standards could 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.

4. Shocks the Conscience

Another strand of substantive due process jurisprudence involves those cases that consider the limits of permissible government conduct outside of the detention context, where "[t]he touchstone of due process is protection of the individual against arbitrary action of government."[193] In *County of Sacramento v. Lewis*, a case evaluating government conduct during a police car chase, the Court held that conduct is "arbitrary in the constitutional sense" and violates substantive due process when it "shocks the conscience" and "violates the decencies of civilized conduct."[194] It stated that "[c]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action

189. Youngberg v. Romeo, 457 U.S. 307, 321, 323 (1982).

190. R.G. v. Koller, 415 F. Supp. 2d 1129, 1152 (D. Haw. 2006).

191. *Id.* at 1155.

192. *See supra* Part II.B. .

193. Cty. of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).

194. *Id.* at 846 (quoting Rochin v. California, 342 U.S. 165, 172–73 (1952)).

most likely to raise to conscience shocking level."[195] Whether conduct can qualify as "conscience-shocking" when it is less than intentional but more than negligent is a "closer call[]."[196] This analysis is objective.[197]

It could be argued—in the alternative to, or as part of, a more traditional substantive due process argument—that solitary confinement "shocks the conscience." At the very least, the standard can be used to bolster the role of proportionality in evaluating violations of the Fifth and Fourteenth Amendment. In the appropriate case, the solitary confinement of children could easily be shown to be unjustifiable by any government interest.

In sum, in litigation advancing substantive due process challenges to solitary confinement of children held before conviction, litigants could seek to reframe existing case law under one of three theories. First, that solitary confinement is a form of pre-conviction punishment in violation of *Bell v. Wolfish* and its progeny. Second, that solitary confinement is such a departure from professional standards for caring for and managing youth deprived of their liberty as to be plainly unconstitutional. Third, that solitary confinement is so extreme as to shock the conscience and is plainly in excess of any appropriate penological purpose.

Similar to Eighth Amendment challenges, substantive due process challenges to solitary confinement could be framed around the specific characteristics of individual plaintiffs or groups of plaintiffs and the governing law of the circuit. The various constitutional theories proposed above could be combined or emphasized differently as a result. Of course, in a given case, litigators may find it necessary to seek a narrow rule of decision, challenging practices as applied to an individual or a small number of plaintiffs. However, litigators might also argue for a categorical rule, barring as unconstitutional solitary confinement for all children or for a class of particularly vulnerable children. For these litigators, as discussed above with respect to the Eighth Amendment, the broad domestic consensus and the unqualified condemnation of the practice under international law and standards can be especially helpful tools.

5. The Role of the Emerging Domestic Consensus

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

195. *Id.* at 849.

196. *Id.* Harmful detention conditions that are the result of merely negligent action have been found by the courts not to offend due process. Kingsley v. Hendrickson, 576 U.S. __, slip op. at 5–6 (2015).

197. *See* Kingsley v. Hendrickson, 576 U.S. __, slip op. at 6 (2015) (holding a pretrial detainee need only show that force used was objectively unreasonable to prevail on an excessive force claim).

significant and growing national consensus that solitary confinement is inappropriate for managing children deprived of their liberty can be adduced (including through expert testimony and illustrative reforms implemented by other jurisdictions) to show that its use for children is so excessive as to be unconstitutional punishment. With regard to the case law protecting children from unreasonable restraint, the consensus can help demonstrate just how far solitary confinement, as practiced in adult jails, is beyond the range of accepted professional practices. Finally, the domestic professional consensus can bolster claims (particularly in egregious cases) that solitary confinement cannot be justified by any legitimate government interest and that its use shocks the conscience.

6. The Role of International Law and Standards

As discussed above, courts have invoked international law and the laws of other nations in the context of determining the meaning of the Eighth Amendment, including repeatedly with regard to children.[198] There is no equivalently rich history of invoking international law in the exposition of substantive due process protections to aid litigators in the Fifth and Fourteenth Amendment context. However, the international prohibitions on subjecting children to solitary confinement may be used by litigators seeking to illustrate that solitary confinement of children cannot be justified by any legitimate penological objective (and thus constitutes punishment), that 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).

III.
CONCLUSION

The legality of the solitary confinement of children in adult jails and prisons has been the subject of almost no sustained attention by the courts, by lawmakers and policymakers, or by academics in spite of it being a practice that has impacted the lives, health, and wellbeing of thousands of children in recent years. This article discusses a range of constitutional theories for banning 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 Fifth or Fourteenth Amendment tests for evaluating the constitutional limits of conditions of confinement. Additionally, this article has shown how litigators and judges can make use of a significant body of international law and standards, in addition to domestic standards relating to the use of physical and social isolation. In the future, reformers can use these tools to promote jurisprudence that reflect the developmental and legal differences between children and adults,

198. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

and the heightened risk of harm posed to children by solitary confinement. In this way, it may indeed be possible to take up Justice Kennedy's challenge with respect to the solitary confinement of children in addition to adults.[199] As courts, legislatures, and jail and prison administrators seek to determine whether, as Kennedy wondered, "workable alternative systems" to solitary confinement exist for children or for adults,[200] perhaps they might just come to determine that the only appropriate constitutional option is no solitary confinement at all.

199. *See* Davis v. Ayala, No. 13-1428, slip op. at 4 (June 18, 2015) (Kennedy, J., concurring).
200. *Id.*