

# A REACTION TO IAN KYSEL’S “BANISHING SOLITARY: LITIGATING AN END TO THE SOLITARY CONFINEMENT OF CHILDREN IN JAILS AND PRISONS”

PHILIP DESGRANGES<sup>∞</sup>

Confined to a cell alone for twenty-three hours a day for days, weeks, and even months on end, juveniles in solitary confinement face unbearable conditions. They can be deprived of social interaction, cut off from social activities, and even denied education.<sup>1</sup> The danger of putting children, who are still developing physically, psychologically, and neurologically, in solitary confinement is well documented.<sup>2</sup> Isolating juveniles can cause trauma, psychosis, and depression, increase the risk of suicide and self-harm, and permanently interfere with a child’s psychological and social development.<sup>3</sup> And for juveniles with mental illnesses—approximately sixty percent of juveniles in correctional settings—the risk of harm is especially great.<sup>4</sup> But despite these well-documented risks, the use of solitary confinement for juveniles persists.<sup>5</sup> And there have been few legal challenges to stop it.<sup>6</sup> Ian Kysel’s timely and necessary article *Banishing Solitary: Litigating an*

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<sup>∞</sup> Philip Desgranges is an attorney at the New York Civil Liberties Union, where he focuses on statewide civil rights and civil liberties impact litigation. He is lead counsel in *V.W. v. Conway*, No. 9:16-CV-1150, 2017 WL 696808 (N.D.N.Y. Feb. 22, 2017), a case challenging the solitary confinement of sixteen- and seventeen-year-old juveniles in a Syracuse jail. Desgranges is a 2009 graduate of New York University School of Law.

1. *See, e.g.*, Complaint ¶ 2, *V.W. v. Conway*, No. 9:16-CV-1150, 2017 WL 696808 (N.D.N.Y. Feb. 22, 2017), ECF No. 1.

2. *See Solitary Confinement (Isolation)*, NAT’L COMM’N ON CORR. HEALTH CARE (Apr. 10, 2016), <http://www.ncchc.org/solitary-confinement> (noting the harms of solitary confinement and concluding that “juveniles . . . should be excluded from solitary confinement for any duration”); *see also* Juvenile Justice Reform Committee, *Solitary Confinement of Juvenile Offenders*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Apr. 2012), [http://www.aacap.org/aacap/Policy\\_Statements/2012/Solitary\\_Confinement\\_of\\_Juvenile\\_Offenders.aspx](http://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx) (noting the “developmental vulnerability” of juveniles and noting that most suicides in juvenile correctional facilities occur when the juvenile is in isolation); *Solitary Confinement as a Public Health Issue*, AM. PUBLIC HEALTH ASSOC. (Nov. 5, 2013), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue> (asserting that juveniles should be categorically excluded from solitary confinement).

3. *See* Declaration of Dr. Louis J. Kraus at ¶¶ 30–34, *Conway*, No. 9:16-CV-1150, 2017 WL 696808, ECF No. 46-14.

4. *Id.* at ¶¶ 35–36.

5. *See* Ian M. Kysel, *Banishing Solitary: Litigating an End to the Solitary Confinement of Children in Jails and Prisons*, 40 N.Y.U. REV. L. & SOC. CHANGE 675, 683–84 (2016).

6. *See id.* at 684–85.

*End to the Solitary Confinement of Children in Jails and Prisons*, aims to change that by arming litigators with legal arguments to end the practice.

Kysel proposes two legal arguments under the Eighth Amendment, addressing juveniles convicted of crimes, and three under the due process clauses of the Fifth and Fourteenth Amendments, addressing juveniles detained pre-trial.<sup>7</sup> Having successfully brought an Eighth Amendment challenge to the use of solitary confinement for juveniles,<sup>8</sup> I will focus on Kysel's deliberate indifference argument under this amendment. Establishing cruel and unusual punishment under the Eighth Amendment is the more demanding standard,<sup>9</sup> so litigators should proceed with a due process challenge whenever the juvenile population is pre-trial. But by establishing cruel and unusual punishment, litigators can establish a constitutional violation for both pre-trial and post-conviction juveniles.<sup>10</sup> As background, cruel and unusual punishment is the "unnecessary and wanton infliction of pain."<sup>11</sup> Facility discipline, like the use of solitary confinement, is wanton and unnecessary when correction officials inflict harm or create a risk of harm that is "objectively sufficiently serious" and when officials subjectively are *deliberately indifferent* to an individual's health or safety.<sup>12</sup> The objective prong of

7. *See id.* at 695–717.

8. *See Conway*, No. 9:16-CV-1150, 2017 WL 696808, at \*25 (granting plaintiffs' motion for preliminary injunction, enjoining the use of solitary confinement for juveniles, and requiring that future discipline imposed on juveniles afford them meaningful social interaction with others and that it not harm the psychological health of juveniles).

9. *See id.* at 18; *see also* Kysel, *supra* note 5, at 712.

10. *See, e.g., Langley v. Coughlin*, 709 F. Supp. 482, 485 n.6 (S.D.N.Y. 1989) ("The Court, having found a violation of plaintiffs' rights under the Eighth Amendment, need not reach the question of a violation of plaintiffs' rights under the Fourteenth Amendment.")

11. *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (citation omitted).

12. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *see also Hope*, 536 U.S. at 737–38 (explaining that the infliction of pain for disciplinary purposes is "unnecessary and wanton" when officials act with "deliberate indifference" to an inmate's health or safety). In addition, facility discipline is wanton and unnecessary if the discipline is not penologically justified. *Id.* (holding that inflicting pain without penological justification—there, hitching an inmate to a post after safety concerns had abated—violates the Eighth Amendment). Some circuits consider penological justification under the objective prong of the deliberate indifference standard. *See, e.g., LaMarca v. Turner*, 995 F.2d 1526, 1535 (11th Cir. 1993) ("[The] objective standard . . . must be balanced against competing penological goals.") (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)); *Hope v. Pelzer*, 240 F.3d 975, 979 (11th Cir. 2001) (the objective standard "must be balanced, of course, against the prison officials' need to keep the prison safe"), *rev'd on other grounds*, 536 U.S. 730 (2002); *Gordon v. Faber*, 800 F. Supp. 797, 800 (N.D. Iowa) ("The lack of legitimate penological interest is relevant to the determination of whether the objective [Eighth Amendment] standard has been violated."), *aff'd*, 973 F.2d 686 (8th Cir. 1992). Notably, even when there is some penological justification for the use of discipline, if it is "sufficiently harmful . . . or otherwise reprehensible to civilized society" then it will not pass constitutional muster. *See, e.g., Madrid v. Gomez*, 889 F. Supp. 1146, 1262 (N.D. Cal. 1995) (finding the use of solitary confinement against adults with mental illnesses to be cruel and unusual even though the facility provided some justification).

this deliberate indifference standard refers to the level of risk and harm required. It requires proof of a “substantial risk of serious harm”<sup>13</sup> and proof that the harm is sufficiently serious, which is measured by “whether society considers the risk . . . to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk,”<sup>14</sup> whereas the subjective prong refers to the official’s state of mind and requires proof that corrections officials knew of and disregarded an excessive risk to an individual’s health and safety.<sup>15</sup>

Kysel proposes a different deliberate indifference standard tailored to account for the heightened vulnerabilities of juveniles.<sup>16</sup> Specifically, he proposes a juvenile deliberate indifference standard that requires 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.”<sup>17</sup> That standard is sensible, and it presents an ideal approach for courts. But where courts are unwilling to adopt this new standard, litigators can still accomplish their goal of banning solitary confinement for juveniles.

For one thing, courts can account for the heightened vulnerabilities of a class under the existing standard. Courts have consistently accounted for the heightened vulnerability of adults with mental illnesses when assessing their risk of harm in solitary confinement.<sup>18</sup> And the same logic applies to juveniles: “For

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13. *Farmer*, 511 U.S. at 834 (describing the objective harm test set forth by *Helling v. McKinney*, 509 U.S. 25 (1993)); *Helling*, 509 U.S. at 36 (1993) (requiring “a scientific and statistical inquiry into the seriousness of the potential harm” and its likelihood).

14. *Helling*, 509 U.S. at 36.

15. *Farmer*, 511 U.S. at 837.

16. See Kysel, *supra* note 5, at 701–04.

17. See *id.* at 703 (quotations omitted).

18. See, e.g., *Cnty. Legal Aid Soc’y. v. Coupe*, No. 15-CV-688 (GMS), 2016 WL 1055741, at \*4 (D. Del. Mar. 16, 2016) (holding that plaintiff stated an Eighth Amendment claim by alleging that defendants placed individuals with serious mental illness in solitary confinement); *Ind. Protection & Advocacy Servs. Comm’n v. Comm’r*, 1:08-CV-01317, 2012 WL 6738517, at \*23 (S.D. Ind., Dec. 31, 2012) (holding that the practice of placing prisoners with serious mental illness in segregation without providing them adequate mental health treatment violated the Eighth Amendment); *Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1117 (W.D. Wis. 2001) (granting injunctive relief to prisoners with serious mental illness housed in a supermax prison where they were in almost complete isolation); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) (holding unconstitutional the solitary confinement of mentally ill prisoners), *rev’d on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D. Tex. 2001); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320–21 (E.D. Cal. 1995) (“[D]efendants’ present policies and practices with respect to housing of [prisoners with serious mental disorders] in administrative segregation and in segregated housing units violate the Eighth Amendment rights of class members.”); *Casey v. Lewis*, 834 F. Supp. 1477, 1549–50 (D. Ariz. 1993) (finding an Eighth Amendment violation when “[d]espite their knowledge of the harm to seriously mentally ill inmates, ADOC routinely assigns or transfers seriously mentally ill inmates to [segregation units]”); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (holding that prison officials’ failure to screen out from segregated housing units “those individuals

these inmates, placing them in [solitary confinement] is the mental equivalent of putting an asthmatic in a place with little air to breathe.”<sup>19</sup> Indeed, nearly every district court that has ruled on a constitutional challenge to solitary confinement of juveniles has relied on expert testimony or medical literature about the heightened vulnerability of juveniles to find that even a short period of isolation is cruel and unusual punishment.<sup>20</sup> The Supreme Court and the courts of appeals have not addressed solitary confinement for juveniles; however, the Supreme Court has held that juveniles enjoy greater constitutional protections under the Eighth Amendment.<sup>21</sup>

For another thing, modifying the subjective intent prong to reflect “the heightened duty to protect juveniles” may not be necessary in a practical sense. Under the current standard, litigators must show that corrections officials knew of and disregarded a substantial risk of serious harm—a question of fact that can be

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who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there” plausibly rises to cruel and unusual punishment).

19. *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

20. *See Lollis v. N.Y. State Dep’t of Soc. Servs.*, 322 F. Supp. 473, 482–83 (S.D.N.Y. 1970) (finding the solitary confinement of two juveniles in a barren room for six days and two weeks respectively as punishment for fighting to be cruel and unusual punishment and issuing a preliminary injunction to stop their continued confinement based on the declarations of psychiatrists, psychologists, and educators who were “unanimous in their condemnation” of the practice); *Morgan v. Sproat*, 432 F. Supp. 1130, 1138–40 (S.D. Miss. 1977) (relying on expert testimony of harm and evidence of a suicide attempt and finding that confining delinquent teenage boys for an average of eleven days in a barren room, where they were prohibited from talking to others and were allowed out only during recreation and twice-daily showers, violated the Eighth Amendment); *Inmates of Boys’ Training Sch. v. Affleck*, 346 F. Supp. 1354, 1360, 1366–67 (D.R.I. 1972) (finding that isolation of juveniles for three to seven days “in a dark and stripped confinement cell with inadequate warmth and no human contact can only lead to [their] destruction” and amounted to cruel and unusual punishment); *Temporary Restraining Order at ¶¶ 3, 6, 8, Doe v. Hommrich*, No. 3-16-00799 (M.D. Tenn. Apr. 25, 2016), ECF No. 9 (issuing a temporary restraining order preventing further isolation of a juvenile who had been in solitary for six days and concluding that the “solitary confinement of juveniles for punitive or disciplinary reasons, especially for the length of time that Defendants have confined Plaintiff and especially for youth who may suffer from mental illness, violates the Eighth Amendment’s prohibitions against inhumane treatment of detainees”); *Preliminary Injunction Order, Hommrich*, No. 3-16-00799, ECF Nos. 114–15 (granting plaintiffs’ motion for a preliminary injunction and enjoining the defendants from placing juveniles in “solitary confinement or otherwise isolating them from meaningful contact with their peers as punishment or discipline”).

21. *See Graham v. Florida*, 560 U.S. 48, 68–69 (2010) (recognizing that “developments in psychology and brain science continue to show fundamental differences between juveniles and adult minds” and holding that juveniles cannot be sentenced to life without parole (“LWOP”) for non-homicide offenses); *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (recognizing that “children are constitutionally different from adults for sentencing purposes” and striking down mandatory LWOP sentences for juveniles convicted of homicide); *Roper v. Simmons*, 543 U.S. 551, 573–74 (2005) (holding that the death penalty cannot be imposed on juveniles in light of juveniles’ vulnerabilities and differences from adults).

proven by circumstantial evidence.<sup>22</sup> In most cases, litigators can rely on juveniles' administrative complaints, which must be submitted to corrections officials before litigation can begin,<sup>23</sup> to show that officials were aware of and disregarded a substantial risk of serious harm.<sup>24</sup> And in any case where corrections officials continue to use solitary confinement after being sued, litigators can rely on these "developments that postdate the pleadings and pretrial motions" to establish deliberate indifference to an excessive risk of harm.<sup>25</sup> Thus, in practice, litigators may have enough evidence under the existing standard to prove liability.

As more and more litigators challenge the use of solitary confinement for juveniles, Kysel's article will prove to be an invaluable guide. But whether courts eventually adopt his modified deliberate indifference standard or continue with the existing one, the conclusion they draw should be the same: Solitary confinement is cruel and unusual punishment for children, and it must be banished.

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22. *Farmer v. Brennan*, 511 U.S. 825, 837, 842 (1994).

23. 42 U.S.C. § 1997e(a) ("No action shall be brought . . . until such administrative remedies as are available are exhausted.").

24. *See Walker v. Schult*, 717 F.3d 119, 129–30 (2d Cir. 2013) (holding plaintiff adequately pled that defendants knew of, and disregarded, risk of harm because conditions of confinement did not change after plaintiff made repeated complaints about those conditions).

25. *Farmer*, 511 U.S. at 846, 846 n.9.