

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

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Ian Kysel’s seminal investigative report, “Growing Up Locked Down: Youth In Solitary Confinement Jails and Prisons Across the United States,” exposed the harrowing and sometimes deadly experiences of young people subjected to solitary confinement in America. In “Banishing Solitary,” Kysel now moves the field forward another critical step by endeavoring to “lay the groundwork for litigation promoting an end to this practice.”

Kysel makes a persuasive case that existing doctrines can be marshalled to successfully argue that solitary confinement is unconstitutional for young children. Few other scholars have tackled this difficult question. In this piece, the foundation has been laid, it will now be up to litigators to supply the bricks and mortar.

Happily, at least some lawyers have already taken up that project, and the early results have been encouraging.<sup>1</sup> But for other litigators who intend to use “Banishing Solitary” as their roadmap, there are critical conceptual questions, not fully addressed in the current piece, that deserve careful consideration when crafting and executing the type of litigation that Kysel now urges.

By way of a disclaimer early in the piece, Kysel notes that focusing on the solitary confinement of children “in no way should be viewed to imply that the solitary confinement of adults is constitutional . . . .”<sup>2</sup> If one believes, however, that the ultimate goal of this work is to show that solitary confinement “is incompatible with the concept of human dignity and has no place in civilized society”<sup>3</sup> for any human being of any age, then Kysel’s caveat demands scrutiny. Litigators adhering to his framework must ask a more fundamental question: What are the risks to adopting a litigation strategy that hinges on emphasizing the ways that children are

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<sup>1</sup> Patrick Lohmann, *Federal Judge Orders Halt to Onondaga County Jail Teen Solitary Confinement*, SYRACUSE POST (Feb. 22, 2017, 6:49 PM), [http://www.syracuse.com/news/index.ssf/2017/02/federal\\_judge\\_orders\\_halt\\_to\\_onondaga\\_coun\\_ty\\_jail\\_teen\\_solitary\\_confinement.html](http://www.syracuse.com/news/index.ssf/2017/02/federal_judge_orders_halt_to_onondaga_coun_ty_jail_teen_solitary_confinement.html); Steve Viuker, *Judge Halts Solitary Confinement for Juveniles in Upstate Jail*, N.Y. L.J. (Feb. 24, 2017), <http://www.newyorklawjournal.com/home/id=1202779894497/Judge-Halts-Solitary-Confinement-for-Juveniles-in-Upstate-Jail?mcode=1202617075062&curindex=1&slreturn=20170127113238>.

<sup>2</sup> Ian 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, 679 (2016), [https://socialchangenetwork.files.wordpress.com/2016/10/kysel\\_digital\\_9-29.pdf](https://socialchangenetwork.files.wordpress.com/2016/10/kysel_digital_9-29.pdf).

<sup>3</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

fundamentally different from adults?

The essential risk, of course, is that advocates seeking to end to solitary confinement for children will, in fact, implicitly or explicitly endorse the proposition that it is an acceptable practice for adults. This problematic exchange—accepting an incremental gain on behalf of a vulnerable and often sympathetic group, while ignoring or even sanctioning the idea that the *status quo* is otherwise unobjectionable for everyone else—has long pervaded nearly every area of criminal justice reform.

Far too often, advocates have often been willing to concede the propriety or efficacy of severely punitive and degrading criminal justice practices for one group in order to gain something for another. For example, advocates have endorsed (or, at best, ignored) extraordinarily long prison terms for those who commit “violent” offenses while aiming to lower the numbers of people in prison for “non-violent” crimes. Given the historically steep challenges to achieving any type of criminal justice reform and the ethical obligations lawyers owe to clients who are often suffering unimaginable harm and indignity, it is quite easy to see how these trade-offs occur. Yet there are serious consequences to these short-term bargains that may be self-defeating and ultimately thwart the prospect of achieving more systemic and lasting reforms.

This approach can lead courts, policymakers and criminal justice leaders to believe they have solved an issue merely by addressing it for one subgroup, undercutting the momentum for any further reform. Litigators can craft legal strategies so narrowly that, even in victory, the caselaw provides no stepping stone toward more expansive protections. By focusing too intently on protecting just one vulnerable population, advocates may fail to advance a type of deep-end cultural change necessary to ensure that today’s solitary confinement is not simply replaced by a different—but equally tortuous and punitive—practice tomorrow.

Notwithstanding these potential hazards, there are good reasons that litigators should enthusiastically embrace the legal strategies in “Banishing Solitary.” First, as the piece details, the risk of harm to children is more severe and permanent than it is for adults, and there are unique jurisprudential hooks specific to juveniles that can be utilized to overcome otherwise arduous constitutional hurdles. As a result, courts may be persuaded to move faster, and further, on their behalf. In this context, the challenge for the litigator is to heed Kysel’s disclaimer by contextualizing the litigation as a strategic effort to reduce harm as quickly as possible for a particularly vulnerable group. At the same time, lawyers bringing these cases must contest any implication, inside or outside the courtroom, that the constitutional (or moral) problem with solitary confinement is constrained to its effect on youth.

Second, there are compelling tactical reasons to begin with the legal theories that Kysel has ably developed. Kysel defines children as “individuals

under the age of eighteen.”<sup>4</sup>The scientific evidence has become increasingly clear, however, that the unique features of the adolescent brain that have animated the Supreme Court’s constitutional jurisprudence extend far beyond the age of 18, and in many cases up until the age of 25.<sup>5</sup> If courts rely on this research, as Kysel suggests that they should, when holding that solitary confinement is constitutionally prohibited for youth under age 18, those precedents will provide a firm basis for eventually extending the same protections up to age 25.<sup>6</sup> This type of iterative litigation strategy could yield enormous gains in the broader mission to eradicate solitary confinement, as youth aged 18-25 are often the largest cohorts in a jail or prison’s solitary confinement units. For example, in the New York State Prison system, men aged 18-25 typically comprise between one-quarter and one-third of the entire population held in isolation.<sup>7</sup>

Finally, ending the isolation of children is a fundamental step in proving there are “workable alternative systems”<sup>8</sup> to solitary confinement. Locking children away in small, barren cages is among the starkest possible examples of just how profoundly broken, cruel and unsafe America’s criminal justice systems have become. If we cannot do better than solitary confinement for the most vulnerable, most malleable and least culpable members of our society, it becomes difficult to imagine and argue for more effective and humane approaches for anyone else. While efforts to eradicate solitary confinement for children and for adults will undoubtedly proceed concurrently, “Banishing Solitary” appropriately suggests that time is ripe for using litigation to quickly end the practice for all children. Doing so would force jails and prisons to operate safely without the practice and creating the opportunity for broader reforms to follow in that wake.

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<sup>4</sup> Kysel, *supra* note 2, at 678, n.8.

<sup>5</sup> See, e.g., *Brain Maturity Extends Well Beyond Teen Years*, NAT’L PUB. RADIO (Oct. 10, 2011, 12:00 PM), <http://www.npr.org/templates/story/story.php?storyId=141164708>.

<sup>6</sup> Notably, at least one major correctional system reforming solitary confinement has already started moving in this direction See Michael Winerip & Michael Schwartz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 13, 2015), [https://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html?\\_r=0](https://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html?_r=0).

<sup>7</sup> Calculations by author. See Scarlet Kim, Taylor Pendergrass & Helen Zelon, N.Y. Civil Liberties Union, *Boxed In: The True Cost of Extreme Isolation in New York’s Prisons* 22 (2012), [https://www.nyclu.org/sites/default/files/publications/nyclu\\_boxedin\\_FINAL.pdf](https://www.nyclu.org/sites/default/files/publications/nyclu_boxedin_FINAL.pdf) (showing that, on one day in 2012, approximately 27% of the population held in “Special Housing Units” was aged 18-25).

<sup>8</sup> *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).