

# CHILDREN IN ISOLATION: THE SOLITARY CONFINEMENT OF YOUTH

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## INTRODUCTION

Ismael Nazario was raised in Brooklyn, New York, by his mother, a single parent who consistently emphasized the importance of education and doing well in school.<sup>1</sup> When Ismael was thirteen, his mother was diagnosed with breast cancer.<sup>2</sup> As she underwent chemotherapy and radiation, Ismael began to struggle.<sup>3</sup> By tenth grade, he had lost interest in academics and instead spent his time smoking marijuana and talking to girls.<sup>4</sup> At fifteen, he got into a scuffle with another student at school and was arrested, placed in handcuffs, and taken to the police station. A year later, at age sixteen, he was charged with assault and sent to jail at Rikers Island to await resolution of his case.<sup>5</sup> There he was attacked by

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1. Trey Bundy, *Sixteen, Alone, 23 Hours a Day, in a Six-by-Eight-Foot Box*, MEDIUM (Mar. 5, 2014), <https://medium.com/solitary-lives/sixteen-alone-23-hours-a-day-in-a-six-by-eight-foot-box-26ab1e09632d> (“She made sure she was on top of me when it came to certain things, especially school, so all the way up to junior high school, I was honor roll.”).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* New York is one of only two states in the United States in which juvenile court jurisdiction ends at age fifteen, meaning that all sixteen- and seventeen-year-olds are under adult criminal court jurisdiction. See *Statistical Briefing Book*, OFF. JUV. JUST. & DELINQ. PREVENTION (Apr. 24, 2014), [http://www.ojjdp.gov/ojstatbb/structure\\_process/qa04101.asp](http://www.ojjdp.gov/ojstatbb/structure_process/qa04101.asp). Nine states end juvenile court jurisdiction at age sixteen, and the remaining thirty-nine states plus the District of Columbia end it at age seventeen. *Id.* Rikers Island jail is a

four inmates who demanded his phone privileges and commissary food and required him to ask their permission before sitting in a chair or using the bathroom.<sup>6</sup> Ismael quickly learned that in order to survive, he needed to be ready to fight.<sup>7</sup>

Although Ismael's assault charge was ultimately dismissed, the two months that he spent in jail changed the way in which he saw himself and his place in the world.<sup>8</sup> The following year, at age seventeen, he was once again held at Rikers—this time for two alleged robberies—as he could not afford to post bail.<sup>9</sup> After getting into a fight with a group of other inmates, which guards characterized as “inciting a riot,” Ismael was placed in solitary confinement.<sup>10</sup> While there, he hallucinated, paced, talked to himself, cried, and screamed.<sup>11</sup> The New York City Correction Department's disciplinary rules allow for inmates to be sentenced to “punitive” or “disciplinary” solitary confinement<sup>12</sup> for such seemingly minor infractions as “[h]orseplay,” “[n]oisy behavior,” “annoy[ing a staff member,]” and possessing “[u]nauthorized amounts of . . . clothing” or “[u]nauthorized hobby materials or art supplies.”<sup>13</sup> Before Ismael left Rikers two years later, he had spent more than three hundred days in “the box,” a six-by-eight-foot cell containing a bunk, sink, toilet, and metal door with no natural light and a small mesh window through which food is delivered; his longest stretch in solitary lasted four months.<sup>14</sup> All of Ismael's time in solitary confinement at Rikers was in pretrial detention—he had not yet been convicted of a crime.<sup>15</sup>

Ismael Nazario's experience is representative of the experiences of many thousands<sup>16</sup> of young people<sup>17</sup> who are held in prolonged

massive complex located in the middle of New York City's East River; its adolescent population is between 400 and 800, and hundreds of teenagers held there have been sent to solitary confinement. Bundy, *supra* note 1.

6. Bundy, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* (“It's like you see the black dots and you focus on the black dots and your eyes just follow them around in the cell all over . . . . You're just looking and you know you try to escape seeing the black dots, but you can't.”).

12. See *infra* Subpart II.A.1 for a discussion of the rationales used to justify the solitary confinement of youth, including punishment and discipline.

13. THE CITY OF N.Y. DEPT OF CORR., DIRECTIVE 6500R-B, INMATE DISCIPLINARY DUE PROCESS (Oct. 14, 2005), available at <http://www.nyc.gov/html/doc/downloads/pdf/6500R-B.pdf>.

14. Bundy, *supra* note 1.

15. *Id.*

16. As discussed in further detail below, the numbers of minors held in solitary confinement are only an estimate, as neither the U.S. government nor countries in Europe or elsewhere require facilities to report the numbers of youth in isolation or the duration of their solitary confinement. See *infra* Subpart II.B. As for adults held in solitary confinement, available data from

isolation<sup>18</sup> on any given day across the globe. This type of solitary confinement occurs in adult as well as juvenile facilities, is used as a long-term response to minor misconduct that does not threaten immediate harm to the youth or others, and is typically imposed for a minimum of twenty-four hours at a time, violating best practice standards for juveniles in detention.<sup>19</sup> At Rikers Island, for instance, an average of one hundred teenagers are in solitary confinement each day,<sup>20</sup> and they are routinely placed in segregation for months at a time.<sup>21</sup> On an international level, the author's

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the U.S. Bureau of Justice Statistics and elsewhere suggest that there are at least 80,000 prisoners held in isolation on any given day, including approximately 25,000 held in long-term solitary in "supermaximum" security prisons (also known as "supermax prisons"); see Jean Casella & James Ridgeway, *How Many Prisoners Are in Solitary Confinement in the United States?*, SOLITARY WATCH (Feb. 1, 2012), <http://solitarywatch.com/2012/02/01/how-many-prisoners-are-in-solitary-confinement-in-the-united-states/>; see also Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 126–27 (2003) (defining "supermax prisons" as ones that house prisoners who have been judged to be "dangerous," "a threat," or a member of a "disruptive" group, and holding them in virtual isolation and subjecting them to almost complete idleness for extremely long periods of time that were, until recently, "unprecedented in modern corrections").

17. This Article focuses on the prolonged isolation of minors—individuals under the age of eighteen—who are in some form of custody. Thus, the use of such terms or phrases as "youth," "young inmates," "young people," etc., all refer to those under the age of eighteen. Although there are compelling arguments that prolonged isolation should be abolished for all inmates, regardless of age, such analyses can already be found in legal scholarship. See, e.g., *infra* note 58.

18. There are many different words, phrases, and euphemisms that are used to describe what is most commonly known as solitary confinement, including "separation," "isolation," "intensive support unit," "punitive, protective[,] or administrative segregation," "special housing," "restricted housing," "special management," "room time," "room restriction," "room confinement," "restricted engagement," "reflection time," "reorientation," "separation and care unit," "suicide watch," "lock down," and "the box." In the spirit of clarity, the terms "isolation" and "solitary confinement" will be principally used throughout this Article.

19. See *infra* Subpart IV.B, discussing best practice standards regarding the use of solitary confinement in juvenile detention facilities.

20. Bundy, *supra* note 1; see also Michael Schwirtz, *Solitary Confinement to End for Youngest at Rikers*, N.Y. TIMES, Sept. 29, 2014, at A20 (reporting that the New York City Correction Department has announced plans to eliminate the punitive practice of solitary confinement for sixteen- and seventeen-year-old inmates by the end of 2014 following the August 2014 release of a highly critical report by the U.S. Attorney's Office in Manhattan on the Correction Department's mistreatment of teenage inmates).

21. Letter from Preet Bharara, U.S. Attorney for the S. Dist. of N.Y., to Mayor de Blasio, Commissioner Joseph Ponte, and Zachary Carter, CRIPA Investigation of the N.Y.C. Dep't of Corr. Jails on Rikers Island 49–50 (Aug. 4, 2014), available at <http://www.justice.gov/usao/nys/pressreleases/August14/RikersReportPR/SDNY%20Rikers%20Report.pdf>.

original research reveals that approximately thirty percent of the world's countries either employ the practice or legally condone its use.<sup>22</sup> Whether the young person is held in a juvenile or immigrant detention center,<sup>23</sup> adult jail, or prison, the common denominator for all these settings is that the individual is under the age of eighteen, removed from the general population of the facility, and kept alone in a room or a cell for twenty-three hours each day, with one hour of exercise in what is often a small cage. Frequently, the triggering event for imposing isolation is relatively minor misbehavior that violates the facility's rules, including not keeping one's cell door open or not making one's bed.<sup>24</sup> Solitary may also be imposed during pretrial detention to coerce suspects into confessing or pleading guilty.<sup>25</sup> Large percentages of teenagers in solitary have diagnosed mental health problems.<sup>26</sup>

Government entities have long justified the practice of solitary confinement on two general grounds. Prison regulations typically stipulate that "administrative" solitary confinement is warranted for purposes of prison management to ensure the safety and security of the facility—such as when an inmate is awaiting classification, is awaiting transfer to another institution or location, is awaiting a

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22. See *infra* Appendix (documenting, based on original research, that 57 of the 193 member countries of the United Nations condone and/or employ the isolation of children).

23. See ICE DIRECTIVE, 11065.1, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES (Sept. 4, 2013), available at [http://www.ice.gov/doclib/detention-reform/pdf/segregation\\_directive.pdf](http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf) ("A detainee's age . . . may not provide the sole basis for a decision to place the detainee in involuntary segregation. An individualized assessment must be made in each case. Unaccompanied alien children must be treated in accordance with applicable statutes, regulations, and policies."); JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 74 (2006), available at [http://www.law.yale.edu/documents/pdf/Clinics/Seeking\\_Ashylum\\_Alone\\_US\\_Report.pdf](http://www.law.yale.edu/documents/pdf/Clinics/Seeking_Ashylum_Alone_US_Report.pdf) (noting that a sixteen-year-old was held in isolation by INS after he was transferred to an adult secure detention facility); Esther Yu-Hsi Lee, *Over 1,300 Immigrant Children Spent a Combined 36,598 Days in Adult Detention Facilities*, THINKPROGRESS (June 5, 2013, 12:30 PM), <http://thinkprogress.org/immigration/2013/06/05/2103651/over-1300-immigrant-children-spent-a-combined-36598-days-in-adult-detention-facilities/> ("A few [children] were even placed in solitary confinement to safeguard them against the general adult population."); see also Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 24, 2013, at A1.

24. See HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 52 (2012), available at <http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf>.

25. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 500–02 (2006).

26. See, e.g., Bundy, *supra* note 1 ("Of the teenagers in solitary [at Rikers], almost three-quarters had diagnosed mental health problems.").

hearing for or under investigation for a violation of a prison regulation, has been classified as presenting a risk to staff or other inmates, is requesting segregation for self-protection, or when the staff has determined that such protection is needed.<sup>27</sup> “Disciplinary” solitary confinement is a punitive status imposed as punishment for the commission of a variety of prohibited conduct,<sup>28</sup> with the goal, in some cases, of restricting or restraining inmates so that their behavior does not escalate.<sup>29</sup> It can also be imposed when the institution’s hospital does not have a room or cell with adequate security provisions.<sup>30</sup> In justifying the practice, lobbyists for corrections departments insist that solitary confinement is necessary to protect vulnerable inmates.<sup>31</sup> Corrections officers maintain that solitary is the best way to prevent violence among inmates, many of whom are mentally ill,<sup>32</sup> and is necessary for the safety of the prison guards.<sup>33</sup> Cost concerns are also invoked, with the explanation that there is insufficient funding for proper security, leaving few viable options other than the prolonged isolation of increasingly violent inmate populations.<sup>34</sup> Such rationales are

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27. See, e.g., 28 C.F.R. § 541.23 (2014) (allowing administrative detention and removal from the general population when an inmate’s presence “poses a threat to life, property, self, staff, other inmates, the public, or to the security or orderly running of the institution”).

28. *Id.* § 541.22.

29. *Id.* § 541.3(b).

30. See *id.* § 541.24.

31. See, e.g., David Crary, *Solitary Confinement for Youths Should Be Banned, Makes Juveniles ‘Go Crazy’: Human Rights Watch*, HUFFPOST CRIME (Oct. 10, 2012, 12:36 PM), [http://www.huffingtonpost.com/2012/10/10/solitary-confinement-for-youths-banned\\_n\\_1954848.html](http://www.huffingtonpost.com/2012/10/10/solitary-confinement-for-youths-banned_n_1954848.html) (offering a defense of solitary confinement from the president of the American Correctional Association and the executive director of the N.Y. State Sentencing Commission); Kevin Johnson, *Panel: No Solitary Confinement for Minors, Mentally Ill*, USA TODAY, (Feb. 25, 2014, 6:36 PM) <http://www.usatoday.com/story/news/nation/2014/02/25/judiciary-prison-ban-juvenile-solitary-confinement/5817559/> (noting that some prison authorities defended the use of solitary confinement to protect staff and vulnerable inmates).

32. See, e.g., Bundy, *supra* note 1 (quoting the president of the New York City Correction Officers Union as stating, “We don’t have the experience to deal with a person with psychological problems . . . . We’re not doing enough because they shouldn’t be brought to us”); see also *infra* Subpart 1.A (noting the high rate of preexisting mental health disorders among incarcerated youths).

33. See, e.g., Bundy, *supra* note 1. Bundy quotes Norman Seabrook, the president of the New York City Correction Officers Union, as stating, in a defense of solitary confinement: “We have had inmates bite off the fingers of correction officers so that they now have eight-and-a-half and nine fingers as opposed to 10 . . . . Until you’ve walked in the shoes of a correction officer inside the city’s jail system, please don’t pass judgment on us, because you know what? It’s a tough job.” Seabrook believes that “solitary confinement is the tool that allows correction officers to make it through the day.” *Id.*

34. See Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U.

circuitous, however, as “the increasingly widespread use of long-term [solitary confinement] is beginning to serve as a *de facto* justification for the practice, undercutting” the opportunity for meaningful reform.<sup>35</sup>

These rationales also ignore empirical evidence that has consistently linked the solitary confinement of adult prisoners to “various forms of stress-related, dysfunctional, and destructive behavior,”<sup>36</sup> making prisons less safe rather than more so. Studies have found that isolation is one of the key correlates for reports of illness, self-mutilation, and jail suicides.<sup>37</sup> Property damage is more likely to occur in units with large numbers of inmates in solitary, as those prisoners with the worst coping skills “may be particularly likely to resort to a pattern of impulsive and self-defeating violence.”<sup>38</sup> Likewise, in segregation units, violence toward staff has been found to be significantly more likely.<sup>39</sup> It has even been suggested that isolation and intensified control measures in prison settings generate a culture or “ecology of cruelty,” causing long-term psychological harm to the correctional officers who work in these units.<sup>40</sup> Studies have also found that subjecting adult prisoners to solitary confinement makes it more difficult for them to assimilate back into their communities, increasing the risk of recidivism.<sup>41</sup>

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INT’L L. REV. 71, 75 (2005) (citing JOSEPH T. HALLINAN, *GOING UP THE RIVER: TRAVELS IN A PRISON NATION* xv–xvi (2003) (noting how cost concerns have drastically changed prison design from the nineteenth century to today)).

35. Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 543 (1997).

36. *Id.* at 525.

37. *Id.*

38. Frank J. Porporino, *Managing Violent Individuals in Correctional Settings*, 1 J. INTERPERS. VIOLENCE 213, 219 (1986).

39. Pamela Steinke, *Using Situational Factors to Predict Types of Prison Violence*, 17 J. OFFENDER REHABILITATION 119, 126 tbl.1 (1991); see also Howard Bidna, *Effects of Increased Security on Prison Violence*, 3 J. CRIM. JUST. 33, 42, 44 (1975) (finding that the rate of stabbings of staff by prisoners rose significantly with the transfer of prisoners from the general population to security housing units, and attributing the increase to “the impact of crowding on aggressive tendencies, the lack of both mental and physical exercise in security units, the attachment of the violent label, and possible changing characteristics of the inmate population”).

40. Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 CRIM. JUST. & BEHAV. 956, 967, 969 (2008) (noting that, even though correctional officers create and enforce many aspects of the supermax’s “ecology of cruelty,” they also suffer psychologically from constant exposure to the purely punitive environment of supermax facilities).

41. See Keramet A. Reiter, *Parole, Snitch, or Die: California’s Supermax Prisons and Prisoners, 1997–2007*, 14 PUNISHMENT & SOC. 530, 535–36 (2014) (citing a 2007 study of recidivism rates in the State of Washington finding that prisoners released directly from supermax prisons had the highest felony recidivism rates among released prisoners studied and concluding that “supermax parolees are likely to face additional barriers to successful

There is neither an easy nor straightforward answer to the question of why the practice of isolating inmates—particularly those under the age of eighteen—continues to persist despite extensive evidence of its resultant harm to the individual and its counterproductive impact on prison safety. Despite legal challenges based on the Eighth Amendment to the U.S. Constitution, no state or federal court has found that solitary confinement is *per se* unconstitutional.<sup>42</sup> Since the 1980s, the increasing use of the practice has resulted from the “tough-on-crime” penal philosophy perpetuated by legislators and a lack of meaningful judicial review of isolation conditions.<sup>43</sup> From the perspective of those within the prison industrial complex, it is easier to keep adolescent “super-predators” locked alone in cells than to implement the reforms necessary to create a supportive and psychologically healthy correctional environment. This attitude is particularly pronounced when the young people are black or brown, have no one to advocate for them, and have been labeled—as a result of implicit biases and cultural anxieties—“bad kids” or “throwaway kids” by the juvenile and criminal justice systems.<sup>44</sup> These factors are further compounded by the high percentages of imprisoned youth who have a mental illness, have drug or alcohol addictions, or suffer from both,<sup>45</sup> presenting even greater challenges to facilities with few resources.

A related element at play is the propensity of policy makers and correctional officers to view the age or youth of the inmate as aggravating rather than mitigating.<sup>46</sup> In other words, the sole fact that the inmate is an adolescent charged with or convicted of a crime makes him less human and more threatening to prison staff than if he were an adult. Similarly, the very qualities that should reduce an adolescent’s culpability in the eyes of those around him—

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reintegration into their communities, beyond the usual collateral consequences of having a criminal record”); *US: Look Critically at Widespread Use of Solitary Confinement*, HUM. RTS. WATCH (June 18, 2012), <http://www.hrw.org/news/2012/06/18/us-look-critically-widespread-use-solitary-confinement> (“[P]rolonged solitary may decrease the ability of prisoners to successfully re-enter their communities upon release from prison.”).

42. See *infra* Subpart III.B.

43. SCARLET KIM ET AL., N.Y. CIVIL LIBERTIES UNION, *BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK’S PRISONS* 14–15 (2012), available at [http://www.nyclu.org/files/publications/nyclu\\_boxedin\\_FINAL.pdf](http://www.nyclu.org/files/publications/nyclu_boxedin_FINAL.pdf).

44. See *infra* notes 318–22 and accompanying text (discussing the role of race and class in the juvenile justice system).

45. See *infra* notes 78–82 and accompanying text.

46. See, e.g., Cray, *supra* note 31. Cray quotes the former top corrections official in New York City and in Pennsylvania as stating, “But we have to be very careful not to deprive officials of necessary tools . . . . There are and always will be predatory individuals in custody, including youngsters, who can prey on other youngsters. Sometimes physical separation may be the only resort.” *Id.*

his impetuosity, unpredictability, and inability to understand the consequences of his actions—instead serve to augment it.<sup>47</sup> When these dynamics occur, judgments regarding prison management—both micro and macro—are made through the lens of stereotype and bias, and the individual inmate’s status as an offender takes precedence over his status as a child. Courts that condone correctional policies that do not distinguish between teenage and adult prisoners also fail to take an appropriate account of an inmate’s youth,<sup>48</sup> ultimately denying young offenders all “hope of restoration.”<sup>49</sup>

Recent U.S. Supreme Court decisions addressing juveniles and the Eighth Amendment that call for bright-line rules rather than subjective balancing tests<sup>50</sup> support revisiting correctional policies that allow for the solitary confinement of youth. In *Roper v. Simmons*,<sup>51</sup> which held that the juvenile death penalty was unconstitutional, Justice Kennedy was unwilling to tolerate the risk that jurors would objectify violent young offenders and consider their youth as an aggravating rather than a mitigating factor in sentencing.<sup>52</sup> In *Graham v. Florida*,<sup>53</sup> which held that juvenile life without parole for non-homicides was unconstitutional, the Court was unwilling to tolerate the risk that a judge or jury would sentence a minor based on a “discretionary, subjective judgment” that the youth was incorrigible and could not be redeemed.<sup>54</sup> Similarly, appellate court and trial court judges should not tolerate the risk that correctional administrators or prison guards will abuse their discretion when determining whether to hold a young person

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47. Ashley Dobbs, *The Use of Youth as an Aggravating Factor in Death Penalty Cases Involving Minors*, JUV. JUST. UPDATE, June/July 2004, at 1, 14–15.

48. See, e.g., Hughes v. Judd, No. 8:12-CV-568-T-23MAP, 2013 WL 1821077, at \*4 (M.D. Fla. Mar. 27, 2013), report and recommendation adopted as modified, No. 8:12-CV-568-T-23MAP, 2013 WL 1810806, at \*2 (M.D. Fla. Apr. 30, 2013) (noting a Florida prison’s practice of applying the same levels of force to juvenile and adult inmates).

49. *Graham v. Florida*, 560 U.S. 48, 70 (2010).

50. See, e.g., *id.* at 77–79; *Roper v. Simmons*, 543 U.S. 551, 574 (2005); see also Tamar R. Birkhead, *Graham v. Florida: Justice Kennedy’s Vision of Childhood and the Role of Judges*, 6 DUKE J. CONST. L. & PUB. POL’Y 66, 70–71 (2010) (discussing Justice Kennedy’s opinions in *Roper* and *Graham*, in which he concluded that “only a categorical rule that drew a bright line between childhood and adulthood was sufficient to avoid the imposition of punishment disproportionate to the crime”).

51. 543 U.S. 551.

52. See *id.* at 572–73 (“In some cases a defendant’s youth may even be counted against him.”).

53. 560 U.S. 48.

54. *Id.* at 50, 81.

in solitary confinement, as the resultant harm to the child can be devastating.<sup>55</sup>

The practice of placing teenagers in solitary confinement is not limited to the United States. It is an international phenomenon that crosses boundaries of geography, language, religion, race, and ethnicity. It has been documented in countries as diverse as Canada, Brazil, Sweden, Kenya, Singapore, Israel, and Australia.<sup>56</sup> Although there are no legally binding international instruments that explicitly ban the practice, there is considerable international support for the premise that it is an extreme measure that should only be used when absolutely necessary. Yet, it continues unabated and unregulated, often unacknowledged and documented using only euphemisms or idioms.<sup>57</sup>

This Article is the first to provide a comprehensive comparative analysis of the solitary confinement of youth in the United States, Europe, and across the globe.<sup>58</sup> Part I reviews the literature detailing the varieties of harm that young people suffer as a result of solitary confinement. Part II discusses the rationales that facilities use to justify solitary confinement and the prevalence of

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55. See discussion *infra* Part I.

56. See *infra* Subpart II.B, Appendix.

57. See *infra* notes 148–52, 176–80 and accompanying text.

58. A comprehensive preemption check via Westlaw and Lexis of legal scholarship published within the past thirty years confirmed that there are no comparable law review articles addressing the use of solitary confinement of youth in the United States, Europe, and around the world. Of course, there is a rather large body of legal scholarship on the solitary confinement of adults. See, e.g., Valerie Bresnihan, *Out of Mind, Out of Sound: Solitary Confinement of Mentally Ill/Dysfunctional Prisoners in Irish Prisons*, 9 EUR. J. HEALTH L. 111 (2002); Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115 (2008); R. George Wright, *What (Precisely) Is Wrong with Prolonged Solitary Confinement?*, 64 SYRACUSE L. REV. 297 (2014). There are also a fair number of comparative analyses of the ways in which different criminal court systems treat young offenders pre- and post-adjudication. See, e.g., Jelani Jefferson & John W. Head, *In Whose “Best Interests”?—An International and Comparative Assessment of US Rules on Sentencing of Juveniles*, 1 HUM. RTS. & GLOBALIZATION L. REV. 89 (2008); Roger J.R. Levesque, *Future Visions of Juvenile Justice: Lessons from International and Comparative Law*, 29 CREIGHTON L. REV. 1563 (1996); Ann Skelton, *From Cook County to Pretoria: A Long Walk to Justice for Children*, 6 NW. J.L. & SOC. POL’Y 413 (2011). However, there are very few articles that discuss the solitary confinement of youth in the United States. See, e.g., James Alec Gelin, *Unwarranted Punishment: Why the Practice of Isolating Transgender Youth in Juvenile Detention Facilities Violates the Eighth Amendment*, 18 U.C. DAVIS J. JUV. L. & POL’Y 1 (2014); Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285 (2012); Sandra Simkins et al., *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U. J.L. & POL’Y 241 (2012), and none that appear to present a comprehensive account and analysis of the solitary confinement of youth across the globe.

the practice internationally. Part III analyzes the history of solitary confinement and the legal response within the United States and the international community. Part IV offers strategies for reform, including legislation, federal regulations, and litigation; the adoption of best practice standards; and the role of the juvenile defender and other advocates for incarcerated youth. The Appendix presents the author's original research documenting the current policies of the fifty-seven countries that either legally condone or employ the practice of juvenile solitary confinement.<sup>59</sup>

### I. HOW ISOLATION HARMS YOUNG PEOPLE

Although there is limited research on the effects of isolation on incarcerated youth,<sup>60</sup> the existing studies have found that it is correlated with high rates of suicide as well as with post-traumatic stress disorder ("PTSD"), depression, and future criminal activity.<sup>61</sup>

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59. The data included in the Appendix were collected primarily from reports drafted between 2000 and 2014 by the United Nations Committee on the Rights of the Child as well as by regional governmental organizations, such as the Council of Europe and the Organization of American States. For countries in which such data were not available, I relied on reporting of data on non-governmental organizations and public media. As public reporting of data on juvenile solitary confinement is relatively limited outside of the United States, data collection was often derived from older sources; for this reason, changes may have occurred in policies and practices since the publication date of the reports cited. In addition, only explicit mention of the use of solitary confinement on juveniles was tracked; as a result, several countries with widespread use of the solitary confinement of adults are noticeably absent from the data set (e.g., Iran and Russia). Lack of inclusion in the Appendix indicates merely that the author was unable to verify evidence of the isolation of youth through publicly available sources.

60. See HUMAN RIGHTS WATCH, *supra* note 24, at 24 ("Human Rights Watch and the American Civil Liberties Union are not aware of any studies that look specifically at the effects of prolonged solitary confinement on adolescents.").

61. See Carly B. Dierkhising et al., *Victims Behind Bars: A Preliminary Study of Abuse During Juvenile Incarceration and Post-Release Social and Emotional Functioning*, 20 PSYCHOL. PUB. POL'Y & L. 181, 182 (2014) (finding that rates of abuse of youth in custody—including solitary confinement—are correlated with PTSD symptoms, depression, and future criminal activity); Simkins et al., *supra* note 58, at 259 (reporting that a 1999 study of suicides in juvenile facilities by the Office of Juvenile Justice and Delinquency Prevention ("OJJDP") "found that 50 percent of youth who committed suicide were in isolation at the time of their suicide, and that 62 percent had previously been in isolation"); see also Donna Austin et al., *The Child's Experience of Single Room Isolation: A Literature Review*, 25 NURSING CHILD. & YOUNG PEOPLE 18, 19 (2013) (finding that studies of children during the 1970s and 1980s who were in isolation in hospital settings revealed that "the processes of cognitive, social, psychological[,] and motor development... were altered as a result of isolation").

Of course, its harmful impact on adult prisoners has been well established in the scholarly literature.<sup>62</sup>

Yet, it is continually necessary to chronicle the magnitude of the trauma that isolation inflicts, as courts, including the U.S. Supreme Court, have been “reluctant to consistently accord the suffering of prisoners—whether from isolation or other extremely harsh conditions of confinement—meaningful constitutional recognition”<sup>63</sup> and have “long granted nearly complete deference to correctional decision makers.”<sup>64</sup> This Part, therefore, briefly explores the four broad categories of harm that result from solitary confinement: psychological harm, physical harm, social and developmental harm, and the harm to inmates’ adjudicatory rights.

### A. *Psychological Harm*

It has been nearly two decades since one of the leading scholars in this area, Craig Haney, first argued that there is “sufficient empirical justification to regard solitary confinement as a unique correctional environment that warrants special legal status.”<sup>65</sup> In a

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62. See, e.g., Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 333 (2006) [hereinafter Grassian, *Psychiatric Effects*]; Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1451–53 (1983); Haney & Lynch, *supra* note 35, at 543–48; Lindsay M. Hayes, *And Darkness Closes in . . . a National Study of Jail Suicides*, 10 CRIM. JUST. & BEHAV. 461, 471, 475, 480 (1983); 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, 104–05 (2010); Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment* 14 (Dec. 2001) (unpublished manuscript), available at <http://aspe.hhs.gov/hsp/prison2home02/haney.pdf>; Sal Rodriguez, *Fact Sheet: Psychological Effects of Solitary Confinement*, SOLITARY WATCH (2011), <http://solitarywatch.com/wp-content/uploads/2011/06/fact-sheet-psychological-effects-of-solitary-confinement2.pdf>; see also CITY OF N.Y.C. BD. OF CORR., *THREE ADOLESCENTS WITH MENTAL ILLNESS IN PUNITIVE SEGREGATION AT RIKERS ISLAND* 4–6, 11–13 (2013), available at [http://www.nyc.gov/html/boc/downloads/pdf/reports/Three\\_Adolescents\\_BOC\\_staff\\_report.pdf](http://www.nyc.gov/html/boc/downloads/pdf/reports/Three_Adolescents_BOC_staff_report.pdf) (describing the conditions of minors with mental illnesses facing solitary who failed to receive the mental help they need); HUMAN RIGHTS WATCH, *supra* note 24, at 23–37 (discussing the psychological harms of solitary confinement); ROBERT L. LISTENBEE, JR. ET AL., *REPORT OF THE ATTORNEY GENERAL’S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE* 178, 190 (2012), available at <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf> (noting that “[n]owhere is the damaging impact of incarceration on vulnerable children more obvious than when it involves solitary confinement” where psychological changes can occur after a short time); Simkins et al., *supra* note 58, at 253–57 (describing the psychological effects of isolation).

63. Haney & Lynch, *supra* note 35, at 541.

64. *Id.* at 539; see *infra* Subpart III.B for a discussion of cases in which courts rejected Eighth Amendment challenges to solitary confinement.

65. Haney & Lynch, *supra* note 35, at 481; see *infra* Subpart III.B for a discussion of the U.S. judiciary’s consistent refusal to classify solitary

2003 meta-analysis, Haney concluded that “there is not a single published study of solitary . . . confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects.”<sup>66</sup> Yet, despite uncontroverted evidence of the harm of isolation, courts and other governing bodies continue to reveal a superficial understanding of the nature of the harm. Among the deleterious effects displayed by inmates who have spent extended time in isolation are hypersensitivity to stimuli, confusion, memory loss, irritability, and anger.<sup>67</sup> Common reactions to isolation include self-mutilation, suicidal ideation (as well as an elevated rate of suicide attempts and commissions), and emotional breakdowns.<sup>68</sup> Solitary confinement has also been demonstrated to cause psychosis, hallucinations, and paranoia.<sup>69</sup> In addition, rather than engendering an atmosphere of calm and passivity within a facility, the solitary confinement of prisoners has instead exacerbated displays of aggression and rage as well as increased attacks on staff, destruction of property, and incidents of collective violence.<sup>70</sup>

Perhaps the most damaging psychological impact of solitary confinement is its long-term effect on one’s basic ability to function. In a study at California’s Pelican Bay State Prison, Haney found that because of the complete lack of control that inmates have over every aspect of their existence, “many prisoners [in solitary confinement] gradually lose the ability to initiate or to control their

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confinement as an extreme form of punishment that violates the Eighth Amendment to the U.S. Constitution.

66. Haney, *supra* note 16, at 132.

67. See Grassian, *Psychiatric Effects*, *supra* note 62, at 331–32 (noting that solitary confinement is associated with hyper-responsivity to stimuli, perceptual distortions, illusions, hallucinations, panic attacks, difficulty with concentration and memory, increased aggressive thoughts, paranoia, and lack of impulse control).

68. See Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 444–45 (2014) (finding inmates punished by solitary confinement were 6.89 times more likely to commit acts of self-harm); see also Terry A. Kupers, *What to Do with the Survivors? Coping with the Long-Term Effects of Isolated Confinement*, 35 CRIM. JUST. & BEHAV. 1005, 1006 (2008) (noting that being held in isolation for longer than three months “causes lasting emotional damage if not full-blown psychosis and functional disability”); CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM 3 (2012), available at <http://www.campaignforyouthjustice.org/documents/KeyYouthCrimeFacts.pdf> (finding that “youth housed in adult jails are 36 times more likely to commit suicide than are youth housed in juvenile detention facilities”).

69. See Grassian, *Psychiatric Effects*, *supra* note 62, at 332.

70. See Haney & Lynch, *supra* note 35, at 525–28 (noting that the rates of violence in supermax prisons have not decreased but instead are concentrated in solitary confinement units); see also *supra* notes 60–64 and accompanying text.

own behavior, or to organize their own lives.”<sup>71</sup> They become unable to regulate themselves when given even small degrees of freedom because they have “lost the sense of how to behave in the absence of constantly enforced restrictions, tight external structure, and the ubiquitous physical restraints.”<sup>72</sup> In addition, prisoners in solitary may “begin to lose the ability to initiate behavior of any kind,” resulting in “[c]hronic apathy, lethargy, depression, and despair.”<sup>73</sup> These conditions are compounded by a lack of meaningful interpersonal contact, which leads to “an undermining of the sense of self and a disconnection of experience from meaning.”<sup>74</sup> In short, these prisoners are “literally at risk of losing their grasp on who they are, of how and whether they are connected to a larger social world.”<sup>75</sup> For some, this denial of all social interaction leads to being “disoriented and even frightened by it.”<sup>76</sup> For others, it leads to “intolerable levels of frustration that, for some, turns to anger and then even to uncontrollable and sudden outbursts of rage.”<sup>77</sup>

When considering the impact of isolation on incarcerated youth, it is critical to keep in mind that this cohort is already psychologically compromised when compared to the general teenage population. Rates of mental health disorders are higher among these adolescents, with studies finding that up to seventy percent of incarcerated adolescents satisfy the criteria for one mental health disorder and many of them suffer from multiple disorders.<sup>78</sup> In turn, certain groups of people with mental illness, including males and those of lower socioeconomic status, are at increased risk of abusing drugs such as marijuana, opiates, cocaine and other stimulants, and alcohol.<sup>79</sup> In addition, both drug abuse and mental

71. Haney, *supra* note 16, at 139.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 140.

77. *Id.*

78. Dierkhising et al., *supra* note 61, at 183; Gary Gately, *Detained Youths More Likely to Die Violent Deaths as Adults*, JUV. JUST. INFO. EXCHANGE (June 19, 2014), <http://jjie.org/detained-youths-more-likely-to-die-violent-deaths-as-adults/107151/> (reporting on a study of young people arrested and detained as youths, which found that “many youths who get arrested have untreated mental disorders[,] and some of them might abuse drugs to self-medicate and then sell drugs to pay for them”).

79. See KEN DUCKWORTH & JACOB FREEDMAN, NAT’L ALLIANCE ON MENTAL ILLNESS, DUAL DIAGNOSIS FACT SHEET 1 (2013), *available at* [http://www.nami.org/factsheets/dualdiagnosis\\_factsheet.pdf](http://www.nami.org/factsheets/dualdiagnosis_factsheet.pdf) (finding that recent studies “suggest[] that nearly one-third of people with all mental illnesses and approximately one-half of people with severe mental illnesses (including bipolar disorder and schizophrenia) also experience substance abuse. . . . [And] more than one-third of all alcohol abusers and more than one-half of all drug abusers are also battling mental illness”).

illness often begin “in adolescence or even childhood, periods when the brain is undergoing dramatic developmental changes.”<sup>80</sup> In fact, early exposure to abused substances “can change the brain in ways that increase the risk of mental illness, just as early symptoms of mental illness can increase one’s vulnerability to drug abuse.”<sup>81</sup> As a result, the psychological harm caused by the solitary confinement of young people in juvenile and criminal justice settings can exacerbate preexisting mental illness and increase the likelihood of subsequent drug abuse.<sup>82</sup>

### B. *Physical Harm*

The physical harm caused by solitary confinement has been extensively documented in the context of adult prisoners. In the case of child prisoners, one of the few existing studies is a 2012 report by Human Rights Watch based on interviews and correspondence with 127 individuals detained in U.S. jails or prisons while under the age of eighteen; it concluded that solitary confinement “can cause serious physical harm to youth.”<sup>83</sup> Given that standard practice allows for only one hour per day of exercise—whether alone in a hallway, dayroom, or metal cage, and only occasionally outside—young people in isolation are deprived of exercise, which inevitably results in loss of both aerobic and anaerobic fitness.<sup>84</sup> Youth experience chronic hunger due to meals that are nutritionally inadequate for adolescents, stunting growth and causing hair and weight loss.<sup>85</sup> Prisoners in isolation are prohibited from supplementing their meals by purchasing food items from the facility’s commissary, so they cannot remedy their hunger.<sup>86</sup> Young females suffer from amenorrhea (loss of menstruation), resulting from inadequate nutrition as well as stress and trauma.<sup>87</sup> All of these factors combine to create a strong

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80. NAT’L INST. ON DRUG ABUSE, COMORBID DRUG ABUSE AND MENTAL ILLNESS 1 (2007), available at <http://www.drugabuse.gov/sites/default/files/comorbid.pdf>.

81. *Id.*; see also U.S. DEP’T OF JUST., DRUG ABUSE & MENTAL ILLNESS FAST FACTS (2004), available at <http://www.justice.gov/archive/ndic/pubs7/7343/7343p.pdf> (“Chronic drug abuse by adolescents during formative years is a particular concern because it can interfere with normal socialization and cognitive development and thus frequently contributes to the development of mental disorders.”).

82. See Grassian, *Psychiatric Effects*, *supra* note 62, at 333 (noting that in adults, solitary confinement can cause a “severe exacerbation or recurrence of preexisting illness”).

83. See HUMAN RIGHTS WATCH, *supra* note 24, at 37–40.

84. *Id.* at 37–38.

85. *Id.* at 39–40.

86. *Id.* at 39.

87. *Id.* at 40.

likelihood that teenagers who are confined in solitary will suffer both short- and long-term physical harm.

### C. *Social and Developmental Harm*

Young people in solitary confinement experience a wide range of social and developmental harms as a result of being isolated in penal settings. As with increased rates of mental illness, young people often enter the juvenile justice system with a prior history of trauma and victimization,<sup>88</sup> with research showing that up to forty-two percent of juvenile justice-involved youth also report involvement with child protective services as victims of abuse and neglect.<sup>89</sup> In addition, disproportionate numbers of youth in juvenile detention and correctional facilities have special needs, with one recent federal study showing thirty percent have learning disabilities and forty-five percent have attention deficit problems.<sup>90</sup> Thus, for these children with preexisting disabilities or histories of trauma, the developmental harm of solitary confinement can be

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88. See LISTENBEE ET AL., *supra* note 62, at 171 (finding that according to studies of children in detention centers, “[b]y the time children come into contact with the juvenile justice system, they have almost always been exposed to several types of traumatic violence over a course of many years”); see also JESSICA FEIERMAN & LAUREN FINE, *TRAUMA AND RESILIENCE: A NEW LOOK AT LEGAL ADVOCACY FOR YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS* 4 (2014), available at <http://www.jlc.org/resources/publications/trauma-and-resilience> (finding that “75 percent of youth in the juvenile justice system have experienced ‘traumatic victimization’ and 50 percent have . . . PTSD,” and that “[y]outh in secure juvenile justice settings are at particularly high risk for histories of complex trauma” (internal citation omitted)).

89. See LINDA A. TEPLIN ET AL., *OJJDP, THE NORTHWESTERN JUVENILE PROJECT: OVERVIEW* 10–12 (2013) (finding that ninety-three percent of youth had experienced one or more traumas before the period of detention, and eleven percent met the diagnostic criteria for PTSD in the past year); Dierkhising et al., *supra* note 61, at 183; see also Michael Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 *OJJDP J. JUV. JUST.* 1, 11–13 (2014), available at [www.journalofjuvjustice.org/JOJJ0302/JOJJ0302.pdf](http://www.journalofjuvjustice.org/JOJJ0302/JOJJ0302.pdf) (finding that adverse childhood experiences such as emotional abuse, physical abuse, sexual abuse, emotional or physical neglect, violent treatment towards the mother, household substance abuse, household mental illness, and having an incarcerated household member increase the chances of involvement in the juvenile justice system as well as the risk of recidivism, and recommending the implementation of “trauma-informed care” training for all staff who have contact with juveniles to help them understand traumatic and post-traumatic reactions and help them make appropriate referrals to clinically trained mental health professionals).

90. ANDREA J. SEDLAK & KARLA MCPHERSON, *SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT: YOUTH’S NEEDS AND SERVICES* 3, 34 (2010), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/grants/227660.pdf>; Editorial, *The Next Juvenile Justice Reform*, N.Y. TIMES, Apr. 21, 2014, at A20.

significantly exacerbated, as isolation itself can be re-traumatizing.<sup>91</sup>

Further, children in isolation are denied contact with their families as well as access to education, vocational training, and other forms of rehabilitation, including drug and alcohol treatment.<sup>92</sup> Recent empirical data on incarcerated youth have demonstrated that visits from family members correlate with improved behavior and school performance.<sup>93</sup> Providing adolescents with opportunities for skill acquisition (gained through educational, vocational, or other training) is necessary for the development of “mastery,” just as nurturing by caring adults and opportunities for self-expression are crucial for the development of “identity” (developing a stable definition of themselves and their outlook on life—both of which are critical stages of adolescent psychosocial development).<sup>94</sup> For children in isolation, the denial of these basic needs—access to family, education, and treatment—decreases the likelihood that they will be able to successfully reintegrate into the community upon their release from detention. As Haney has explained:

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91. AM. CIVIL LIBERTIES UNION, ALONE & AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT AND ISOLATION IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES 5 (2014), available at <http://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf>; Simkins et al., *supra* note 58, at 258–59 (noting that solitary confinement can re-traumatize juveniles who have been previously abused); *Solitary Confinement for Juveniles Receiving Renewed Scrutiny*, JUV. JUST. UPDATE, Feb./Mar. 2014, at 7, 7 (“Solitary confinement itself is potentially horribly traumatic for a child, but when the child has already experienced a traumatic event involving confinement or restraint, the effects are compounded.”).

92. See HUMAN RIGHTS WATCH, AGAINST ALL ODDS: PRISON CONDITIONS FOR YOUTH OFFENDERS SERVING LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES 22, 26–27 (2012), available at [http://www.hrw.org/sites/default/files/reports/us0112ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf) (finding that isolation can exacerbate the lack of opportunities for education and counseling); HUMAN RIGHTS WATCH, *supra* note 24, at 41–47.

93. SANDRA VILLALOBOS AGUDELO, VERA INST. OF JUST., THE IMPACT OF FAMILY VISITATION ON INCARCERATED YOUTH’S BEHAVIOR AND SCHOOL PERFORMANCE 1 (2013).

94. See, e.g., Marty Beyer, *Experts for Juveniles at Risk for Adult Sentences*, in MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT, COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE 1, 15 (2002) (discussing the three basic developmental tasks that adolescents must achieve: development of identity, mastery, and development of morality); ERIK ERIKSON, IDENTITY: YOUTH AND CRISIS 26–29 (1968) (discussing the formation of identity during adolescence); Angela J. Huebner, *An Introduction to Adolescent Development*, in BEHAVIORAL APPROACHES TO CHRONIC DISEASE IN ADOLESCENCE 7, 11–12 (William T. O’Donohue & Lauren Woodward Tolle eds., 2009) (discussing the five adolescent psychosocial development issues of identity, autonomy, intimacy, comfort with sexuality, and achievement).

The political stereotype is that a fourteen- or sixteen-year-old who commits an adult crime must be as sophisticated as an adult when paradoxically these kids are most often younger than their age emotionally . . . . Regardless of what they have done, they are in an uncertain, unformed state of social identity. These are kids who are the least appropriate to place in solitary confinement. Not only are you putting them in a situation where they have nothing to rely on but their own, underdeveloped internal mechanisms, but you are making it impossible for them to develop a healthy functioning adult social identity. You're basically taking someone who's in the process of finding out who they are and twisting their psyche in a way that will make it very, very difficult for them to ever recover.<sup>95</sup>

From the perspective of procedural justice theory—"the notion that people are more likely to comply with law and policy when they believe that the procedures utilized by decision makers are fair"<sup>96</sup>—the solitary confinement of adolescents also hampers the process of legal socialization that occurs between childhood and adolescence. This is a fluid period that is interactive and integrative in which young people "internalize information that is assimilated from their own experiences, from the attitudes and factual claims of others, and from the ways others react to them."<sup>97</sup> "The core argument underpinning the literature in this area is that children develop an orientation toward the law and legal actors early in life, and that this orientation shapes their behavior towards authority through adulthood."<sup>98</sup> Therefore, given that the vast majority of young people who are placed in solitary confinement view it—rightly, as the evidence shows—as a disproportionate punishment, behavioral psychology suggests that this perception leads to a lack of trust of the adults around them as well as of the criminal justice system.<sup>99</sup> The failure to trust adults and the failure to trust the justice system have both been shown to result in recidivism.<sup>100</sup>

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95. Matt Olson, *Kids in the Hole*, PROGRESSIVE, Aug. 2003, at 26, 27 (internal quotation marks omitted).

96. See Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1471 (2009).

97. *Id.* at 1476–77 (citing Jeffrey Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIRICAL LEGAL STUD. 715, 716 (2007)).

98. *Id.* at 1477; Alex R. Piquero et al., *Developmental Trajectories of Legal Socialization Among Serious Adolescent Offenders*, 96 J. CRIM. L. & CRIMINOLOGY 267, 270–74 (2005).

99. Birkhead, *supra* note 96, at 1479–83.

100. *Id.*

#### D. Denial of Adjudicatory Rights

It is well established that solitary confinement and other harsh practices, including sleep deprivation and threats of harm, continue to be used to coerce suspects into confessing.<sup>101</sup> Cases have been reported in countries as diverse as Denmark,<sup>102</sup> Russia,<sup>103</sup> Israel,<sup>104</sup> and South Africa,<sup>105</sup> and experts have concluded that “there seems to be little doubt that solitary confinement for purposes of interrogation, indoctrination, or information extraction has aversive effects and should be regarded as a form of torture.”<sup>106</sup>

Even in cases in which isolation is not explicitly imposed for purposes of evidentiary coercion, the practice inevitably infringes upon an inmate’s right to effective representation of counsel under both the Sixth and Fourteenth Amendments.<sup>107</sup> Because of its negative impact on the mental and intellectual condition of pretrial detainees, solitary confinement hampers their ability to properly function and participate in a meaningful way in their pending juvenile or criminal cases.<sup>108</sup> As a result, these inmates become less able to communicate effectively, express their preferences and opinions, and assist in their own defenses.<sup>109</sup>

This reality is further compounded by the fact that improving access to legal counsel for young offenders has long been a policy concern, particularly in the context of the juvenile justice system.<sup>110</sup> In fact, “[v]ery few states require mandatory appointment of counsel in juvenile” court without an opportunity for waiver of counsel, and in a majority of jurisdictions, children are allowed to waive counsel at any stage of the proceeding as long as the waiver is found to be

101. See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 16 (2010) (finding that the use of isolation can heighten a suspect’s distress and susceptibility to influence and impaired decision making, and that prolonged isolation is often associated with false confessions); Smith, *supra* note 25, at 500.

102. See Smith, *supra* note 25, at 501; *infra* notes 202–03 and accompanying text.

103. Smith, *supra* note 25, at 501.

104. See *infra* notes 252–56 and accompanying text.

105. Smith, *supra* note 25, at 501.

106. DON FOSTER ET AL., DETENTION AND TORTURE IN SOUTH AFRICA: PSYCHOLOGICAL, LEGAL AND HISTORICAL STUDIES 68 (1987); see also *infra* Part III (discussing the grounds for comparing the solitary confinement of youth with torture).

107. See Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1366 (2012) (noting that prolonged isolation can impair inmates’ abilities to effectively participate in their defense).

108. *Id.* (discussing the negative effects of solitary confinement on detainees’ mental health).

109. Smith, *supra* note 25, at 502.

110. See Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL’Y 53, 85–87 (2012) (discussing juveniles’ problems with access to counsel).

knowing, intelligent, and voluntary.<sup>111</sup> “Empirical evidence shows, however, that few juveniles are cognitively or developmentally capable of comprehending and executing a valid waiver of the right to counsel.”<sup>112</sup> Therefore, it is not surprising that only a minority of youth in custody report having a lawyer (42%), requesting contact with a lawyer (20%), or requesting and receiving access to a lawyer (13%).<sup>113</sup> When those few youths who do have attorneys are then held in solitary confinement, the likelihood of effective representation becomes even more remote.

Having chronicled the variety of harms that young people suffer as a result of solitary confinement, this Article next discusses the rationales that correctional institutions use for imposing solitary confinement and the prevalence of the practice across the globe.

## II. YOUTH IN ISOLATION IN ADULT JAILS, PRISONS, AND DETENTION CENTERS

In order to fully appreciate the extent of the practice of isolating young people in jails, prisons, and detention centers, it is necessary to understand the mechanisms by which institutions hold teenagers under these conditions. It is also critical to delineate the rate at which adolescents are placed in solitary confinement around the world as well as the average number of days that young offenders are held in solitary confinement.

### A. *Solitary Confinement Correction Practices*

Correctional authorities use two main rationales to justify placing young people in isolation: prison management and punishment. The harsh conditions under which adolescents are held in solitary, however, are basically the same, regardless of the stated reason for placing them there.<sup>114</sup>

### B. *Prison Management*

Solitary confinement is labeled “administrative” whenever it is used for purposes other than those that are explicitly punitive.<sup>115</sup>

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111. Birkhead, *supra* note 96, at 1489 (citing RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 54–55 (1991)); Tory J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 AM. J. CRIM. L. 611, 622–23 (1996); Robert E. Shepherd, Jr., *Juvenile’s Waiver of the Right to Counsel*, 13 CRIM. JUST. 38, 38 (1998).

112. Birkhead, *supra* note 110, at 85 (citing THOMAS GRISSO, JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 193–94 (Bruce Dennis Sales ed., 1981)).

113. ANDREA J. SEDLAK & KARLA S. MCPHERSON, CONDITIONS OF CONFINEMENT: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT 8 (2010), available at <https://www.ncjrs.gov/pdffiles1/ojdp/227729.pdf>.

114. HUMAN RIGHTS WATCH, *supra* note 24, at 48.

115. *See id.* at 57, 57.

For instance, “administrative confinement” is used to separate youths from adult inmates either as a matter of law, of policy, or on a case-by-case basis.<sup>116</sup> To achieve separation, some facilities resort to keeping youth in permanent “protective” solitary confinement.<sup>117</sup> This type of solitary can also be ordered at the request of young people who do not feel safe in the general population, often after being victimized by other inmates.<sup>118</sup> Some facilities place lesbian, gay, bisexual, or transgender teenage inmates in protective solitary confinement as a matter of policy, rather than in response to their own requests.<sup>119</sup>

Solitary confinement may also be used to separate from the general population individual inmates whom the facility has decided cannot be readily “managed.”<sup>120</sup> This is typically the result of determinations of dangerousness or predictions of likely future conduct made by the correctional staff and premised upon the inmate’s behavior and the severity of past disciplinary infractions within the facility itself.<sup>121</sup> This form of solitary can also be imposed as a custody classification based on the inmate’s criminal history or other individual characteristics.<sup>122</sup> Age is not always a factor when offenders are assigned to specific facilities, and even when it is, state law rarely indicates what role it plays.<sup>123</sup> Once in administrative

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116. *Id.* at 53–54. International law and the law of some U.S. states require that individuals under the age of eighteen be separated from adults while detained; some facilities require it as a matter of policy. *Id.* at 53.

117. *Id.* at 54; see also CAMPAIGN FOR YOUTH JUSTICE, *JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA* 14 (2007), available at [http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing\\_Juveniles\\_Report\\_2007-11-15.pdf](http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf) (discussing the long-term isolation of youth detained in jails).

118. HUMAN RIGHTS WATCH, *supra* note 24, at 55–56.

119. See *id.* at 56; Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 537 (2009) (noting that transgender inmates may not want to be placed in isolation, but that prison policy often requires it); Gelin, *supra* note 58, at 5 (discussing a complaint filed by juvenile inmates seeking injunctive relief to prevent further isolation); see also *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1133, 1154–55 (D. Haw. 2006) (granting a motion for a preliminary injunction against the Hawaii Youth Correction Facility; requiring them to stop isolating, abusing, and failing to protect lesbian, gay, bisexual, and transgender (“LGBT”) youth in their custody; and holding that isolation is not a constitutionally valid way to “protect” LGBT residents in juvenile facilities).

120. HUMAN RIGHTS WATCH, *supra* note 24, at 57; see, e.g., N.C. DEP’T OF PUB. SAFETY, *PRISONS POLICY & PROCEDURE MANUAL*, ch. C § .0301 (2008), available at [http://www.doc.state.nc.us/dop/policy\\_procedure\\_manual/c0300.pdf](http://www.doc.state.nc.us/dop/policy_procedure_manual/c0300.pdf).

121. HUMAN RIGHTS WATCH, *supra* note 24, at 57, 59; see NELL BERNSTEIN, *BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON* 135–36 (2014) (recounting an instance in which a juvenile was held in administrative confinement for a year for refusing to take his psychiatric medication).

122. HUMAN RIGHTS WATCH, *supra* note 24, at 58.

123. *Id.*; see, e.g., N.C. DEP’T OF PUB. SAFETY, *supra* note 120, § .0300 (failing to consider the age of the inmate).

solitary, the status of the inmate is reviewed at weekly or monthly intervals.<sup>124</sup> In most facilities, administrative solitary can also be imposed following one or more terms of punitive solitary confinement, and it can “extend for months, or even indefinitely.”<sup>125</sup>

Prison administrators also hold youth in solitary confinement for the ostensible purpose of “treatment.”<sup>126</sup> This justification is most frequently used to isolate young inmates with perceived or actual mental illnesses or for those experiencing “psychological emergencies.”<sup>127</sup> Historically, it was considered medically appropriate to keep mentally ill inmates in “seclusion” on a long-term basis.<sup>128</sup> Although the medical community now disfavors this practice, instances persist in which prisons hold young people in “medical” solitary confinement for days or weeks at a time; some youth have also reported being placed in isolation—either administrative or punitive solitary confinement—after attempting suicide.<sup>129</sup> The conditions under which youth are held in solitary for these reasons can be even more onerous—and potentially traumatic—than “regular” solitary confinement: youths often are not permitted out of their cells (not even for an hour each day); they are not allowed to have any personal possessions or anything else with them inside the cell; they are kept naked except for a thin paper hospital gown; and they are allowed “only a single, thick, tear-resistant blanket.”<sup>130</sup>

In addition, prisons place inmates in “therapeutic isolation” for temporary quarantine pending the results of a test for tuberculosis or some other contagious disease.<sup>131</sup> This occurs most often when adolescents first enter a correctional facility, although policies differ among facilities, and it is difficult to generalize in regard to the timing and treatment.<sup>132</sup> It has been reported, however, that young prisoners have been quarantined for anywhere from one to three days or more pending the results of a standard tuberculosis test, which arguably violates the norm that solitary confinement for

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124. See, e.g., 210 IND. ADMIN. CODE 3-1-14 (2014).

125. HUMAN RIGHTS WATCH, *supra* note 24, at 57.

126. *Id.* at 60.

127. See *id.* at 60–61.

128. *Id.* at 60; see also Stacey A. Tovino, *Psychiatric Restraint and Seclusion: Resisting Legislative Solution*, 47 SANTA CLARA L. REV. 511, 530–33 (2007) (discussing that studies through the early 1990s supported the position that seclusion and restraints help agitated patients, while more recent studies found that seclusion carries “significant physical and psychological risks” to individuals with mental illness).

129. HUMAN RIGHTS WATCH, *supra* note 24, at 60–61; see also, e.g., *Troy D. v. Mickens*, 806 F. Supp. 2d 758, 762 (D.N.J. 2011) (finding that a juvenile inmate was held in solitary confinement for 178 to 188 days under the guise of suicide prevention).

130. HUMAN RIGHTS WATCH, *supra* note 24, at 61.

131. *Id.* at 62.

132. *Id.*

purposes of treatment should be utilized only when medically necessary.<sup>133</sup> As a result, questions have been raised as to whether medical solitary is overused for quarantine and is unjustifiable for matters of public health.<sup>134</sup>

### C. Punishment

Jails, prisons, and detention facilities attempt to maintain order through a structured disciplinary system in which solitary confinement is typically the most punitive sanction available.<sup>135</sup> Youth who violate even minor rules of the facility—including horseplay or being in someone else’s cell—can be placed in punitive solitary confinement.<sup>136</sup> Separate terms of solitary are frequently imposed to run consecutively for each discrete infraction committed at a facility, although concurrent terms are occasionally ordered when there has been more than one rule violation originating from a single incident; also, a range of behaviors committed during the isolation period itself can be punished by extending the term of solitary confinement.<sup>137</sup>

Prior to the imposition of punitive solitary, youth have very few procedural rights. They generally receive some form of notice describing the charges.<sup>138</sup> When the prison imposes isolation for the purpose of punishment, there is typically a “hearing,” although there are almost no due process protections in this forum.<sup>139</sup> Before the hearing, young people are often placed in solitary confinement

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133. *Id.* (citing HUMAN RIGHTS WATCH & ACLU, SENTENCED TO STIGMA: SEGREGATION OF HIV-POSITIVE PRISONERS IN ALABAMA AND SOUTH CAROLINA (2010), available at <http://www.hrw.org/sites/default/files/reports/health0410webwcover.pdf>).

134. *Id.*

135. *Id.* at 48.

136. *Id.* at 48, 51–52; see also BERNSTEIN, *supra* note 121, at 130 (noting that solitary confinement may be imposed as a punishment for anything from fighting to possession of a pencil); Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., to Robert Moore, Chair of LeFlore Cnty. Bd. of Supervisors 2 (Mar. 31, 2011) (on file with Department of Justice, Civil Rights Division), available at [http://www.justice.gov/crt/about/spl/documents/LeFloreJDC\\_findlet\\_03-31-11.pdf](http://www.justice.gov/crt/about/spl/documents/LeFloreJDC_findlet_03-31-11.pdf) (reporting on the investigation of Leflore County Juvenile Detention Center and noting that “[s]taff have unfettered discretion to immediately administer punishment, and isolation is used excessively for punishment and control”).

137. HUMAN RIGHTS WATCH, *supra* note 24, at 48; see also Findings Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., to Mitch Daniels, Governor, State of Ind., 22 (Jan. 29, 2010), available at [http://www.justice.gov/crt/about/spl/documents/Indianapolis\\_findlet\\_01-29-10.pdf](http://www.justice.gov/crt/about/spl/documents/Indianapolis_findlet_01-29-10.pdf) (noting that seven girls had spent more than forty-five days in isolation apiece).

138. HUMAN RIGHTS WATCH, *supra* note 24, at 49.

139. *Id.* at 49–50; see also, e.g., N.C. DEP’T OF PUB. SAFETY, *supra* note 120, § .0205.

for “management” purposes,<sup>140</sup> leaving them with no opportunity to prepare or contact their families before being segregated.<sup>141</sup> At the hearing, inmates are typically allowed to call witnesses, but almost no one does, resulting in a guilty finding that is frequently based on the correctional officials’ testimony alone.<sup>142</sup> Even though a formal appeal process often exists in these facilities, very few juveniles appeal their sentences of punitive solitary confinement.<sup>143</sup>

#### D. Prevalence

The solitary confinement of youth is an international phenomenon that exists on all of the inhabited continents, although at least two countries—Nepal and Georgia—have explicitly banned its use.<sup>144</sup> New research conducted by the author has documented that at least fifty-seven countries (or approximately thirty percent of the world’s 193 countries that are members of the United Nations<sup>145</sup>) either employ it as a penal technique or legally recognize

140. See *supra* notes 120–25 and accompanying text.

141. HUMAN RIGHTS WATCH, *supra* note 24, at 49 n.147; see also STEVE J. MARTIN, *S.H. v. REED: JCF MONITORING CUYAHOGA HILLS JUVENILE CORRECTIONAL FACILITY (CHJCF) 4TH NARRATIVE FOR THE MONITOR’S REPORT 5* (2012) (noting that over ninety percent of seclusion occurred prior to hearings).

142. HUMAN RIGHTS WATCH, *supra* note 24, at 49–50 (finding that it was “unthinkable” for young people to call witnesses, although one young man tried but was unsuccessful because he did not know the inmates’ first and last names or their inmate numbers); see also MARK BOWERS ET AL., *SOLITARY CONFINEMENT AS TORTURE* 33–34 (2014), available at <http://www.law.unc.edu/documents/academics/humanrights/solitaryconfinement/fullreport.pdf> (finding, based on survey data from North Carolina prisoners held in solitary confinement, that the majority did receive a hearing for alleged infractions but described the hearing process as a “joke”).

143. HUMAN RIGHTS WATCH, *supra* note 24, at 51; see also David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1455 (2010) (noting that the Prison Litigation Reform Act, which covers juveniles as well as adults, is an “especially formidable barrier to justice for incarcerated children” (discussing Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered titles and sections of the U.S.C.)).

144. UNITED NATIONS CHILDREN’S FUND, *JUVENILE JUSTICE IN SOUTH ASIA: IMPROVING PROTECTION FOR CHILDREN IN CONFLICT WITH THE LAW 14* (2006) [hereinafter UNITED NATIONS CHILDREN’S FUND, *JUVENILE JUSTICE IN SOUTH ASIA*], available at [http://www.unicef.org/rosa/Juvenile\\_Justice\\_in\\_South\\_Asia.pdf](http://www.unicef.org/rosa/Juvenile_Justice_in_South_Asia.pdf) (reporting that Nepal has banned its use); UNITED NATIONS CHILDREN’S FUND, *TORTURE AND ILL-TREATMENT IN THE CONTEXT OF JUVENILE JUSTICE: THE FINAL REPORT OF RESEARCH IN ARMENIA, AZERBAIJAN, GEORGIA, KAZAKHSTAN, KYRGYZSTAN, REPUBLIC OF MOLDOVA, TAJIKISTAN, AND UKRAINE 7* (2013) [hereinafter UNITED NATIONS CHILDREN’S FUND, *TORTURE AND ILL-TREATMENT*], available at [http://www.unicef.org/ceecis/Torture\\_and\\_ill-treatment\\_in\\_the\\_Context\\_of\\_Juvenile\\_EN.pdf](http://www.unicef.org/ceecis/Torture_and_ill-treatment_in_the_Context_of_Juvenile_EN.pdf) (reporting that the country of Georgia has banned its use).

145. See *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/index.shtml> (last visited Jan. 27, 2015) (listing the 193 member states of the United Nations).

its use.<sup>146</sup> Western and more affluent countries are more likely to distinguish between the imposition of solitary for prison management and for punishment, whereas countries with less wealth justify it solely for reasons of punishment.<sup>147</sup> Data that explicitly establish its presence or absence, however, are limited, requiring reliance on third-party reports. Further, in some areas of the world, idioms are used to describe the process, allowing the practice to remain hidden and its prevalence obscured.<sup>148</sup> Although selected English-speaking countries generate data on the isolation of youth, most countries focus on other areas of concern related to young offenders—ranging from their incarceration with adults and corporal punishment by guards to the death penalty and sentences to life in prison without the possibility of parole.<sup>149</sup> Further, the data that do exist provide only a limited picture; the policies of many countries' juvenile justice systems receive scant direct review, and there is little documentation of their day-to-day operations<sup>150</sup>—particularly in less developed countries where court and agency records are virtually nonexistent.<sup>151</sup> In addition, there is often a discrepancy between official policy and practice on the ground. Sources referencing the solitary confinement of youth are frequently limited to an abbreviated statement acknowledging merely that the practice is being used inappropriately.<sup>152</sup>

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146. See *infra* Appendix (identifying the countries in which the practice of holding youth in solitary confinement is condoned or actively employed).

147. See *infra* Appendix (finding that Western countries distinguish between administrative and punitive confinement, while other countries typically justify solitary only on punitive grounds).

148. Org. of Am. States, Inter-Am. Comm'n on Human Rights, *Juvenile Justice and Human Rights in the Americas*, 144–45, OEA/Ser.L/V/II doc. 78 (July 13, 2011) (finding that in South America, young people are confined to “reflection rooms,” and that in other parts of the world the practice is characterized merely as “isolation,” with no details describing the policy or duration of the terms).

149. See UNITED NATIONS CHILDREN'S FUND, *JUVENILE JUSTICE IN SOUTH ASIA*, *supra* note 144; Org. of Am. States, *supra* note 148, at xi–xii.

150. MICHAEL BOCHENEK, HUMAN RIGHTS WATCH, *CRUEL CONFINEMENT 16* (2003), available at <http://www.hrw.org/print/reports/2003/04/09/cruel-confinement> (reporting that Brazil's juvenile detention facilities are independently run by the State, with little or no oversight from the federal government).

151. See, e.g., HUMAN RIGHTS WATCH, *CHILDREN OF THE DUST: ABUSE OF HANOI STREET CHILDREN IN DETENTION* 7, 17 (2006), available at <http://www.hrw.org/sites/default/files/reports/vietnam1106webwcover.pdf> (finding that street children in Vietnam who have not committed any crime may be detained and sent to Social Protection Centers, where solitary confinement may be used as a punishment without judicial or independent oversight, but because Vietnam does not allow NGOs to conduct independent research within the country, there are few records on the detention of street children).

152. See, e.g., Council of Eur., European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Estonian Government on the Visit to Estonia Carried Out by the European*

E. *The Americas*

The United States is “the world’s leader in the incarceration of children.”<sup>153</sup> Of those incarcerated, thousands of American teenagers are held in solitary confinement each day.<sup>154</sup> According to national prevalence reports, of the approximately 100,000 youth in residential facilities for juvenile offenders at any given time, more than one-third reported spending time in solitary confinement, and more than one-half of this group reported periods of isolation exceeding twenty-four hours.<sup>155</sup> Further, a national survey on suicide in juvenile facilities found that approximately one-half of the youth who committed suicide were on “room-confinement” at the time of death.<sup>156</sup>

These numbers are only an estimate, however, as the U.S. government does not require prisons, jails, or juvenile facilities to report the numbers of youth placed in isolation or how long they are kept there.<sup>157</sup> Further, every state has its own data, if it keeps track at all, and each state defines “solitary” in its own way.<sup>158</sup> In fact, many states, including Texas and California, allow juvenile facilities to establish their isolation policies with little or no governmental oversight.<sup>159</sup>

As for individuals under the age of eighteen who are prosecuted in the adult criminal court system, data show that close to 100,000 (or forty percent of the 250,000 who are prosecuted) are held in jails and prisons annually.<sup>160</sup> On any given day, approximately 6000 to

*Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 May to 6 June 2012*, CPT/Inf (2014) 1 (Jan. 21, 2014), available at <http://www.refworld.org/docid/52de97a54.html>.

153. Liz Ryan, *Human Rights Day 2013: Making U.S. Children Behind Bars a Priority*, CAMPAIGN YOUTH JUST. (Dec. 9, 2013), <http://www.campaignforyouthjustice.org/news/blog/item/human-rights-day-2013-making-us-4>.

154. Daffodil J. Altan & Trey Bundy, “*Alone: Teens in Solitary Confinement Debuts on the I Files*,” REVEAL (June 26, 2014), <http://www.revealnews.org/article-legacy/alone-teens-in-solitary-confinement-debuts-on-the-i-files/>.

155. AM. CIVIL LIBERTIES UNION, *supra* note 91, at 7.

156. LINDSAY M. HAYES, OFF. OF JUV. JUST. & DELINQ. PREVENTION, *JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY 18* (2009), available at <https://www.ncjrs.org/pdffiles1/offdp/213691.pdf>.

157. See Bundy, *supra* note 1.

158. *Id.*

159. *Id.*; Trey Bundy, *Young Prisoners Faced 24-Hour Confinement, Classes in Closets*, BAY CITIZEN, (June 6, 2011, 3:50 PM), <https://www.baycitizen.org/news/youth/young-prisoners-faced-24-hour-classes/> (reporting that an audit by California’s Division of Juvenile Justice found 249 instances of young prisoners being locked in their cells for twenty-two to twenty-four hours per day, violating the agency’s own policy).

160. JAMES AUSTIN ET AL., U.S. DEP’T OF JUSTICE, *JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 4* (2000), <https://www.ncjrs.gov>

10,000 youth are incarcerated, at least a three-fold increase from 1984.<sup>161</sup> Of these, thirty-five percent report being isolated, eighty-seven percent of these for more than two hours, and fifty-five percent for more than twenty-four hours.<sup>162</sup> Further, fifty-two percent of those who were isolated for more than two hours stated they had not talked to a counselor while at the facility.<sup>163</sup> Of course, the vast majority of these thousands of young people held in solitary in adult correctional facilities will, at some point, return to society, yet very few will be equipped to become functioning members of the community.<sup>164</sup> The prevalence of the solitary confinement of youth in the United States is particularly ironic given that public opinion polls indicate strong opposition to the incarceration of youth in adult jails and prisons and strong support for rehabilitation and treatment for young offenders over all forms of detention.<sup>165</sup>

In Canada, young people in detention facilities have a high incidence of untreated mental illness and severe behavior disorders for which the institutional response is often solitary confinement as well as restraints, chemicals, Tasers (conductive energy weapons),

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/pdffiles1/bja/182503.pdf; HUMAN RIGHTS WATCH, *supra* note 24, at 2 (noting that the ACLU and Human Rights Watch estimate that there were 95,000 children in adult facilities in 2011).

161. See E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T. OF JUSTICE, PRISONERS IN 2012: TRENDS IN ADMISSION AND RELEASES, 1991–2012 app. tbl.8 (2014), available at <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf> (noting that 1325 juveniles were in state prison in 2012 according to census reports); TODD D. MINTON & DANIELA GOLINELLI, U.S. DEP'T. OF JUSTICE, JAIL INMATES AT MIDYEAR 2013—STATISTICAL TABLES 6 (2014), available at <http://www.bjs.gov/content/pub/pdf/jim13st.pdf> (finding that approximately 4600 juveniles were held in adult jails daily in 2013); Jean Casella & James Ridgeway, *Children in Lockdown: Solitary Confinement of Teens in Adult Prisons*, SOLITARY WATCH (Jan. 30, 2010), <http://solitarywatch.com/2010/01/30/children-in-lockdown-part-1-solitary-confinement-of-kids-in-adult-prisons/> (finding more than 11,300 juveniles in state prisons and jails daily); see also MICHELE DEITCH ET AL., FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM, at xiii (2009), available at <http://www.utexas.edu/lbj/archive/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf> (“More than half the states permit children under 12 to be treated as adults for criminal justice purposes,” and in twenty-two states, “children as young as 7 can be prosecuted and tried in adult court . . . .”); CAMPAIGN FOR YOUTH JUSTICE, *supra* note 68, at 3 (“On any given night in America, 10,000 children are held in adult jails and prisons.”).

162. SEDLAK & MCPHERSON, *supra* note 113, at 9.

163. *Id.*

164. Anthony Giannetti, Comment, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment?*, 30 BUFF. PUB. INT. L.J. 31, 47–48 (2012) (noting that solitary confinement results in “distorted cognitive and social development” making reintegration into society problematic).

165. Ryan, *supra* note 153.

or other punitive interventions.<sup>166</sup> The rates of solitary confinement, however, have not begun to reach the levels reported in either the United States or the United Kingdom.<sup>167</sup> Furthermore, none of the studies conducted by international bodies, such as the United Nations or UNICEF, or by international advocacy organizations, such as Human Rights Watch, have identified Canada as a country in violation of international standards.<sup>168</sup> Rather, it is the mainstream media that has offered the most pointed criticism of juvenile solitary confinement in Canada with reports of tragedies that have resulted from the administrative isolation of teenagers.<sup>169</sup>

In the Caribbean, both Jamaica and the Dominican Republic have been negatively cited by the United Nations<sup>170</sup> and the Organization for American States,<sup>171</sup> respectively, for their use of juvenile solitary confinement. In Jamaica, solitary confinement is termed “isolation” and is used during pretrial detention at police stations and for administrative and punitive purposes in juvenile detention facilities.<sup>172</sup> In the Dominican Republic, solitary confinement cells are called “reflection rooms.”<sup>173</sup> They are used to punish the misconduct of young inmates, who may be held for a maximum of between eight and fifteen days.<sup>174</sup> Some data suggest

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166. CANADIAN COAL. FOR THE RIGHTS OF CHILDREN, RIGHTS AND EFFECTIVENESS IN THE YOUTH JUSTICE SYSTEM 6 (2011), available at <http://rightsofchildren.ca/wp-content/uploads/working-document-youth-justice-research-report.pdf>.

167. See Kirk Makin, *Canadian Prisons Called “Out of Step”; Experts Decry Growing Practice of Segregating Prisoners in Federal and Provincial Jails While Rest of World Limits Its Use*, GLOBE & MAIL (Can.), Mar. 21, 2013, at A4 (noting that Canada holds 850 inmates in solitary on any given day and a total of 8600 a year, while reports of juvenile solitary confinement are unknown).

168. See, e.g., U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: Canada*, 85, U.N. Doc. CRC/C/Can/CO/3-4 (Oct. 5, 2012) (noting no violation of the Convention on the Rights of the Child related to isolation, seclusion, or solitary confinement in Canada).

169. See, e.g., Donovan Vincent, *Ashley Smith Inquest: Corrections Head Admits Overreliance on Segregation*, THESTAR.COM (Oct. 16, 2013), [http://www.thestar.com/news/canada/2013/10/16/ashley\\_smith\\_inquest\\_top\\_prison\\_official\\_to\\_testify\\_at\\_inquiry\\_wednesday.html](http://www.thestar.com/news/canada/2013/10/16/ashley_smith_inquest_top_prison_official_to_testify_at_inquiry_wednesday.html) (reporting on a 2007 incident in which nineteen-year-old Ashley Smith entered the justice system as a young offender and committed suicide while in solitary confinement).

170. See generally U.N. Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, add., U.N. Doc. A/HRC/16/52/Add.3 (Oct. 11, 2010), available at [http://www.univie.ac.at/bimtor/dateien/jamaica\\_unsrt\\_2010\\_mission\\_report.pdf](http://www.univie.ac.at/bimtor/dateien/jamaica_unsrt_2010_mission_report.pdf).

171. Org. of Am. States, *supra* note 148, at 145.

172. See NOWAK, *supra* note 170, at 41.

173. Org. of Am. States, *supra* note 148, at 145.

174. *Id.*

that Trinidad and Tobago has also used solitary confinement as a form of punishment at one of its juvenile detention facilities.<sup>175</sup>

In a recent review of juvenile justice systems, the Inter-American Commission on Human Rights noted that “the vast majority of member States” have continued to use solitary confinement as a punishment.<sup>176</sup> In Latin America, the term “solitary confinement” has been replaced by idioms such as “reflection room” (Colombia), “separation from the group” (Chile), and “retreat areas” (Mexico), although the conditions imposed upon young people are no different than those of traditional isolation.<sup>177</sup> Similar to Jamaica and the Dominican Republic, the practice is used for punishment and has a maximum duration of between eight and fifteen days.<sup>178</sup> However, there are reports of individuals being held for much longer, including a seventeen-year-old Paraguayan youth who was isolated for six weeks.<sup>179</sup> Solitary confinement is also used for purposes of administrative isolation of individuals “under [need of] surveillance,” especially for those with suicidal ideation.<sup>180</sup>

The substandard conditions found within Brazil’s juvenile institutions are the most egregious in South America. Brazil’s facilities are overcrowded and crumbling, lack rehabilitative value, and have high rates of violence between prisoners and staff.<sup>181</sup> State juvenile detention centers are managed by individual Brazilian states and lack central governmental oversight.<sup>182</sup> The primary method of discipline is cell confinement, and with no reported protocols governing its use, juveniles are routinely held in isolation for their first five days in custody.<sup>183</sup>

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175. UNITED NATIONS CHILDREN’S FUND, JUVENILE JUSTICE IN THE CARIBBEAN—A RIGHTS APPROACH TO CHILDREN IN THE JUVENILE JUSTICE SYSTEM 23 (1997), available at [http://www.unicef.org/lac/spbarbados/Legal/Subregional/CP/Synthesis%20of%20Studies\\_JJCaribbean\\_1997.doc](http://www.unicef.org/lac/spbarbados/Legal/Subregional/CP/Synthesis%20of%20Studies_JJCaribbean_1997.doc).

176. See Org. of Am. States, *supra* note 148 (documenting that juvenile solitary confinement is used in Brazil, Paraguay, Guyana, Suriname, Chile, Belize, Ecuador, and Mexico).

177. *Id.* at 145.

178. *Id.*

179. See also HUMAN RIGHTS WATCH, *supra* note 92, at 23 (profiling a minor who spent three hundred days in isolation); Dina Levy & Jean Casella, *City to Sharply Increase Solitary Confinement on Rikers Island*, SOLITARY WATCH (Nov. 21, 2011), <http://solitarywatch.com/2011/11/21/city-to-sharply-increase-solitary-confinement-cells-on-rikers-island/> (profiling a minor who spent twenty days in isolation).

180. Org. of Am. States, *supra* note 148, at 144 (noting that Suriname uses solitary to monitor individuals with suicidal ideation, but psychological treatment is rarely permitted).

181. *Brazil: Abusive Conditions for Detained Children*, HUMAN RIGHTS WATCH (Apr. 10, 2003), <http://www.hrw.org/news/2003/04/09/brazil-abusive-conditions-detained-children>.

182. *Id.*

183. *Id.*

F. *Europe and the United Kingdom*

Although youth under eighteen in Europe and the United Kingdom are not tried or sentenced as adults, and the maximum sentences are often no more than ten years, children in conflict with the law remain among their most vulnerable groups of citizens.<sup>184</sup> They routinely suffer violations of rights, including solitary confinement, with little recourse.<sup>185</sup> Furthermore, although the solitary confinement of youth as a disciplinary measure is discouraged throughout Europe, the laws of most countries in Central and Eastern Europe explicitly allow it.<sup>186</sup> The reasons for this are threefold: “[a]ccountability remains weak, and a culture of impunity persists in many [European] countries,” exacerbated by the privileged position of law enforcement and security forces;<sup>187</sup> poverty and lack of resources inhibit the development of well-functioning juvenile justice systems; and corruption in the form of bribery is endemic and remains one of the “most formidable obstacles to the development of fair, humane[,] and effective juvenile justice systems.”<sup>188</sup>

In the United Kingdom, independent inquiries have found that detention facilities for youth regularly use solitary confinement, ranging from a few minutes in isolation to several weeks.<sup>189</sup> The practice often “contradicted the rules,” with children kept in solitary for as long as twenty-eight days, even though the limit at one institution was twenty days.<sup>190</sup> Self-harm incidents in prison segregation units are “a major concern.”<sup>191</sup> Although well-developed incentive schemes exist to encourage good behavior, staff sometimes

184. UNITED NATIONS CHILDREN’S FUND, *JUVENILE JUSTICE IN THE CEE/CIS REGION: PROGRESS, CHALLENGES, OBSTACLES, AND OPPORTUNITIES* 4 (2013), available at [http://www.unicef.org/ceecis/EU\\_UNICEF\\_Juvenile\\_Justice\\_in\\_the\\_CEECIS\\_Region.pdf](http://www.unicef.org/ceecis/EU_UNICEF_Juvenile_Justice_in_the_CEECIS_Region.pdf).

185. *Id.* at 8.

186. *Id.* at 6.

187. *Id.* at 8–9.

188. *Id.* at 9.

189. Sharon Shalev, *Solitary Confinement as a Prison Health Issue*, in *PRISONS AND HEALTH* 27, 30–31 (Stefan Enggist et al. eds., 2014), available at [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0011/249194/Prisons-and-Health,-5-Solitary-confinement-as-a-prison-health-issue.pdf](http://www.euro.who.int/__data/assets/pdf_file/0011/249194/Prisons-and-Health,-5-Solitary-confinement-as-a-prison-health-issue.pdf) (“An inquiry into the use of physical restraint and solitary confinement of children in England and Wales found that solitary confinement was widely used in institutions for young offenders: during an 18-month period, for example, 519 children were placed in solitary confinement in 6 such institutions”).

190. LORD CARLILE OF BERRIEW QC, *THE HOWARD LEAGUE FOR PENAL REFORM, AN INDEPENDENT INQUIRY INTO THE USE OF PHYSICAL RESTRAINT, SOLITARY CONFINEMENT AND FORCIBLE STRIP SEARCHING OF CHILDREN IN PRISONS, SECURE TRAINING CENTRES AND LOCAL AUTHORITY SECURE CHILDREN’S HOMES* 64 (2006), available at [http://www.howardleague.org/fileadmin/howard\\_league/user/pdf/Publications/Carlile\\_Report\\_pdf.pdf](http://www.howardleague.org/fileadmin/howard_league/user/pdf/Publications/Carlile_Report_pdf.pdf) [hereinafter LORD CARLILE, *INQUIRY*].

191. *Id.* at 63.

ignore or negate them by being “too[ ]ready [to] resort to punishments like isolation.”<sup>192</sup> In violation of theories of procedural justice,<sup>193</sup> the institutions’ disciplinary schemes are “capricious,” as corrections staff do not clearly explain to young people what they did wrong or how to remedy their wrongdoing; thus, young people have no incentive to comply.<sup>194</sup> The director of the Howard League for Penal Reform, which examined the findings of inspections of fifteen jails holding children, stated that its report showed that “extraordinary squalor and institutional brutality were endemic in young offender institutions” and that this was:

[A] systemic problem . . . . It’s not a case of a bad apple in the barrel—all the apples are bad. Our legal teams talk to 40 or 50 children in young offender institutions across the country every month and the common complaints we hear are allegations of being raped by their cellmate, arms being broken during restraint by staff[,] and being held in solitary confinement.<sup>195</sup>

Northern Ireland has seen an increase in the use of solitary confinement in its juvenile facilities.<sup>196</sup> A higher percentage of juveniles than adults are held in solitary, and while the rate of adults held in solitary has decreased, the rate of juveniles held in solitary has only increased.<sup>197</sup> In fact, rather than decreasing the maximum time for juvenile solitary from seven to three days as recommended by outside groups, the government has increased it to fourteen days.<sup>198</sup> Few explanations have been offered for this troubling increase.

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192. *Id.* at 65.

193. *See supra* notes 96–100 and accompanying text.

194. LORD CARLILE, *INQUIRY*, *supra* note 190, at 65.

195. *United Kingdom: Analysis of the Inspectorate of Prisons Reports on Young Offender Institutions Holding Children in Custody*, CHILD RTS. INT’L NETWORK, <http://www.bettercarenetwork.org/resources/infodetail.asp?id=20833> (last visited Apr. 12, 2015); *see* THE HOWARD LEAGUE FOR PENAL REFORM, UNITED KINGDOM: ANALYSIS OF THE INSPECTORATE OF PRISONS REPORTS ON YOUNG OFFENDER INSTITUTIONS HOLDING CHILDREN IN CUSTODY (2009), available at [http://www.crin.org/docs/YOI\\_Inspections.pdf](http://www.crin.org/docs/YOI_Inspections.pdf).

196. Barry McCaffrey, *Alarm Bells over Young Offenders Put in Solitary*, SUNDAY TIMES (N. Ir.), July 29, 2012, at 14.

197. *Id.*

198. *Id.*

In the countries of Austria,<sup>199</sup> Germany,<sup>200</sup> Cyprus,<sup>201</sup> the Netherlands,<sup>202</sup> Belgium,<sup>203</sup> Sweden,<sup>204</sup> Luxembourg,<sup>205</sup> and Portugal,<sup>206</sup> corrections facilities use solitary confinement of youth for both administrative confinement and punishment. Although observer agencies have not included these countries among those that violate best practices, the Council of Europe has stated that their maximum limits for the isolation of children are too long.<sup>207</sup> For example, Luxembourg allows up to ten days of solitary confinement as a punishment, though it rarely imposes terms of this length.<sup>208</sup> The Council of Europe Committee on the Prevention of Torture has noted that, in Cyprus, corrections staff informally

199. URSULA KILKELLY, CHILDREN'S RIGHTS AND THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE FROM 15 TO 25 FEBRUARY 2009, at 18 (2012), available at [http://www.coe.int/t/dg3/children/publications/CPTReport\\_en.pdf](http://www.coe.int/t/dg3/children/publications/CPTReport_en.pdf); Council of Eur., European Comm. for the Prevention of Torture, *Report to the Austrian Government on the Visit to Austria by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 25 February 2009*, at 43, CPT/Inf (2010) 5 (March 11, 2010).

200. KILKELLY, *supra* note 199; Council of Eur., European Comm. for the Prevention of Torture, *Report to the German Government on the Visit to Germany by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 November to 7 December 2010*, at 30, CPT/Inf 6 (Feb. 22, 2012).

201. KILKELLY, *supra* note 199; Council of Eur., European Comm. for the Prevention of Torture, *Report to the Government of Cyprus on the Visit to Cyprus by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 12 to 19 May 2008*, at 40, CPT/Inf (2012) 34 (Dec. 6, 2012).

202. KILKELLY, *supra* note 199; Council of Eur., European Comm. for the Prevention of Torture, *Report to the Authorities of the Kingdom of the Netherlands on the Visits Carried Out to the Kingdom in Europe, Aruba, and the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in June 2007*, at 40–41, CPT/Inf (2008) 2 (Feb. 5, 2008).

203. U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: Belgium*, ¶ 82, U.N. Doc. CRC/C/BEL/CO/3-4 (June 18, 2010).

204. U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Sweden*, ¶¶ 70–71, U.N. Doc. CRC/C/SWE/CO/4 (June 26, 2009).

205. U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Luxembourg*, ¶ 50, U.N. Doc. CRC/C/LUX/CO/3-4 (Oct. 29, 2013).

206. U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Portugal*, ¶ 65, U.N. Doc. CRC/C/PRT/CO/3-4 (Feb. 25, 2014).

207. See KILKELLY, *supra* note 199, at 17–18.

208. See U.N. Comm. on the Rights of the Child, *supra* note 205.

confine individuals in solitary confinement or “cool down” periods without due process.<sup>209</sup>

In other European countries, the use of solitary confinement varies. In Denmark, for instance, solitary confinement may be used during pretrial detention in serious cases in order to prevent “obstruction” of the investigation, without limit on the length of the term.<sup>210</sup> However, solitary cannot be used on suspects under seventeen, and no more than six offenders under the age of eighteen were held in solitary during any given year between 2001 and 2008, so the practice is rare.<sup>211</sup> In Turkey, solitary confinement is allowed for punitive or administrative reasons.<sup>212</sup> Although Turkey’s law only allows a maximum of five days for punitive solitary, this rule is often ignored with consecutive terms imposed.<sup>213</sup>

Solitary confinement as punishment is an accepted practice in many Eastern European countries. It has been documented in Ukraine, Moldova,<sup>214</sup> Romania,<sup>215</sup> Macedonia,<sup>216</sup> Latvia,<sup>217</sup> Lithuania,<sup>218</sup> Estonia,<sup>219</sup> Belarus,<sup>220</sup> and Croatia.<sup>221</sup> Maximum

209. Council of Eur., *supra* note 201, ¶ 96.

210. U.N. Comm. on the Rights of the Child, *Written Replies by the Government of Denmark to the List of Issues (CRC/C/DNK/Q/4) Concerning Additional and Updated Information Related to the Consideration of the Fourth Report of Denmark (CRC/C/DNK/4)*, ¶¶ 105–07, U.N. Doc. CRC/C/DNK/Q/4/Add.1 (Jan. 5, 2011).

211. *Id.* ¶ 107 tbl.1.

212. Council of Eur., European Comm. for the Prevention of Torture, *Report to the Turkish Government on the Visit to Turkey Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 28 June 2012*, at 30, CPT/Inf (2013) 30 (Oct. 10, 2013).

213. *Id.*; see, e.g., Nicole Pope, *Lack of Focus on Children’s Rights*, TODAY’S ZAMAN (Oct. 21, 2013), [http://www.todayszaman.com/columnist/nicole-pope/lack-of-focus-on-childrens-rights\\_329396.html](http://www.todayszaman.com/columnist/nicole-pope/lack-of-focus-on-childrens-rights_329396.html).

214. UNITED NATIONS CHILDREN’S FUND, TORTURE AND ILL-TREATMENT, *supra* note 144.

215. KILKELLY, *supra* note 199.

216. U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: The Former Yugoslav Republic of Macedonia*, ¶¶ 38–39, U.N. Doc. CRC/C/MKD/CO/2 (June 23, 2010).

217. Council of Eur., European Comm. for the Prevention of Torture, *Report to the Latvian Government on the Visit to Latvia by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 15 September 2011*, at 39, CPT/Inf (2013) 20 (Aug. 27, 2013).

218. Council of Eur., European Comm. for the Prevention of Torture, *Report to the Lithuanian Government on the Visit to Lithuania by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 18 June 2010*, at 26–27, CPT/Inf (2011) 17 (May 19, 2011).

219. Council of Eur., European Comm. for the Prevention of Torture, *Report to the Estonian Government on the Visit to Estonia by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or*

terms for solitary confinement in Eastern Europe are typically longer than in Western Europe.<sup>222</sup> A few states in Eastern Europe also maintain a quarantine procedure, which allows individuals entering a facility to be held in solitary confinement when initially detained.<sup>223</sup> Romania requires that juveniles be held in solitary confinement for the first three weeks of their detention.<sup>224</sup> Older reports list the lack of adequate record keeping as a major problem among countries in this region.<sup>225</sup>

### G. Africa

The data on the prevalence of juvenile solitary confinement in Africa are relatively limited.<sup>226</sup> Although there are reports of solitary confinement of adults, the data do not address the treatment of inmates under eighteen. In general, however, urban African prisons appear to be overcrowded and plagued by claims of physical abuse and starvation of inmates.<sup>227</sup> The use of solitary confinement is most likely limited because facilities lack space, and

*Punishment (CPT) from 30 May to 6 June 2012*, at 35, CPT/Inf (2014) 1 (Jan. 21, 2014).

220. Ali Bracken, *Belarus Juveniles Are Under "Threat,"* IRISH TIMES, Aug. 23, 2006, at 4 (reporting that imprisoned juveniles may be put in solitary confinement for thirty days as punishment).

221. Council of Eur., European Comm. for the Prevention of Torture, *Report to the Croatian Government on the Visit to Croatia by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 14 May 2007*, at 40, CPT/Inf (2008) 29 (Oct. 9, 2008).

222. See, e.g., Council of Eur., *supra* note 219 (criticizing the maximum term limit in Estonia, which is set at twenty days).

223. See KILKELLY, *supra* note 199.

224. *Id.*

225. See, e.g., Council of Eur., Comm. for the Prevention of Torture, *Report to the Lithuanian Government on the Visit to Lithuania by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 February 2000*, at 53, CPT/Inf (2001) 22 (Oct. 18, 2001) ("[T]he imposition of a disciplinary measure and, in particular, the measure of solitary confinement, should be systematically recorded.").

226. See CELIA PETTY & MAGGIE BROWN, JUSTICE FOR CHILDREN: CHALLENGES FOR POLICY AND PRACTICE IN SUB-SAHARAN AFRICA 64 (1998) (stating that in general, data on crime in Africa are scarce, in large part as a result of public perception that the police forces are inept and corrupt).

227. See, e.g., *Annual Report: Benin 2013*, AMNESTY INT'L (May 23, 2013), <http://www.amnestyusa.org/research/reports/annual-report-benin-2013> (noting that Benin's Cotonou prison is at six times its capacity); Nomalanga Moyo, *Zimbabwe: 100 Die from Hunger in Zimbabwe's Prisons*, ALLAFRICA (Dec. 3, 2013), <http://allafrica.com/stories/201312040149.html> (reporting at least 100 inmate deaths from malnutrition in Zimbabwe's prisons in 2013); Laura Smith-Spark, *What's Life Like in a South African Prison?*, CNN WORLD (Mar. 3, 2014, 5:44 AM), <http://www.cnn.com/2013/02/21/world/africa/south-africa-prison-conditions/index.html> (noting that South African prisons are frequently overcrowded at two times their intended capacity in remand prisons).

its practice may receive little attention due to other more pressing issues. However, there is documentation suggesting that juveniles are held in solitary confinement in Benin.<sup>228</sup> In addition, there are data documenting the use of juvenile solitary confinement in pre-revolution Libya<sup>229</sup> and its use historically in South Africa;<sup>230</sup> however, current use is only documented for adult prisoners. In rural areas in Africa, discipline for misconduct is often dealt with by tribal leaders who resolve disputes via reparations schemes— isolation and other forms of physical discipline are rare.<sup>231</sup> In general, formal legal proceedings are only initiated against young people who are not from the area in which the crime was committed.<sup>232</sup>

#### H. Asia

Similar to conditions in Africa, information regarding the use of juvenile solitary confinement in Asia is constrained by widespread limits placed on free speech, a lack of English-speaking media, and poor record keeping.<sup>233</sup> In areas where juvenile solitary confinement has been documented—such as the former Soviet republics of Kyrgyzstan, Tajikistan, Azerbaijan, Kazakhstan, Armenia,<sup>234</sup> and

228. *Benin: OMCT Mission to Monitor and Promote the Rights of Children in Conflict with the Law*, OMCT (Nov. 6, 2013), <http://www.omct.org/rights-of-the-child/statements/benin/2013/11/d22431/>.

229. HUMAN RIGHTS WATCH, LIBYA: A THREAT TO SOCIETY? THE ARBITRARY DETENTION OF WOMEN AND GIRLS FOR “SOCIAL REHABILITATION” 16 (2006) (reporting that Libyan facility records documented instances of girls being held in isolation for several weeks).

230. See, e.g., Johann Louw & Catherine O’Brien, *The Psychological Effects of Solitary Confinement: An Early Instance of Psychology in South African Courts*, 37 S. AFR. J. PSYCHOL. 96, 97 (2007) (noting that in 1963, the government had the authority to detain anyone for ninety days in isolation units for questioning).

231. See PETTY & BROWN, *supra* note 226, at 64 (noting that within urban areas, juvenile crime is often dealt with by the local community, while in rural areas formal proceedings are often replaced by “traditional” tribal justice); see also *id.* at 84–86 (noting that formal justice systems have limited reach outside of major cities, especially in countries where national governments are viewed as inept and corrupt).

232. *Id.* at 94–95 (noting that formal proceedings may be initiated for serious offenses such as murder or when the minor is from outside the community).

233. See REPORTERS WITHOUT BORDERS, WORLD PRESS FREEDOM INDEX 2013 (2013), available at [http://fr.rsf.org/IMG/pdf/classement\\_2013\\_gb-bd.pdf](http://fr.rsf.org/IMG/pdf/classement_2013_gb-bd.pdf) (finding that the majority of Asian countries lack freedom of the press); *African Conference Addresses FOI Implementation Issues*, FREEDOMINFO.ORG (Apr. 3, 2014), <http://www.freedominfo.org/2014/04/african-conference-addresses-foi-implementation-issues/>.

234. UNITED NATIONS CHILDREN’S FUND, TORTURE AND ILL-TREATMENT, *supra* note 144, at 6–7.

Uzbekistan<sup>235</sup>—there is evidence of lengthy maximum terms imposed for punitive purposes, but there remains a lack of transparency and oversight. Similarly, Singapore,<sup>236</sup> Vietnam,<sup>237</sup> Bangladesh,<sup>238</sup> and Mongolia<sup>239</sup> also appear to use juvenile solitary confinement as punishment. Mongolia's use of juvenile solitary confinement is limited to a small subset of crimes committed by sixteen- and seventeen-year-old offenders, but the country allows for the imposition of between one and six months of isolation.<sup>240</sup> Singapore uses both solitary confinement and caning as the primary forms of punishment in its juvenile facilities.<sup>241</sup> Vietnam has reported the use of solitary confinement as a punishment for young offenders, but there are also anecdotal reports that isolation is used to hide the physical abuse of street children that occurs in police stations.<sup>242</sup> Pakistan uses solitary confinement as punishment in juvenile facilities<sup>243</sup> and imposes it in conjunction with death sentences.<sup>244</sup> In fact, even after commutation of death sentences, juveniles have been held for several years in isolation with little recourse.<sup>245</sup> Although punitive solitary has a maximum limit of two weeks in Pakistan, the rules are not routinely followed, and a standard term of isolation may last for up to a month.<sup>246</sup>

235. U.N. Comm. on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Uzbekistan*, ¶ 38, U.N. Doc. CRC/C/UZB/CO/3-4 (July 10, 2013).

236. U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Singapore*, ¶ 68, U.N. Doc. CRC/C/SGP/CO/2-3 (May 4, 2011).

237. U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Vietnam*, ¶ 43, U.N. Doc. CRC/C/VNM/CO/3-4 (Aug. 22, 2012).

238. U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Bangladesh*, ¶ 41, U.N. Doc. CRC/C/15/Add.221 (Oct. 27, 2003).

239. JANE S. KIM & OYUNBILEG RENTSENDORJ, UNITED NATIONS CHILDREN'S FUND, EVALUATION OF UNICEF MONGOLIA'S CHILD PROTECTION PROGRAMME: JUVENILE JUSTICE & LEGISLATIVE REFORM 65 (2009).

240. *Id.* at 65, 130 n.133.

241. U.N. Comm. on the Rights of the Child, *supra* note 236.

242. HUMAN RIGHTS WATCH, *supra* note 151, at 46–47.

243. See HUMAN RIGHTS WATCH, PRISON BOUND: THE DENIAL OF JUVENILE JUSTICE IN PAKISTAN 4, 62–64 (1999).

244. *Id.* at 17.

245. See Nadir Ali Khoso, *Justice for Juvenile Offenders*, DAWN.COM (Jan. 18, 2012, 12:00 AM), <http://www.dawn.com/news/688906/justice-for-juvenile-offenders> (noting that an individual whose death sentence was commuted to twenty-five years had already spent four years in solitary confinement by his eighteenth birthday).

246. HUMAN RIGHTS WATCH, *supra* note 243, at 64.

Information regarding juvenile solitary confinement in China is quite limited.<sup>247</sup> In general, China appears to use “re-education” facilities, which focus on indoctrination, for its youth offenders.<sup>248</sup> However, China also detains juveniles without notice, process, or the opportunity to contact family members.<sup>249</sup> Chinese confinement conditions for juveniles are not a matter of public record, but reports from adult prisons include accounts of isolation and torture of children in juvenile facilities.<sup>250</sup> In Macau, an autonomous zone within China, the use of juvenile solitary confinement is allowed, likely as a byproduct of the zone’s Portuguese heritage.<sup>251</sup>

### I. Middle East

In the Middle East, there is evidence of the regular use of solitary confinement of young people. Israel’s solitary confinement of Palestinian child detainees has been particularly well-documented.<sup>252</sup> Israel uses solitary confinement for days or weeks against approximately ten percent of their five to seven hundred Palestinian child detainees each year.<sup>253</sup> The practice starts at the moment of detention and is often used as punishment for peaceful protest or other minor offenses, such as throwing rocks.<sup>254</sup>

247. U.N. Comm. on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of China*, ¶ 15, U.N. Doc. CRC/C/CHN/CO/3-4 (Oct. 29, 2013).

248. See *id.* ¶¶ 85, 92. See generally *China: Abolition of Labour Camps Must Lead to Wider Detention Reform*, AMNESTY INT’L (Nov. 15, 2013), <https://www.amnesty.org/en/articles/news/2013/11/china-re-education-through-labour-camps/> (noting that China uses “re-education through labor” camps to deal with prisoners outside of standard legal proceedings).

249. See U.N. Comm. on the Rights of the Child, *supra* note 247, ¶¶ 93–95.

250. See *id.* ¶ 93.

251. See *id.* ¶ 94.

252. See, e.g., Dalia Hatuqa, *Israel Locking Up More Children in Isolation*, ALJAZEERA (May 19, 2014, 12:53 PM), <http://www.aljazeera.com/news/middleeast/2014/05/israel-locking-up-more-children-isolation-201451965832961918.html> (reporting that an increasing number of Palestinian children face solitary confinement during interrogation by Israeli authorities).

253. *Israel Urged to Treat Palestinian Child Detainees in Accordance with Rights Law—UN*, U.N. NEWS CENTRE (July 20, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42527#.UyZQqf2ua5c>; Harriet Sherwood, *The Palestinian Children—Alone and Bewildered—in Israel’s Al Jalame Jail*, THEGUARDIAN (Jan. 22, 2012, 3:00 PM), <http://www.theguardian.com/world/2012/jan/22/palestinian-children-detained-jail-israel> (reporting “a pattern of night-time arrests [of Palestinian children], hands bound with plastic ties, blindfolding, physical and verbal abuse, and threats,” with nine percent being placed in solitary confinement, with a “marked increase to 22% in the past six months”).

254. See NAAMA BAUMGARTEN-SHARON, B’TSELEM: THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, NO MINOR MATTER: VIOLATION OF THE RIGHTS OF PALESTINIAN MINORS ARRESTED BY ISRAEL ON SUSPICION OF STONE THROWING 43, 58–59 (2011), available at <http://www.btselem.org/download>

Illustrating how isolation infringes upon the adjudicatory rights of young detainees, one international human rights worker explained, “Solitary confinement [of Palestinian youth in Israel] breaks the spirit of a child . . . . Children say that after a week or so of this treatment, they confess simply to get out of the cell.”<sup>255</sup> Palestinian children have demonstrated many symptoms of trauma when released from isolation, including “nightmares, mistrust of others, fear of the future, feelings of helplessness and worthlessness, obsessive compulsive behavior, bedwetting, aggression, withdrawal[,] and lack of motivation.”<sup>256</sup>

Reports have also confirmed the use of juvenile solitary confinement elsewhere in the Middle East. In Syria, for instance, solitary has been used at high rates during the recent three-year conflict between the government and rebel forces.<sup>257</sup> In Saudi Arabia, juvenile solitary confinement is used pretrial<sup>258</sup> for purposes of inmate management, and it is frequently imposed on juveniles facing death sentences.<sup>259</sup> Because Saudi Arabia has neither a defined age for juvenile jurisdiction nor a published legal code, it makes no distinctions between youth and adult offenders in regards to punishment and sentencing.<sup>260</sup>

#### J. Australia

Australia uses solitary confinement in a similar fashion and at comparable rates to the United States and the United Kingdom.<sup>261</sup>

/201107\_no\_minor\_matter\_eng.pdf (finding that minor detainees were kept in solitary confinement during prolonged interrogations and were held in the same cells as adult detainees and prisoners).

255. Sherwood, *supra* note 253.

256. *Id.*

257. Catherine Philp, *Abuse, Torture, Death: The Fate of Syria's Children*, TIMES, Feb. 6, 2014, at 32.

258. See, e.g., Brian Whitaker, *Saudi Boy, 14, Faces Execution*, THE GUARDIAN (Oct. 28, 2005), <http://www.theguardian.com/world/2005/oct/29/saudi-arabia-brian-whitaker>.

259. See *id.*; see also HUMAN RIGHTS WATCH, ADULTS BEFORE THEIR TIME: CHILDREN IN SAUDI ARABIA'S CRIMINAL JUSTICE SYSTEM 49–50 (2008) (noting that girls may be held in “therapeutic isolation” when their medical conditions do not warrant isolation under unhygienic conditions).

260. Syed Nazir Gilani, *Juvenile Justice in Saudi Arabia*, in DELINQUENCY AND JUVENILE JUSTICE SYSTEMS IN THE NON-WESTERN WORLD 145, 149 (Paul C. Friday & Xin Ren eds., 2006).

261. See Kristin Shorten, *Prisoner Marks 40th Year in Solitary Confinement*, NEWS.COM.AU (May 13, 2013, 11:40 AM), <http://www.news.com.au/national/prisoner-marks-40th-year-in-solitary-confinement/story-fncynjr2-1226641015427> (noting that five percent of Australia's prison population is held in solitary confinement); see also DETENTION: SEPARATION OF ADULTS AND JUVENILES IN DETENTION, AUSTRALIAN LAW REFORM COMM'N § 20.102 (1997), available at <http://www.alrc.gov.au/publications/20-detention/separation-adults-and-juveniles-detention> (last visited Feb. 11, 2015) (“A number of States and Territories, in particular, Victoria and Western Australia emphasise that the

Reports of abuse are relatively common, ranging from discriminatory use of solitary confinement against aboriginal youths<sup>262</sup> to reports of pretrial solitary confinement when a suitable guardian cannot be located.<sup>263</sup> There are also reported incidents of young people who are held in isolation for months.<sup>264</sup> Papua New Guinea also allows the use of solitary confinement as a form of punishment against youths, although specifics about its use are limited.<sup>265</sup>

#### K. *Duration in U.S. Juvenile Detention Facilities*

In order to appreciate the prevalence of juvenile solitary confinement on the international level, it is critical to examine data on the total number of young people who are isolated in specific countries and regions as well as the length of time—in hours, days, weeks, or months—that children are held in isolation. While rates for the former are difficult to locate in many countries of the world,<sup>266</sup> data for the latter are nearly impossible to find outside of U.S. juvenile detention facilities. This Subpart, therefore, focuses on available data on the solitary confinement policies within these facilities. Given that these institutions are specifically designed for adolescents and not for adults, a survey of their practices arguably reflects the most benign use of isolation in the United States—with the caveat that the United States holds young people in solitary confinement at much higher rates and for much longer periods than most countries in the world.<sup>267</sup>

small number of children in adult prisons means that separation from adult prisoners would amount to solitary confinement.”).

262. *Amnesty International Outraged by Treatment of Teenagers Held in Solitary Confinement*, AMNESTY INT’L (Oct. 29, 2012, 9:47 PM), <http://www.amnesty.org.au/news/comments/30180/>; Josie Taylor, *Aboriginal Teen Kept in Solitary Confinement*, ABC NEWS, <http://www.abc.net.au/news/2012-10-26/criticism-over-aboriginal-teen-kept-in-solitary-confinement/4336448> (last updated Oct. 30, 2012).

263. Debbie Guest, *Boy, 12, Endured Week in Lock-Up*, AUSTRALIAN (May 30, 2011, 12:00 AM), <http://www.theaustralian.com.au/national-affairs/boy-12-endured-week-in-lock-up/story-fn59niix-1226065208729>.

264. VICTORIAN OMBUDSMAN, *INVESTIGATION INTO CHILDREN TRANSFERRED FROM THE YOUTH JUSTICE SYSTEM TO THE ADULT PRISON SYSTEM 3–5* (2013), available at <https://www.ombudsman.vic.gov.au/getattachment/6a579e49-212e-42b0-9d3c-791e2d60e102/reports-publications/parliamentary-reports/investigation-into-children-transferred-from-the-y.aspx>.

265. U.N. Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Addendum, Mission to Papua New Guinea*, 38, U.N. Doc. A/HRC/16/52/Add.5 (Feb. 7, 2011); see also Mark Evenhuis, *When Justice Harms: Juvenile Justice in Papua New Guinea*, 36 ALTERNATIVE L.J. 166, 166 (2011).

266. See *supra* Subpart II.B.

267. See *supra* notes 153–54 and accompanying text.

Based on a survey of juvenile justice systems in the fifty states and the District of Columbia, twenty jurisdictions prohibit terms of punitive solitary confinement that exceed twenty-four hours, while the remaining thirty-one jurisdictions allow for such confinement, with the most common limits set at three days and five days.<sup>268</sup> More specifically, eleven states allow juveniles to remain in solitary for one to four days;<sup>269</sup> eleven other states limit confinement to between five and ninety days;<sup>270</sup> and ten states place no time limits at all on the length of solitary.<sup>271</sup> In most states, solitary confinement triggers due process protections, and in some states, facilities must seek administrative approval for prolonged isolation.<sup>272</sup> States often run more than one facility within their borders that allows for juvenile solitary confinement, and different high-security facilities within a state may have significantly varying policies.<sup>273</sup> States' solitary confinement policies vary in their restrictiveness. Some order solitary for an unspecified amount of time each day, while others have policies that allow facilities to straddle the line between solitary confinement and the ostensibly less punitive status, "loss of privileges."<sup>274</sup>

### III. HOW DID THE PROLONGED ISOLATION OF CHILDREN BECOME POLICY?

Although U.S. courts have not classified the solitary confinement of incarcerated inmates as cruel and unusual

268. CATHERINE WEISS ET AL., LOWENSTEIN CTR. FOR THE PUB. INTEREST, 51-JURISDICTION SURVEY OF SOLITARY CONFINEMENT RULES IN JUVENILE JUSTICE SYSTEMS 1–8, 44–46 (2014), available at <http://www.lowensteinprobono.com/files/Uploads/Documents/solitary%20confinement%20memo%20survey%20-%20FINAL.pdf>; see also RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 7–8 (2011), available at <http://files.eric.ed.gov/fulltext/ED527944.pdf> (finding that in July 2009 in Ohio, youth confined in state correctional facilities spent over 66,000 hours in seclusion, an average of more than fifty hours per resident, and also finding that in 2003 in California, on any given day, about 450 youth, or between ten and twelve percent of the population in six of the state's large youth corrections facilities, were confined to their rooms for twenty-three hours per day).

269. WEISS ET AL., *supra* note 268, at 45 (noting that Illinois, Iowa, Maine, Hawaii, Louisiana, Mississippi, Nevada, North Carolina, Rhode Island, Washington, and Montana allow for a maximum limit of between one and four days).

270. *Id.* (noting that Florida, Indiana, Kentucky, Minnesota, New Jersey, South Dakota, and Virginia set maximum limits at five days, and California, Kansas, Nebraska, and Wisconsin have maximums of five days or longer).

271. *Id.* (noting that Alabama, Georgia, Massachusetts, Michigan, Missouri, Ohio, Oregon, Tennessee, Texas, and South Carolina have no maximum limits for juvenile solitary confinement).

272. *Id.* at 2.

273. *Id.* at 4–5.

274. *Id.* at 5.

punishment—much less torture—the isolation of detainees in U.S.-operated facilities in Afghanistan, Guantánamo, and Iraq has been consistently characterized by human rights groups as “psychological torture” having “extremely devastating consequences . . . [that] can be just as harmful and . . . often more long-lasting than physical torture.”<sup>275</sup> This is particularly the case when the confinement has been combined with techniques such as sensory deprivation, sleep deprivation, forced nudity, cultural and sexual humiliation, and threats of violence or death.<sup>276</sup>

At first blush it may seem hyperbolic, or at best inaccurate, to compare the solitary confinement of young people to such scenarios and argue that it, too, should be considered torture—or, at the very least, cruel and unusual punishment. However, the plain language of U.S. statutes drafted to define and criminalize torture belies this view. For instance, the federal anti-torture statute, 18 U.S.C. § 2340, defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control.”<sup>277</sup> It defines “severe mental pain or suffering” as “prolonged mental harm caused by or resulting from . . . procedures calculated to disrupt profoundly the senses or the personality.”<sup>278</sup> Similar language is contained in the Torture Victims Protection Act of 1991 (“TVPA”),<sup>279</sup> which gives U.S. and

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275. PHYSICIANS FOR HUMAN RIGHTS, BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY U.S. FORCES 1 (2005), available at [https://s3.amazonaws.com/PHR\\_Reports/break-them-down.pdf](https://s3.amazonaws.com/PHR_Reports/break-them-down.pdf); see also David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823, 856 (2012) (“Psychological torture . . . undermines the structure of the personality—it literally breaks apart the self, unhinging its parts from each other. The victim is reduced to a quivering bundle of fears, driven to try to please, that is, to try to fulfill the wishes of others, with few wishes of her own, except release from the awful psychological stresses that are being systematically and relentlessly imposed by all-powerful others. This stress goes far beyond what slavery involved and gives new meaning to being at the mercy of someone else.”).

276. PHYSICIANS FOR HUMAN RIGHTS, *supra* note 275.

277. 18 U.S.C. § 2340 (2012).

278. *Id.*

279. Torture Victim Protection Act of 1991 § 256, 28 U.S.C. § 1350 (2012) (“[T]he term ‘torture’ means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering, . . . whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual . . . information or a confession, punishing that individual for an act that individual . . . has committed or is suspected of having committed, intimidating or coercing that individual, . . . or for any reason based on discrimination of any kind; and . . . mental pain or suffering refers to prolonged mental harm caused by or resulting from . . . the administration or application, or threatened administration or application, of . . . procedures calculated to disrupt profoundly the senses or the personality . . .”).

non-U.S. citizens the right to bring private claims for torture and extrajudicial killing committed outside the United States.<sup>280</sup>

One may counter by arguing that prison officials who place young inmates in isolation do so not with the *specific intent* to disrupt the senses or the personality of these teenage detainees, but rather to prevent violence and protect prison guards. However, facility administrators and others who establish prison policy cannot be unaware of the extensive data chronicling both the extreme nature of the harm of solitary confinement and the fact that it is often perpetrated against nonviolent offenders for minor institutional infractions.<sup>281</sup> In fact, the defense of ignorance of the harm suffered by adolescents placed in solitary confinement has been rejected as willful blindness in recent lawsuits brought against state correction agencies for unregulated use of solitary confinement.<sup>282</sup> Similarly, the U.S. Supreme Court has held that for prison officials to be civilly liable for inflicting cruel and unusual punishment, the following test applies:

[A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. . . . Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . .[,] and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.<sup>283</sup>

Not surprisingly, however, and consistent with the refusal of U.S. courts to characterize the solitary confinement of prisoners as torture, cases that have interpreted the meaning of torture within the definitions used by the TVPA have found only for those plaintiffs subjected to the most extreme conditions—cases in which

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280. See Ekaterina Apostolova, *The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L L. 640, 641 (2010).

281. See *supra* Parts I and II.

282. See *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1149 (D. Haw. 2006) (noting that the fact that the facility was following procedures from the 1980s was not an excuse for failing to adopt new policies to replace “1984 policies that [the] DOJ condemned as ‘outdated and intended for an adult institution’” (citing Letter from Bradley J. Schlozman, Acting Assistant Attorney Gen., to the Hon. Linda Lingle, Governor, State of Hawaii, regarding Investigation of the Hawaii Youth Correctional Facility, Kailua, Hawaii (Aug. 4, 2005), available at [http://www.justice.gov/crt/about/spl/documents/hawaii\\_youth\\_findlet\\_8-4-05.pdf](http://www.justice.gov/crt/about/spl/documents/hawaii_youth_findlet_8-4-05.pdf))).

283. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994); see also *infra* Subpart III.B (discussing legal challenges to solitary confinement based on the Eighth Amendment’s prohibition of cruel and unusual punishment).

psychological coercion has been coupled with physical abuse or degradation.<sup>284</sup>

Despite the trend in the case law, the history of solitary confinement reveals that the prolonged isolation of prisoners differs neither in form nor in substance from accepted conceptions of torture.<sup>285</sup> This Part illustrates the development of solitary confinement from a monastic practice during the Middle Ages, to its widespread use as a penal measure during the first half of the nineteenth century (coinciding with the rise of the modern penitentiary), to the recognition of its harmful effects on mental health and resultant decrease in use following World Wars I and II, to its resurgence during the 1980s with the advent of institutional overcrowding and supermax prisons. This history culminates in the twenty-first century with increasingly vocal calls for reform by legislators and advocacy groups alike. This Part then analyzes the legal challenges—premised upon the U.S. Constitution, international law, and human rights instruments—brought against the solitary confinement of youth.

#### A. *History of Solitary Confinement*

The historical roots of the practice of solitary confinement can be traced back to the monastic practice of imprisonment during the Middle Ages (*muris strictus* or “close confinement”).<sup>286</sup> There is also documentation of its use between 1703 and 1828 at the San Michele a Ripa in Rome, an austere papal prison for boys where the practice was used to segregate them from adult inmates.<sup>287</sup> The solitary confinement of prisoners gained notoriety in 1787 in Philadelphia,

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284. Compare *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 25 (D.D.C. 2001) (finding that being held at gunpoint, threatened with physical injury, and incarcerated in a room with no bed, window, light, electricity, water, or toilet constitutes torture), with *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (reversing the district court's finding that the plaintiff had stated a claim for torture and finding that being interrogated, held incommunicado, threatened with death, and separated from one's spouse may “reflect a bent toward cruelty on the part of [the] perpetrators, [but these acts] are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture”).

285. Of course, this is hardly the first instance in which such a comparison has been made, although the question typically is directed at whether human rights abuses and Eighth Amendment violations against *adult* inmates of U.S. prisons constitute psychological torture. See, e.g., Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in *THE TRAUMA OF PSYCHOLOGICAL TORTURE* 127, 128–29 (Almerindo E. Ojeda ed., 2008).

286. Smith, *supra* note 25, at 441 n.1.

287. Giannetti, *supra* note 164, at 35; see also Luigi Cajani, *Surveillance and Redemption: The Casa di Correzione of San Michele a Ripa in Rome*, in *INSTITUTIONS OF CONFINEMENT: HOSPITALS, ASYLUMS, AND PRISONS IN WESTERN EUROPE AND NORTH AMERICA, 1500–1950*, at 301, 301 (Norbert Finzsch & Robert Jütte eds., 1996).

Pennsylvania, at the Walnut Street Jail, which led to the practice itself becoming known as the “Philadelphia system” or “Pennsylvania model.”<sup>288</sup> The Society for Alleviating the Miseries of Public Prisons promoted the practice at Walnut Street as a humane alternative to overcrowded jails where prisoners were whipped and publicly humiliated in order to maintain order.<sup>289</sup>

During the first half of the nineteenth century, solitary confinement was used broadly as a penal measure designed to rehabilitate criminals through the use of isolation.<sup>290</sup> This practice coincided with the rise of the modern penitentiary, beginning in 1829 with Pennsylvania’s Eastern State Penitentiary.<sup>291</sup> “Known for its grand architecture and strict discipline,” Eastern State was designed to inspire “true regret in the hearts of convicts.”<sup>292</sup> Its inmates were ominously hooded whenever they were outside their cells—ostensibly to prevent them from gaining knowledge of the building or interacting with guards—and the institution held such notorious criminals as Al Capone and bank robber Willie Sutton.<sup>293</sup> The Eastern State’s penal philosophy was premised upon a Quaker-inspired system of isolation and labor, in which inmates had only honest work, the “light of heaven” (skylights), and the word of God (Bible) to reform them.<sup>294</sup>

In the decades after the construction of Eastern State, more than three hundred prisons from all parts of the world followed this model. European and South American visitors to American prisons during the 1830s through 1850s praised the modern institutions.<sup>295</sup> In this period, European jails and prisons were built on the model of

288. See *In re Medley*, 134 U.S. 160, 167–68 (1890); CYNDI BANKS, PUNISHMENT IN AMERICA: A REFERENCE HANDBOOK 46 (2005).

289. See Norman Johnston, *The World’s Most Influential Prison: Success or Failure?*, 84 PRISON J. 20S, 21S–23S (2004).

290. Smith, *supra* note 25, at 456–57 (“The inmate was expected to turn his thoughts inward, to meet God, to repent his crimes, and eventually to return to society as a morally cleansed Christian citizen.”).

291. See Johnston, *supra* note 289, at 24S–27S; Grassian, *Psychiatric Effects*, *supra* note 62, at 340; *History of Eastern State*, E. ST. PENITENTIARY, <http://www.easternstate.org/learn/research-library/history> (last visited Jan. 8, 2015).

292. *America’s Most Historic Prison*, E. ST. PENITENTIARY, <http://www.easternstate.org/home> (last visited Jan. 8, 2015); see also Johnston, *supra* note 289, at 23S (explaining that complete isolation was thought to be “the key to true reform” for prisoners).

293. Johnston, *supra* note 289, at 25S–26S; *Eastern State Penitentiary Draws Curiosity Seekers to Philadelphia*, LEB. DAILY NEWS (Oct. 14, 2013, 6:21 PM), [http://www.ldnews.com/lifestyle/ci\\_24306249/lebanon-daily-news](http://www.ldnews.com/lifestyle/ci_24306249/lebanon-daily-news).

294. Todd Pitock, *Jailhouse Blues*, SATURDAY EVENING POST, Jan.–Feb. 2013, at 44–46.

295. Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 10 (2012); Smith, *supra* note 25, at 457.

social isolation.<sup>296</sup> Yet, by the 1840s, a backlash against solitary confinement began to develop on the international level.<sup>297</sup> Isolation was documented as having caused “cases of insanity” in England’s Millbank Prison, and isolation was thereafter limited to the first three months of a sentence.<sup>298</sup> Psychiatrists reported that German prisons based on the Eastern State model caused “negative health effects.”<sup>299</sup>

Throughout the nineteenth century, use of solitary confinement decreased with recognition of its harmful effects on mental health. After 1821, prisoners at Auburn Prison in New York State (the “Auburn System”) were removed from solitary and allowed to work together in silence during the day; prior to that, the Auburn System was found to produce “results so dire” that the governor ended the practice after a visit and ordered that twenty-six inmate “survivors” immediately be released.<sup>300</sup> By the 1830s, experts recognized that Pennsylvania inmates’ mental health deteriorated when they were held in solitary confinement.<sup>301</sup> Charles Dickens himself visited Eastern State and condemned the practice of solitary confinement in 1842.<sup>302</sup>

Meanwhile, other prison systems developed that moved away from penitentiary discipline to a regime that facilitated individualized treatment, or a “progressive system” that combined an initial period of solitary confinement with later stages that allowed for contact with other prisoners and an increase in privileges.<sup>303</sup> “From the 1860s onward, the use of solitary confinement declined gradually in the Western world.”<sup>304</sup> It was not until 1930, at a penitentiary congress in Prague, that the international community of prison experts condemned solitary confinement.<sup>305</sup> Even so, solitary was still prevalent in such countries as Sweden, Belgium, and Holland throughout the first half

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296. Hafemeister & George, *supra* note 295; Smith, *supra* note 25.

297. Smith, *supra* note 25, at 460; *see also* Hafemeister & George, *supra* note 295, at 11 (noting that prison officials began to notice the development of mental health issues in the early 1800s).

298. Hafemeister & George, *supra* note 295, at 11; Smith, *supra* note 25, at 458.

299. Smith, *supra* note 25, at 459; *see* Grassian, *Psychiatric Effects*, *supra* note 62, at 342 (describing the work of German clinicians who documented hundreds of cases of “psychotic disturbances” among prisoners).

300. Smith, *supra* note 25, at 457.

301. *Id.*

302. *Id.* at 460 (“I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers . . . and which no man has a right to inflict upon his fellow-creature.”).

303. *Id.* at 465–66.

304. *Id.* at 467.

305. *Id.*

of the twentieth century.<sup>306</sup> However, it was typically a short-term punishment that was used on a much lower scale.<sup>307</sup>

Discussions regarding the long-term effects of solitary confinement resurfaced in the 1950s when sensory deprivation studies were conducted in reaction to reports of mistreatment of POWs, including solitary isolation, during the Korean War.<sup>308</sup> The vast majority of post-World War II studies of solitary confinement in prisons found substantial negative health effects and concluded that it “produc[ed] a higher rate of psychiatric and psychological health problems than ‘normal’ imprisonment.”<sup>309</sup> Studies also reported serious post-isolation effects as well as “chronic isolation syndrome.”<sup>310</sup>

From the mid-1970s through the beginning of the twenty-first century, the legislative branches of state governments in the United States set the stage for unprecedented growth in the prison population through mandatory sentencing laws and mandatory minimum sentences for drug crimes.<sup>311</sup> In the era of the “super predator,” states passed laws making it easier to transfer youth from juvenile to criminal court for a wide variety of offenses,<sup>312</sup> and jurisdictional age caps were lowered, increasing the numbers of adolescent and teenage offenders doing “hard time” in adult prisons.<sup>313</sup> Under the guise of being tough on crime, lawmakers further exacerbated the overcrowding crisis with determinative

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306. Peter Scharff Smith, *Solitary Confinement: History, Practice, and Human Rights Standards*, 181 PRISON SERVICE J. 3, 4 (2009); Smith, *supra* note 25, at 467.

307. Smith, *supra* note 25, at 467.

308. *Id.* at 469–71 (summarizing studies at McGill University in Montreal that inspired a wide range of psychological experiments on sensory deprivation, which revealed that “isolating people and severely restricting sensory stimulation can provoke a number of quite drastic reactions and symptoms—even after short durations of isolation (hours or days)—including, for example, hallucinations, confusion, lethargy, anxiety, panic, time distortions, impaired memory, and psychotic behavior.”).

309. *Id.* at 476–87.

310. *Id.* at 495–97.

311. See, e.g., Haney, *supra* note 16, at 127–28; see also MICHELLE ALEXANDER, *THE NEW JIM CROW* 16, 59–88 (2010) (discussing the ways in which the War on Drugs has contributed to the culture of mass incarceration, in which “[f]ew legal rules meaningfully constrain the police in the drug war, and enormous financial incentives have been granted to law enforcement to engage in mass drug arrests through military-style tactics[, and that o]nce swept into the system, one’s chances of ever being truly free are slim”).

312. See Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 39 (2013) (“One of the first and most sweeping changes from the 1980s and 1990s panic was that legislatures lowered the age at which a juvenile could be transferred to juvenile court, and also lowered the level of eligible offenses for transfer. . . . In four states, there is no age restriction whatsoever for transfer for any criminal offense.”).

313. See *id.*

sentencing schemes that abolished any meaningful opportunity for parole.<sup>314</sup> In 1983, prison riots in Marion, Illinois, catalyzed by boredom and discontent among the inmates, triggered the use of permanent “lockdown” status in prisons across the United States.<sup>315</sup> Throughout the 1980s and 1990s, the combination of unprecedented prison growth and inadequate funding for rehabilitative services led to increased use of solitary confinement.<sup>316</sup> Although solitary confinement was intended to be a short-term solution, because these fundamental conditions have prevailed, the practice has only become more entrenched in the culture of incarceration.

Marginalized groups, especially those perceived to require “special” treatment, have long been particularly vulnerable to being held in solitary confinement. Among these are prisoners with mental illness or developmental disabilities; juveniles who misbehave or are deemed in need of “protection” or “dangerous”; LGBT individuals; non-English speaking individuals; Muslims, including those accused or convicted of terrorism-related offenses; prisoners who hold “radical” political beliefs or seek to challenge prison conditions; and individuals who complain of abuse by prison officials.<sup>317</sup> It is not readily known whether this is the result of well-meaning concern for these populations and a desire to “protect” them; routine adherence to administrative policies intended for prison security; or implicit bias<sup>318</sup> and a tendency to view these groups as “other” and, therefore, deserving of banishment. It is

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314. See Michael Tonry, *Sentencing in America, 1975–2025*, 42 CRIME & JUST. 141, 149–50 (2013) (“From 1984 through 1996, most jurisdictions enacted some or all of mandatory minimum sentence, truth-in-sentencing, ‘sexual predator,’ ‘career criminal,’ three-strikes, and [life-without-parole] laws . . . . The imprisonment rate continued to increase rapidly, reaching 615 per 100,000 in 1996, principally because of increases in sentence lengths and sharply increased arrest and imprisonment rates for drug offenders . . . .”(citations omitted)).

315. See David A. Ward & Thomas G. Werlich, *Alcatraz and Marion: Evaluating Super-Maximum Custody*, 5 PUNISHMENT & SOC’Y 53, 57–59 (2003) (noting that after the prison riots, the federal courts ruled that solitary confinement did not violate the Eighth Amendment, which allowed the states to use similar lockdown procedures referred to as the “Marion Model”).

316. See Haney, *supra* note 16, at 127–37 (detailing the origins of the modern supermax prison, the psychological pains that supermax confinement imposes, and the prevalence of pain and suffering in supermax prisons).

317. See Jean Casella & James Ridgeway, *Solitary Watch, Solitary 101: An Introduction to Solitary Confinement in U.S. Prisons and Jails*, SOLITARY WATCH 39 (Nov. 12, 2012), <http://solitarywatch.com/2012/11/12/new-from-solitary-watch-solitary-101-powerpoint-presentation/>.

318. See Mark Soler, *Reducing Racial and Ethnic Disparities in the Juvenile Justice System*, in TRENDS IN STATE COURTS 2014: JUVENILE JUSTICE AND ELDER ISSUES 27, 27–30 (Carol R. Flango et al. eds., 2014), available at <http://www.ncsc.contentdm.oclc.org/cdm/singleitem/collection/famct/id/992/rec/1> (finding that racial and ethnic disparities in the juvenile justice system are “often the result of implicit bias by key decision makers,” including judges).

likely that in many instances, the reasons and rationales bleed into one another, and the long-term use of solitary confinement becomes its own de facto justification.

Equally important to understanding the history of the solitary confinement of youth is the role of race and socioeconomic status in the juvenile and criminal justice systems. Research has demonstrated that young people of color are more likely to be placed into these systems, to remain in them longer, and to experience more punitive sanctions than whites.<sup>319</sup> This trend is true even when controlling for a variety of factors, including the category of offense, and it is particularly true for drug and weapon possession cases, despite higher rates of drug use and possession by white youth than youth of color.<sup>320</sup> Similarly, families of means inevitably have greater access than low-income families to voluntary mental health services to address the issues that often trigger referrals to juvenile delinquency court, which can be a gateway into criminal court.<sup>321</sup> These trends are compounded by probation officers who perceive impoverished neighborhoods as high risk and dangerous for youth, increasing the likelihood that they will recommend incarceration for these adolescents, rather than community-based treatment.<sup>322</sup> Therefore, because higher percentages of children of color and poor children are detained in the juvenile and criminal

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319. See, e.g., JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., *ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 2* (Shadi Rahimi ed., 2008) (stating that African American youth are five times more likely to be in juvenile justice custody than white youth, and that Latino youth are twice as likely to be in custody than white youth).

320. See, e.g., ANNE E. CASEY FOUND., *UNEQUAL OPPORTUNITIES FOR JUVENILE JUSTICE 3* (2006), available at <http://www.aecf.org/m/resourcedoc/aecf-RACEMATTERSjuvenilejustice-2006.pdf> (“When compared to White youth committing comparable offenses, African American, Latino/a, and Native American youth experience more punitive treatment in terms of arrests, referral to juvenile court, detention, formal processing, waiver to adult court, incarceration in juvenile facilities, and incarceration in adult facilities. Further, while White youth engage in unlawful behaviors more than their African American and Latino/a counterparts, such as fighting, weapons possession crimes, and using and selling drugs, data show that White youth are more than twice as likely not to be arrested. . . . [e]ven when White, African American, and Latino/a youth with no prior admissions are charged with the same offense, African American youth are six times more likely and Latino/a youth three times more likely than White youth to be incarcerated. In 26 states, Native American youth are disproportionately placed in secure confinement. In every offense category, the average length of confinement was longer for Latino/a youth than for any other group.”(footnotes omitted)); see BELL & RIDOLFI, *supra* note 319.

321. Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL’Y 53, 83 (2012) (“[T]he family’s ability to obtain services is a critical factor in the determination of whether a child will face formal delinquency charges.”).

322. Tamar R. Birkhead, *Closing the Widening Net: The Rights of Juveniles at Intake*, 46 TEX. TECH L. REV. 157, 178 (2013).

justice systems, higher percentages of them are held in solitary confinement.

### B. U.S. Law

Most of the legal challenges of solitary confinement in the United States have been based on the Eighth Amendment to the Constitution, which prohibits the infliction of “cruel and unusual punishments.”<sup>323</sup> The U.S. Supreme Court has held that “[t]he Constitution ‘does not mandate comfortable prisons,’ but neither does it permit inhumane ones . . . .”<sup>324</sup> The distinction between that which is humane and that which is cruel and unusual has been drawn from “evolving standards of decency,”<sup>325</sup> and the analysis, which is fact intensive, has focused on whether the particular condition results in “pain without any penological purpose.”<sup>326</sup> The Supreme Court has established a two-part test for determining whether conditions of confinement are “cruel and unusual.” The objective prong requires the plaintiff to “demonstrate that the conditions of his confinement result ‘in unquestioned and serious deprivations of basic human needs.’ The subjective test requires a plaintiff to show that the defendant prison officials imposed those conditions with deliberate indifference.”<sup>327</sup> In essence, “[t]he question under the Eighth Amendment is whether prison officials . . . exposed a prisoner to a sufficiently substantial ‘risk of serious damage to his future health.’”<sup>328</sup>

In 1890, the U.S. Supreme Court first subjected the practice of solitary confinement to constitutional scrutiny in *In re Medley*.<sup>329</sup> The Court struck down a Colorado statute requiring inmates

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323. U.S. CONST. amend. VIII.

324. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citation omitted) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

325. *Rhodes*, 452 U.S. at 346.

326. *Id.* at 347. *But see* *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, J., dissenting) (arguing that the scope of the Eighth Amendment “extends not only to barbarous methods of punishment, but also to punishments that are grossly disproportionate”). Brennan, Marshall, and Stevens joined Powell in acknowledging that the majority opinion may limit the applicability of proportionality analysis in non-death penalty cases. *Id.*

327. *Davidson v. Coughlin*, 968 F. Supp. 121, 128 (S.D.N.Y. 1997) (citations omitted) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 480 (2d Cir. 1996)); *see also* *Farmer*, 511 U.S. at 837 (holding that deliberate indifference requires that an “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”); *Thomas v. Baca*, 514 F. Supp. 2d 1201, 1207 (C.D. Cal. 2007) (holding that deliberate indifference “entails something more than mere negligence but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result”).

328. *Farmer*, 511 U.S. at 843.

329. 134 U.S. 160, 169 (1890) (describing solitary confinement as “itself an infamous punishment”).

sentenced to death to be held in solitary for one month prior to their execution, relying on accounts of the harmful impact of isolation in nineteenth century prisons in the United States:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.<sup>330</sup>

Although the Court premised the holding on the Ex Post Facto Clause of the Constitution and not the Eighth Amendment, the decision is noteworthy for holding that one month of solitary confinement is a substantial enough burden to justify the Ex Post Facto Clause's application.<sup>331</sup>

Since *In re Medley*, state and federal courts have heard many cases involving Eighth Amendment challenges to solitary confinement, but none has held that the practice is a per se Eighth Amendment violation.<sup>332</sup> Traditionally, evaluations of Eighth Amendment violations have focused on whether prisoners have been denied the basic physical necessities of human existence, including food, shelter, and medical care.<sup>333</sup> In recent decades, with the advent of supermax prisons and the prevalence of solitary confinement, courts have begun to recognize that institutionally imposed psychological pain and suffering can violate the Eighth Amendment.<sup>334</sup> As a result, they have found that specific solitary confinement regimes coupled with particularly harsh conditions can be cruel and unusual.<sup>335</sup> However, these cases typically involve

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330. *Id.* at 168.

331. *Id.* at 172–73.

332. *See, e.g.*, Giannetti, *supra* note 164, at 37 (“Since *Medley*, state and federal courts have heard numerous cases involving Eighth Amendment challenges to the practice of solitary confinement. However, thus far, solitary confinement has withstood these challenges and is not *per se* violative of the Eighth Amendment.”).

333. *Farmer*, 511 U.S. at 832; *see also* Ben Kleinman-Green, Administrative and Punitive Isolation of Children in Jails and Prisons: Cruel, Unusual, and Awaiting Condemnation 23 (Jan. 2008) (unpublished paper), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=ben\\_kleinm](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=ben_kleinm) (suggesting that the right to normal development from adolescence to adulthood is a basic need that isolation denies in violation of the Eighth Amendment).

334. *See, e.g.*, *Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1116–17 (W.D. Wis. 2001); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 914 (S.D. Tex. 1999), *rev’d on other grounds*, 243 F.3d 941 (5th Cir. 2001); *Madrid v. Gomez*, 889 F. Supp. 1146, 1279–80 (N.D. Cal. 1995); *see also* Haney & Lynch, *supra* note 35, at 545–47.

335. *See, e.g.*, *Rhodes v. Chapman*, 452 U.S. 337, 362–63 (1981) (“It is important to recognize that various deficiencies in prison conditions ‘must be

conditions that amount to sensory deprivation and would likely violate the Eighth Amendment even in the absence of the use of solitary.<sup>336</sup> In contrast, courts have rejected Eighth Amendment claims based on solitary confinement without additional evidence of either “deliberate indifference” by prison administrators or egregious conditions or treatment.<sup>337</sup> Scholars have attributed courts’ failure to hold solitary confinement a per se Eighth Amendment violation to judges’ superficial understanding of the traumatic nature of solitary, compounded by judicial deference to prison administrators.<sup>338</sup>

Several important court decisions have established minimum standards for solitary confinement when holding that solitary violates the Eighth Amendment—particularly when imposed upon mentally ill inmates.<sup>339</sup> For instance, in *Madrid v. Gomez*,<sup>340</sup> a federal district court analogized placing mentally ill inmates (or

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considered together.’ The individual conditions ‘exist in combination; each affects the other; and taken together they [may] have a cumulative impact on the inmates.’” (citations omitted) (quoting *Holt v. Sarver*, 309 F. Supp. 362, 373 (8th Cir. 1970))).

336. See, e.g., *Madrid*, 889 F. Supp. at 1264, 1280 (finding that isolation conditions within supermax prisons, when imposed on those with preexisting mental illness, amount to sensory deprivation and “may well hover on the edge of what is humanly tolerable for those with normal resilience”).

337. See, e.g., *Harrelson v. Dupnik*, 970 F. Supp. 2d 953, 979 (D. Ariz. 2013) (rejecting an Eighth Amendment claim based on the isolation of juvenile inmates without evidence that the isolation policies applied to juveniles with mental health needs created a risk of harm that was “so ‘obvious’ that ignoring it amounted to deliberate indifference” on the part of prison administrators); *Bowers ex rel. Alexander S. v. Boyd*, 876 F. Supp. 773, 785 (D.S.C. 1995) (finding that use of lockup units to punish juveniles for disciplinary infractions did not violate the constitutional rights of incarcerated juveniles but that the indiscriminate use of tear gas did).

338. See, e.g., *Haney & Lynch*, *supra* note 35, at 542–50; see also *Kelly v. Brewer*, 525 F.2d 394, 399 (8th Cir. 1975) (rejecting an Eighth Amendment challenge to administrative confinement because Kelly had already been returned to the general population and it was found to be “absolutely necessary for a number of non-punitive reasons to segregate individual inmates from the general prison population, and to hold them in segregated status for varying or indefinite periods of time”); *Sostre v. McGinnis*, 442 F.2d 178, 193–94 (2d Cir. 1971) (rejecting an Eighth Amendment challenge to solitary confinement based on the inmate’s diet, availability of personal hygiene items in his cell, the opportunity for exercise and participation in group therapy, access to reading material from the prison library, and the “constant possibility of communication with other segregated prisoners,” all of which “raised the quality of [his] segregated environment several notches above those [who are] truly barbarous and inhumane”).

339. This pattern has also been seen in the context of death penalty litigation, in which procedural and per se challenges have met limited success while specific groups (e.g., mentally disabled; juveniles) have succeeded in striking down capital punishment as a categorical matter under the Eighth Amendment.

340. 889 F. Supp. 1146 (N.D. Cal. 1995).

those at risk for mental illness) in solitary with placing an asthmatic in a room with little air,<sup>341</sup> and equated denying mentally ill prisoners adequate human contact and social stimuli with committing “psychological torture.”<sup>342</sup> In *Bono v. Saxbe*,<sup>343</sup> an Illinois federal district court found that conditions at the maximum security prison in Marion where inmates were held in small cells similar to solitary confinement cells—some of which were equipped with a steel door that was closed as a disciplinary measure—violated the Eighth Amendment.<sup>344</sup> Perhaps the most eloquent critique of solitary confinement came from a federal district court in Texas, which found in *Ruiz v. Johnson*<sup>345</sup> that the “extreme deprivations and repressive conditions of confinement of Texas[s] administrative segregation units” violated the Eighth Amendment as to the plaintiff class and the subclass of mentally ill inmates.<sup>346</sup> The court characterized these units as “virtual incubators of psychoses-seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities.”<sup>347</sup> The court concluded:

341. *Id.* at 1265 (“For these inmates, placing them in the [special housing unit] 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.’” (citing *Helling v. McKinney*, 509 U.S. 25, 35 (1993))).

342. *Id.* at 1264 (“However, if the particular conditions of segregation being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture.”); *see also Hutto v. Finney*, 437 U.S. 678, 687 (1978) (explaining that punitive isolation may be unconstitutional based on the length of the term of confinement and the conditions of the isolation, including diet, overcrowding, violence, cell conditions, and professionalism and judgment of prison personnel); *Wright v. McMann*, 460 F.2d 126, 128 (2d Cir. 1972) (holding that some solitary confinement conditions are unconstitutional); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev’d on other grounds*, 243 F. 3d 941 (5th Cir. 2001) (“Conditions in [Texas prisons] administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs’ class made up of mentally-ill prisoners.”); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (holding that evidence of prison officials’ failure to screen out from the special housing unit “those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there” supports an Eighth Amendment claim).

343. 450 F. Supp. 934 (E.D. Ill. 1978).

344. *Id.* at 947 (“[S]ensory deprivations occasioned by use of the [closed front cells], along with the lack of any idea about what could be done to be released from the control unit, resulted in both mental and physical deterioration. Simultaneously, unnecessary pain and suffering was the result.”).

345. 37 F. Supp. 855.

346. *Ruiz*, 37 F. Supp. 2d at 861.

347. *Id.* at 907.

As the pain and suffering caused by a cat-o'-nine-tails lashing an inmate's back are cruel and unusual punishment by today's standards of humanity and decency, the pain and suffering caused by extreme levels of psychological deprivation are equally, if not more, cruel and unusual. The wounds and resulting scars, while less tangible, are no less painful and permanent when they are inflicted on the human psyche.<sup>348</sup>

Just as few court decisions have condemned the practice of holding adult prisoners—even mentally ill ones—in solitary confinement, few have found that the isolation of juveniles is unconstitutional. Among those that have are cases from Puerto Rico,<sup>349</sup> New York (if imposed for a punitive purpose without a rehabilitative goal),<sup>350</sup> Rhode Island,<sup>351</sup> Hawaii,<sup>352</sup> and Texas.<sup>353</sup> *Lollis v. New York Department of Social Services*<sup>354</sup> is representative of decisions that have denounced specific instances of the solitary confinement of children. The named plaintiff, Antoinette Lollis, was a fourteen-year-old inmate of a New York juvenile prison (euphemistically called a "training school"), who was committed to the facility at the request of her mother, not ever having been accused or convicted of a crime.<sup>355</sup> After Antoinette initiated a fight with another inmate and a guard,<sup>356</sup> she was immediately

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348. *Id.* at 914.

349. *Santana v. Collazo (Santana II)*, 793 F.2d 41, 48 (1st Cir. 1986) (holding that juvenile detention facilities failed to meet the burden of showing a legitimate interest in confining juveniles in isolation for as long as twenty days on grounds of protecting them from harm, discouraging misbehavior, and preventing escape); *Santana v. Collazo (Santana I)*, 714 F.2d 1172, 1178 (1st Cir. 1983) (citing federal courts that found juvenile isolation to be cruel and unusual, including cases from Puerto Rico, New York, Rhode Island, Mississippi, and Texas).

350. *Lollis v. N.Y. State Dep't of Soc. Servs.*, 322 F. Supp. 473, 482 (S.D.N.Y. 1970). Solitary confinement has a disparate impact on juveniles, and adolescents are more likely to behave in ways that result in the imposition of isolation; even if it is not harmful, it is unconstitutional if imposed for a punitive purpose or without a rehabilitative goal. *See id.* at 479–82.

351. *See Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354, 1372 (D.R.I. 1972).

352. *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1154–55, 1162 (D. Haw. 2006) (granting a motion for preliminary injunction against the Hawaii Youth Correction Facility, requiring its officers to stop isolating, abusing, and failing to protect LGBT youth in their custody, and holding that isolation is not a constitutionally valid way to "protect" LGBT residents in juvenile facilities).

353. *See Morales v. Turman*, 364 F. Supp. 166, 174 (E.D. Tex. 1973); *see also Koller*, 415 F. Supp. 2d at 1129; *D.B. v. Tewksbury*, 545 F. Supp. 896, 905 (D. Or. 1982) (isolating child pretrial detainees constitutes punishment and thus violates due process); *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 (N.D. Ind. 1972).

354. 322 F. Supp. 473.

355. *Id.* at 475.

356. *Id.* ("Two or three days after her return to custody plaintiff became involved in a fight with a matron and another inmate. The record indicates

confined—without a hearing—to the “strip room,”<sup>357</sup> where she remained for approximately two weeks until a family court judge, who was there to inspect the school, discovered the girl and insisted she be released.<sup>358</sup> In holding that the conditions under which Antoinette was held violated the standards of the Eighth Amendment, both in terms of the disproportionality of the punishment to the offense and the severity or harshness of the sanction, the court was careful to clarify that the isolation of children was not per se unconstitutional.<sup>359</sup> While court opinions like *Lollis* are promising, they are ultimately very fact-specific decisions with little precedential value.

There are, however, strong arguments for holding juvenile solitary confinement unconstitutional. Empirical data demonstrate that solitary confinement adversely affects adolescent development and stymies the process of maturation, causing irreparable harm.<sup>360</sup> One can compare the abnormal brain functioning of the mentally ill, for whom courts have found solitary confinement to be cruel and unusual,<sup>361</sup> to the prefrontal cortex of the teenage brain, which neuroscience research has shown is not fully developed until a

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that plaintiff was abusive and aggressive and bore the responsibility for the start of the fracas. Before peace returned it took several persons to subdue Lollis.”).

357. *Id.* (explaining that the “strip room” was “so called because it is stripped of all facilities normally available to inmates”).

358. *Id.* at 475–76 (quoting the judge’s description of the conditions under which Antoinette was held: “She was kept in a room about 6’ x 9’ for 24 hours a day. The first seven or eight days of confinement she was visited by a social worker. Then the social worker went on vacation and one other staff member visited her once. She was completely unoccupied for 24 hours daily. Nevertheless I inquired how she kept herself busy. She replied by saying, ‘I sleep all day and I cry all night.’ She had, indeed, requested to see a psychiatrist[] but was informed that she would not be able to see him until she was released from solitary. . . . There was a wooden bench . . . . There was a blanket on the bench and this was where the child rested for twenty-four hours.”).

359. *Id.* at 482–83 (“In so holding, I do not mean to intimate that the isolation of children under any circumstances is unconstitutional, but merely that the treatment of Lollis in this case violated permissible bounds. I share the hesitancy of fellow judges in interfering with the administration of custodial institutions[] and sympathize with the difficult problems which disciplinary matters present to administrative officials, especially when they may be ‘second guessed’ by the courts.”).

360. Giannetti, *supra* note 164, at 46 (“The brain learns, especially in youth; its plasticity is critical to emotional and cognitive maturation. But it cannot do so in isolation; it needs experience—things to ‘chew on,’ to learn from. Depriving [the plaintiff] of the opportunity for such experience now, at such a critical developmental period, will inevitably prevent and distort development.” (citation omitted)); *see also supra* Subpart I.C.

361. *See supra* notes 339–48 and accompanying text; *see also* Ruiz v. Johnson, 37 F. Supp. 2d 855, 861 (S.D. Tex. 1999).

person's mid-twenties.<sup>362</sup> This analogy can form the basis for arguing that, just as solitary confinement implicates the Eighth Amendment when applied to those with diagnosed mental illness or those *at risk* for suffering very serious or severe injury to their mental health, it applies with equal weight to adolescents whose brains are not yet fully formed and are vulnerable to suffering injury to their mental health.<sup>363</sup> Further, evidence in the area of adolescent development has shown that harmful changes in the environment for those between ages eleven and twenty-four impede cognition and impact behavior. This, in turn, influences brain structure—not just during the adolescent years but even for the next generation:

Environment affects the growth and development of brain cells, impacts the wiring of these cells, and affects which cells live or die. More importantly, it is possible for changes engendered by the environment to be passed genetically to the next generation by “epigenesis,” the ability of cells to turn genes on and off in response to the environmental influences experienced by those cells. Thus, activities and experiences impact the development and functioning of the brain, not just during the adolescent years, but for the long term, with implications for future generations.<sup>364</sup>

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362. See, e.g., Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 216 (2009) (“In the last decade, a growing body of longitudinal neuroimaging research has demonstrated that adolescence is a period of continued brain growth and change, challenging longstanding assumptions that the brain was largely finished maturing by puberty. The frontal lobes, home to key components of the neural circuitry underlying ‘executive functions’ such as planning, working memory, and impulse control, are among the last areas of the brain to mature; they may not be fully developed until halfway through the third decade of life.”); Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, ISSUES SCI. & TECH., Spring 2012, at 67, 75 (“[S]tudies of adolescent brain anatomy clearly indicate that regions of the brain that regulate such things as foresight, impulse control, and resistance to peer pressure are still developing at age 17. . . . Evidence that the adolescent brain is less mature than the adult brain in ways that affect some of the behaviors that mitigate criminal responsibility suggests that at least some of adolescents’ irresponsible behavior is not entirely their fault.”); Julie Vidal et al., *Response Inhibition in Adults and Teenagers: Spatiotemporal Differences in the Prefrontal Cortex*, 79 BRAIN & COGNITION 49, 49–50 (2012) (noting that lack of a fully developed prefrontal cortex in teenagers leads to lessened inhibition when presented with specific stimuli).

363. See Giannetti, *supra* note 164, at 45; see also Simkins et al., *supra* note 58, at 257.

364. JANE ANDERSON, AM. COLL. OF PEDIATRICIANS, *THE TEENAGE BRAIN: UNDER CONSTRUCTION* 1 (2011), available at <http://www.acpeds.org/wordpress/wp-content/uploads/Teen-Brain-for-Docman-5.2011.pdf>. But see Kleinman-Green, *supra* note 333, at 21 (acknowledging the limits to which experimental

U.S. Supreme Court precedent on the lessened culpability of young offenders further bolsters the argument. In *Roper v. Simmons*,<sup>365</sup> the Court recognized that because juveniles are less likely to conform to societal norms, weigh risks, and withstand peer pressure, they are less culpable than adults.<sup>366</sup> Because juveniles are less culpable than adults, the Court reasoned, juveniles are less deserving of the harshest form of punishment.<sup>367</sup> *Roper*, in this way, allows for an analogy between the death penalty and solitary confinement: just as death is the harshest penalty in criminal law and, thus, is cruel and unusual for young offenders, solitary confinement is the harshest penalty available to prison administrators and, thus, is unconstitutional for minors due to their lessened culpability.<sup>368</sup> Although it is only in rare cases that courts

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research can address the effect of isolation on children, and discussing the difficulty of drawing conclusions, as there are no controlled experiments on children and isolation and no direct research that compares the impact of isolation on children and adults).

365. 543 U.S. 551 (2005).

366. *Id.* at 569–70.

367. *Id.*; see also Tamar R. Birkhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 WASH. & LEE L. REV. 385, 398–400 (2008) (“Relying on neuro-psychiatric and psychosocial assessments of death-row inmates as well as imaging studies exploring brain maturation in adolescents,” the Court in *Roper* concluded “that juveniles cannot be classified ‘among the worst offenders[,]’” and due to their diminished culpability, the penological justifications for capital punishment fail to resonate with this age group (quoting *Roper*, 543 U.S. at 570)). *But see* Deborah W. Denno, *The Scientific Shortcomings of Roper v. Simmons*, 3 OHIO ST. J. CRIM. L. 379, 381–97 (2006) (contending that some of the case law and social science research in *Roper* is insufficient and outdated); Johnson et al., *supra* note 362, at 219 (arguing that neuroimaging techniques “involve an element of subjectivity” and that the “cognitive or behavioral implications of a given brain image or pattern of activation are not necessarily straightforward”); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 400–01 (2006) (exposing limitations of brain research and warning against over-reliance on neuroscience to explain behavior and to lessen criminal responsibility).

368. *Roper*, 543 U.S. at 575 (discussing disproportionate punishment and culpability of juvenile offenders); see also *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 631 (2012) (testimony of Prisoners’ Legal Services of New York); *Solitary Confinement as a Public Health Issue*, AM. PUB. HEALTH ASS’N (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> (“The placement of juveniles in solitary confinement for disciplinary reasons is particularly problematic. Recent research suggests that the brain continues to develop into young adulthood and that adolescent risk-taking behaviors and lack of self-regulation may be a function of neurobiological factors. Such research may, in turn, *inform the relative culpability of juvenile offenders*. Indeed, courts in the United States have considered this diminished

have found that sentences of solitary confinement violate the Eighth Amendment based on a proportionality analysis,<sup>369</sup> when youth is combined with solitary, these factors together may be more persuasive to a court than solitary confinement cases in which the inmate is an adult.<sup>370</sup>

A related argument may be advanced using two other recent U.S. Supreme Court cases that address the punishment of juvenile offenders: *Graham v. Florida*<sup>371</sup>—holding that juveniles convicted of non-homicide crimes cannot be sentenced to life in prison without parole (“JLWOP”)<sup>372</sup>—and *Miller v. Alabama*<sup>373</sup>—holding that mandatory JLWOP is unconstitutional.<sup>374</sup> Relying on these decisions, it may be argued that just as JLWOP is unconstitutional because youth are psychologically different than adults,<sup>375</sup> the solitary confinement of youth is likewise unconstitutional: juveniles

culpability in determining that the death penalty and certain adult sentencing schemes are inappropriate for juveniles.” (emphasis added)).

369. See, e.g., *Chapman v. Pickett*, 586 F.2d 22, 28 (7th Cir. 1978) (holding that a seven-month sentence to solitary confinement is unconstitutionally disproportionate to the offense of refusing to handle pork while on kitchen detail); *Adams v. Carlson*, 368 F. Supp. 1050, 1053 (E.D. Ill. 1973) (upholding an Eighth Amendment disproportionality claim of thirty-six inmates who served sixteen months of solitary confinement for participating, or attempting to participate, in a prison work stoppage as a protest against prison conditions); see also Giannetti, *supra* note 164, at 43 (“[Such] decisions reflect the reluctance of courts to interfere with the discretion of prison administrators, particularly in imposing sanctions for violations of prison regulations. This is true even when severe sanctions are imposed for *de minimis* infractions.”).

370. See, e.g., *Sostre v. McGinnis*, 442 F.2d 178, 191, 193 (2d Cir. 1971) (holding that the indefinite term of solitary confinement imposed on an adult inmate was not disproportionate under the Eighth Amendment, despite the court’s acknowledgment that the sentence may be “unsound” or even “personally repugnant” to some of the judges).

371. 560 U.S. 48 (2010).

372. *Id.* at 82.

373. 132 S. Ct. 2455 (2012).

374. *Id.* at 2464.

375. *Id.* at 2469 (“But given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’” (citations omitted) (quoting *Roper*, 543 U.S. at 573)); *Graham*, 560 U.S. at 68 (“As compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’” (citations omitted) (quoting *Roper*, 543 U.S. at 569–70)); see also *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403–04 (2011) (“[T]he legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal.”).

are more likely than adults to act in ways that result in its imposition,<sup>376</sup> and their experience of solitary confinement is harsher and “longer” than it is for adults.<sup>377</sup> In other words, because young people are more impulsive and less risk averse than adults, they are more likely to behave in ways that lead to the imposition of solitary confinement. This explains why greater proportions of teenage inmates end up in solitary than adults,<sup>378</sup> whether as direct punishment for violating prison rules or as an expression of administrative concern for the safety of prisoners and staff. Likewise, because young people perceive time as moving more slowly than adults, they experience a greater *qualitative* (harsher) level of suffering when held in isolation, which translates for children into a greater *quantitative* (subjectively longer) duration of punishment.<sup>379</sup> As the Court stated in *Graham*: “Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.”<sup>380</sup>

Similarly, under solitary confinement, a juvenile’s suffering will be more profound than an adult offender’s—both in terms of the

376. See Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 298–99 (2012) (explaining the neurological differences between adolescent and adult brains that lead adolescents to be less inhibited and greater risk takers than adults). *But see* Broulette *ex rel* Monroe v. Soliz, 939 P.2d 205, 211–12 (Wash. 1997) (rejecting an equal protection argument advanced on behalf of a delinquent adjudicated as a juvenile but held in an adult facility, holding that the class of juveniles who were administratively transferred to the adult facility were not similarly situated to those whose criminal cases were judicially transferred from juvenile to adult court).

377. David E. Arredondo, *Principles of Child Development and Juvenile Justice: Information for Decision-Makers*, 5 J. CENTER FOR FAMS. CHILD. & CTS. 127, 131 (2004) (“It is therefore imperative that decision-makers remember that the younger the child, the longer a given duration of sanction will be subjectively experienced. This is especially important when detention is used.”); *see also* Lollis v. N.Y. State Dep’t of Soc. Servs., 322 F. Supp. 473, 481 (S.D.N.Y. 1970).

378. Compare SEDLAK & MCPHERSON, *supra* note 113, at 9 (noting thirty-five percent of youth report being held in solitary confinement and fifty-five percent of those had been held longer than twenty-four hours), with E. ANN CARSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2013, at 1 (2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf> (estimating that 1,574,700 adults in the United States were incarcerated in state and federal prisons at the end of 2013), and Casella & Ridgeway, *supra* note 16 (noting that approximately 80,000 of the 1,574,700 U.S. adult prisoners are in isolation, which is only five percent).

379. Arredondo, *supra* note 377, at 131–32 (“In practical terms, this means that three months for a 14-year-old is subjectively much longer than three months for an adult.”); Giannetti, *supra* note 164, at 52.

380. *Graham*, 560 U.S. at 70.

quality of the experience as well as the child's subjective perception of its length.

Challenges to the isolation of young people premised upon the Due Process Clause of the Fifth Amendment (applied to the states through the Fourteenth Amendment) have not been successful in U.S. courts.<sup>381</sup> It is well settled that the Due Process Clause provides procedural as well as substantive protection against arbitrary governmental action.<sup>382</sup> Procedural due process requires a "minimally fair and rational inquiry" with "basic safeguards against arbitrariness," such as notice, opportunity to reply, and a reasonable investigation of the facts, although these rights are not as extensive as those necessary prior to a criminal trial.<sup>383</sup> Substantive due process protects individuals from government action so arbitrary that it violates "protected" liberty interests; by its terms, however, the Due Process Clause only protects certain interests.<sup>384</sup> In 1980, the U.S. Supreme Court held in *Hughes v. Rowe*<sup>385</sup> that administrative solitary confinement of prisoners without a hearing may violate due process "if the postponement of procedural protections is not justified by apprehended emergency conditions."<sup>386</sup> Yet, when the Court revisited the decision several years later in *Hewitt v. Helms*,<sup>387</sup> it distinguished *Hughes* and held that prisoners have no liberty interest in remaining in the general population because transfer to "less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence."<sup>388</sup> More than a decade later, in *Sandin v. Connor*,<sup>389</sup> the Court further narrowed its test for determining when the State has created a protected liberty interest, holding that such interests "will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of

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381. See Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675, 702 (1998) (explaining that the Fifth Amendment applies to juveniles through the Fourteenth Amendment Due Process Clause "because children in the delinquency area are treated differently than adults"); Kleinman-Green, *supra* note 333, at 7.

382. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 502-03 (1977).

383. See *Wright v. McMann*, 460 F.2d 126, 130 (2d Cir. 1972).

384. See *Bono v. Saxbe*, 450 F. Supp. 934, 941 (E.D. Ill. 1978).

385. 449 U.S. 5 (1980) (per curiam).

386. *Id.* at 11.

387. 459 U.S. 460 (1983).

388. *Id.* at 468. But see *id.* at 470-72 (holding that although the Pennsylvania statutes and regulations in question did create a protected liberty interest for the respondent in remaining in the general prison population, the process afforded satisfied the minimum requirements of the Due Process Clause).

389. 515 U.S. 472 (1995).

prison life.”<sup>390</sup> Not surprisingly, lower courts have found that even punitive solitary confinement does not impose either “atypical” or “significant hardship” on inmates.<sup>391</sup> As for juveniles, courts have also rejected the argument that there is a substantive liberty interest for children in being free from isolation, maintaining that the typical conditions of isolation are not different in kind from standard conditions of confinement.<sup>392</sup> In short, few courts either appreciate the traumatic impact of isolation on young people or are willing to interfere with the discretion of prison administrators.

There are, however, prominent national legal associations, federal agencies, and foundations that have acknowledged the dangers inherent in the use of isolation in juvenile detention facilities.<sup>393</sup> For instance, the U.S. Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) promulgated guidelines for the administration of juvenile justice systems in 1980, providing that no juvenile should be placed in room confinement for more than twenty-four hours.<sup>394</sup> Also promulgated in 1980, the American Bar Association Juvenile Justice Standards Relating to Corrections Administration (“1980 Standards”) called for limiting juvenile isolation to ten days for major infractions and five days for minor ones.<sup>395</sup> The implementation of the 1980 Standards, however, was

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390. *Id.* at 484.

391. *See, e.g., id.* at 486 (“The record shows that, at the time of Conner’s punishment, disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody.”); *Bono v. Saxbe*, 450 F. Supp. 934, 934 (E.D. Ill. 1978).

392. *See, e.g., Broulette ex rel. Monroe v. Soliz*, 939 P.2d 205, 211 (Wash. 1997). The court in *Monroe* held that a juvenile transferred into adult court did not have a liberty interest in remaining out of administrative confinement at an adult facility. *Id.* at 212. The administrative transfer “merely change[d] the place of confinement for [the juvenile] and [did] not substantively alter the nature of the juvenile’s detention.” *Id.* at 211. *But see* Kleinman-Green, *supra* note 333, at 22 (suggesting that there may be a fundamental liberty interest for children in the right to mature that would support a Fourteenth Amendment challenge of solitary confinement).

393. Given that juvenile facilities are considered to be less punitive settings for young offenders than adult jails and prisons, these arguments—although put forward here in the specific context of juvenile justice systems—can be readily extrapolated to the context of adult penal institutions that also house youth.

394. NAT’L ADVISORY COMM. FOR JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEPT OF JUSTICE, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE § 4.52 (1980) (“Juveniles should be placed in room confinement only when no less restrictive measure is sufficient to protect the safety of the facility and the persons residing or employed therein. No juvenile should be placed in room confinement for more than one hour unless the procedures set forth . . . have been followed. Room confinement for more than twenty-four hours should never be imposed.”).

395. INST. OF JUDICIAL ADMIN., AM. BAR ASS’N, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO CORRECTIONS ADMINISTRATION 33, 36–37 (1980) (limiting juvenile isolation to ten days for major infractions and five days for

not a priority during the administrations of President Ronald Reagan or President George H.W. Bush.<sup>396</sup> In 1992—amidst the height of national anxiety regarding juvenile crime<sup>397</sup>—the 1980 Standards were reviewed and revived, but no jurisdiction has been willing to adopt them in their entirety.<sup>398</sup> In those states in which only a portion has been incorporated into the juvenile code, their effectiveness has been limited due to a lack of resources and refusal to adopt necessary interrelated standards.<sup>399</sup> More recent recommendations by nonprofit organizations,<sup>400</sup> including those representing youth correctional administrators,<sup>401</sup> compare

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minor ones; mandating that isolation be in the juvenile's own room or in rooms that resemble ordinary rooms of the facility; requiring that no dietary restrictions or extraordinary sensory deprivation be imposed; and calling for access to reading materials and hourly visits by trained staff).

396. Barbara Flicker, *Introduction* to INST. OF JUDICIAL ADMIN., AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS ANNOTATED, at xv, xv (Robert E. Shepherd, Jr. ed., 1996), available at <https://www.ncjrs.gov/pdffiles1/ojdp/166773.pdf>.

397. See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPT OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 59–61 (1996), available at <https://www.ncjrs.gov/pdffiles/statresp.pdf> (explaining that as a result of the perception that juvenile crime was on the rise, the majority of states changed their laws during the early 1990s, resulting in a generally more punitive juvenile justice system). *But see* MIKE MALES, FRAMING YOUTH: TEN MYTHS ABOUT THE NEXT GENERATION 32 (1998) (discussing the media's mischaracterization of youth violence during the 1990s as "soaring," when it was actually falling); Julian V. Roberts, *Public Opinion and Youth Justice*, 31 CRIME & JUST. 495, 499–503 (2004) (explaining that empirical research has shown that people overestimated the volume of crime for which juveniles were responsible).

398. Flicker, *supra* note 396, at xvi, xx.

399. *Id.* at xx ("For example[,] . . . [s]tandards for corrections administration depend upon standards for the size of facilities, for the permissible range of sanctions, and other conditions.").

400. See, e.g., ANNIE E. CASEY FOUND., DETENTION FACILITY SELF-ASSESSMENT: A PRACTICE GUIDE TO JUVENILE DETENTION REFORM 84, 92, 94 (2006), available at <http://www.aecf.org/m/resourcedoc/aecf-jdaidetentionfacilityselfassessment-2006.pdf> (calling for "room confinement," allowed only for serious rule violations, to be regularly limited to four hours and not to be used routinely for more than twenty-four hours (if it extends any longer than this, a mental health professional must evaluate the youth), and limiting "isolation" to four hours, imposed only when a youth's behavior threatens imminent harm to herself or others or serious destruction of property; less restrictive techniques must be utilized first to de-escalate the youth, and a mental health professional must provide crisis intervention); MENDEL, *supra* note 268, at 4, 36; Simkins et al., *supra* note 58, at 268–70; see also PBS LEARNING INST., REDUCING ISOLATION AND ROOM CONFINEMENT 2 (2012), available at [http://pbstandards.org/uploads/documents/PbS\\_Reducing\\_Isolation\\_Room\\_Confinement\\_201209.pdf](http://pbstandards.org/uploads/documents/PbS_Reducing_Isolation_Room_Confinement_201209.pdf) ("[I]solating 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.").

401. See, e.g., PBS LEARNING INST., COUNCIL OF JUVENILE CORR. ADM'RS, GOALS, STANDARDS, OUTCOME MEASURES, EXPECTED PRACTICES AND PROCESSES 9 (2011) (providing that isolation should never be used punitively for youth, but

favorably to the 1980 Standards in regard to juvenile solitary confinement policies, but these, too, have failed to gain traction among legislators, who are more concerned with politics and the balance of power than the problems affecting juveniles and their families.<sup>402</sup>

### C. *International Law*

Although there are no legally binding international treaties or instruments that ban solitary confinement, there is considerable international support for the proposition that prolonged solitary confinement is an extreme measure with potentially devastating effects on the health and well-being of those subjected to it.<sup>403</sup> Likewise, there is support for the premise that solitary should only be used when absolutely necessary, for only as long as necessary, and entail no more deprivation than necessary.<sup>404</sup> Practices that constitute "cruel, inhuman[,] or degrading treatment or punishment," are explicitly condemned by the International Covenant on Civil and Political Rights ("ICCPR")<sup>405</sup> and the Standard Minimum Rules for the Treatment of Prisoners ("Standard Rules"),<sup>406</sup> and they are implicitly prohibited by language in the U.N. Charter<sup>407</sup> and the Convention Against Torture.<sup>408</sup> For treatment to be humane, according to the ICCPR: "Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."<sup>409</sup> The Convention on the

rather to neutralize out-of-control behavior and redirect it into positive behavior).

402. Flicker, *supra* note 396, at xv–xvi.

403. Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 2076, U.N. ESCOR, 62d Sess., Supp. No. 1, U.N. Doc. E/5988, r. 31, 32, 57 (May 13, 1977) [hereinafter Standard Rules].

404. *See id.*

405. International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by U.S. June 8, 1992) [hereinafter ICCPR].

406. Standard Rules, *supra* note 403, r. 31.

407. U.N. Charter pmbl. (setting forth its goals, including a reaffirmation of "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small"); *id.* art. 55(c) (promoting "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion").

408. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/Res/39/46, at 197 (Dec. 10, 1984) [hereinafter Convention Against Torture].

409. ICCPR, *supra* note 405, art. 10(3); *see also* Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, ¶ 3 (Nov. 20, 1959) ("[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth . . .").

Rights of the Child ("CRC")<sup>410</sup> includes a fundamental recognition of the child's potential for rehabilitation, requiring that a state's decision to incarcerate a child "shall be used only as a measure of last resort and for the shortest appropriate period of time."<sup>411</sup> Although the United States ratified both the ICCPR and the Convention Against Torture, it attached a limiting reservation to each, providing that it "reserves the right, in exceptional circumstances, to treat juveniles as adults," and that the agreements bind the United States only to the extent that "prohibited treatment" is that which is "cruel, inhuman[,] or degrading" as interpreted by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.<sup>412</sup> As for the CRC, the United States has signed the treaty but is the only country in the world other than Somalia that has not ratified it.<sup>413</sup>

Similarly, there are at least two international resolutions that explicitly condemn the use of juvenile solitary confinement. The U.N. Guidelines for the Prevention of Juvenile Delinquency ("Riyadh Guidelines")<sup>414</sup> prohibit young people from being "subjected to harsh or degrading correction or punishment measures."<sup>415</sup> The U.N. Rules for the Protection of Juveniles Deprived of their Liberty,<sup>416</sup> a U.N. resolution approved by the General Assembly in 1990 and supported by the United States, specifically prohibits the solitary confinement of juvenile offenders because it "may compromise the physical or mental health of the juvenile."<sup>417</sup> Like the instruments discussed above, neither of these is legally binding, but they can be used to guide countries as they enact legislation and formulate policies.

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410. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 144 U.N.T.S. 123 (entered into force Sept. 2, 1990).

411. *Id.* art. 37(b).

412. *International Covenant on Civil and Political Rights: Hearing Before the S. Comm. on Foreign Relations*, 102d Cong. 8 (1991) [hereinafter ICCPR Hearing] (noting that although the United States ratified the ICCPR and the Convention Against Torture, it attached a limiting reservation stating that "prohibited treatment" is only that which is cruel, inhuman, or degrading punishment as interpreted via the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution); *see also* Convention Against Torture, *supra* note 408, U.S. Reservations; ICCPR, *supra* note 405, Declarations and Reservations of U.S.

413. *See Convention on the Rights of the Child: Frequently Asked Questions*, UNICEF, [http://www.unicef.org/crc/index\\_30229.html](http://www.unicef.org/crc/index_30229.html) (last updated Nov. 30, 2005) (noting that Somalia is currently unable to proceed to ratification because it has no recognized government).

414. U.N. Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), G.A. Res. 45/112, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/RES/45/112 (Dec. 14, 1990).

415. *Id.* ¶ 54.

416. U.N. Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

417. *Id.* r. 67.

International human rights and monitoring bodies also condemn the solitary confinement of children. The U.N. Committee on the Rights of the Child, which interprets the CRC, characterizes the punitive solitary confinement of minors as cruel, inhuman, or degrading treatment and explicitly prohibits it.<sup>418</sup> The Council of Europe Anti-Torture Committee has “particularly strong reservations” regarding the “solitary confinement of juveniles.”<sup>419</sup> It recognizes that solitary confinement “can have an extremely damaging effect on the mental, somatic[,] and social health” of prisoners and states that the maximum period should be no higher than fourteen days for a given offense and “should certainly be lower” for juveniles.<sup>420</sup> The Inter-American Commission on Human Rights,<sup>421</sup> the permanent body of the Organization of American States, has also expressed concern over the excessive use of juvenile solitary confinement in the United States.<sup>422</sup> Yet, despite recognition on the international level that solitary confinement is an extreme practice and that isolating youth should be a measure of last resort (if not banned altogether), confining young people alone in cells continues unabated throughout the world.<sup>423</sup>

In comparing the language of U.S. law with that of international treaties and declarations, one can argue that international instruments more readily prohibit a wide range of corrections practices, including solitary confinement, than the U.S. Constitution. The Eighth Amendment protects only against “cruel and unusual punishments,” while international instruments recognize “cruel, inhuman, or degrading punishment” and prohibit forms of *treatment* as well as punishment.<sup>424</sup> Because the Eighth

418. U.N. Comm. on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, ¶ 89, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) (“[D]isciplinary measures in violation of article 37 of CRC must be strictly forbidden, including . . . closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned . . .”).

419. Council of Eur., European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *21st General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (1 August 2010–31 July 2011)*, at 40, CPT/Inf (2011) 28 (Nov. 10, 2011).

420. *Id.* at 39, 43 & n.11.

421. Org. of Am. States, Inter-Am. Comm'n on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, princ. XXII(3), OEA/Ser/L/V/II.131 doc. 26 (Mar. 14, 2008).

422. *IACHR Expresses Concern over Excessive Use of Solitary Confinement in the United States*, ORG. OF AM. STS. (July 18, 2013), [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/051.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/051.asp).

423. See *supra* Subpart II.B; *infra* Appendix.

424. U.S. CONST. amend. VIII (emphasis added); Vasiliades, *supra* note 34, at 85–86; David Heffernan, Comment, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U. L. REV. 481, 540 (1996).

Amendment does not specifically reference “treatment” as a constitutional protection, there is a gap between what is egregious enough to be *punishment* that is *both* cruel and unusual and what is merely inhumane treatment.<sup>425</sup> In U.S. jurisprudence, solitary confinement often falls into this protection gap, making it more challenging for U.S. courts to condemn its use but easier for the international community to do so.<sup>426</sup> This distinction was illustrated recently when the U.N. Special Rapporteur on Torture, Juan Mendez, called for an absolute ban on the solitary confinement of youth premised not on the Eighth Amendment but upon, *inter alia*, the language in international treaties prohibiting torture and “other cruel, inhuman[,] or degrading treatment or punishment . . . .”<sup>427</sup> This is the very language, of course, that the United States refused to be bound by when ratifying the ICCPR and the Convention Against Torture.<sup>428</sup>

Interestingly, in *Roper v. Simmons*<sup>429</sup> the U.S. Supreme Court explicitly invoked the CRC and the ICCPR to hold that the juvenile death penalty violated the Eighth Amendment.<sup>430</sup> Predictably, critics characterized *Roper* as an example of liberal judges overturning the “will of the democracy” in favor of international opinion, because the legislative and executive branches had reserved the right to execute minors for capital crimes when ratifying the ICCPR and the Convention Against Torture (and had never ratified the CRC).<sup>431</sup> In future litigation, *Roper* could arguably be invoked to support the striking down of the solitary confinement of youth, premised at least in part on the Court’s dicta that international

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425. Vasiliades, *supra* note 34, at 86; Heffernan, *supra* note 424; see also Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 683–92 (2004) (discussing judicial interpretations of “punishment” in the context of the Eighth Amendment).

426. See ICCPR Hearing, *supra* note 412 and accompanying text.

427. U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 33, 61, U.N. Doc. A/68/295 (Aug. 9, 2013) (“The Rules should explicitly prohibit the imposition of solitary confinement of any duration for juveniles, persons with psychosocial disabilities or other disabilities or health conditions, pregnant women, women with infants[,] and breastfeeding mothers . . . . No prisoner, including those serving life sentence and prisoners on death row, shall be held in solitary confinement merely because of the gravity of the crime.”).

428. See ICCPR Hearing, *supra* note 412 and accompanying text.

429. 543 U.S. 551 (2005).

430. *Id.* at 576.

431. See Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 653, 659 (2009) (discussing the structural problem as posed by *Roper*); see also ICCPR Hearing, *supra* note 412 (reserving the right to impose capital punishment on “persons below eighteen years of age”); *supra* text accompanying note 412; *supra* text accompanying note 413 (noting that the United States signed, but did not ratify, the Convention on the Rights of the Child).

laws, practices, and opinions are relevant to whether a punishment is cruel and unusual: “It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply *underscores the centrality of those same rights* within our own heritage of freedom.”<sup>432</sup>

#### IV. STRATEGIES FOR REFORM

##### A. *Legislation, Federal Regulations, and Litigation*

With renewed attention being paid to the mass incarceration crisis in the United States,<sup>433</sup> there have been several recent legislative developments related to solitary confinement of youth. In 2014, the U.S. Congress took steps to prohibit the solitary confinement of juveniles. Senator Dick Durbin (D-IL) led a Senate panel that called on federal and state prison authorities to ban the use of solitary confinement of juveniles as well as pregnant women and the mentally ill.<sup>434</sup> Senator Durbin characterized this form of isolation as a “human rights issue we can’t ignore” and asserted that the overuse of solitary confinement not only threatens prisoners but presents “a serious threat to public safety.”<sup>435</sup> In response, U.S. Rep. Tony Cardenas (D-CA) introduced a House bill banning the solitary confinement of juveniles in federal juvenile facilities and

432. *Roper*, 543 U.S. at 578 (emphasis added).

433. See, e.g., Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 425 (2013) (discussing the need for judicial consideration of mass incarceration); Christopher Wildeman & Sara Wakefield, *The Long Arm of the Law: The Concentration of Incarceration in Families in the Era of Mass Incarceration*, 17 J. GENDER RACE & JUST. 367, 367 (2014) (discussing the impact of mass incarceration on family structure); see also Bryan L. Sykes & Becky Pettit, *Mass Incarceration, Family Complexity, and the Reproduction of Childhood Disadvantage*, 654 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 127 (2014) (discussing the impact of incarceration on race and class inequity, especially in children with incarcerated parents); Editorial, *End Mass Incarceration Now*, N.Y. TIMES, May 25, 2014, at 10SR.

434. Johnson, *supra* note 31.

435. Ruth Tam, *Senate Leaders Consider Solitary Confinement Reform for Select Prisoners*, PBS NEWS HOUR (Feb. 26, 2014, 6:18 PM), <http://www.pbs.org/newshour/rundown/senate-leaders-consider-solitary-confinement-reform-select-prisoners/>; see also *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Sen. Dick Durbin, Chairman, S. Subcomm. on the Constitution, Civil Rights and Human Rights) (“More must be done. That’s why today I’m calling for all federal and state facilities to end the use of solitary confinement for juveniles, pregnant women, and individuals with serious and persistent mental illness, except in exceptional circumstances. By reforming our solitary confinement practices, the United States can protect human rights, improve public safety, and be more fiscally responsible. It is the right and smart thing to do, and the American people deserve no less.”).

requiring prison administrators to file annual reports to Congress on the rate at which juveniles are subject to isolation.<sup>436</sup> Rep. Cardenas explained: “The pain and suffering experienced as a result of solitary confinement can violate the standards of international and U.S. Constitutional law. It is unacceptable that we put our children at risk of sustaining the massive emotional, psychological[,] and physical damage that can be created by solitary confinement.”<sup>437</sup>

Subsequently, Senator Cory Booker (D-NJ) and Senator Rand Paul (R-KY) proposed a bill severely restricting juvenile solitary confinement as part of a legislative package designed to incentivize states to increase the age of criminal responsibility to age eighteen.<sup>438</sup> On the state level, a bill was introduced in California in 2014 that would define and limit the use of solitary confinement of youth at state and county juvenile correctional facilities.<sup>439</sup>

Federal regulations developed under the Prison Rape Elimination Act (“PREA”), which was unanimously passed by Congress in 2003 to address the national problem of sexual abuse in correctional facilities,<sup>440</sup> may provide a tool for opponents of the

436. Protecting Youth from Solitary Confinement Act, H.R. 4124, 113th Cong. § 2 (2d sess. 2014); *see also* Press Release, Office of Congressman Tony Cárdenas, Cárdenas Legislation: Stop Putting Kids in Solitary, Putting Them in Jail for Skipping School (Feb. 28, 2014), *available at* <http://cardenas.house.gov/media-center/press-releases/c-rdenas-legislation-stop-putting-kids-in-solitary-putting-them-in-jail>.

437. *See* H.R. 4124.

438. Record Expungement Designed to Enhance Employment, S. 2567, 113th Cong. (2d Sess. 2014); *see also* Press Release, Office of Senator Cory Booker, U.S. Senators Booker and Paul Introduce Legislation Calling for Criminal Justice Reform (July 8, 2014), *available at* [http://www.booker.senate.gov/?p=press\\_release&id=100](http://www.booker.senate.gov/?p=press_release&id=100) (explaining that the proposed legislation “[r]estricts use of juvenile solitary confinement” by ending “the cruel and counterproductive practice of solitary confinement except in the most extreme circumstances in which it is necessary to protect [] juvenile detainee[s] or those around them”).

439. S.B. 970, 2013–2014 Reg. Sess. (Cal. 2014); *see also* David Greenwald, *Court Watch: Statewide Reforms on Solitary Confinement and Bail*, PEOPLE’S VANGUARD DAVIS (Feb. 17, 2014), <http://www.davisvanguard.org/court-watch-statewide-reforms-on-solitary-confinement-and-bail/> (reporting that the provisions of SB-970 provide that solitary confinement shall only be used if the minor “poses an immediate and substantial risk of harm to others or the security of the facility, and all other less restrictive options have been exhausted”); *see also* Trey Bundy, *Inside Calif. Juvenile Hall, Rare Glimpse at Solitary Confinement Cells*, CENTER FOR INVESTIGATIVE REPORTING (Apr. 17, 2014), <http://cironline.org/reports/inside-calif-juvenile-hall-rare-glimpse-solitary-confinement-cells-6268> (reporting that the bill has “little chance of passing after [the bill’s sponsor, Senator Leland Yee,] was indicted on corruption charges last month[and that s]imilar legislation died last year, in part because it had little support from state prison officials and faced opposition from lobbyists for probation and corrections officers unions”).

440. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003) (codified at 42 U.S.C. §§ 15601–15609 (2012)).

solitary confinement of youth. PREA regulations recognize that youth are always at risk when housed with adult inmates, but they also assert that solitary confinement of children is not the answer and that youth should not be subjected to prolonged isolation.<sup>441</sup> In this way, the regulations codify a long-standing recognition that isolation of young people is harmful and counterproductive. Whether congressional hearings, proposed legislation, or federal regulations actually manage to produce broad-reaching, substantive change in our solitary confinement policies remains to be seen. Given the incremental pace of other reform movements on behalf of young offenders, however, it is unlikely.<sup>442</sup>

Litigation is another tool that has been used by prison reform advocates. In fact, the excessive reliance on the use of isolation and restraints has been alleged in forty-six of the fifty-seven successful lawsuits filed against juvenile corrections agencies in the United States since 1970.<sup>443</sup> In lawsuits against adult corrections agencies, settlements typically include restrictions against juvenile solitary confinement. For instance, in 2014, the New York Civil Liberties Union and the New York State Department of Community Corrections settled *Peoples v. Fischer*<sup>444</sup> by agreeing to ban the use of solitary confinement of prisoners younger than eighteen in state prisons.<sup>445</sup> Settlements have also been reached (or are in the process of being reached) in states as diverse as New Jersey,<sup>446</sup>

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441. See 28 C.F.R. § 115.14 (2014) (“Agencies shall make best efforts to avoid placing youthful inmates in isolation to comply with this provision. Absent exigent circumstances, agencies shall not deny youthful inmates daily large-muscle exercise and any legally required special education services to comply with this provision. Youthful inmates shall also have access to other programs and work opportunities to the extent possible.”).

442. See, e.g., Marsha Levick et al., *Between Hope and Despair, Waiting for Meaningful Implementation of Miller v. Alabama*, HUFFINGTON POST BLOG (June 24, 2014, 3:56 PM), [http://www.huffingtonpost.com/marsha-levick/between-hope-and-despair\\_b\\_5525238.html](http://www.huffingtonpost.com/marsha-levick/between-hope-and-despair_b_5525238.html) (“While a handful of states have completely eliminated life without parole as a sentencing option for children and others have scaled back its use, the large majority of states have not responded to *Miller* appropriately. Overall, legislative results are at best mixed.”).

443. MENDEL, *supra* note 268, at 7.

444. Second Amended Complaint, *Peoples v. Fischer*, No. 11 Civ. 2694, 2012 WL 6062680 (S.D.N.Y. Dec. 6, 2012).

445. *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, NYCLU (Feb. 19, 2014), <http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement>. The settlement does not apply, however, to Rikers Island jail, which is run by the City of New York and which still holds sixteen- and seventeen-year-olds in solitary confinement. See Bundy, *supra* note 1 (reporting that hundreds of teenagers have been sent in recent years to solitary confinement at Rikers Island).

446. See Charles Toutant, *Suit over Solitary Confinement of Juveniles to Cost N.J. \$400,000*, 214 N.J. L.J. 7, 7 (2013) (reporting that the suit was brought on behalf of two teenagers who were held in solitary confinement on an intermittent basis for 178 and fifty days, respectively); Gary Gately, *N.J.*

California,<sup>447</sup> Illinois,<sup>448</sup> Montana,<sup>449</sup> Ohio,<sup>450</sup> Florida,<sup>451</sup> Louisiana,<sup>452</sup> and Indiana.<sup>453</sup> These litigation reform efforts, like

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*Solitary Confinement: Extreme Cases of Life "In the Box,"* JUV. JUST. INFO. EXCHANGE (Mar. 9, 2014), <http://jjie.org/n-j-solitary-confinement-extreme-cases-of-life-in-the-box/106456/>.

447. Matthias Gafni, *Feds Chastise Contra Costa Officials over Juvenile Hall Solitary Confinement Policy*, CONTRA COSTA TIMES (Feb. 19, 2014, 4:24 PM), [http://www.contracostatimes.com/ci\\_25174278/feds-chastise-contra-costa-officials-over-juvenile-hall](http://www.contracostatimes.com/ci_25174278/feds-chastise-contra-costa-officials-over-juvenile-hall) (reporting that a class action was filed by Disability Rights Advocates against the Contra Costa, California, county probation department and Office of Education for locking up youths in solitary confinement, many with mental health disabilities, and refusing to provide them with schooling).

448. Eric Ferkenhoff & Leah Varjacques, *ACLU, Human Rights Watch Press for End to Juvenile Solitary Confinement*, CHI. BUREAU (Oct. 10, 2012), <http://www.chicago-bureau.org/aclu-human-rights-watch-press-for-end-to-juvenile-solitary-confinement/> (reporting that in 2012, the ACLU of Illinois filed suit against the state's juvenile corrections department to ban the solitary confinement of juveniles, which is still ongoing).

449. Press Release, ACLU of Montana, *ACLU Settlement with Montana State Prison Restricts Solitary Confinement for Juvenile Prisoners, Protects Vulnerable* (Apr. 16, 2011), available at <http://aclumontana.org/wp-content/uploads/2013/10/katkareleaseapril2012.pdf> (reporting that in 2011, the ACLU of Montana reached a settlement with the Montana State Prison limiting the amount of time juveniles can be placed in isolation to seventy-two hours and providing better treatment of mentally ill inmates in solitary).

450. See Pamela Engel & Alan Johnson, *Filing: Conditions in Ohio Juvenile Detention Facilities Remain Unconstitutional*, COLUMBUS DISPATCH (Oct. 31, 2012, 3:57 PM), <http://www.dispatch.com/content/stories/local/2012/10/30/conditions-in-detention-facilities-remain-unconstitutional.html>; Gary Gately, *Justice Department Seeks to Stop Ohio Solitary Confinement of Mentally Ill Boys*, JUV. JUST. INFO. EXCHANGE (Mar. 13, 2014), <http://jjie.org/justice-department-seeks-to-stop-ohio-solitary-confinement-of-mentally-ill-boys/106507/>. In 2008, a federal class action on behalf of youth in juvenile detention facilities in Ohio was settled with the state's Department of Youth Services. See *id.* As part of the settlement, the Department of Youth Services agreed not to use solitary confinement to punish "youth with mental health needs." See *id.* Plaintiffs filed a motion for a temporary restraining order, and in 2014, the U.S. Department of Justice filed a temporary restraining order to expand the earlier complaint based on the continued unlawful seclusion of boys with mental health needs. See *id.*

451. See U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE ARTHUR G. DOZIER SCHOOL FOR BOYS AND THE JACKSON JUVENILE OFFENDER CENTER, MARIANNA, FLORIDA 6 (2011), available at [http://www.justice.gov/crt/about/spl/documents/dozier\\_findltr\\_12-1-11.pdf](http://www.justice.gov/crt/about/spl/documents/dozier_findltr_12-1-11.pdf).

452. See Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to Michel Claudet, President, Terrebonne Parish 9 (Jan. 18, 2011), available at [http://www.justice.gov/crt/about/spl/documents/TerrebonneJDC\\_findlet\\_01-18-11.pdf](http://www.justice.gov/crt/about/spl/documents/TerrebonneJDC_findlet_01-18-11.pdf).

453. See Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to Mitch Daniels, Governor, State of Ind. 31-32 (Aug. 22, 2012), available at [http://www.justice.gov/crt/about/spl/documents/pendleton\\_findings\\_8-22-12.pdf](http://www.justice.gov/crt/about/spl/documents/pendleton_findings_8-22-12.pdf); Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to Mitch Daniels, Governor, State of Ind. 21-22 (Jan. 29, 2010), available at [http://www.justice.gov/crt/about/spl/documents/Indianapolis\\_findlet](http://www.justice.gov/crt/about/spl/documents/Indianapolis_findlet)

earlier ones directed at the unfair treatment of juveniles,<sup>454</sup> are critically important for the plaintiffs who are directly affected, and they contribute to the sense of growing national momentum against the solitary confinement of youth. Until the U.S. Supreme Court holds that isolating young offenders is a per se Eighth Amendment violation, however, progress will continue to be slow.

As for other forms of advocacy, in recent years there has been an increase in the number of editorials in the media explicitly calling to ban or sharply minimize the solitary confinement of youth.<sup>455</sup> Likewise, a number of prominent professional associations have taken a stand against it,<sup>456</sup> and increasing numbers of

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454. See Tamar R. Birckhead, *Juvenile Justice Reform 2.0*, 20 J.L. & POL'Y 15, 39–41 (2011) (discussing *In re Gault*, 387 U.S. 1 (1967), which established due process rights for juveniles in delinquency court, including the right to counsel).

455. See, e.g., Editorial, *Adolescents in Grown-Up Jails*, N.Y. TIMES, Oct. 15, 2012, at A30; Editorial, *New York Rethinks Solitary Confinement*, N.Y. TIMES, Feb. 21, 2014, at A24; Editorial, *Striking Against Solitude*, WASH. POST, Aug. 4, 2013, at A18; Editorial, *Too Young for Solitary*, L.A. TIMES, May 12, 2013, at A25; Grace Bauer, Op-Ed., *Solitary Confinement: A Mother's Perspective*, JUV. JUST. INFO. EXCHANGE (June 6, 2013), <http://jjie.org/op-ed-solitary-confinement-a-mothers-perspective/>; James Burns, *I Was Six-Years-Old and Locked in Solitary*, ACLU (Feb. 13, 2014, 1:24 PM), <https://www.aclu.org/blog/prisoners-rights-criminal-law-reform/i-was-six-years-old-and-locked-solitary>; Elizabeth Clarke & John Maki, *End Solitary Confinement for Juveniles*, CHI. SUN TIMES (Mar. 6, 2014, 12:03 AM), <http://www.suntimes.com/news/otherviews/26003178-452/end-solitary-confinement-for-juveniles.html#.VHDEhlfHJhk>; John Lash, Op-Ed: *One Boy's Story of Solitary Confinement*, JUV. JUST. INFO. EXCHANGE (Feb. 14, 2014), <http://jjie.org/op-ed-one-boys-story-of-solitary-confinement/>; see also Shane Bauer, *No Way Out*, MOTHER JONES, Nov.–Dec. 2012, at 22; Rick Raemisch, Op-Ed., *My Night in Solitary*, N.Y. TIMES, Feb. 21, 2014, at A25 (reflecting on his twenty hours in solitary confinement, the executive director of the Colorado Department of Corrections left the experiment determined to drastically reduce its use in Colorado).

456. See, e.g., *Solitary Confinement as a Public Health Issue*, AM. PUB. HEALTH ASS'N (Nov. 5, 2013), <http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue> (calling for a categorical exclusion from placement in solitary confinement for juveniles, regardless of whether they are held in adult or juvenile facilities); *Solitary Confinement of Juvenile Offenders*, AM. ACAD. 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) (concurring with the U.N. position and opposing the use of solitary confinement in correctional facilities for juveniles; calling for youth who are confined for more than twenty-four hours to be evaluated by a mental health professional); Michael Sorkin, *Drawing the Line: Architects and Prisons*, NATION (Aug. 27, 2013), <http://www.thenation.com/article/175946/drawing-line-architects-and-prisons#> (reporting that in 2004, Architects/Designers/Planners for Social Responsibility promulgated a pledge not to participate in the design of prisons and are currently calling for the American Institute for Architects “to amend its code of ethics to explicitly exclude participation in designing” sites of execution, torture, and solitary confinement).

nonprofit organizations have issued public statements and given congressional testimony advocating a ban on the solitary confinement of youth.<sup>457</sup> Although all of these developments suggest that there has been a shift in public opinion and attitudes toward the practice of isolating children, reform will be negligible until courts acknowledge the profound nature of the harm and evince a willingness to challenge the judgment of prison administrators.

### *B. The Adoption of Best Practice Standards*

There are several basic steps that must be taken to reform the adult and juvenile correctional systems in the United States in regard to the solitary confinement of youth. Isolating young people in inhumane conditions is not only detrimental to their mental and physical health, but it also decreases the safety and security of the facilities themselves.<sup>458</sup> Furthermore, it increases the likelihood of recidivism when these individuals are eventually released back into the community.<sup>459</sup>

The first recommendation is that children under the age of eighteen must be removed from adult facilities, as a significant number of these institutions rely on solitary confinement when detaining young people.<sup>460</sup> In the alternative (or until the policy of incarcerating juveniles with adults has ended), jails and prisons must review existing policies and practices and modify them to reflect differences in their application to youth and adults. In general, adult facilities that house youth must maintain appropriate numbers of trained and supervised staff, including social workers and mental health professionals. They must provide significant levels of programming and activities for young people, including education and programs that develop pro-social, problem-solving skills. In regard to youth solitary confinement practices, prisons must establish systems of graduated sanctions that are immediate and proportional to the behavior, connected to the programming, and reward positive behavior.<sup>461</sup> In most instances the adoption of these standards will foreclose the practice of placing youth held in adult facilities in solitary confinement; for those few cases that comport to these guidelines, the duration of the confinement should be limited to no more than several hours.

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457. See, e.g., Ryan, *supra* note 153; see also *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 492 (2012) (testimony of the Juvenile Justice Initiative).

458. See *supra* notes 32–37 and accompanying text.

459. See *supra* note 41 and accompanying text.

460. See *supra* Subpart II.A.

461. See HUMAN RIGHTS WATCH, *supra* note 24, at 83–87.

In regard to juvenile detention facilities, these institutions must adopt best practice standards for juvenile facilities, such as those established by the Juvenile Detention Alternatives Initiative (“JDAI”),<sup>462</sup> which share some aspects of the 1980 Standards originally promulgated in 1980 by the American Bar Association.<sup>463</sup> JDAI best practices include ensuring that facility staff members receive regular training in conflict management, de-escalation of confrontations, crisis intervention techniques, and management of assaultive behavior.<sup>464</sup> Solitary confinement may be used only as a temporary response to behavior that threatens immediate harm to the youth or to others.<sup>465</sup> Prior to using solitary confinement, staff should use less restrictive techniques, including bringing in other staff, qualified mental health professionals, or other young people to talk with the young person.<sup>466</sup> Prior to or immediately after placing a youth in solitary confinement, staff must explain the reasons for the isolation and the fact that the young person will be released upon regaining self-control.<sup>467</sup> Facility staff should not place young people in solitary confinement for fixed periods of time—and never longer than four hours—but should return them to regular programming as soon as they have regained self-control and are no longer engaging in behavior that poses immediate harm to themselves or others.<sup>468</sup> Juvenile facilities must keep designated areas for solitary confinement suicide resistant and protrusion free, and they must divert youth to specialized services whenever necessary, such as medical units of facilities, mental health hospitals, and residential drug or alcohol treatment programs.<sup>469</sup> Facility staff and youth must undergo a debriefing process with supervisors and mental health professionals as soon as possible after the youth’s release from isolation to explore what might have prevented the need for solitary confinement and to identify alternative ways of handling the situation.<sup>470</sup> Staff should provide notice to parents and the youth’s attorney or guardian ad litem of the use of solitary confinement by the end of the next business day and request input and support for ways to prevent future incidents.<sup>471</sup>

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462. JUVENILE DET. ALTS. INITIATIVE, ANNIE E. CASEY FOUND., JUVENILE DETENTION FACILITY ASSESSMENT: 2014 UPDATE 91–192 (2014), available at <http://www.aecf.org/m/resourcedoc/aecf-juveniledetentionfacilityassessment-2014.pdf>.

463. JUVENILE JUSTICE STANDARDS ANNOTATED, *supra* note 396, at 56–61.

464. JUVENILE DET. ALTS. INITIATIVE, *supra* note 462, at 173.

465. *Id.* at 177.

466. *Id.*

467. *Id.*

468. *Id.* at 177–78.

469. *Id.* at 178–79.

470. *Id.* at 180.

471. *Id.*

One potential model may be found at the Santa Cruz County Juvenile Hall in California. Although Santa Cruz occasionally places juveniles in twenty-three-hour isolation, sometimes for days at a time, its approach to management and discipline has had promising results.<sup>472</sup> The juvenile inmates, most of whom have been charged with violent offenses, spend the majority of time when outside their cells either in school and therapy groups or in the extensive array of programs that the facility offers every afternoon and evening.<sup>473</sup> The ratio of guards to inmates is only one to five (compared with Rikers Island, where the ratio is one to fifty). As a result, the staff establishes close bonds with the teenagers and de-escalates potentially dangerous situations through mediation. Since the implementation of this model in 2011, the use of isolation at Santa Cruz has been significantly reduced, with fewer than eighteen young people placed in solitary each month, for an average of two days, which is far below national averages.<sup>474</sup>

*C. The Role of the Juvenile Defender and Other Advocates for Incarcerated Youth*

At the vast majority of juvenile detention centers, often the only hope for young people held in prolonged isolation lies with lawyers or other youth advocates willing to expose the phenomenon, report it to the appropriate parties, and advocate for its ban. For this reason, attorneys representing incarcerated youth should regularly ask them about the conditions of their confinement and specifically question them about isolation practices: whether solitary confinement is used, under what circumstances, its duration, whether there is any debriefing following it, and whether alternative strategies are used.

If an attorney suspects the excessive use of isolation, the attorney should immediately bring the situation to the judge's attention at a hearing reviewing the conditions of confinement.<sup>475</sup> If these types of hearings are not mandated in the client's jurisdiction, the attorney should file a motion for review of the conditions of confinement. In addition, the attorney should contact the administrator or licensing or regulatory agency for the facility holding the juvenile client.<sup>476</sup> In states with provisions for filing child abuse complaints against individuals, this filing may be done

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472. Bundy, *supra* note 439.

473. *Id.* (reporting that activities have included therapy groups, yoga, football, basketball, violence prevention classes, writing workshops, bible study, Narcotics Anonymous meetings, music lessons, and cultural history seminars, among others).

474. *Id.*

475. Simkins et al., *supra* note 58, at 281.

476. *Id.* at 281–83 (discussing strategies for individual juvenile defenders that were developed by Sue Burrell of the Youth Law Center in California).

on a confidential basis against a facility staff member or law enforcement officer, and the state's child welfare agency will be obligated to respond.<sup>477</sup>

It must be acknowledged, however, that most young inmates do not have ready access to legal assistance while they are incarcerated in either adult or juvenile facilities. Appointed trial counsel for the underlying criminal or juvenile delinquency case typically ends their formal representation after a sentence or disposition is imposed (or after an appeal of the conviction has been resolved), as they are not compensated by the state for post-conviction advocacy on behalf of prisoners.<sup>478</sup> Similarly, the availability of prisoners' legal services for civil grievances and lawsuits regarding the conditions of confinement has become increasingly limited as legal aid budgets are cut and offices are forced to discontinue their prisoners' rights programs.<sup>479</sup> Ideally, every correctional facility should have an inmate-grievance system with grievance counselors who address both routine and emergency complaints. Every facility should also have the equivalent of an institutional ombudsperson to whom adolescent inmates may raise claims or express concerns related to their conditions of confinement; unfortunately, these resources are few and far between.

One other option, given that a disproportionate number of children who are incarcerated have diagnoses of mental health conditions or learning disabilities, may be referring the matter to a state agency with oversight responsibility for this cohort.<sup>480</sup> These caseworkers may be useful in obtaining services for the client or in advocating for a change in the conditions of confinement.<sup>481</sup> Finally, as evidenced by the numbers of ongoing federal investigations of public-operated corrections agencies,<sup>482</sup> there is also the option of contacting the Special Litigation Section of the Civil Rights Division of the U.S. Department of Justice to report allegations of the excessive use of juvenile solitary confinement.<sup>483</sup>

## CONCLUSION

Ismael Nazario, who spent more than three hundred days in "the box" in Rikers Island,<sup>484</sup> is now in his mid-twenties.<sup>485</sup> His

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477. *Id.* at 283.

478. See Megan Annitto, *Juvenile Justice Appeals*, 66 U. MIAMI L. REV. 671, 679, 684–85 (2012).

479. See, e.g., Bradley Bannon, *Costly Cuts to Legal Services*, NEWS & OBSERVER (Raleigh, N.C.), May 26, 2013, at 21A.

480. Simkins et al., *supra* note 58, at 283.

481. *See id.*

482. *See supra* notes 445–53 and accompanying text.

483. Simkins et al., *supra* note 58, at 283–84 (providing contact information for the Special Litigation Section).

484. *See supra* text accompanying note 14.

mother survived cancer, and she and her son are still close.<sup>486</sup> Ismael eventually pled guilty to one of the robbery charges and the other was reduced to a misdemeanor, enabling him to avoid a felony conviction.<sup>487</sup> Since his release he has found meaningful employment—for three years he worked as a case manager with at-risk adolescents in Brooklyn and more recently with adults and teenagers who have been released from Rikers Island.<sup>488</sup> Ismael does not talk with his clients about his own time in the box, but he has seen what the experience has done to other boys.<sup>489</sup>

Most young people who are held in isolation are not as fortunate as Ismael. Research has confirmed that on an international level, the use of the practice is increasingly widespread,<sup>490</sup> the time spent in solitary is lengthy and counterproductive,<sup>491</sup> and the impact—both short- and long-term—is profoundly destructive.<sup>492</sup> Yet, the traditional rationales advanced for imposing isolation on those adolescents who are already among the most vulnerable continue to resonate among prison administrators.<sup>493</sup> Likewise, courts in the United States have repeatedly failed to hold that the solitary confinement of children is a per se Eighth Amendment violation, and there are no legally binding international treaties or instruments that ban the practice.<sup>494</sup>

As suggested in the Introduction, the question of whether to continue to isolate youth cannot be characterized as merely another intractable issue about which reasonable minds may differ.<sup>495</sup> The justifications that allow governments to keep teenagers alone in cells for hours, days, and weeks at a time are not the result of rational thinking based on evidence. Instead, the solitary confinement of youth is one more by-product of the systemic problems that continue to plague modern society and which have been addressed in detail elsewhere: the vanishing social safety net, generational poverty, implicit bias, the school-to-prison pipeline, mass incarceration, and the criminalization of mental illness. Ending the practice of isolating children is an important step toward confronting these broader issues.

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485. Bundy, *supra* note 1.

486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.*

490. *See infra* Appendix.

491. *See supra* Part I; Subpart II.C.

492. *See supra* Part I.

493. *See supra* notes 27–35 and accompanying text.

494. *See supra* Subpart III.B–C.

495. *See supra* Introduction.

APPENDIX: INTERNATIONAL PRACTICE OF THE SOLITARY  
CONFINEMENT OF YOUTH

Country	Type of Solitary	Length of Solitary	Specific Policies	Source
Armenia	Punitive	5–10 days		U.N. Comm. on the Rights of the Child, <i>Concluding Observations on the Combined Third and Fourth Periodic Reports of Armenia, Adopted by the Committee at Its Sixty-Third Session (27 May–14 June 2013)</i> , ¶ 51, U.N. Doc. CRC/C/ARM/CO/3-4 (July 8, 2013).
Australia	Punitive and Admin.	Unknown	Widespread use to separate juveniles from adults in adult facilities and as a punishment for violation of facility rules. Aboriginal youth have been particularly affected by solitary confinement.	VICTORIAN OMBUDSMAN, INVESTIGATION INTO CHILDREN TRANSFERRED FROM THE YOUTH JUSTICE SYSTEM TO THE ADULT PRISON SYSTEM 3–5 (Dec. 2013), available at <a href="https://www.ombudsman.vic.gov.au/getattachment/6a579e49-212e-42b0-9d3c-791e2d60e102/reports-publications/parliamentary-reports/investigation-into-children-transferred-from-the-y.aspx">https://www.ombudsman.vic.gov.au/getattachment/6a579e49-212e-42b0-9d3c-791e2d60e102/reports-publications/parliamentary-reports/investigation-into-children-transferred-from-the-y.aspx</a> .
Austria	Punitive	14-day maximum	Facilities very rarely impose the maximum sentence.	Council of Eur., European Comm. for the Prevention of Torture, <i>Report to the Austrian Government on the Visit to Austria</i> , ¶ 102 (March 11, 2010).
Azerbaijan	Punitive	Unknown		UNICEF, TORTURE AND ILL-TREATMENT IN THE CONTEXT OF JUVENILE JUSTICE: THE FINAL REPORT OF RESEARCH IN ARMENIA, AZERBAIJAN, GEORGIA, KAZAKHSTAN, KYRGYZSTAN, REPUBLIC OF MOLDOVA, TAJIKISTAN, AND UKRAINE 7 (2013).
Bangladesh	Punitive	14 days per incident, can be stacked to a maximum of 3 months total		U.N. Comm. on the Rights of the Child, <i>Concluding Observations of the Committee on the Rights of the Child: Bangladesh</i> , ¶ 41, U.N. Doc. CRC/C/15/Add.221 (Oct. 27, 2003).
Belarus	Punitive	30-day maximum	The maximum is not typically imposed.	Ali Bracken, <i>Belarus Juveniles are Under "Threat,"</i> IRISH TIMES, Aug. 23, 2006, at 4.
Belgium	Admin.	Temporary placement	Used when juveniles are held in adult facilities.	U.N. Comm. on the Rights of the Child, <i>Concluding Observations of the Committee on the Rights of the Child: Belgium</i> , ¶ 82, U.N. Doc. CRC/C/BEL/CO/3-4 (June 18, 2010).
Belize	Punitive	28-day maximum	Referred to as "cell confinement," may be combined with dietary restrictions, and may not be counted toward formal term of incarceration.	Org. of Am. States, Inter-Am. Comm'n on Human Rights Rapporteurship on the Rights of the Child, <i>Juvenile Justice and Human Rights in the Americas</i> , ¶ 558, OEA/Ser.L/V/II Doc. 78 (2011).
Benin	Unknown	Unknown		<i>Benin: OMCT Mission to Monitor and Promote the Rights of Children in Conflict with the Law</i> , OMCT (Nov 6, 2013), <a href="http://www.omct.org/rights-of-the-child/statements/benin/2013/11/d22431/">http://www.omct.org/rights-of-the-child/statements/benin/2013/11/d22431/</a> .

Brazil	Punitive	No limit	Referred to as "cell confinement"; most facilities do not have standards or procedures in place to regulate its use.	<i>Brazil: Abusive Conditions for Detained Children</i> , HUMAN RIGHTS WATCH (Apr. 10, 2003), <a href="http://www.hrw.org/news/2003/04/09/brazil-abusive-conditions-detained-children">http://www.hrw.org/news/2003/04/09/brazil-abusive-conditions-detained-children</a> .
Canada	Admin.	Two months before a periodic renewal	Public information is relatively limited re its use on juveniles; a recent inquest identified isolation as a factor in youth's suicide.	Donovan Vincent, <i>Ashley Smith Inquest: Corrections Head Admits Overreliance on Segregation</i> , THE STAR (Oct. 16, 2013), <a href="http://www.thestar.com/news/canada/2013/10/16/ashley_smith_inquest_to_p_prison_official_to_testify_at_inquiry_wednesday.html">http://www.thestar.com/news/canada/2013/10/16/ashley_smith_inquest_to_p_prison_official_to_testify_at_inquiry_wednesday.html</a> .
Chile	Punitive	5-day maximum	Prohibited by law, but used in juvenile facilities.	Org. of Am. States, Inter-Am. Comm'n on Human Rights Rapporteurship on the Rights of the Child, <i>Juvenile Justice and Human Rights in the Americas</i> , ¶¶ 559-60, OEA/Ser.L/V/II Doc. 78 (2011).
China	Punitive	Unknown	Conditions in mainland China are unknown; Macao continues to utilize the solitary confinement of juveniles.	U.N. Comm. on the Rights of the Child, <i>Concluding Observations of the Committee on the Rights of the Child: China</i> , ¶¶ 93-95, U.N. Doc. CRC/C/CHN/CO/3-4 (Oct. 29, 2013).
Colombia	Punitive	8- to 15-day maximum	Referred to as "reflection rooms."	Org. of Am. States, Inter-Am. Comm'n on Human Rights Rapporteurship on the Rights of the Child, <i>Juvenile Justice and Human Rights in the Americas</i> , ¶ 561, OEA/Ser.L/V/II Doc. 78 (2011).
Croatia	Punitive	7-day maximum	Rarely used (0 in 2005-2006, 8 in 2007).	Council of Eur., European Comm. for the Prevention of Torture, <i>Report to the Croatian Government on the Visit to Croatia</i> , ¶ 94 (Oct. 9, 2008).
Cyprus	Punitive	Unknown (60-day maximum for adults)	Staff impose informal "cool down" periods, but no formal procedural process is in place.	Council of Eur., European Comm. for the Prevention of Torture, <i>Report to the Government of Cyprus on the Visit to Cyprus</i> , ¶ 96 (Dec. 6, 2012).
Denmark	Admin.	4 weeks for pretrial detention	Pretrial detention to prevent interference with the criminal investigation; rarely used.	U.N. Comm. on the Rights of the Child, <i>Written Replies by the Government of Denmark to the List of Issues (CRC/C/DNK/Q/4) Concerning Additional and Updated Information Related to the Consideration of the Fourth Report of Denmark (CRC/C/DNK/4)</i> , ¶¶ 105-07 & 16 tbl.1, U.N. Doc. CRC/C/DNK/Q/4/Add.1 (Jan. 5, 2011).
Dominican Republic	Punitive	8- to 15-day maximum	Referred to as "reflection rooms."	Org. of Am. States, Inter-Am. Comm'n on Human Rights Rapporteurship on the Rights of the Child, <i>Juvenile Justice and Human Rights in the Americas</i> , ¶ 563, OEA/Ser.L/V/II Doc. 78 (2011).
Ecuador	Punitive	8- to 15-day maximum	Referred to as "isolation punishment."	Org. of Am. States, Inter-Am. Comm'n on Human Rights Rapporteurship on the Rights of the Child, <i>Juvenile Justice and Human Rights in the Americas</i> , ¶ 563, OEA/Ser.L/V/II Doc. 78 (2011).
England	Both	Institutional limits vary, but are not adhered to.	Well documented in public media and via official investigations.	THE HOWARD LEAGUE FOR PENAL REFORM, THE CARLILE INQUIRY 61-65 (2006).

Estonia	Punitive	20-day maximum		Council of Eur., European Comm. for the Prevention of Torture, <i>Report to the Estonian Government on the Visit to Estonia</i> , ¶¶ 75-76 (Jan. 21, 2014).
Germany	Punitive	Unknown	Solitary-like conditions imposed upon uncooperative inmates for several weeks; rarely used as a standard punishment.	Council of Eur., European Comm. for the Prevention of Torture, <i>Report to the Germany Government on the Visit to Germany</i> , ¶ 60 (Feb. 22, 2012).
Guyana	Punitive	Unknown		Org. of Am. States, Inter-Am. Comm'n on Human Rights Rapporteurship on the Rights of the Child, <i>Juvenile Justice and Human Rights in the Americas</i> , ¶ 559, OEA/Ser.L/V/II Doc. 78 (2011).
Israel	Admin.	90-day maximum	Typically used for pretrial interrogation of Palestinian youth for offenses as minor as rock throwing.	Harriet Sherwood, <i>The Palestinian Children—Alone and Bewildered—in Israel's Al Jalame Jail</i> , THE GUARDIAN, Jan. 22, 2012, <a href="http://www.theguardian.com/world/2012/jan/22/palestinian-children-detained-jail-israel">http://www.theguardian.com/world/2012/jan/22/palestinian-children-detained-jail-israel</a> .
Jamaica	Both	3-day maximum	May be used in police stations, but also used for admin. confinement and punishment at detention facilities.	U.N. Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <i>Manfred Nowak, Addendum, Mission to Jamaica</i> , ¶ 211, U.N. Doc. A/HRC/16/52/Add.3 (Oct. 11, 2010).
Japan	Punitive	Unknown	Limited available information as to its use; solitary is used extensively on adult prisoners in a variety of forms.	NATHALIE MAN, CHILDREN, TORTURE, AND POWER: THE TORTURE OF CHILDREN BY STATES AND ARMED OPPOSITION GROUPS 51 (2000).
Kazakhstan	Punitive	Unknown		UNICEF, TORTURE AND ILL-TREATMENT IN THE CONTEXT OF JUVENILE JUSTICE: THE FINAL REPORT OF RESEARCH IN ARMENIA, AZERBAIJAN, GEORGIA, KAZAKHSTAN, KYRGYZSTAN, REPUBLIC OF MOLDOVA, TAJIKISTAN, AND UKRAINE 7 (2013).
Kenya	Punitive	14-day maximum	Punishment in juvenile facilities typically consists of solitary confinement, corporal punishment, and/or a restricted diet.	HUMAN RIGHTS WATCH, JUVENILE INJUSTICE, POLICE ABUSE AND DETENTION OF STREET CHILDREN IN KENYA 54 (1997).
Kyrgyzstan	Punitive	Unknown		UNICEF, TORTURE AND ILL-TREATMENT IN THE CONTEXT OF JUVENILE JUSTICE: THE FINAL REPORT OF RESEARCH IN ARMENIA, AZERBAIJAN, GEORGIA, KAZAKHSTAN, KYRGYZSTAN, REPUBLIC OF MOLDOVA, TAJIKISTAN, AND UKRAINE 7 (2013).
Latvia	Punitive	30-day maximum		Council of Eur., European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, <i>Report to the Latvian Government on the Visit to Latvia</i> , ¶ 94 (Aug 27, 2013).

Libya	Punitive	7-day maximum (not adhered to)	This report was issued pre-regime change; solitary confinement conditions often employed with female youth.	HUMAN RIGHTS WATCH, LIBYA: A THREAT TO SOCIETY? 15 (2006).
Lithuania	Punitive	5-day maximum		Council of Eur., European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, <i>Report to the Lithuanian Government on the Visit to Lithuania</i> , ¶¶ 54–57 (May 19, 2011).
Luxembourg	Punitive	10 days	Rarely used.	U.N. Comm. on the Rights of the Child, <i>Concluding Observations of the Committee on the Rights of the Child: Luxembourg</i> , ¶ 50, U.N. Doc. CRC/C/LUX/CO/3-4 (Oct. 29, 2013).
Macedonia	Punitive	Unknown		U.N. Comm. on the Rights of the Child, <i>Concluding Observations of the Committee on the Rights of the Child: Macedonia</i> , ¶¶ 38–39, U.N. Doc. CRC/C/MKD/CO/2 (June 23, 2010).
Mexico	Punitive	8- to 15-day maximum	Referred to as a form of isolation.	Org. of Am. States, Inter-Am. Comm'n on Human Rights Rapporteurship on the Rights of the Child, <i>Juvenile Justice and Human Rights in the Americas</i> , ¶ 563, OEA/Ser.L/V/II Doc. 78 (2011).
Moldova	Punitive	Unknown		UNICEF, TORTURE AND ILL-TREATMENT IN THE CONTEXT OF JUVENILE JUSTICE: THE FINAL REPORT OF RESEARCH IN ARMENIA, AZERBAIJAN, GEORGIA, KAZAKHSTAN, KYRGYZSTAN, REPUBLIC OF MOLDOVA, TAJIKISTAN, AND UKRAINE 7 (2013).
Mongolia	Punitive	1- to 6-months maximum for 16- and 17-year-olds	Typically imposed by courts for more serious offenses.	JANE S. KIM & OYUNBILEG RENTSENDORJ, EVALUATION OF UNICEF MONGOLIA'S CHILD PROTECTION PROGRAMME: JUVENILE JUSTICE & LEGISLATIVE REFORM 65 (2009), available at <a href="http://www.unicef.org/tdad/unicef_mongoliaevaluation09full.pdf">http://www.unicef.org/tdad/unicef_mongoliaevaluation09full.pdf</a> .
Netherlands	Punitive	Unknown		Council of Eur., European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, <i>Report to the Government of Netherlands on the Visit to Netherlands</i> , ¶ 87 (Feb. 5, 2008).
Northern Ireland	Punitive	14-day maximum	Rates of isolation have been increasing among juveniles, while rates among adults have been decreasing.	Barry McCaffrey, <i>Alarm Bells Over Young Offenders Put in Solitary</i> , SUNDAY TIMES (London), July 29, 2012, at 14.
Pakistan	Both	21-day maximum	Used pretrial as a punishment during detention and for juveniles facing the death penalty.	HUMAN RIGHTS WATCH, PRISON BOUND: THE DENIAL OF JUVENILE JUSTICE IN PAKISTAN 60–64 (1999).
Papua New Guinea	Punitive	Unknown		U.N. Human Rights Council, <i>Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Addendum, Mission to Papua New Guinea</i> , 38, U.N. Doc. A/HRC/16/52/Add.5 (Feb. 7, 2011).

Paraguay	Punitive	8- to 15-day maximum		Org. of Am. States, Inter-Am. Comm'n on Human Rights Rapporteurship on the Rights of the Child, <i>Juvenile Justice and Human Rights in the Americas</i> , ¶ 562, OEA/Ser.L/V/II Doc. 78 (2011).
Portugal	Punitive	30 days maximum for 16- and 17-year-olds		U.N. Comm. on the Rights of the Child, <i>Concluding Observations of the Committee on the Rights of the Child: Portugal</i> , ¶ 65, U.N. Doc. CRC/C/PRT/CO/3-4 (Feb. 25, 2014).
Romania	Both	First 3 weeks held in quarantine	May also be used as punishment in detention facilities.	URSULA KILKELLY, CHILDREN'S RIGHTS AND THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE 18 (2012), available at <a href="http://www.coe.int/t/dg3/children/publications/CPTReport_en.pdf">http://www.coe.int/t/dg3/children/publications/CPTReport_en.pdf</a> .
Saudi Arabia	Both	15 days	Solitary also used during pretrial detention, especially in juvenile death penalty cases.	Brian Whitaker, <i>Saudi Boy, 14, Faces Execution</i> , GUARDIAN, Oct. 29, 2005, at 19.
Singapore	Punitive	Unknown	Solitary confinement and caning are the primary forms of punishment of youth in detention centers.	U.N. Comm. on the Rights of the Child, <i>Concluding Observations of the Committee on the Rights of the Child: Singapore</i> , ¶¶ 68-69, U.N. Doc. CRC/C/SGP/CO/2-3 (May 4, 2011).
South Africa	Punitive	Unknown	Use of solitary confinement was linked to the apartheid government.	Current information not available.
Surinam	Punitive	Unknown	Used for suicide prevention.	Org. of Am. States, Inter-Am. Comm'n on Human Rights Rapporteurship on the Rights of the Child, <i>Juvenile Justice and Human Rights in the Americas</i> , ¶ 562, OEA/Ser.L/V/II Doc. 78 (2011).
Sweden	Both	Unknown		U.N. Comm. on the Rights of the Child, <i>Concluding Observations of the Committee on the Rights of the Child: Sweden</i> , ¶¶ 70-71, U.N. Doc. CRC/C/SWE/CO/4 (June 26, 2009).
Syria	Punitive	Unknown	Reports are unconfirmed regarding the use of solitary confinement by the Damascus government during the ongoing struggle.	Catherine Philp, <i>Abuse, Torture, Death: the Fate of Syria's Children</i> , TIMES (London), Feb. 6, 2014, at 32.
Tajikistan	Punitive	Unknown		WORLD ORG. AGAINST TORTURE, HUMAN RIGHTS VIOLATIONS IN TAJIKISTAN 29 (2006), available at <a href="http://www.omct.org/files/2005/09/3070/tajikistan_alt_report_cat_eng.pdf">http://www.omct.org/files/2005/09/3070/tajikistan_alt_report_cat_eng.pdf</a> .
Tanzania	Punitive	Unknown		COMM. FOR HUMAN RIGHTS AND GOOD GOVERNANCE, INSPECTION REPORT FOR CHILDREN IN DETENTION FACILITIES IN TANZANIA, at xiv (2011), available at <a href="http://www.ipjj.org/fileadmin/data/documents/reports_monitoring_evaluation/CHRAGG_InspectionChildrenDetentionTanzania_2011_EN.pdf">http://www.ipjj.org/fileadmin/data/documents/reports_monitoring_evaluation/CHRAGG_InspectionChildrenDetentionTanzania_2011_EN.pdf</a> .

Turkey	Both	5-day maximum (not adhered to)	Allows for the imposition of consecutive sentences of juvenile solitary confinement.	Council of Eur., European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, <i>Report to the Turkish Government on the Visit to Turkey</i> , ¶¶ 58, 64 (Oct. 10, 2013).
Ukraine	Punitive	10-day maximum		Council of Eur., European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, <i>Report to the Government of Ukraine on the Visit to Ukraine</i> , ¶ 168 (Apr. 29, 2014).
United States	Both	Variable	The United States holds more juveniles in solitary confinement than any other country in the world and employs every variety of isolation.	See HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 63–70, available at <a href="http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf">http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf</a> .
Uzbekistan	Punitive	Unknown		U.N. Comm. on the Rights of the Child, <i>Concluding Observations on the Combined Third and Fourth Periodic Reports of Uzbekistan</i> , ¶ 38, U.N. Doc. CRC/C/UZB/CO/3-4 (July 10, 2013).
Vietnam	Punitive	Unknown		U.N. Comm. on the Rights of the Child, <i>Concluding Observations of the Committee on the Rights of the Child: Vietnam</i> , ¶ 43, U.N. Doc. CRC/C/VNM/CO/3-4 (Aug. 22, 2012).