

Written Statement of

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Briefing on

**The Use of Solitary Confinement for Juveniles in New York**

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I am grateful for this opportunity to testify before the New York Advisory Committee to the United States Commission on Civil Rights on solitary confinement in the United States and in New York. This is an extremely important issue and one on which both the United States Federal and state governments can and should take immediate action. Thank you for investigating this issue.

In the last few years, I have interviewed or corresponded with scores of young people who were subjected to solitary confinement while they were under age 18 in juvenile facilities, as well as in jails and prisons in 20 states across the country. I want to share my perspective and some of their stories with the Commission.

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Every day in this country young people under the age of 18 are held in solitary confinement in juvenile facilities, jails and prisons. In solitary confinement, children spend 22 or more hours a day alone, usually in a small cell, isolated both physically and socially – and this can extend for days, weeks or months. Sometimes a window allows natural light to filter in or a view of the outside. Sometimes children can communicate with each other – yelling to other children, voices distorted, reverberating against concrete and metal. In some facilities, children get a book, or maybe just a bible, or perhaps study materials slipped under their door. But in solitary confinement, few contours distinguish one hour, day or week from the next.

I use the term ‘solitary confinement’ to refer to physical and social isolation of 22 to 24 hours per day for one day or more. Juvenile facilities, jails and prisons in the United States generally use solitary confinement for three purposes: to discipline, to manage or to treat. Children are held in solitary confinement to punish them when they break the rules inside a facility; to manage them, either to protect them from adults or one another or because they are deemed to require segregation when officials don’t know how else to handle them; or to medically treat them, such as when they threaten to take their own life. Some facilities, sometimes in addition to using solitary confinement, use various, shorter forms of physical and social isolation that can be imposed for many hours – though fewer than 22.

Much of the national discussion about solitary confinement focuses on the use of prolonged physical and social isolation to manage individuals in state and federal prisons: a practice which, in its most extreme iterations, involves near-complete isolation for decades. But, and although I have met those whose isolation began in their childhood and continued long into adulthood, the alarming truth is that children all across the United States, in juvenile facilities, jails and prisons, are subjected to a range of shorter solitary confinement practices, and with devastating consequences.

The solitary confinement of children is a serious and widespread problem in the United States. Extended isolation of children can have a devastating impact – inhibiting healthy growth, development and rehabilitation and causing serious pain and suffering, or worse. All isolation practices are problematic: prolonged isolation is inconsistent with medical and correctional best-practices and can violate both constitutional and international human rights law.

### **The Solitary Confinement of Children is Widespread and Harmful**

There is no comprehensive national data on the solitary confinement of children in this country. But what research there is suggests that thousands of children each year are subjected to the practice.

With regard to juvenile facilities, a recent briefing paper by the American Civil Liberties Union, *Alone and Afraid: Children Held in Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities*, gathers the best data available on both solitary confinement and other isolation practices, including from a number of states.<sup>1</sup> The most recent comprehensive estimate from Bureau of Justice

Statistics data suggests that in 2003 an estimated 35,000 young people between the ages of 10 and 20 were held in isolation in juvenile facilities in the United States with over half – or an estimated more than 17,000 children – held for more than 24 hours in a form of solitary confinement.<sup>ii</sup>

In *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, the only national study of the solitary confinement of children in the United States, which I authored, Human Rights Watch and the American Civil Liberties Union estimated (using Bureau of Justice Statistic data through 2011) that in recent years nearly 100,000 children – each year – are held in jails and prisons where they are at risk of being subjected to solitary confinement.<sup>iii</sup> Jail and prison officials nationwide reported using the same techniques to manage children and adults in their care, including solitary confinement.<sup>iv</sup> Those few states in which data is available suggest that a striking percentage of children may be held in solitary confinement in adult jails and prisons each year – with some large state jail and prison systems reporting that well over 10% of children in their care are subjected to the practice and some small jail facilities holding 100% of children in their care in solitary.<sup>v</sup>

#### *New York State Data – and Gaps*

In New York State, there are some recent, albeit incomplete, data regarding the use of solitary confinement.

In the New York City Department of Corrections (NYC DOC) facility at Rikers Island, recent data disclosures suggest that in FY2012, 14.4 percent of adolescents between age 16 and 18 spent some time in solitary confinement for an average length of stay of 43.1 days.<sup>vi</sup> In the summer of 2013, before the New York City Board of Corrections (which exercises some rulemaking authority over operations at Rikers) approved a rulemaking petition, between 25 and 28 percent of adolescents boys reportedly spent some time in solitary confinement.<sup>vii</sup> For reference, in FY2013, NYC DOC processed 4,312 new adolescent admissions and in FY2012, 5,279 new adolescent admissions.<sup>viii</sup>

In the New York State Department of Corrections and Community Supervision (DOCCS), a January 2012 snapshot of inmates suggests that 83 prisoners between the age of 16 and 18 were held either in isolation or with cellmates in Special Housing Units (or SHUs).<sup>ix</sup> At the time, officials confirmed that adolescents in the state prisons system were at times held in conditions in the SHU that constituted solitary confinement.<sup>x</sup> For reference, in January 2012, DOCCS held 181 young people in custody.<sup>xi</sup> (Though it should be noted that there have been important developments with regard to litigation against DOCCS that may lead to the placement of children in solitary confinement for long periods of time.<sup>xii</sup>)

I have not carried out systematic research on the juvenile justice system in New York. However, based on very the very limited data available, there is reason to think that a form of isolation, called “room confinement” by the State Office of Children and Family Services and New York City Administration for Children’s Services, is used for children in the custody of both systems, and in some instances can last for days at a time.<sup>xiii</sup>

While all of these numbers are alarming in and of themselves, it is important to underscore first that data about the solitary confinement of children in the care of New York state, as in other states, are not systematically or publically reported. It is also important to highlight that the available data do not account for the use of solitary confinement by county jail systems in New York State other than New York City. There is no publicly-available data on the use of solitary confinement for adolescents in the custody of county officials outside New York City who are accused or convicted of an adult criminal offense.<sup>xiv</sup>

### *Psychological, Physical and Developmental Harm*

The children I have spoken with about their experience of solitary confinement in adult jails and prisons were haunting in their descriptions of the practice as harmful and counterproductive.

Young people told me about just how difficult it was for them to cope in solitary. Several described losing touch with reality while isolated. Carter, who entered prison when he was 14 years old, told me:

“I felt like I was going mad. Nothing but a wall to stare at... I started to see pictures in the little bumps. Eventually, I said the hell with it and started acting insane. I made little characters with my hands and acted out video games I used to play on the outside.”<sup>xv</sup>

Others spoke about fits of uncontrollable anger. Jacob, from New York, said, “I couldn’t sleep. I was having anger. My anger was crazy. I was having outbursts.”<sup>xvi</sup>

I spoke with at least a dozen young people in detail about their suicidal thoughts or attempts. This sad fact is no surprise, as there is widespread agreement that suicide is highly correlated with solitary confinement among youth in juvenile and adult facilities (with some of the most disturbing and recent data about suicidality drawn from young people Rikers Island).<sup>xvii</sup>

One young girl I interviewed in New York told me:

I just felt I wanted to die, like there was no way out—I was stressed out. I hung up [tried to hang myself] the first day. I took a sheet and tied it to my light and they came around .... The officer, when she was doing rounds, found me. She was banging on the window: “Are you alive? Are you alive?” I could hear her, but I felt like I was going to die. I couldn’t breathe.<sup>xviii</sup>

Many of those who had attempted suicide, and a few others, had repeatedly cut themselves with staples or razors. One young man, Landon, showed me his arms while we spoke. One was covered in small cuts and scars. He said that when he was in solitary confinement, “I would hear stuff. When no one was around it was harder to control. When I was by myself, I would hear stuff and see stuff *more*.”<sup>xix</sup> Landon said he had struggled with these auditory and visual hallucinations for many years, but that solitary confinement “is not a place that you want to go.”<sup>xx</sup> He said, “It’s like mind torture.”<sup>xxi</sup>

And young people described that solitary confinement brought back memories and pain from past trauma. One young girl, Melanie, was held in protective solitary confinement for three months when she was 15. She said, “when I was eleven, I was raped. And it happened again in 2008 and 2009.”<sup>xxii</sup> She said that when she was isolated, the memories came back. “I was so upset ... and a lot was surfacing from my past... I don’t like feeling alone. That’s a feeling I try to stay away from. I hate that feeling.”<sup>xxiii</sup>

Because physical isolation is a defining feature of solitary, it is perhaps not surprising that the practice is unhealthy for growing bodies. Indeed, restriction of physical exercise is ubiquitous. I did not identify a single adult jail or prison through my research that encouraged the kind of strenuous aerobic physical activity recommended by the U.S. Department of Health and Human Services. Teens, including teens at Rikers Island, talked about only being allowed to exercise in small metal cages, alone, a few times a week.

Young people described barriers to care and programming. Not surprisingly, adult jails and prisons have little, if any, age-differentiated services or programming. But once young people are placed in solitary

confinement in any detention setting they are more likely to be cut off (or have much greater difficulty accessing) whatever resources are available. This makes normal growth and development – social, emotional, educational – all but impossible.

Young people described being prevented from going to school or participating in any activity that promotes growth or change. Henry said that then:

“The only thing left to do is go crazy – just sit and talk to the walls. I catch myself talking to the walls every now and again. It’s starting to become a habit because I have nothing else to do. I can’t read a book. I work out and try to make the best of it, but there is no best. Sometimes I go crazy and I can’t even control my anger anymore... . I feel like I am alone, like no one cares about me – sometimes I feel like, why am I even living?”<sup>xxiv</sup>

Finally, young people in adult jails and prisons reported being denied contact with their families. Sean said, “It was very depressing not being able to give them a hug. I would cry about that.”<sup>xxv</sup> Lauren said: “visits behind glass were torture.”<sup>xxvi</sup> Again and again, young people who *did* get family visits told me that they gave them the will to live.

During adolescence, the body changes significantly, including the development of secondary sex characteristics. Boys and girls gain height, weight, and muscle mass, as well as pubic and body hair; girls develop breasts and begin menstrual periods, and boys’ genitals grow and their voices change.<sup>xxvii</sup> The human brain also goes through dramatic structural growth during teen years and into the mid-twenties. The major difference between the brains of teens and those of young adults is the development of the frontal lobe.<sup>xxviii</sup> The frontal lobe is responsible for cognitive processing, such as planning, strategizing, and organizing thoughts and actions.<sup>xxix</sup> Researchers have determined that one area of the frontal lobe, the dorsolateral prefrontal cortex, is among the last brain regions to mature, not reaching adult dimensions until a person is in his or her twenties.<sup>xxx</sup> This part of the brain is linked to “the ability to inhibit impulses, weigh consequences of decisions, prioritize, and strategize.”<sup>xxxi</sup> As a result, teens’ decision-making processes are shaped by impulsivity, immaturity, and an under-developed ability to appreciate consequences and resist environmental pressures.<sup>xxxii</sup>

The differences between children and adults make young people more vulnerable to harm, and disproportionately affected by the trauma and deprivations of solitary confinement and isolation. Extensive research on the impact of isolation has shown that adult prisoners generally exhibit a variety of negative physiological and psychological reactions to conditions of solitary confinement.<sup>xxxiii</sup> However, there has been no systematic study of the effects of solitary confinement or other forms of isolation on growing brains and bodies – in spite of its widespread use on children. Given their stage of growth and development, children may be even less able than adults to handle solitary confinement.<sup>xxxiv</sup> Psychologically, children are different from adults, making their time spent in isolation even more difficult and the developmental, psychological, and physical damage more comprehensive and lasting. For these reasons, the American Academy of Child and Adolescent Psychiatry has concluded that adolescents are in particular danger of adverse reactions to prolonged isolation and solitary confinement and has recommended a ban on the practice.<sup>xxxv</sup>

### **The Solitary Confinement of Children is Inadequately Regulated**

Both international and constitutional law have been interpreted to ban solitary confinement. And while standards and policies at both the state and federal levels address the use of isolation in certain circumstances, there are significant gaps. There is thus a great need for strong and unequivocal national and state bans on the solitary confinement of children.

Every set of national standards governing age-appropriate and developmentally-appropriate practices to manage children in rehabilitative and/or correctional settings strictly regulate and limit all forms of isolation.<sup>xxxvi</sup> The Department of Justice Standards for the Administration of Juvenile Justice limit isolation to a maximum period of 24 hours.<sup>xxxvii</sup> Notably, standards governing the isolation of children in medical and mental health facilities and educational settings are even more restrictive.<sup>xxxviii</sup> The American Academy of Child and Adolescent Psychiatry has recommended a ban on solitary confinement.<sup>xxxix</sup> These standards show not just the consensus against this practice, but also that it is possible to manage and care for youth without reliance on solitary confinement or other harmful isolation practices.<sup>xl</sup>

But *no state* prohibits the solitary confinement of children in adult jails and prisons by statute. Three states – New York, Mississippi and Montana – currently impose or are in the process of imposing some limitations on the use of solitary confinement in adult prisons, pursuant to agreements reached and reforms implemented following litigation.<sup>xli</sup> In recent years, many state juvenile justice agencies across the country have implemented policy changes more strictly regulating isolation practices, with a majority of state agencies limiting isolation to a maximum of five days.<sup>xlii</sup> Yet only six states – Alaska, Connecticut, Maine, Nevada, Oklahoma, and West Virginia – have prohibited certain forms of isolation, such as solitary confinement, in juvenile facilities by statute.<sup>xliii</sup>

On the federal level, the Juvenile Justice and Delinquency Prevention Act (JJDP) creates financial incentives for states to treat some young people differently from adults, including by diverting those subject to the jurisdiction of the juvenile justice system (and certain categories of misdemeanants) out of adult facilities.<sup>xliv</sup> But no provision of either the JJDP – or any other federal law or implementing regulation – prohibits solitary confinement or isolation of children in juvenile detention facilities, jails or prisons.

Fortunately, regulations implementing the Prison Rape Elimination Act (PREA) do include provisions regulating isolation.<sup>xlv</sup> With regard to adult jails and prisons, the regulations require that adult facilities maintain sight, sound and physical separation between “youthful inmates” and adults and that officials should use their “best efforts” to avoid placing children in isolation to comply with the regulations.<sup>xlvi</sup> The regulations also require that any young person separated or isolated in an adult facility must receive, absent exigent circumstances, daily large-muscle exercise, any legally-required special education services, and, to the extent possible, access to other programming and work opportunities.<sup>xlvii</sup>

With regard to juvenile facilities, the PREA regulations require that any young person separated or isolated in a juvenile facility as a disciplinary sanction or protective measure must receive daily large-muscle exercise, access to legally-mandated educational programming or special education services, daily visits from a medical or mental health care clinician, and, to the extent possible, access to other programs and work opportunities.<sup>xlviii</sup> There is as yet no data indicating whether these regulations have had an impact on the solitary confinement of youth. It is also important to note that, while a step in the right direction with regard to solitary confinement, the regulations are inconsistent in the way they protect youth, as they contain significant gaps that still leave children vulnerable to solitary confinement and the harmful conditions associated with prolonged isolation.

The Department of Justice has repeatedly recognized that isolation is not appropriate for youth (and the work of its Special Litigation Section deserves plaudits),<sup>xlix</sup> including in investigations of New York state facilities; yet the Department has neither banned this practice for youth in the custody of its Bureau of Prisons (who are held in contract facilities), nor has it issued clear guidance prohibiting the practice in juvenile facilities, jails or prisons across the country (though the Attorney General has said that “solitary confinement can be dangerous, and a serious impediment to the ability of juveniles to succeed once released.”).<sup>1</sup>

## *Constitutional and Human Rights Law*

The U.S. Constitution protects persons deprived of their liberty, both before and after conviction. It also provides unique protections for children charged with crimes. Although no decision of the Supreme Court has considered the constitutionality of the solitary confinement of children, in its recent decisions on children in conflict with the law, the Supreme Court has ruled that the Constitution's protections apply differently to children in that context because of the legal and developmental differences between children and adults. In cases involving the juvenile death penalty,<sup>li</sup> juvenile life without parole,<sup>lii</sup> and custodial interrogations,<sup>liii</sup> the Court has held that punishing or questioning children without acknowledging their age, developmental differences, or individual characteristics is unconstitutional.

Whether and when isolation is unconstitutional – and how and what body of law applies – will vary from case to case. The Fifth and Fourteenth Amendment protections against deprivation of liberty without due process of law establish the constitutional protections generally applicable to conditions of confinement for children (and applicable to most children in detention) as well as adults detained before conviction.<sup>liv</sup> Children in confinement have a “liberty interest in safety and freedom from [unreasonable] bodily restraint.”<sup>lv</sup> Conditions of confinement are unreasonable when they are “a substantial departure from accepted professional judgment, practice or standards”<sup>lvi</sup> The Supreme Court has also held that government conduct violates substantive due process when it “shocks the conscience.”<sup>lvii</sup> There are also powerful arguments that the solitary confinement violates the Eighth Amendment prohibition against cruel and unusual punishment (which protects individuals who are convicted of an offense in the criminal justice system and may also protect juveniles adjudicated delinquent) because it is so starkly disproportionate for children as a class, in light of the differences between children and adults, as well as because it manifests indifference *per se* to such a harmful practice.<sup>lviii</sup> In short, there is a range of strong arguments to extend existing law dictating how children must be protected while in custody to solitary confinement.

A small number federal courts have ruled that solitary confinement and isolation practices used in juvenile facilities are unconstitutional.<sup>lix</sup> Few courts have considered this issue recently.<sup>lx</sup> Regardless of the context, efforts to determine whether extreme isolation practices breach professional standards, shock the conscience, constitute improper punishment of a pretrial detainee, manifest deliberate indifference or are starkly disproportionate such that they violate the Constitution must take into account the developmental differences and individual characteristics of the children involved.

International human rights law, which identifies anyone below the age of 18 years as a child, recognizes that children, by reason of their physical and mental immaturity, need special safeguards and care, including appropriate legal protection, before as well as after birth.<sup>lxi</sup> The International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by the United States, acknowledges the need for special treatment of children in the criminal justice system and emphasizes the importance of their rehabilitation.<sup>lxii</sup> The Convention on the Rights of the Child (CRC), a treaty signed by the United States, also addresses the particular rights and needs of children who come into conflict with the law.<sup>lxiii</sup>

A number of international instruments and human rights organizations have declared that the solitary confinement of children violates human rights laws and standards governing the protection of children, including those prohibiting cruel, inhuman or degrading treatment, and have thus called for the practice to be banned, including: the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),<sup>lxiv</sup> the Committee on the Rights of the Child,<sup>lxv</sup> the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Beijing Rules),<sup>lxvi</sup> and the Inter-American Commission on Human Rights.<sup>lxvii</sup> Based on the harmful physical and psychological effects of solitary confinement and the particular vulnerability of children, the Office of the U.N. Special Rapporteur on Torture has repeatedly called for the abolition of solitary confinement of persons under age 18.<sup>lxviii</sup> This

international consensus is important to legislators and policymakers because U.S. courts, including the Supreme Court, have repeatedly relied on international law and practice on children's rights to affirm their reasoning that certain domestic practices violate the Constitution.<sup>lxix</sup> These international standards are useful in determining the contours of constitutional protections for children in solitary confinement in the United States.

## **Conclusion**

Solitary confinement is extreme—well outside of the range of acceptable best practices for caring for and managing children—and it carries a high risk of physical, developmental, and psychological harm, and even death. Laws and practices that subject children to this inherently cruel and punitive treatment shock the conscience. There is a clear international consensus that the practice violates the rights of children under human rights law, including under treaty and customary international law obligations binding on the United States. There is clear support for the view that the solitary confinement of children violates both the substantive due process protections and the prohibition against cruel and unusual punishment in the U.S. Constitution. Indeed, in conjunction with the growing recognition that the practice is widespread and the broad consensus regarding how harmful it is for children, recent jurisprudence recognizing that 'kids are different' may well pave the way for clearer doctrinal recognition of the ways in which the practice violates the constitution – or at least waves of litigation seeking to protect children from the practice in juvenile facilities, jails and prisons.

In sum, the solitary confinement of children can and should no longer be the dark secret of our juvenile and criminal justice systems: It works against the rehabilitation of thousands of children each year. Congress and the states must act to end the practice.

## **Recommendations**

The U.S. Congress should ban the solitary confinement of children and support increased federal oversight, monitoring, transparency and funding for alternatives to solitary confinement generally. Each state legislature should ban the practice at the state and county level, regardless of where children are detained.

The U.S. Congress should clearly prohibit the detention of children in adult facilities, as it has done with regard to juvenile delinquents and all children in the custody of the Attorney General. Each state legislature should pursue the same prohibition at the state and county level.

The U.S. Congress should mandate that federal, state, and local prisons, jails, detention centers and juvenile facilities report to the Department of Justice who is held in solitary confinement, for what reasons and how long, as well as the impact of the practices on cost, facility safety, incidents of self-harm and recidivism. This data must include the numbers of children who are subjected to solitary confinement and other forms of prolonged isolation. This data must also include information that would show whether the use of solitary confinement on children is racially disproportionate or disparately impacts children with disabilities. Each state legislature should pursue the same robust public reporting at the state and county level, for any facility in which children are detained.

The U.S. Congress should require reforms of the use of solitary confinement in federal facilities. This should include a ban on the solitary confinement of children and the strict regulation of the use of other isolation practices on children held under the jurisdiction of the Federal government, including in the care of the Bureau of Prisons, the Department of Homeland Security, the Department of Defense, and the Department of Health and Human Services' Office of Refugee Resettlement. Each state legislature and agencies that detain children should similarly implement bans that include any facility in which children



are detained.

The U.S. Congress should encourage rulemaking by the Department of Justice to promulgate regulations that limit solitary confinement under existing or new statutory authority, and which provide for effective, evidence-based alternatives to isolation practices. These actions must include a ban on the solitary confinement of children and the strict regulation of the use of other isolation practices on children. Each state legislature and agency should similarly pursue action to ban the practice and promote alternatives.

The U.S. Congress should allocate federal funding to Department of Justice to support federal, state and local efforts to reduce the use of solitary confinement, with a focus on alternatives. This allocation should specifically direct the Department of Justice to seek the implementation of a national ban on the solitary confinement of children and the strict regulation of the use of other forms of isolation on children. This allocation should also include funds to support research into the impact of isolation and its alternatives. Each state government and agency should work to identify and promote alternatives.

The U.S. Congress must ensure that the United States fully engages in the international effort to reduce and reform the use of physical and social isolation, including solitary confinement. This must include constructive engagement in the process of updating the United Nations Standard Minimum Rules on the Treatment of Prisoners and facilitating a visit to the United States by the United Nations Special Rapporteur on Torture to investigate solitary confinement in the United States, including the solitary confinement of children. Each state government can similarly support efforts to ensure compliance with international standards and responsive engagement with international bodies.

## Notes

<sup>i</sup> THE AMERICAN CIVIL LIBERTIES UNION, ALONE AND AFRAID 7 (2013), available at [https://www.aclu.org/files/assets/Alone\\_and\\_Afraid\\_COMPLETE\\_FINAL.pdf](https://www.aclu.org/files/assets/Alone_and_Afraid_COMPLETE_FINAL.pdf) (citing national data and data from California, Ohio and Texas).

<sup>ii</sup> DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CONDITIONS OF CONFINEMENT: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT 9 (2010), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf>. The study, based on a nationally-representative sample of more than 7,000 young people ages 10-20, finds that in 2003 more than one-third (35 percent) of youth in juvenile facilities reported being isolated as a punishment and that more than half of those children were held for longer than 24 hours –amounting to more than 17,000 young people held in solitary confinement. In response to a 2010 Department of Justice census (the most recent year for which there is data) of close to 4,000 juvenile facilities, more than 850 facilities indicated that they locked young people in their room in certain circumstances and more than 430 facilities reported locking young people alone for more than 4 hours at a time in certain circumstances. JUVENILE RESIDENTIAL FACILITY CENSUS CODEBOOK, US DEP'T OF JUSTICE, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH 42, 156-57 (2010), available at [http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=34449&ds=1&file\\_id=1097802](http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=34449&ds=1&file_id=1097802).

<sup>iii</sup> HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 106-12 (2012), available at <http://www.aclu.org/growinguplockeddown>.

<sup>iv</sup> Id. 53-54. Some data suggests that in some jurisdictions, youth may actually be subjected to higher rates of solitary confinement than adults because their behavior leads to more disciplinary infractions associated with solitary confinement. Attapol Kuanliang et al., *Juvenile Inmates in an Adult Prison System: Rates of Disciplinary Misconduct and Violence*, 35 CRIMINAL JUSTICE & BEHAVIOR 1186, 93 (2008), available at <http://cjb.sagepub.com/content/35/9/1186.full.pdf> (finding that—per year—youth under age 18 are found guilty of “potentially violent rule violations” at a rate of 353.17 per 1,000 and of “assaultive rule violations” at a rate of 109.38 per 1,000 – both higher than the relevant rates for adults).

<sup>v</sup> GROWING UP LOCKED DOWN, *supra* note i at 64-65 (citing examples from Florida, New York, Ohio, and Pennsylvania).

<sup>vi</sup> GROWING UP LOCKED DOWN, *supra* note i at 132-33.

<sup>vii</sup> NEW YORK CITY BOARD OF CORRECTIONS, MOTION TO PROCEED WITH RULEMAKING REGARDING PUNITIVE SEGREGATION ON RIKERS ISLAND, (September 2013), available at <http://www.nyc.gov/html/boc/downloads/pdf/Memo%20to%20the%20Board%20%2008222013.pdf>.

<sup>viii</sup> NEW YORK CITY DEPARTMENT OF CORRECTIONS, ADOLESCENT CENSUS DATA AND SECURITY INDICATORS: FY2013 ANNUAL (2013), available at [http://www.nyc.gov/html/doc/downloads/pdf/adolescent/census\\_data/FY2013-ANNUAL.pdf](http://www.nyc.gov/html/doc/downloads/pdf/adolescent/census_data/FY2013-ANNUAL.pdf).

<sup>ix</sup> GROWING UP LOCKED DOWN, *supra* note i at 131. See also NEW YORK CIVIL LIBERTIES UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS 22 (2012), available at [http://www.nyclu.org/files/publications/nyclu\\_boxedin\\_FINAL.pdf](http://www.nyclu.org/files/publications/nyclu_boxedin_FINAL.pdf).

<sup>x</sup> GROWING UP LOCKED DOWN, *supra* note i at 131.

<sup>xi</sup> GROWING UP LOCKED DOWN, *supra* note i at 131.

<sup>xii</sup> Benjamin Weiser, *New York State in Deal to Limit Solitary Confinement*, N.Y. TIMES, Feb. 19, 2014, available at [http://www.nytimes.com/2014/02/20/nyregion/new-york-state-agrees-to-big-changes-in-how-prisons-discipline-inmates.html?\\_r=0](http://www.nytimes.com/2014/02/20/nyregion/new-york-state-agrees-to-big-changes-in-how-prisons-discipline-inmates.html?_r=0).

<sup>xiii</sup> At the end of December, 2012 (the most recent year for which comprehensive data is available), there were 983 children in the custody of state juvenile justice authorities. NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, 2012 ANNUAL REPORT: DIVISION OF JUVENILE JUSTICE AND OPPORTUNITIES FOR YOUTH Table 4 (2013), available at <http://www.ocfs.state.ny.us/main/reports/2012%20Youth%20in%20Care.pdf>. The Office of the Agency's Ombudsman noted that it received a total of 10, 2, and 2 complaints regarding room confinement in October, November and December, respectively. NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES OFFICE OF THE OMBUDSMAN, ISSUE REPORTS (2012) available at <http://ocfs.ny.gov/main/ombudsman/reports.asp>. The New York City Administration for Children's Services (ACS) held an average daily population of approximately 150 children in secure facilities in FY2013 (with a total of 2,074 new admissions during that year). NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, DETENTION DEMOGRAPHIC DATA FISCAL YEAR REPORT 5 (2014) available at [http://www.nyc.gov/html/acs/downloads/pdf/statistics/FY\\_13\\_Demographic\\_Report\\_Detention.pdf](http://www.nyc.gov/html/acs/downloads/pdf/statistics/FY_13_Demographic_Report_Detention.pdf). ACS reported 187 instances of room confinement, 61 of which were for shorter than 24 hours 11 of which were for 3 or 4 days. NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, ANNUAL INCIDENT DATA REPORT 2 (2013), available at [http://www.nyc.gov/html/acs/downloads/pdf/statistics/FY\\_13\\_Incident\\_Data\\_Report\\_Detention.pdf](http://www.nyc.gov/html/acs/downloads/pdf/statistics/FY_13_Incident_Data_Report_Detention.pdf).

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It is worth noting that New York reported only 1 use of room confinement, for a total duration of 12 hours and 15 minutes, between January and March of 2014. NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, QUARTERLY INCIDENT DATA REPORT 2-3 (2014), available at [http://www.nyc.gov/html/acs/downloads/pdf/statistics/Fiscal\\_Year\\_2014\\_3Q\\_Detention.pdf](http://www.nyc.gov/html/acs/downloads/pdf/statistics/Fiscal_Year_2014_3Q_Detention.pdf).

<sup>xiv</sup> Note that estimates of the number of annual adolescent arrests across the state range as high as 50,000. GROWING UP LOCKED DOWN, *supra* note i at 130.

<sup>xv</sup> *Id.* at 25.

<sup>xvi</sup> *Id.* at 27.

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

<sup>xviii</sup> *Id.* at 36.

<sup>xix</sup> GROWING UP LOCKED DOWN, *supra* note i at 33.

<sup>xx</sup> *Id.*

<sup>xxi</sup> *Id.*

<sup>xxii</sup> *Id.* at 34.

<sup>xxiii</sup> *Id.*

<sup>xxiv</sup> *Id.* at 22.

<sup>xxv</sup> *Id.* at 42.

<sup>xxvi</sup> *Id.*

<sup>xxvii</sup> Sedra Spano, Stages of Adolescent Development, ACT FOR YOUTH UPSTATE CENTER FOR EXCELLENCE (May 2004), [http://www.actforyouth.net/resources/rf/rf\\_stages\\_0504.pdf](http://www.actforyouth.net/resources/rf/rf_stages_0504.pdf); Adolescent Development, NAT'L INSTS. OF HEALTH, <http://www.nlm.nih.gov/medlineplus/ency/article/002003.htm>.

<sup>xxviii</sup> Laurence Steinberg et al., The Study of Development Psychopathology in Adolescence: Integrating affective neuroscience with the study of context, in *DEVELOPMENTAL PSYCHOPATHOLOGY* 710 (DANTE CICCETTI & DONALD J. COHEN EDS., 2d ed. 2006).

<sup>xxix</sup> *Id.*; Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 *ANNALS N.Y. ACAD. SCI.* 83 (2004), available at <http://intramural.nimh.nih.gov/research/pubs/giedd05.pdf>.

<sup>xxx</sup> Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, *supra* note xxix, at 1021.

<sup>xxxi</sup> *Id.*

<sup>xxxii</sup> Matthew S. Stanford et al., Fifty Years of the Barratt Impulsiveness Scale: An Update and Review, 47 *PERSONALITY & INDIVIDUAL DIFFERENCES* 385 (2009); Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 *BEHAV. SCI. & L.* 741, 744-745 (2000).

<sup>xxxiii</sup> Studies have suggested that these symptoms include: hypersensitivity to stimuli; perceptual distortions and hallucinations; increased anxiety and nervousness; revenge fantasies, rage, and irrational anger; fears of persecution; lack of impulse control; severe and chronic depression; appetite loss and weight loss; heart palpitations; withdrawal; blunting of affect and apathy; talking to oneself; headaches; problems sleeping; confusing thought processes; nightmares; dizziness; self-mutilation; and lower levels of brain function, including a decline in EEG activity after only seven days in solitary confinement. See *THE AMERICAN CIVIL LIBERTIES UNION, ALONE AND AFRAID* n. 13 – n. 31 and accompanying text (2013), available at [https://www.aclu.org/files/assets/Alone\\_and\\_Afraid\\_COMPLETE\\_FINAL.pdf](https://www.aclu.org/files/assets/Alone_and_Afraid_COMPLETE_FINAL.pdf).

<sup>xxxiv</sup> The US Supreme Court has described how youth have a “capacity for change,” and that they are therefore “in need of and receptive to rehabilitation.” *Graham v. Florida*, 130 S.Ct. 2011, 2017 (2010).

<sup>xxxv</sup> *AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, POLICY STATEMENTS: SOLITARY CONFINEMENT OF JUVENILE OFFENDERS* (Apr. 2012), available at [http://www.aacap.org/cs/root/policy\\_statements/solitary\\_confinement\\_of\\_juvenile\\_offenders](http://www.aacap.org/cs/root/policy_statements/solitary_confinement_of_juvenile_offenders).

<sup>xxxvi</sup> JUVENILE DET. ALT. INITIATIVE, JUVENILE DETENTION ALTERNATIVES INITIATIVE FACILITY SITE ASSESSMENT, Standard VII(E)

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(2006), available at <http://www.cclp.org/documents/Conditions/JDAI%20Standards.pdf>; PBS LEARNING INST., PBS GOALS, STANDARDS, OUTCOME MEASURES, EXPECTED PRACTICES AND PROCESSES 10 (2007), available at <http://sccounty01.co.santa-cruz.ca.us/prb/media%5CGoalsStandardsOutcome%20Measures.pdf>; PERFORMANCE-BASED STANDARDS, REDUCING ISOLATION AND ROOM CONFINEMENT 2 (Sept. 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) (“PbS standards are clear: isolating or confining a youth to his/her room should be used only to protect the youth from harming himself or others and if used, should be brief and supervised. Any time a youth is alone for 15 minutes or more is a reportable PbS event and is documented”).

<sup>xxxvii</sup> DEP’T OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE, Standard 4.52 (1980), available at <http://catalog.hathitrust.org/Record/000127687> (“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 . . . Room confinement of more than twenty-four hours should never be imposed.”).

<sup>xxxviii</sup> 42 C.F.R. 482.13(e) (2012), available at <http://www.ecfr.gov/cgi-bin/textidx?c=ecfr&SID=5ba18485f8033f30fb496dba3e87c626&rgn=div8&view=text&node=42:5.0.1.1.1.2.4.3&idno=42> (implementing 42 U.S.C. 1395x § 1861(e)(9)(A) (Prohibiting isolation used for coercion, discipline, convenience or retaliation and allowing involuntary isolation only (1) when less restrictive interventions have been determined to be ineffective, (2) to ensure the immediate physical safety of the patient, staff member, or others, and (3) must be discontinued at the earliest possible time. The regulations also limit involuntary isolation to a total maximum of 24 hours and limit individual instances of involuntary isolation to 2 hours for children and adolescents age 9 to 17); NAT’L COMM. ON CORR. HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN JUVENILE DETENTION AND CONFINEMENT FACILITIES, Standard Y-E-09 (2011); NAT’L COMM. ON CORR. HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN JUVENILE DETENTION AND CONFINEMENT FACILITIES, Standard Y-39 (1995), available at <http://www.jdcap.org/SiteCollectionDocuments/Health%20Standards%20for%20Detention.pdf> (Requiring that segregation policies should state that isolation is to be reserved for incidents in which the youth’s behavior has escalated beyond the staff’s ability to control the youth by counseling or disciplinary measures and presents a risk of injury to the youth or others); US DEP’T OF EDUCATION, RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 11-23 (2012), available at <http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf> (Stating that isolation should not be used as a punishment or convenience and is appropriate only in situations where a child’s behavior poses an imminent danger of serious physical harm to self or others, where other interventions are ineffective, and should be discontinued as soon as the imminent danger of harm has dissipated).

<sup>xxxix</sup> AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, POLICY STATEMENTS: SOLITARY CONFINEMENT OF JUVENILE OFFENDERS (Apr. 2012), available at [http://www.aacap.org/cs/root/policy\\_statements/solitary\\_confinement\\_of\\_juvenile\\_offenders](http://www.aacap.org/cs/root/policy_statements/solitary_confinement_of_juvenile_offenders).

<sup>xl</sup> See, e.g., Paul DeMuro, *Towards Abolishing the Use of Disciplinary Isolation in Juvenile Institutions: Some Initial Ideas*, Youth Advocate Program, Inc. (Jan. 22, 2014), available at <http://www.yapinc.org/Portals/0/Documents/News/Abolishing%20Isolation%20Juvenile%20Justice%20Demuro.pdf>.

<sup>xli</sup> See Consent Decree, C.B., et al. v. Walnut Grove Corr. Facility, No. 3:10-cv-663 (S.D. Miss. 2012) (prohibiting solitary confinement of children); Settlement Agreement, Raistlen Katka v. Montana State Prison, No. BDV 2009-1163 (Apr. 12, 2012), available at <http://www.aclumontana.org/images/stories/documents/litigation/katkasettlement.pdf> (limiting the use of isolation and requiring special permission); Benjamin Weiser, *New York State in Deal to Limit Solitary Confinement*, N.Y. TIMES, Feb. 19, 2014, available at [http://www.nytimes.com/2014/02/20/nyregion/new-york-state-agrees-to-big-changes-in-how-prisons-discipline-inmates.html?\\_r=0](http://www.nytimes.com/2014/02/20/nyregion/new-york-state-agrees-to-big-changes-in-how-prisons-discipline-inmates.html?_r=0).

<sup>xlii</sup> PERFORMANCE-BASED STANDARDS, REDUCING ISOLATION AND ROOM CONFINEMENT, *supra* note xxxvii at 4.

<sup>xliii</sup> These states at a minimum either ban punitive solitary confinement or heavily restrict its use. See Alaska Delinquency Rule 13 (Oct. 15, 2012) (“A juvenile may not be confined in solitary confinement for punitive reasons”); Conn. Gen. Stat. Ann. § 46b-133 (2012) (“no child shall at any time be held in solitary confinement”); Me. Rev. Stat. tit. 34-A § 3032 (5) (2006) (including “segregation” in the list of punishments for adults, but not in the list for children); Nev. Rev. Stat. § 62B (2013) (“A child who is detained in a local or regional facility for the detention of children may be subjected to corrective room restriction only if all other less-restrictive options have been exhausted and only [for listed purposes].”); Okla. Admin. Code § 377:35-11-4 (2013) (“Solitary confinement is a serious and extreme measure to be imposed only in emergency situations.”); W. Va. Code § 49-5-16a (1998) (“A juvenile may not be punished by . . . imposition of solitary confinement and except for sleeping hours, a juvenile in a state facility may not be locked alone in a room unless that juvenile is not amenable to reasonable direction and control.”).

<sup>xliv</sup> Coalition for Juvenile Justice, *The JJDPA: Federal Juvenile Justice and Delinquency Prevention Act* (2007), available at <http://www.juvjustice.org/media/.../CJJ%20Hill%20Packet--Handouts.doc>.

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

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(providing a summary of regulations).

<sup>xlvi</sup> 28 C.F.R. § 115.14 (2012), available at [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_final\\_rule.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf).

<sup>xlvii</sup> *Id.*

<sup>xlviii</sup> Compare 28 C.F.R. § 115.378(b) (2012), available at [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_final\\_rule.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf).

<sup>xlix</sup> In its most recent case, the Department of Justice sought a Temporary Restraining Order against the State of Ohio, leading to a strong settlement. DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS, *Justice Department Settles Lawsuit Against State of Ohio to End Unlawful Seclusion of Youth in Juvenile Correctional Facilities*, <http://www.justice.gov/opa/pr/2014/May/14-crt-541.html>. See also Letter from Robert L. Listenbee, Administrator, US Department of Justice, to Jesselyn McCurdy, Senior Legislative Counsel, American Civil Liberties Union 1 (Jul. 5, 2013), available at [https://www.aclu.org/sites/default/files/assets/doj\\_ojjdp\\_response\\_on\\_jj\\_solitary.pdf](https://www.aclu.org/sites/default/files/assets/doj_ojjdp_response_on_jj_solitary.pdf); Letter from Thomas E. Perez, Assistant Att’y Gen., to Hon. Mitch Daniels, Governor, State of Indiana, Investigation of the Pendleton Juvenile Correctional Facility 8 (Aug. 22, 2012), available at [http://www.justice.gov/crt/about/spl/documents/pendleton\\_findings\\_8-22-12.pdf](http://www.justice.gov/crt/about/spl/documents/pendleton_findings_8-22-12.pdf) (Finding excessively long periods of isolation of suicidal youth. Stating that, “the use of isolation often not only escalates the youth’s sense of alienation and despair, but also further removes youth from proper staff observation. . . . Segregating suicidal youth in either of these locations is punitive, anti-therapeutic, and likely to aggravate the youth’s desperate mental state.”); Letter from Thomas E. Perez, Assistant Att’y Gen., to Hon. Chairman Moore, Leflore County Board of Supervisors, Investigation of the Leflore County Juvenile Detention Center 2, 7 (Mar. 31, 2011), available at [http://www.justice.gov/crt/about/spl/documents/LeFloreJDC\\_findlet\\_03-31-11.pdf](http://www.justice.gov/crt/about/spl/documents/LeFloreJDC_findlet_03-31-11.pdf) (Finding that isolation is used excessively for punishment and control, and the facility has unfettered discretion to impose such punishment without process); Letter from Thomas E. Perez, Assistant Att’y Gen., to Hon. Michael Claudet, President, Terrebonne Parish, Terrebonne Parish Juvenile Detention Center, Houma, Louisiana 12-13 (Jan. 18, 2011), available at [http://www.justice.gov/crt/about/spl/documents/TerrebonneJDC\\_findlet\\_01-18-11.pdf](http://www.justice.gov/crt/about/spl/documents/TerrebonneJDC_findlet_01-18-11.pdf) (Finding excessive use of isolation as punishment or for control – at four times the national average – and that the duration of such sanctions is far in excess of acceptable practice for such minor violations, and violates youths’ constitutional rights and stating, “Isolation in juvenile facilities should only be used when the youth poses an imminent danger to staff or other youth, or when less severe interventions have failed.”); Letter from Thomas E. Perez, Assistant Att’y Gen., to Hon. Mitch Daniels, Governor, State of Indiana, Investigation of the Indianapolis Juvenile Correctional Facility, Indianapolis, Indiana 21-22 (Jan. 29, 2010), available at [http://www.justice.gov/crt/about/spl/documents/Indianapolis\\_findlet\\_01-29-10.pdf](http://www.justice.gov/crt/about/spl/documents/Indianapolis_findlet_01-29-10.pdf) (Finding that facility subjected youth to excessively long periods of isolation without adequate process and stating, “generally accepted juvenile justice practices dictate that [isolation] should be used only in the most extreme circumstances and only when less restrictive interventions have failed or are not practicable.”); Letter from Grace Chung Becker, Acting Assistant Att’y Gen., to Yvonne B. Burke, Chairperson, Los Angeles County Board of Supervisors, Investigation of the Los Angeles County Probation Camps 42-45 (Oct. 31, 2008), available at [http://www.justice.gov/crt/about/spl/documents/lacamps\\_findings\\_10-31-08.pdf](http://www.justice.gov/crt/about/spl/documents/lacamps_findings_10-31-08.pdf) (Finding inadequate supervision of youth isolated in seclusion or on suicide watch); Letter from Wan J. Kim, Assistant Att’y Gen., to Marion County Executive Committee Members and County Council President, Marion County Juvenile Detention Center, Indianapolis, Indiana 10-12 (Aug. 6, 2007), available at [http://www.justice.gov/crt/about/spl/documents/marion\\_juve\\_ind\\_findlet\\_8-6-07.pdf](http://www.justice.gov/crt/about/spl/documents/marion_juve_ind_findlet_8-6-07.pdf) (Finding that isolation practices substantially departed from generally acceptable professional standards and that use of isolation was excessive and lacked essential procedural safeguards and stating, “Regardless of the name used to describe it, the facility excessively relies on isolation as a means of attempting to control youth behavior’ and that ‘Based on the review of housing assignments in January and February 2007, on any given day, approximately 15 to 20 percent of the youth population was in some form of isolation.”); Letter from Bradley J. Scholzman, Acting Assistant Att’y Gen., to Hon. Linda Lingle, Governor, State of Hawaii, Investigation of the Hawaii Youth Correctional Facility, Kailua, Hawaii 17-18 (Aug. 4, 2005), available at [http://www.justice.gov/crt/about/spl/documents/hawaii\\_youth\\_findlet\\_8-4-05.pdf](http://www.justice.gov/crt/about/spl/documents/hawaii_youth_findlet_8-4-05.pdf) (Finding excessive use of disciplinary isolation without adequate process); Letter from Alexander Acosta, Assistant Atty Gen., to Hon. Jennifer Granholm, Governor, State of Michigan, CRIPA Investigation of W.J. Maxey Training School, Whitmore Lake, MI 4-5 (Apr. 19, 2004), available at [http://www.justice.gov/crt/about/spl/documents/granholm\\_findingle.pdf](http://www.justice.gov/crt/about/spl/documents/granholm_findingle.pdf) (Finding excessive use of isolation for disciplinary purposes, often without process and for arbitrary reasons and durations.); Letter from Thomas E. Perez, Assistant Att’y Gen., to Janet Napolitano, Governor, State of Arizona, CRIPA Investigation of Adobe Mountain School and Black Canyon School in Phoenix, Arizona; and Catalina Mountain School in Tuscon, Arizona (Jan. 23, 2004), available at [http://www.justice.gov/crt/about/spl/documents/ariz\\_findings.pdf](http://www.justice.gov/crt/about/spl/documents/ariz_findings.pdf) (Finding that youth are kept in isolation for extended and inappropriate periods of time that fly in the face of generally accepted professional standards.).

<sup>1</sup> DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS, *Attorney General Holder Criticizes Excessive Use of Solitary Confinement for Juveniles with Mental Illness* (2014), available at <http://www.justice.gov/opa/pr/2014/May/14-ag-509.html>; Ian Kysel, Ban Solitary Confinement for Youth in the Care of the Federal Government, THE HILL (Apr. 11, 2013), available at <http://thehill.com/blogs/congress-blog/judicial/293395-ban-solitary-confinement-for-youth-incare-of-the-federal-government>; Letter from The American Civil Liberties Union et al. to Eric H. Holder, Jr., Attorney General, US Department of Justice, (Oct. 11, 2013).

<sup>ii</sup> *Roper v. Simmons*, 453 U.S. 551 (2005).

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<sup>lii</sup> *Miller v. Alabama*, 132 S.Ct. 2455 (2012); *Graham v. Florida*, 130 S.Ct. 2011 (2010).

<sup>liii</sup> *J.D.B. v. North Carolina*, 564 U.S. \_\_\_ (2011).

<sup>liv</sup> *Schall v. Martin*, 467 U.S. 253, 269 (1984) (Holding that the state has a legitimate interest in detaining youth prior to delinquency proceedings but that their conditions of confinement must not amount to punishment.). Notably, some courts apply both the Substantive Due Process protections as well as the prohibition against Cruel and Unusual punishment to conditions claims of post-adjudication youth. *Morgan v. Sproat*, 432 F.Supp. 1130, 1135 (S.D.Miss. 1977). See also *Bell v. Wolfish*, 441 U.S. 520 (1979).

<sup>lv</sup> *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982) (the case, while focused on the treatment of persons held in mental health facilities, has repeatedly been used to evaluate conditions of confinement for youth).

<sup>lvi</sup> *Id.* In the case of pre-trial detention of adults in adult facilities, the Supreme Court has held that conditions constitute punishment when “excessive” in relation to a legitimate government objective. *Bell v. Wolfish*, 441 U.S. 520, 539, 540 & n.23 (1979). (If the conditions are as such, “a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.” ... “In determining whether restrictions or conditions are reasonably related to the Government’s interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that “[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.”) (*citing Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

<sup>lvii</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

<sup>lviii</sup> While the majority of children at risk of being subjected to solitary confinement are protected by the Fifth and Fourteenth, rather than the Eighth Amendment, many view the solitary confinement of children as an important ground for clarifying the impact of the Supreme Court’s recent jurisprudence on extreme sentencing and custodial interrogation to conditions of confinement challenges. Other advocates have urged the development of an Eighth Amendment conditions jurisprudence. Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J. L. & SOC. CHANGE 285, 321 (2012) The paradigmatic Eighth Amendment test for non-medical challenges is subjective and objective and requires that officials manifest deliberate indifference to an “objectively serious harm. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Estelle v. Gamble*, 429 U.S. 97, 102-103 (1976). Recent dicta suggests room for a more expanded, dignitary conception of when broad penal practices can violate the Constitution. *Brown v. Plata*, 131 S.Ct. 1910, 1928 (2011) (“Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment ... To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison’s failure to provide sustenance for inmates may actually produce physical ‘torture or a lingering death ... Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.’) (Internal citations omitted). But concepts of proportionality consistently animate both Supreme Court and lower court considerations of Eighth Amendment challenges to conditions of confinement. See *Smith v. Coughlin*, 748 F.2d 783, 87 (2d. Cir. 1984) (holding that “SHU confinement is not cruel and unusual unless it is totally without penological justification, grossly disproportionate, or involve[s] the unnecessary and wanton infliction of pain.”). See also *LeBron v. Artus*, 2007 WL 2765046 at \*7 (N.D.N.Y. 2007) (finding that sanction of loss of two years good time for assault might violate Eighth Amendment if “grossly disproportionate,” but finding no violation and citing *Fortuna v. Coughlin*, 222 A.D.2d 588, 588, 636 N.Y.S.2d 640 (2d Dep’t 1995) (finding that penalties of 180 days in the SHU and one year’s loss of good time were not so disproportionate to the offense ... as to *shock one’s sense of fairness*) (emphasis added)). In a discussion of this issue, John Boston & Dan Manville, PRISONERS’ SELF-HELP LITIGATION MANUAL, 124 (4<sup>th</sup> Ed. 2010), cites a number of cases employing various iterations of proportionality review specifically with regard to challenges of terms of solitary confinement as excessive. *Pearson v. Ramos*, 237 F.3d 881, 885 (7th Cir. 2001) (stating that court “continue[s] to recognize” norm of proportionality); *Adams v. Carlson*, 368 F. Supp. 1050, 1053 (E.D. Ill. 1973) (sixteen months’ segregation excessive for involvement in a work stoppage), on remand from 488 F.2d 619 (7th Cir. 1973); *Black v. Brown*, 524 F. Supp. 856, 858 (N.D.Ill. 1981) (eighteen months’ segregation excessive for running in the yard), *aff’d in part and rev’d in part*, 688 F.2d 841 (7th Cir. 1982); *Hardwick v. Ault*, 447 F.Supp. 116, 125-26 (M.D.Ga. 1978) (indefinite segregation held per se disproportionate); *Fulwood v. Clemmer*, 206 F. Supp. 370, 379 (D.D.C. 1962) (two years’ segregation excessive for disruptive preaching).

<sup>lix</sup> See, e.g., *D.B. v. Tewksbury*, 545 F.Supp. 896, 905 (D.Or.1982) (ruling that “[p]lacement of younger children in isolation cells as a means of protecting them from older children’ violates plaintiffs’ Due Process rights under the fourteenth amendment.”); *Inmates of Boys’ Training School v. Affleck*, 346 F.Supp. 1354 (D.C.R.I.1972); *Lollis v. N.Y. State Dep’t of Soc. Servs.*, 322 F.Supp. 473, 480-82 (S.D.N.Y.1970).

<sup>lx</sup> *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155-56 (D. Haw. 2006) (Concluding that, “The expert evidence before the court uniformly indicates that long-term segregation or isolation of youth is inherently punitive and is well outside the range of accepted professional practices... Defendants’ practices are, at best, an excessive, and therefore unconstitutional, response to

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legitimate safety needs of the institution.”); *Hughes v. Judd*, 8:12-cv-568-T-23MAP, 2013 WL 1821077 (M.D.Fl. 2013); *Troy D. and O'Neill S. v. Mickens et al.*, Civil Action No.: 1:10-cv-02902-JEI-AMD (D. N.J. 2013).

<sup>lxvi</sup> United Nations Declaration on the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/4354 (Nov. 20, 1959). Similarly, The American Convention on Human Rights (“Pact of San José, Costa Rica”), Article 19, states, “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.” Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>lxvii</sup> International Covenant on Civil and Political Rights, Arts. 10, 14(4), opened for signature Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by U.S. June 8, 1992) (“ICCPR”). The Human Rights Committee has interpreted the ICCPR’s provisions on child offenders to apply to all persons under the age of 18. UN Human Rights Comm., 44th Sess., General Comment No. 1, U.N. Doc. HRI/GEN/1/Rev.1 at 155 (1994), available at <http://www1.umn.edu/humanrts/gencomm/hrcoim20.htm>. Treaties signed and ratified by the United States are the “supreme Law of the Land.” U.S. CONST. art. VI cl. 2.

<sup>lxviii</sup> Convention on the Rights of the Child (CRC), opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (“CRC”). The United States signed the CRC in 1995 but has not ratified.

<sup>lxviiii</sup> U.N. Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112, Annex, 45 U.N. GAOR Supp. (No. 49A), U.N. Doc. A/45/49, at 201 (Dec. 14, 1990) (“The Riyadh Guidelines”).

<sup>lxviiii</sup> U.N. Comm. on the Rights of the Child, 44th Sess., General Comment No. 10, Children’s rights in juvenile justice, U.N. Doc. CRC/C/GC/10 (2007).

<sup>lxviiii</sup> U.N. Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, Annex, 45 U.N. GAOR Supp. (No. 49A), U.N. Doc. A/45/49, ¶ 67 (Dec. 14, 1990) (“The Beijing Rules”).

<sup>lxviiii</sup> Press Release, Annex to the Press Release Issued at the Close of the 147th Session (Apr. 5, 2013), available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/023A.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/023A.asp) (incorporating the definition of the United Nations Special Rapporteur on Torture, Mr. Juan Mendez, into the IACHR *corpus juris*).

<sup>lxviiii</sup> Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶¶ 78-85, Annex (Istanbul Statement on the Use and Effects of Solitary Confinement), U.N. Doc A/63/175 (July 28, 2008) (by Manfred Nowak), available at <http://www.unhcr.org/refworld/pdfid/48db99e82.pdf>; Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 77, U.N.Doc. A/66/268 (Aug. 5, 2011) (by Juan Mendez), available at <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>.

<sup>lxviiii</sup> *Graham v. Florida*, 130 S.Ct. at 2034; *Roper v. Simmons*, 543 U.S. at 575 (citing *Trop v. Dulles*, 356 U.S. 86, 102- 103 (1958)). These cases start from the supposition that, whether a punishment is “cruel and unusual” is a determination informed by “evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).