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# Digging Out of the Hole: Arguments Against the Use of Juvenile Solitary Confinement in Kentucky

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# NOTES

## Digging Out of the Hole: Arguments Against the Use of Juvenile Solitary Confinement in Kentucky

Mary Ann Lee<sup>1</sup>

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## INTRODUCTION

The United States confines hundreds of thousands of children each year to cells approximately the size of an apartment bathroom. The children live in these cells, staring at concrete walls, for twenty-three hours per day, free for only one hour of recreation.<sup>1</sup> The Department of Justice recently estimated that as many as 17,000 juveniles live in isolation cells nationwide.<sup>2</sup> One in five juvenile jails employ punitive isolation to punish children for a wide range of infractions.<sup>3</sup> Isolation is an unnecessarily harsh punishment technique that is overused against children throughout the United States. Kentucky joins ten states that authorize punitive juvenile solitary confinement for an indefinite period of time.<sup>4</sup>

Criticism against the use of punitive solitary confinement has steadily risen in recent years. President Obama,<sup>5</sup> the American Academy of Child and Adolescent Psychiatry,<sup>6</sup> the United Nations,<sup>7</sup> Kentucky Senator Rand Paul,<sup>8</sup> and the United States Department of Justice,<sup>9</sup> among others, have spoken out against punitive juvenile solitary confinement—advocating for its elimination because the harm greatly outweighs the benefits. States surrounding Kentucky, including Illinois,<sup>10</sup>

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<sup>1</sup> Abby Taskier, *DC's Youth Face Solitary Confinement in District Jails and Federal Prisons*, SOLITARY WATCH (Dec. 19, 2013), <http://solitarywatch.com/2013/12/19/dcs-youth-face-solitary-confinement-district-jails-federal-prisons/>.

<sup>2</sup> Timothy Williams, *Locked in Solitary at 14: Adult Jails Isolate Juveniles Despite Risk*, N.Y. TIMES (Aug. 15, 2015), [http://www.nytimes.com/2015/08/16/us/citing-safety-adult-jails-put-juveniles-in-solitary-despite-risks.html?\\_r=1](http://www.nytimes.com/2015/08/16/us/citing-safety-adult-jails-put-juveniles-in-solitary-despite-risks.html?_r=1).

<sup>3</sup> Dana Liebelson, *This Is What Happens When We Lock Children in Solitary Confinement*, MOTHER JONES (Jan./Feb. 2015), <http://www.motherjones.com/politics/2014/01/juveniles-kids-solitary-confinement-ohio-new-york>.

<sup>4</sup> Dana Liebelson, *In 10 States, Children Can Be Punished with Indefinite Solitary Confinement*, HUFFINGTON POST (Nov. 2, 2015, 1:21 PM), [http://www.huffingtonpost.com/entry/children-solitary-confinement\\_us\\_5637991fe4b00aa54a4ee011](http://www.huffingtonpost.com/entry/children-solitary-confinement_us_5637991fe4b00aa54a4ee011).

<sup>5</sup> Editorial, *President Obama Takes on the Prison Crisis*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/opinion/president-obama-takes-on-the-prison-crisis.html> (discussing solitary confinement generally).

<sup>6</sup> Juvenile Justice Reform Comm., *Solitary Confinement of Juvenile Offenders*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Apr. 2012), [https://www.aacap.org/aacap/Policy\\_Statements/2012/Solitary\\_Confinement\\_of\\_Juvenile\\_Offenders.aspx](https://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx).

<sup>7</sup> *Id.*

<sup>8</sup> Press Release, U.S. Senator Cory Booker, Booker Introduces Legis. Banning Juv. Solitary Confinement (Aug. 5, 2015), [http://www.booker.senate.gov/?p=press\\_release&id=293](http://www.booker.senate.gov/?p=press_release&id=293); Liebelson, *supra* note 3.

<sup>9</sup> *Combating Excessive Use of Juvenile Solitary Confinement*, U.S. DEPT JUST. (May 13, 2014), <http://www.justice.gov/opa/video/combating-excessive-use-juvenile-solitary-confinement?page=1>.

<sup>10</sup> *R.J. v. Jones*, AM. C.L. UNION ILL., <http://www.aclu-il.org/r-j-v-bishop22/> (last visited Oct. 3, 2016).

West Virginia,<sup>11</sup> and Ohio,<sup>12</sup> have eliminated using isolation as a punishment against youth. Kentucky should join these states, as solitary confinement directly contradicts the goals of Senate Bill 200, the Juvenile Justice Reform Bill.

Kentucky recently enacted Senate Bill 200, commonly referred to as the Juvenile Justice Reform Bill, which raises the standard for committing children to juvenile facilities.<sup>13</sup> However, Kentucky continues to utilize indefinite punitive solitary confinement, a practice contrary to Senate Bill 200's stated goal of reducing the number of incarcerated children.<sup>14</sup> Isolated children are more likely to reoffend because the brain damage resulting from isolation permanently changes their impulse control and ability to make mature decisions.<sup>15</sup> As such, Kentucky should join the growing consensus asserting that juvenile punitive solitary confinement violates the constitutional rights of youth in detention and eliminate this damaging practice.

Part I of this Note begins with an explanation of the practices commonly employed by states that authorize solitary confinement, an examination of the changing landscape of punitive solitary confinement across America, and a description of Kentucky's practices. Part II discusses the scientific effects of isolation on children's brains, extrapolated from studies conducted on adults and juvenile animals in solitary confinement. Part III discusses how indefinite punitive solitary confinement violates constitutional protections and examines how the federal government and other states have used these arguments to eradicate its use. Part IV argues that juvenile solitary confinement contributes to recidivism and directly contradicts the goals of Senate Bill 200. Part V offers solutions and alternatives, including abolishing the practice completely.

## I. THE USE OF PUNITIVE JUVENILE SOLITARY CONFINEMENT IN KENTUCKY AND ACROSS THE UNITED STATES

Many juvenile facilities today place children in punitive and non-punitive solitary confinement under the guise of *parens patriae*: the belief that the state can act as a surrogate parent, taking youth into custody and rehabilitating them.<sup>16</sup> Although juvenile solitary confinement is a prevalent practice, it goes by many

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<sup>11</sup> Associated Press, *W. Va. Ends Solitary Confinement for Juveniles*, TIMES WEST VIRGINIAN (Apr. 26, 2012), [http://www.timeswv.com/news/w-va-ends-solitary-confinement-for-juveniles/article\\_79dc1c7e-3279-5e97-adeb-fc45c9c2deaa.html](http://www.timeswv.com/news/w-va-ends-solitary-confinement-for-juveniles/article_79dc1c7e-3279-5e97-adeb-fc45c9c2deaa.html).

<sup>12</sup> *Justice Department Settles Lawsuit Against State of Ohio to End Unlawful Seclusion of Youth in Juvenile Correctional Facilities*, U.S. DEP'T JUST. (May 21, 2014), <http://www.justice.gov/opa/pr/justice-department-settles-lawsuit-against-state-ohio-end-unlawful-seclusion-youth-juvenile> [hereinafter *Lawsuit to End Juvenile Seclusion in Ohio*].

<sup>13</sup> *Kentucky's 2014 Juvenile Justice Reform*, THE PEW CHARITABLE TRUSTS 1, 7-8 (July 2014), <http://www.pewtrusts.org/~media/assets/2014/07/psppkyjuvenilejusticereformbriefjuly2014.pdf>.

<sup>14</sup> *Id.* at 1.

<sup>15</sup> Liebelson, *supra* note 3.

<sup>16</sup> Liebelson, *supra* note 3.

names: the shu, the box, 23-1, and more.<sup>17</sup> This makes accountability difficult for advocates. Additionally, there is no public reporting mechanism that requires the state to publish the number of isolated juveniles. Despite these difficulties, many states, the federal government, and many agencies have come to understand the harmful effects of juvenile solitary confinement and have banned or spoken against the practice.

Facilities use solitary confinement for punitive and non-punitive reasons. Punitive confinement places a youth in solitary as a sanction for a specified or unspecified amount of time.<sup>18</sup> Non-punitive confinement isolates youth because they pose a threat to themselves, others, or the security of the facility, and authorizes release when they no longer pose a risk.<sup>19</sup> However, the line between punitive and non-punitive often blurs as juvenile facility staff loosely interpret the requirements, leading to the use of punitive-like solitary confinement.<sup>20</sup> Kentucky explicitly authorizes non-punitive confinement<sup>21</sup> and remains one of ten states in the country that authorizes indefinite punitive solitary confinement.<sup>22</sup> Kentucky continues to authorize punitive and non-punitive solitary confinement indefinitely.<sup>23</sup>

#### *A. The Hole: Rationale, Terms, Duration, and Frequency of Solitary Confinement*

Prisons have used solitary confinement since the 1800s, when administrators believed placing a person in solitude would cause them to repent and change their criminal behavior.<sup>24</sup> The practice remained relatively uncommon until twenty years ago. At that time, the number of incarcerated juveniles rose after criminal justice systems adopted stricter sanctions for youth in response to the crack epidemic and the fears of violent, youthful “super-predators.”<sup>25</sup> Correctional facilities justified these measures through the *parens patriae* doctrine, where the “state serves as a surrogate parent, educating and rehabilitating wayward kids.”<sup>26</sup> Kentucky adopted a similar rationale for its juvenile justice system: to “provide services for the

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<sup>17</sup> *Infra* note 32 and accompanying text.

<sup>18</sup> Kraner et al., *supra* note 28, at 2, 10.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> *Id.*

<sup>21</sup> DJJ 323, *supra* note 23.

<sup>22</sup> Liebelson, *supra* note 4.

<sup>23</sup> JUSTICE AND PUB. SAFETY CABINET DEP'T OF JUVENILE JUSTICE POLICY AND PROCEDURES, POLICY NO. DJJ 323 (2016), <http://djj.ky.gov/300%20Policy%20Manual/DJJ%20323%20Isolation.pdf> [hereinafter DJJ 323].

<sup>24</sup> Liebelson, *supra* note 3.

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

<sup>26</sup> *Id.*

rehabilitation of probated and committed youth.”<sup>27</sup> Although juvenile solitary confinement eventually became an institutional, common practice, many jurisdictions have recently banned solitary confinement, while others question their commitment.<sup>28</sup> Kentucky should follow this trend and recognize that placing juveniles in solitary confinement indefinitely does not serve the goals of rehabilitation or education.

Institutions and youth use many terms to describe solitary confinement, which create barriers to advocates attempting to track its prevalence and duration.<sup>29</sup> Solitary confinement is generally understood to be “the placement of an incarcerated individual in a locked room or cell with minimal or no contact with people other than staff of the correctional facility.”<sup>30</sup> Juvenile facilities describe the practice as “room restriction, segregation, isolation, room lock, lockdown, seclusion, behavior modification unit, and others.”<sup>31</sup> Slang terms among youth include “lockup, 23 and 1, dark room.”<sup>32</sup> These seemingly innocuous terms create barriers for advocates trying to track the number of juveniles in isolation and create systems of accountability.

The lack of published statistics creates another barrier for advocates trying to determine the prevalence of solitary confinement.<sup>33</sup> Few studies exist about the use of juvenile solitary confinement in America. The Department of Justice (“DOJ”) conducted one study in 2011, which determined that 61,423 minors lived in

<sup>27</sup> JUSTICE CABINET DEPT JUVENILE JUSTICE POLICY AND PROCEDURES, POLICY NO. DJJ 300.1 (2016), <http://djj.ky.gov/300%20Policy%20Manual/DJJ%20300-1%20Programs%20and%20Services.pdf> [hereinafter DJJ 300.1].

<sup>28</sup> See Natalie J. Kraner et al., *51 – Jurisdictional Survey of Juvenile Solitary Confinement Rules in Juvenile Justice Systems*, LOWENSTEIN CTR. FOR PUB. INT. 1, 2 (October 2015), <http://www.lowensteinprobono.com/files/Uploads/Documents/Pro%20Bono/51-Jurisdiction%20Survey%20of%20Juvenile%20Solitary%20Confinement%20Rules.pdf>.

<sup>29</sup> Rachel Barth, *U.S. Prisons Are Trying to Rebrand Solitary Confinement*, BUS. INSIDER (Apr. 11, 2014, 2:51 PM), <http://mobile.businessinsider.com/prisons-want-to-rebrand-solitary-confinement-2014-4> (discussing how the juvenile justice system has rebranded solitary confinement, now calling it other various terms).

<sup>30</sup> Juvenile Justice Reform Comm., *supra* note 6.

<sup>31</sup> See, e.g., Kraner, *supra* note 28, at 10; see also Barth, *supra* note 29 (discussing the rebranding of solitary confinement). A further illustration: Kentucky’s Department of Corrections, which regulates the adult prison system in the state, refers to solitary confinement as “administrative segregation,” “disciplinary segregation,” and “protective custody.” KY. CORR. POLICIES AND PROCEDURES, SPECIAL MGMT. INMATES, POLICY NO. 10.2, 1 (2015), <http://corrections.ky.gov/communityinfo/Policies%20and%20Procedures/Documents/CH10/PPP%2010-2%20Effect%207-31-15.pdf> [hereinafter SPECIAL MGMT. INMATES, POLICY NO. 10.2].

<sup>32</sup> Barth, *supra* note 29; see also Liebelson, *supra* note 3 (referring to solitary confinement as the “hole”); Am. Civil Liberties Union & Human Rights Watch, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, AM. C.L. UNION 1, 131 (Oct. 2012), [https://www.aclu.org/sites/default/files/field\\_document/us1012webcover.pdf](https://www.aclu.org/sites/default/files/field_document/us1012webcover.pdf) (referring to solitary confinement as SHU).

<sup>33</sup> *Alone & Afraid: Children Held in Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities*, AM. C.L. UNION 1, 7 (June 2014), <https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf> [hereinafter *Alone & Afraid*].

juvenile facilities across the United States. One in five of those facilities used isolation as a punitive measure.<sup>34</sup> Recently, the DOJ estimated the number of juveniles in solitary confinement at 17,000.<sup>35</sup> This number has certainly changed as more states restrict or eliminate the use of solitary confinement. The Office of Juvenile Justice and Delinquency Prevention conducted an anonymous survey of 7,073 children in residential placements (“SYRP”) and asked them to describe their experiences in juvenile facilities that ranged from community placement to correctional facilities.<sup>36</sup> Of the juveniles surveyed, 35% reported being isolated in their rooms or in solitary confinement.<sup>37</sup> Over half of the juveniles surveyed reported being isolated longer than twenty-four hours and 87% reported being isolated over two hours.<sup>38</sup> Although best practice guidelines recommend that juveniles see a counselor after being confined for over two hours, 52% of those locked in solitary confinement did not speak to a counselor.<sup>39</sup> It is clear the reported number of juveniles in solitary confinement is, at best, an educated guess. There are no published statistics about the number of juveniles held in solitary confinement in Kentucky.

Many juveniles are housed in solitary confinement within adult facilities as a protective measure while awaiting adjudication, or after sentencing when charged as an adult.<sup>40</sup> The rate of suicide among these youth is approximately double that of adults held in solitary confinement.<sup>41</sup> In addition, many transgender youth are held

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<sup>34</sup> Liebelson, *supra* note 3.

<sup>35</sup> Williams, *supra* note 2.

<sup>36</sup> Andrea J. Sedlak & Karla S. McPherson, *Conditions of Confinement: Findings from the Survey of Youth in Residential Placement*, U.S. DEPT JUSTICE 1, 1–2 (May 2010), <https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf>.

<sup>37</sup> *Id.* at 9.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Am. Civil Liberties Union & Human Rights Watch, *supra* note 32, at 48. The ACLU and Human Rights Watch reports that 95,000 juveniles were held in adult prisons and jails in 2011. *Id.* at 2. The Prison Rape Elimination Act (PREA) mandates that youth under the age of 18 must be separated by sight and sound from adult inmates and no child may be “placed in a housing unit in which the youthful inmate will have sight, sound, or physical contact with any adult inmate through use of a shared dayroom or other common space, shower area, or sleeping quarters.” National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37130 (June 20, 2012) (codified at 28 C.F.R. pt. 115). This leads many prisons to isolate youth from adult inmates by using solitary confinement despite PREA’s admonition against the practice. Am. Civil Liberties Union & Human Rights Watch, *supra* note 32, at 48.

<sup>41</sup> See *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. 3 (2014) (statement of Carmen E. Daugherty, Policy Director, Campaign for Youth Justice), <http://www.campaignforyouthjustice.org/documents/Testimonies/senate%20judiciary%20testimony%202014.pdf> (explaining that from 2000 to 2007, the “suicide rate of youth in jails was 63.0 per 100,000 under-18 inmates, as compared to 42.1 per 100,000 inmates overall, and 31 per 100,000 inmates aged 18–24.”).



in solitary confinement as a protective measure.<sup>42</sup> Because of these high statistics, the DOJ calls for housing youth who must be held in adult facilities in dedicated units, or reforming sentencing practices to allow youth to remain in juvenile facilities.<sup>43</sup> While these topics certainly deserve attention, they are beyond the scope of this paper.

*B. A Dwindling Number: The Use of Punitive Juvenile Solitary Confinement Across the United States*

The conversation surrounding juvenile solitary confinement has quickly changed as federal, state, and international governments recognize the detriments of isolating children. Throughout the past two years, the number of states that ban punitive solitary confinement has increased.<sup>44</sup> Initially, the federal government recognized the inherently different needs of incarcerated children when it passed the Juvenile Justice and Delinquency Prevention Act (“JJDPA”), which created financial incentives for states to provide effective youth rehabilitation and treatment.<sup>45</sup> On August 5, 2015, Senators Rand Paul, Cory Booker, Dick Durbin, and Mike Lee introduced the Maintaining dignity and Eliminating unnecessary Restrictive Confinements of Juveniles Act of 2015 (“MERCY Act”) to ban federal juvenile solitary confinement except “as a temporary response to a behavioral issue that poses serious and immediate risk to any individual.”<sup>46</sup> Before Congress voted on the Act, President Obama issued a series of orders banning juvenile solitary confinement in federal prisons, calling the practice “an affront to our common humanity.”<sup>47</sup> The U.S. Attorney General’s National Task Force on Children Exposed to Violence echoed President Obama’s concern: “Nowhere is the damaging impact of incarceration on vulnerable children more obvious than when

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<sup>42</sup> Am. Civil Liberties Union & Human Rights Watch, *supra* note 32, at 56; *see also* SPECIAL MGMT. INMATES, POLICY NO. 10.2, *supra* note 31, at 1 (showing that the Kentucky Department of Corrections policy manual provides that inmates may be placed in protective custody if they are “in danger of being harmed by any other inmate or who, for various reasons other than a rule violation, [are] unable to adjust to living in the general inmate population.”).

<sup>43</sup> National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37130 (June 20, 2012) (codified at 28 C.F.R. pt. 115).

<sup>44</sup> Compare Catherine Weiss et al., *51-Jurisdictional Survey of Juvenile Solitary Confinement Rules in Juvenile Justice Systems*, LOWENSTEIN CTR. FOR PUB. INT. 1 (August 2013), <https://www.lowenstein.com/files/upload/SolitaryConfinementSurvey.pdf> (showing that nineteen states have banned lengthy punitive solitary confinement), *with* Kraner et al., *supra* note 28, at 2 (showing that twenty-one states have banned punitive solitary confinement).

<sup>45</sup> *History of the JJDPA*, COALITION FOR JUV. JUST., <http://www.juvjustice.org/federal-policy/juvenile-justice-and-delinquency-prevention-act> (last visited Oct. 3, 2016).

<sup>46</sup> Press Release, U.S. Senator Cory Booker, *supra* note 8.

<sup>47</sup> Barack Obama, Opinion, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce\\_story.html?tid=a\\_inl](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?tid=a_inl).

it involves solitary confinement.<sup>748</sup> These changes only apply to children in federal prisons, however, and do not apply to children in facilities managed by the Kentucky Department of Juvenile Justice.

Not only has national awareness with regard to juvenile solitary confinement in the United States risen, the international community has taken notice. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty banned solitary confinement in 1990, “[a]ll disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned.”<sup>749</sup>

### *C. Threat to Orderly Management: The Use of Punitive Juvenile Solitary Confinement in Kentucky*

The Kentucky Department of Juvenile Justice (“DJJ”) regulates the discipline of children in its care and explicitly authorizes potentially indefinite punitive solitary confinement.<sup>50</sup> The DJJ operates long term residential youth development centers (“YDCs”) for children committed to state custody and short term juvenile detention centers for youth awaiting adjudication.<sup>51</sup> Kentucky authorizes six types of solitary confinement for major rule violations in YDCs: isolation, room confinement, room restriction, intensive room restriction, intensive room supervision, and time out.<sup>52</sup> Juvenile detention centers utilize isolation, room restriction, and time out.<sup>53</sup> All of these involve placing a child in a room or a space, alone, for a period of time. However, only isolation involves placing a child alone for a potentially indefinite period of time.<sup>54</sup>

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<sup>48</sup> ROBERT L. LISTENBEE, JR. ET AL., REPORT OF THE ATTORNEY GENERAL’S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 178 (2012), <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>.

<sup>49</sup> Juvenile Justice Reform Comm., *supra* note 6.

<sup>50</sup> DJJ 323, *supra* note 23.

<sup>51</sup> *Facilities*, DEP’T OF JUV. JUST., <http://djj.ky.gov/Facilities/Pages/default.aspx> (last visited Oct. 3, 2016). In juvenile courts, adjudication refers to a finding of guilt by a judge, similar to an adult conviction. *Commonly Used Terms*, JUV. L. CTR., <http://jlc.org/news-room/media-resources/glossary> (last visited Aug. 7, 2016).

<sup>52</sup> JUSTICE AND PUB. SAFETY CABINET DEP’T OF JUVENILE JUSTICE POLICY AND PROCEDURES, POLICY NO. DJJ 318.1 (2016), <http://djj.ky.gov/300%20Policy%20Manual/DJJ%20318-1%20Graduated%20Responses%20Sanctions%20and%20Incentives.pdf> [hereinafter DJJ 318.1].

<sup>53</sup> JUSTICE CABINET DEP’T OF JUVENILE JUSTICE POLICY AND PROCEDURES, POLICY NO. DJJ 717 (2006), <http://djj.ky.gov/700%20Policy%20Manual/717%20Discipline%20021506.pdf>.

<sup>54</sup> Intensive room supervision, like isolation, involves placing a youth alone in an isolation room for up to twenty-four hours, except the door remains open and under constant staff supervision. *Id.* Facilities use this when a youth “is showing or expressing a behavior that is a safety or security threat to the program; . . . [a]s a less restrictive attempt to avoid a locked isolation placement; or . . . as a step-down from an isolation placement.” *Id.* Room restriction removes child from the general population for

All YDCs may isolate “[y]outh who threaten the safety, security, and orderly management of the facility [by separating them] from the general population and [placing them] in special isolation units to allow for individualized intervention.”<sup>55</sup> The range of offenses that could land a child in isolation vary. These include: assault, attempted assault, sexual assault, attempted sexual assault, escape, attempted escape, absent without leave (“AWOL”), attempted AWOL, riot, plotting a riot, dangerous contraband, extensive property damage, and chronic program disruption.<sup>56</sup> While many of these offenses seem to be justified by their threat to the safety of the staff or other youth, other offenses have the potential for ambiguity and overuse: plotting a riot, dangerous contraband, and chronic program disruption are not defined in Kentucky’s Juvenile Justice Policy and Procedure Manual (“Policy Manual”). These could easily be used to isolate youth for speaking out of turn, holding a pencil outside of class, or giggling in class.

The Policy Manual authorizes indefinite isolation. Although the Policy Manual states “youth shall not be isolated longer than necessary,”<sup>57</sup> the Superintendent can authorize isolation beyond four hours, and the Director of Medical Services or the Chief of Mental Health Services can authorize isolation over the stated five-day maximum.<sup>58</sup> Although, once a child is placed in locked-door isolation, a staff member must create a plan for release and conduct a review every four hours. This is done to determine if the child is following the plan.<sup>59</sup> An uninvolved staff member must also conduct an isolation placement review every twenty-four hours. The Superintendent, Treatment Director, Facility Nurse, and Psychologist should also visit the child every day, according to the Policy Manual.<sup>60</sup>

Although “[i]solation shall not be used as a suicide precaution,”<sup>61</sup> suicidal children can be placed in or remain in isolation. If a child becomes suicidal after being placed in isolation and presents an immediate assault risk to staff or other youth, the staff can authorize the youth to remain in isolation.<sup>62</sup> The staff must reevaluate the youth’s mental status if the youth becomes suicidal, assaultive, or homicidal again.<sup>63</sup> If a youth becomes suicidal outside of isolation, staff can place the youth in isolation if he or she “present[s] an immediate assault risk to staff or

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behavior management and to allow them to “process their behavior.” *Id.* Children on room restriction must remain within sight and sound and can remain the way up to twelve hours. *Id.* Room confinement involves placing a child housed at a level five facility in a separate room with the door closed to avoid a placement in isolation. *Id.* Room confinement can occur up to four hours once each twenty-four-hour period. *Id.* Time out temporarily removes the child; staff can initiate a time out and time out can last up to one hour. *Id.*

<sup>55</sup> DJJ 323, *supra* note 23.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

other youth” and if other less restrictive interventions have failed or are inappropriate.<sup>64</sup>

The Policy Manual provides youth accused of major rule violations and subject to isolation, room confinement, intensive room supervision, etc., in YDCs and detention centers with few guaranteed rights. Accused youth have the right to an investigation within twenty-four hours of the accusation, notice in the form of a penalty slip, and a hearing before the treatment team where the child can make a statement, call witnesses (if the witnesses’ behavior permits), and have staff representation (if the staff is on duty in juvenile detention centers) within seven business days, although this time can be extended.<sup>65</sup> Youth have a right to attend “unless [their] behavior justifies exclusion” or the youth waives attendance in writing.<sup>66</sup> Although the Policy Manual states that isolation may last up to five days per offense, the treatment team is required to meet within seven business days, so a child could potentially remain in isolation or any other form of solitary confinement for more than five days.<sup>67</sup>

If the youth is found guilty, the treatment team imposes additional sanctions, which can include isolation. Interestingly, the Policy Manual warns that sanctions shall not “include the use of restraints or isolation,” but it allows “impos[ing] additional measures on a youth for the behavior requiring isolation or restraint.”<sup>68</sup> So, theoretically, the hearing could occur with a youth representing themselves without legal knowledge or witnesses, without the youth present whatsoever, or after an indefinite amount of time. There are no policies guaranteeing the youth counsel, the right to attend, or a hearing within a definite period of time.

The Policy Manual does not require anyone to notify a court, attorney, or the child’s parents of placement in solitary confinement or these hearings. Therefore, there are no systems of accountability outside of the DJJ System to guarantee these hearings occur, or that youth receive due process within the hearing. The Confining Facility is required to make a note in the child’s hard and electronic file, which is reviewed by the Superintendent.<sup>69</sup> Increasing reporting requirements will provide accountability and protect the child’s due process rights by ensuring a party outside of the Confining Facility is aware of the confinement or sanctions imposed.

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<sup>64</sup> *Id.*

<sup>65</sup> JUSTICE CABINET DEP’T OF JUVENILE JUSTICE POLICY AND PROCEDURES, POLICY NO. DJJ 318.2 (2016), <http://djj.ky.gov/300%20Policy%20Manual/DJJ%20318-2%20%20Disciplinary%20Review.pdf> [hereinafter DJJ 318.2].

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> DJJ 318.1, *supra* note 52.

<sup>69</sup> DJJ 323, *supra* note 23.

## II. SOLITARY CONFINEMENT CREATES LONG-LASTING, DAMAGING EFFECTS AND PARTICULARLY HARMS CHILDREN BECAUSE OF THEIR STATUS AS DEVELOPING INDIVIDUALS

Since its inception, researchers have found that solitary confinement causes extreme and long-lasting effects, even finding indefinite solitary confinement too harsh of a punishment.<sup>70</sup> Current research indicates that isolation can cause its own syndrome: causing symptoms such as hallucinations, hyper-sensitivity, and perceptual distortions that only those in isolation experience.<sup>71</sup> Solitary confinement causes irreparable harm to the children who are forced to endure it. The effects suffered by adults are more pronounced in children because children's brains are still developing.<sup>72</sup> The chemistry of the brain changes as solitary confinement causes the release of cortisol and the development of synapses and the way the brain grows may be altered.<sup>73</sup> This prevents children from growing out of impulsive behaviors or developing coping skills, which increases rates of recidivism.<sup>74</sup> Kentucky should recognize these effects as what they are: antithetical to the goals of the juvenile justice system and Senate Bill 200.

### A. Significant Psychological Pain: Effects of Solitary Confinement on Adults

First called the "Philadelphia System," the American penal system introduced prolonged incarceration and solitary confinement in the early nineteenth century.<sup>75</sup> Although America eventually abandoned the system of universal, automatic, and prolonged solitary confinement, the effects were obvious: prisoners suffered from delirium, confusion, paranoia, hallucinations, intense agitation, self-directed violence, exacerbation of underlying mental illnesses, and inflicted "significant psychological pain."<sup>76</sup> It "impaired [the prisoners] capacity to adapt successfully to the broader prison environment."<sup>77</sup> In the case of *In re Medley*, the Supreme Court held that a sentence of indefinite solitary confinement was too extreme, stating:

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

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<sup>70</sup> See *In re Medley*, 134 U.S. 160, 168 (1890).

<sup>71</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U.J.L. & POL'Y, 2006 at 332.

<sup>72</sup> See *infra* note 80 and accompanying text (describing effects sustained by adults); Liebelson, *supra* note 3 (describing the fact that brains continue to develop into adulthood).

<sup>73</sup> Liebelson, *supra* note 3.

<sup>74</sup> *Id.*

<sup>75</sup> Grassian, *supra* note 71 at 325, 328.

<sup>76</sup> *Id.* at 328-29.

<sup>77</sup> *Id.* at 329.

not recover sufficient mental activity to be of any subsequent service to the community.<sup>78</sup>

Stuart Grassian, a psychiatrist studying the solitary confinement of women in Lexington, Kentucky, described similar symptoms: “[I]ndividuals will soon become incapable of maintaining an adequate state of alertness and attention to the environment. Indeed, even a few days of solitary confinement will predictably shift the electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium.”<sup>79</sup> He describes symptoms such as hyper-responsivity to external stimuli (such as noise, sound, and light); perceptual distortions, illusions, and hallucinations; panic attacks; difficulty with thinking, concentration, and memory; obsessions, typically rage or revenge (one prisoner obsessed over killing the guards); overt paranoia; and problems with impulse control.<sup>80</sup> Symptoms such as loss of perceptual constancy (which is when the prisoner experiences objects became larger and smaller, noises became softer and louder), severe hallucinations, and hypersensitivity to stimuli are very rare but occurred often after a person had been confined in isolation for a period of time.<sup>81</sup>

Although the women Grassian studied were highly educated and had no history of mental illness, they experienced high rates of perceptual disturbances, anxiety, and panic attacks.<sup>82</sup> They also experienced difficulty concentrating, thinking, and remembering.<sup>83</sup> One woman described her inability to write or concentrate past three hours of waking up, stating that she remained “in a fog” and unable to think clearly for the remainder of the day.<sup>84</sup>

The long-term effects of solitary confinement include post-traumatic stress disorder and personality changes, such as intolerance to social interaction, feeling withdrawn, and lasting fear.<sup>85</sup> These effects last for several years, leaving the person “dramatically different from their functioning prior to solitary confinement.”<sup>86</sup> Grassian suggests that solitary confinement creates its own syndrome because these symptoms are so rare on their own but occur together once a person has been placed in solitary confinement.<sup>87</sup> They affect people with no history of mental illness.<sup>88</sup> These effects also translate to children.<sup>89</sup>

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<sup>78</sup> *In re Medley*, 134 U.S. 160, 168 (1890).

<sup>79</sup> Grassian, *supra* note 71, at 327, 330–31, 352.

<sup>80</sup> *Id.* at 335–36.

<sup>81</sup> *Id.* at 337; *see also Alone & Afraid*, *supra* note 33, at 4.

<sup>82</sup> Grassian, *supra* note 71, at 352–53.

<sup>83</sup> *Id.* at 353.

<sup>84</sup> *Id.* at 353.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 354.

<sup>87</sup> *Id.* at 333, 335–38.

<sup>88</sup> *Id.* at 352–53.

<sup>89</sup> *Alone & Afraid*, *supra* note 33 at 4–5.

*B. Losing Motivation: Effects of Solitary Confinement on Children*

While research on the effects of solitary confinement on developing juvenile brains is rare, research does indicate that prolonged isolation has direct and lasting effects. Children experience time differently, so a day for a child feels longer than a day for an adult.<sup>90</sup> They also have an increased need for social stimulation.<sup>91</sup> These perceptual differences make it more difficult for children to withstand solitary confinement and cause the effects to be longer lasting.<sup>92</sup> The prefrontal cortex, the section of the brain that impacts self-control, working memory, and decision-making, continues to develop through adulthood, actively changing as teenagers develop.<sup>93</sup> Research on adolescent marmosets indicates that isolation increases the stress hormone cortisol and decreases the production of neurons in the hippocampus.<sup>94</sup> In one research study, the marmosets stopped cleaning themselves and became anxious while isolated.<sup>95</sup> David Chura, a teacher who spent a decade teaching isolated youth in New York, watched his students experience similar effects.<sup>96</sup> They began to experience many of the same symptoms: “The motivation for doing anything was lost.”<sup>97</sup> Researchers believe the results from the studies involving animals can be directly extrapolated and applied to human teenagers: “[T]he results would suggest that kids already prone to breaking rules will become even *more* likely to act out” because a whole different network develops.<sup>98</sup> This, in turn, leads to symptoms of mental illness and drug addiction, increasing the risk of recidivism.<sup>99</sup>

The American Academy of Child and Adolescent Psychiatry recognizes the unique impact solitary confinement has on children as their brains continue to form: “The potential psychiatric consequences of prolonged solitary confinement are well recognized and include depression, anxiety and psychosis. Due to their developmental vulnerability, juvenile offenders are at particular risk of such adverse reactions.”<sup>100</sup> These symptoms sound quite similar to the syndrome symptoms described by Dr. Grassian in adults.<sup>101</sup>

These adverse reactions often lead to suicide, as the children are unable to cope and their perception of time lengthens.<sup>102</sup> The rate of suicide among children

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<sup>90</sup> *Alone & Afraid*, *supra* note 33, at 5.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 4–5.

<sup>93</sup> Laura Dimon, *How Solitary Confinement Hurts the Teenage Brain*, ATLANTIC (June 30, 2014), <http://www.theatlantic.com/health/archive/2014/06/how-solitary-confinement-hurts-the-teenage-brain/373002/>.

<sup>94</sup> Liebelson, *supra* note 3.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Juvenile Justice Reform Comm., *supra* note 6 (footnotes omitted).

<sup>101</sup> Grassian, *supra* note 71, at 335–37.

<sup>102</sup> *Alone and Afraid*, *supra* note 33, at 5.

isolated in juvenile correctional facilities is significantly higher than those children who are not isolated.<sup>103</sup> According to former Attorney General Eric Holder, one half of juveniles who commit suicide while in custody do so while in solitary confinement, and 62% of children who committed suicide had been isolated in solitary confinement at one point.<sup>104</sup> The notes to the Prison Rape Elimination Act state that “[a]mong other things, isolation puts youth at greater risk of committing suicide . . . [a recent] survey determined that 50.6% of the suicides occurred when inmates were confined to their rooms outside of traditional nonwaking [sic] hours as a behavioral sanction.”<sup>105</sup> Placing children in prolonged solitary confinement directly harms them by increasing the prevalence of mental illness, ultimately resulting in suicide.

These harmful effects demonstrate that placing juveniles in solitary confinement is antithetical to the stated goal of the Kentucky Juvenile Justice system, which is to “provide services for the rehabilitation of probated and committed youth.”<sup>106</sup> As the American Civil Liberties Union notes, “[h]olding children in solitary confinement can thus result in long-term harm, undermining their future and the purported goals of the juvenile justice system.”<sup>107</sup> The National Research Council of the National Academies of Sciences agrees: “confinement [of children] under punitive conditions may increase recidivism.”<sup>108</sup> Therefore, instead of rehabilitating youth, solitary confinement increases rates of suicide, recidivism, and re-incarceration.

### III. JUVENILE SOLITARY CONFINEMENT VIOLATES CONSTITUTIONAL PROTECTIONS AND VIOLATES THE SUPREME COURT’S HOLDINGS THAT CHILDREN ARE DIFFERENT FROM ADULTS

In the 1970s, courts addressed Eighth Amendment and substantive due process challenges to juvenile solitary confinement on behalf of children committed and awaiting disposition.<sup>109</sup> However, since that wave of litigation passed, fewer parties have litigated the issue, instead choosing to settle the cases through consent decrees

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<sup>103</sup> See Juvenile Justice Reform Comm., *supra* note 6.

<sup>104</sup> Press Release, Dep’t of Justice, Office of Pub. Affairs, Attorney General Holder Criticizes Excessive Use of Solitary Confinement for Juveniles with Mental Illness (May 14, 2014), <https://www.justice.gov/opa/pr/attorney-general-holder-criticizes-excessive-use-solitary-confinement-juveniles-mental>.

<sup>105</sup> National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37130 (June 20, 2012) (codified at 28 C.F.R. pt. 115).

<sup>106</sup> DJJ 300.1, *supra* note 27.

<sup>107</sup> *Alone & Afraid*, *supra* note 33, at 5.

<sup>108</sup> *Id.* at 2 (quoting Letter from Robert L. Listenbee, Admin., U.S. Dep’t of Justice, to Jesselyn McCurdy, Senior Legislative Counsel, Am. Civil Liberties Union (July 5, 2013), [https://www.aclu.org/sites/default/files/assets/doj\\_ojdp\\_response\\_on\\_jj\\_solitary.pdf](https://www.aclu.org/sites/default/files/assets/doj_ojdp_response_on_jj_solitary.pdf)).

<sup>109</sup> See generally *Lollis v. N.Y. State Dep’t of Soc. Servs.*, 322 F. Supp. 473 (S.D.N.Y. 1970).



and judicial oversight.<sup>110</sup> The passage of the Civil Rights of Institutionalized Persons Act (“CRIPA”), 42 U.S.C. § 1997, in 1980 may have influenced this area, as the DOJ began investigating conditions of juvenile confinement throughout the United States.<sup>111</sup> Substantive due process and the Eighth Amendment remain the two constitutional arguments plaintiffs and the DOJ raise on behalf of children.

*A. Contemporary Standards of Decency: Punitive Solitary Confinement  
Amounts to Cruel and Unusual Punishment*

Courts have applied the Eighth Amendment to juveniles committed to correction facilities and determined that certain forms of juvenile solitary confinement violate the Eighth Amendment prohibition of cruel and unusual punishment.<sup>112</sup> In order for a deprivation to rise to a violation of the Eighth Amendment, it must “result in the denial of ‘the minimal civilized measure of life’s necessities.’”<sup>113</sup> The plaintiffs must show that the defendants were “deliberately indifferen[t] to a substantial risk of serious harm.”<sup>114</sup> The first prong, deliberate indifference, is a subjective question—were the guards aware of facts that a substantial risk of harm could be inferred from, *and* did they draw that inference?<sup>115</sup> The harm must be “longstanding, pervasive, well-documented, or expressly noted by prison officials in the past” so that they “must have known about” the risk.<sup>116</sup> The second prong, the risk of harm, is an objective question and looks to (1) the seriousness of the injury, (2) whether there is a sufficient likelihood that serious

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<sup>110</sup> See Consent Decree at 3, *U.S. v. Kentucky*, No. 95-CV-757 (W.D. Ky. Nov. 13, 1995), <http://www.clearinghouse.net/chDocs/public/JI-KY-0004-0005.pdf>.

<sup>111</sup> *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155–56 (D. Haw. 2006); *D. B. v. Tewksbury*, 545 F. Supp. 896, 905 (D. Or. 1982). Kentucky has its own history with CRIPA: in 1995 the Department of Justice opened CRIPA investigations into five youth development centers across the state. See Consent Decree at 3, *U.S. v. Kentucky*, No. 95-CV-757 (W.D. Ky. Nov. 13, 1995), <http://www.clearinghouse.net/chDocs/public/JI-KY-0004-0005.pdf>. The DOJ found that conditions in the centers utilized isolation excessively and the parties entered into a consent decree whereby Kentucky agreed to protect the youth from arbitrary and harmful uses of time out and isolation by creating policies that clarified eligible infractions and oversight. *Id.*

In 1997, the DOJ conducted a similar investigation into a YDC and two detention centers and found that the staff placed the youth at risk of suicide because they locked them in their cells for sixteen to twenty hours per day. BILL LANN LEE, FULL TEXT OF DEPARTMENT OF JUSTICE REPORT 1, 4, 14 (1998),

<http://www.clearinghouse.net/detailDocument.php?id=1471&search=source|general;caseType|JI;caseState|KY;chDocument.caseNum|0001;orderby|chDocument.docDate%20DESC>; The DOJ noted that, although the policy manual mandated a hearing with notice and representation, youth were rarely provided these procedural safeguards. *Id.*

<sup>112</sup> See *Morales v. Turman*, 562 F.2d 993, 998–99 (5th Cir. 1977).

<sup>113</sup> *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 256 (3d Cir. 2010) (quoting *Farmer v. Brennan*, 511 U.S. 825, 835 (1994)).

<sup>114</sup> *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 828 (1994)).

<sup>115</sup> *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

<sup>116</sup> *Id.* at 842.

injury will result, and (3) whether the risks associated with the activity violate contemporary standards of decency.<sup>117</sup>

Advocates against juvenile solitary confinement argue that our maturing society should refuse to accept isolating children as a general practice because of its damaging psychological effects—as evidenced by the many states banning its practice. In one of the most cited cases regarding juvenile solitary confinement, *Lollis v. New York State Dept. of Social Services*, the court emphasized that the Eighth Amendment is a changing standard that “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>118</sup> In *Lollis*, the court held that isolating a child in a room with a bench, no blanket, no access to light, in night clothes, without recreation or reading material, and without an end date amounted to cruel and unusual punishment.<sup>119</sup> The court determined (1) whether the punishment is disproportionate to the offense and (2) the severity or harshness of the sanction as measured by “broad and idealistic concepts of dignity, civilized standards, humanity, and decency.”<sup>120</sup> The opinion cited seven psychiatrists, psychologists, and educators who were unanimous in concluding that extended isolation on children is “cruel and inhuman” and “counterproductive to the development of the child.”<sup>121</sup> Although the court declined to issue a statewide injunction, it required the institution to follow specific restrictions on the use and conditions of confinement.<sup>122</sup> As discussed above, many of today’s psychologists, scientists, politicians, and administrators agree with the findings in *Lollis*: that isolating juveniles is cruel, inhuman, and counterproductive to the development of the child. Furthermore, Kentucky’s practice of indefinitely isolating these children mirrors the unconstitutional conditions determined in *Lollis*.

*B. Psychologically Damaging, Anti-Rehabilitative, Inhumane:  
Punitive Isolation Violates Substantive Due Process*

Courts addressing juvenile facilities under substantive due process have found that conditions of isolation violate juveniles’ constitutional rights because these facilities deny rehabilitation and treatment.<sup>123</sup> Regardless of whether or not youth are being held in detention centers awaiting adjudication or if they have been committed for committing a crime, this necessary right to treatment is considered a quid pro quo for society exercising its *parens patriae* powers: “Whether specifically

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<sup>117</sup> *Betts*, 621 F.3d at 256–57.

<sup>118</sup> *Lollis v. N.Y. State Dep’t of Soc. Servs.*, 322 F. Supp. 473, 480 (S.D.N.Y. 1970) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>119</sup> *Id.* at 476, 482.

<sup>120</sup> *Id.* at 480 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 483–84.

<sup>123</sup> *Pena v. N.Y. State Div. for Youth*, 419 F. Supp. 203, 204, 207 (S.D.N.Y. 1976); see also *Nelson v. Heyne*, 491 F.2d 352, 360 (7th Cir. 1974).

recognized by statutory enactment or implicitly derived from the constitutional requirements of due process, the right to treatment exists.<sup>124</sup> In *Pena v. New York State Division for Youth*, the companion case to *Lollis*, the court held that conditions at the Goshen Annex violated the boys' Fourteenth and Eighth Amendments because punitive isolation lasting longer than six hours with inadequate release processes and reporting requirements did not provide for treatment or rehabilitation.<sup>125</sup> After considering reports from psychologists and other experts, the district court of Rhode Island held that similar conditions violated the Eighth and Fourteenth Amendments because the children had a right to treatment, stating that "solitary confinement may be psychologically damaging, anti-rehabilitative, and, at times inhumane."<sup>126</sup> Kentucky's Policy Manual aims to "provide services for the rehabilitation of probated and committed youth."<sup>127</sup> The legislature reaffirmed this goal when it adopted Senate Bill 200, which aims to reduce recidivism by coordinating treatment systems and increasing rehabilitation services to youth.<sup>128</sup> As these courts have stated, locking a child in a room is psychologically damaging, anti-rehabilitative, and inhumane.

Other courts have rejected the right to treatment approach, instead determining whether the confinement served the governmental objectives surrounding juvenile incarceration. Juveniles not yet convicted of a crime have a due process freedom from unnecessary bodily restraint that is subject to closer scrutiny than those who have been convicted of a crime through trial.<sup>129</sup> Any restriction on this freedom must be reasonably related to a legitimate government interest and not used solely for punishment.<sup>130</sup> The court in *Santana v. Collazo* stated the purpose of incarceration is to protect society from children, instead of providing rehabilitative treatment.<sup>131</sup> The court declined to hold that isolation consisting of a nine-by-nine concrete cell with one bed, toilet, and window, and lengths of stay extending to several months were *per se* unconstitutional and remanded the case to determine whether the isolation served a legitimate government interest.<sup>132</sup> The court also stated that the Eighth Amendment may apply because "[i]t would not be

<sup>124</sup> *Heyne*, 491 F.2d at 359 (quoting *Martarella v. Kelley*, 349 F. Supp. 575, 600 (S.D.N.Y. 1972)).

<sup>125</sup> *Pena*, 419 F. Supp. at 207, 210 ("[T]his court finds that the detention of a youth under a juvenile justice system *absent provision for the rehabilitative treatment . . .* is a violation of due process rights guaranteed under the Fourteenth Amendment.")

<sup>126</sup> *Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354, 1372 (D. R.I. 1972).

<sup>127</sup> DJJ 300.1, *supra* note 27.

<sup>128</sup> Press Release, Governor Steve Beshear's Comm. Office, Gov. Beshear Ceremonially Signs Juvenile Justice Law (Aug. 28, 2014), <http://migration.kentucky.gov/Newsroom/governor/20140828juvenile.htm> [hereinafter Beshear Ceremonially Signs Juvenile Justice Law].

<sup>129</sup> *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983); *see also* *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982) ("A person involuntarily confined by the state to an institution retains liberty interests that are protected by the due process clause of the fourteenth amendment.")

<sup>130</sup> *See* *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (discussing the application of *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) to those with different mental abilities).

<sup>131</sup> *Collazo*, 714 F.2d at 1176-77.

<sup>132</sup> *Id.* at 1177-78, 1181.

unreasonable to assume that society's conscience might be shocked by the conditions of confinement imposed on a juvenile in an isolation cell."<sup>133</sup> Kentucky's punitive isolation policies necessarily impose retribution upon youth and do not serve any purpose except for punishment. The staff isolate children for indefinite periods of time for breaking rules, which necessarily violates the children's substantive due process right to be free from unnecessary bodily restraint unrelated to any legitimate government objectives.

*C. An Indefinite Period: Kentucky's Isolation Policy Violates Procedural Due Process Under the Fourteenth Amendment*

Kentucky's policy that allows the Director of Medical Services or the Chief of Mental Health Services to extend isolation beyond five days violates procedural due process. In *H.C. v. Jarrard*, the court allowed injunctive relief and compensatory damages when a child awaiting trial on delinquency charges was subjected to extended isolation without written notice of the charges against him, without an opportunity to represent himself before an impartial person, or the ability to call witnesses on his behalf.<sup>134</sup> He was "told that he would remain in isolation until [the guard] decided to release him."<sup>135</sup> Although Kentucky's Policy Manual provides for notice and a due process hearing with staff representation (not counsel), the treatment team can impose isolation upon a finding of guilt.<sup>136</sup> Once this hearing is held, a child could theoretically remain in isolation indefinitely if the Director of Medical Services or the Chief of Mental Health Services authorizes it. Kentucky must impose a definite limit on the amount of time a child may remain in isolation to avoid violating the child's procedural due process rights.

*D. Remorse, Renewal, Rehabilitation: Solitary Confinement Contradicts the Supreme Court's Holdings that Children Should be Treated Differently*

In a series of influential decisions, the Supreme Court has recently recognized that the criminal justice system should treat children differently because they are still developing and less deserving of the most severe punishments. This rationale should extend to solitary confinement because, arguably, many of the rationales behind the recent Supreme Court decisions apply to the arguments against isolation.

First, in *Roper v. Simmons*, the Supreme Court held that executing juveniles violated the Eighth Amendment's ban on cruel and unusual punishment because youth demonstrate "[a] lack of maturity and an underdeveloped sense of

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<sup>133</sup> *Id.* at 1179.

<sup>134</sup> *H.C. v. Jarrard*, 786 F.2d 1080, 1082–83, 1087–89 (11th Cir. 1986).

<sup>135</sup> *Id.* at 1083.

<sup>136</sup> See *supra* text accompanying notes 65–67.

responsibility[.]” which leads to “impetuous and ill-considered actions and decisions.”<sup>137</sup> The Court noted that the character and personality of youth are “more transitory, less fixed” than those of adults.<sup>138</sup> These rationales could easily extend to placing youth in solitary confinement and the effect it has on their brains: they remain in this state, unable to progress to adulthood.<sup>139</sup>

Second, the Supreme Court banned juvenile life sentences without parole for non-homicide offenders because children have the “capacity for change and limited moral culpability.”<sup>140</sup> The Court cautioned that the juvenile justice system should facilitate rehabilitation rather than destroying children’s hope: “[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.”<sup>141</sup> Children, the Court explained, who do not believe they will leave prison have little incentive to become responsible adults.<sup>142</sup> Solitary confinement also changes a child’s perception, removing hope and destroying their chance of rehabilitation.

Third, in *Miller v. Alabama*, the Court banned mandatory juvenile life sentences without parole on the grounds that “juveniles have diminished culpability and greater prospects for reform.”<sup>143</sup> The Court explained that children’s “transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s ‘moral culpability’ and enhanced the prospect that, as the years go by and neurological development occurs, [the child’s] ‘deficiencies will be reformed.’”<sup>144</sup> In *Montgomery v. Louisiana*, the Supreme Court extended the rationale of these three cases to hold that retroactivity applies to juveniles sentenced to life without parole because children deserve different penological treatment based on their diminished culpability and capacity for reform.<sup>145</sup>

While the Supreme Court has not recently confronted solitary confinement directly, Justice Kennedy delivered a clear warning in his concurrence to *Davis v. Ayala*: “Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind.”<sup>146</sup> Justice Kennedy continued to argue that “the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”<sup>147</sup> Some argue

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<sup>137</sup> *Roper v. Simmons*, 543 U.S. 551, 568–69 (2005) (quoting *Johnson v. Texas*, 509 U.S. 349, 367 (1993)).

<sup>138</sup> *Id.* at 570.

<sup>139</sup> *See supra* Part II (discussing self-control and decision making).

<sup>140</sup> *Graham v. Florida*, 560 U.S. 48, 74 (2010).

<sup>141</sup> *Id.* at 79.

<sup>142</sup> *Id.*

<sup>143</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2460, 2464 (2012).

<sup>144</sup> *Id.* at 2465 (quoting *Graham*, 560 U.S. at 68–69).

<sup>145</sup> *Montgomery v. Louisiana*, No. 14-280, slip op. at 14–17 (U.S. Jan. 25, 2016).

<sup>146</sup> *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

<sup>147</sup> *Id.* at 2210.

that Justice Kennedy set the stage for the Supreme Court to return to the issue in the future.<sup>148</sup> Punitive juvenile solitary confinement contradicts each of these holdings because it destroys any potential of rehabilitation by removing children's hope and incentive to become responsible adults.

*E. Following the Examples of Others: States Surrounding Kentucky Have Restricted or Banned Punitive Solitary Confinement*

States surrounding Kentucky have banned solitary confinement through litigated consent decrees, regulations, or statutes. West Virginia statutorily banned juvenile solitary confinement in 1998, but continued the practice until 2012 when the Director of Juvenile Services ordered an end to it in response to a lawsuit.<sup>149</sup> Investigations by the DOJ's Civil Rights Division pursuant to CRIPA into juvenile facilities' use of solitary confinement consistently uncovered unconstitutional conditions. Mississippi,<sup>150</sup> Montana,<sup>151</sup> New York,<sup>152</sup> and Arizona<sup>153</sup> recently

<sup>148</sup> See David G. Savage, *Justice Kennedy Practically Invites a Challenge to Solitary Confinement*, L.A. TIMES (June 19, 2015 3:00 AM), <http://www.latimes.com/nation/la-na-justice-kennedy-solitary-20150618-story.html>.

<sup>149</sup> NATASHA A. FROST & CARLOS E. MONTEIRO, NATIONAL INSTITUTE OF JUSTICE: ADMINISTRATIVE SEGREGATION IN U.S. PRISONS 8 (2016), <https://www.ncjrs.gov/pdffiles1/nij/249749.pdf> ("West Virginia became the first state to ban the solitary confinement of youth in custody in 1998."); Associated Press, *W.Va. Ends Solitary Confinement for Juveniles*, TIMES WEST VIRGINIAN (Apr. 26, 2012), [http://www.timeswv.com/news/w-va-ends-solitary-confinement-for-juveniles/article\\_79dc1c7e-3279-5e97-ade7-fc45c9c2deaa.html](http://www.timeswv.com/news/w-va-ends-solitary-confinement-for-juveniles/article_79dc1c7e-3279-5e97-ade7-fc45c9c2deaa.html) ("West Virginia has stopped using solitary confinement to punish juvenile offenders in response to a lawsuit by two inmates at the Industrial Home for Youth in Salem.")

<sup>150</sup> Press Release, Am. Civil Liberties Union, *Children Will No Longer Be Housed in Facility Run by Private Prison Company After ACLU and Southern Poverty Law Center Lawsuit* (Feb. 27, 2012), <https://www.aclu.org/news/groundbreaking-federal-consent-decree-will-prohibit-solitary-confinement-youth-mississippi>.

<sup>151</sup> Settlement Agreement at 2–3, *Katka v. Montana*, No. BDV 2009-1163 (D. Mont. Mar. 30, 2012), <http://www.clearinghouse.net/chDocs/public/JI-MT-0004-0002.pdf> ("[Youth] shall not be placed in isolated confinement . . . for longer than 72 hours without the approval of the Director of the Department of Corrections . . . and without certification from the mental health team . . . that the extended isolation would not have an adverse affect upon the inmate's mental health.")

<sup>152</sup> Settlement Agreement at 21, *Peoples v. Fischer*, No. 1:11-CV-02694 (SAS) (S.D.N.Y. Dec. 16, 2015), <http://www.clearinghouse.net/chDocs/public/PC-NY-0062-0011.pdf> ("[The state] will ensure that even under the most restrictive form of disciplinary housing, 16 and 17 year-old inmates shall, 5 days per week . . . be offered out-of-cell programming and outdoor exercise, limiting time in their cells to 19 hours a day . . .").

<sup>153</sup> Arizona entered into consent decrees in 1993 and 2004 in response to allegations of excessive use of solitary confinement and isolation. Consent Decree, *Johnson v. Upchurch*, No. CIV 86-195 TUC RMB (D. Ariz. May 5, 1993), <http://www.clearinghouse.net/chDocs/public/JI-AZ-0002-0002.pdf>; Memorandum of Agreement Between the United States Department of Justice and the State of Arizona Concerning Adobe Mountain School, Black Canyon School, and Catalina Mountain School, U.S. v. Arizona, No 2:04-cv-01926 (D. Ariz. Sept. 15, 2004), <http://www.clearinghouse.net/chDocs/public/JI-AZ-0003-0003.pdf>. The 1993 consent decree expired in 1997 and the 2004 consent decree expired in 2007. See SCOTT H. DECKER ET AL., A CASE STUDY OF THE RESPONSE OF THE ARIZONA

entered into agreements that dramatically reduced the use of solitary confinement in juvenile facilities.

The Southern District of Ohio recently terminated the consent decree reached in *S.H. v. Reed* and *United States v. Ohio* between the Ohio Department of Youth Services (“ODYS”), a class of incarcerated juveniles, and the United States after ODYS agreed to severely limit the use of solitary confinement.<sup>154</sup> Initially, investigators found “that the conditions of confinement for youth in DYS [Department of Youth Services] facilities violated the constitutional and statutory rights of those youth”<sup>155</sup> and the “[e]xcessive force and the excessive use of isolation, some of it extraordinarily prolonged, is endemic to the ODYS [Ohio Department of Youth Services] system.”<sup>156</sup>

Illinois underwent similar changes to its use of solitary confinement due to a similar class action, *R.J. v. Jones*.<sup>157</sup> In that case, it was alleged that conditions violated the Due Process Clause under the Fourteenth Amendment by subjecting the youth to “room confinement when not warranted, for excessive periods of time, and in improper conditions.”<sup>158</sup> The complaint claimed that the Illinois Department of Juvenile Justice (“IDJJ”) acted with deliberate indifference to the deficient conditions, and as a direct result the plaintiffs suffered irreparable harm.<sup>159</sup> The district judge approved a consent decree in 2012 and a remedial plan in 2014 that allowed separation, but required the children to be out of their cells for eight hours per day.<sup>160</sup> Unfortunately, the monitors expressed concern that the staff failed to follow the plan. In the first half of 2015, 1,697 incidents involved confinement or time out in rooms with graffiti and inadequate lighting and ventilation.<sup>161</sup>

A child awaiting disposition in Tennessee recently filed a complaint in *Doe v. Hommrich*, which alleged that solitary confinement objectively and subjectively constituted inhumane treatment and that the defendant acted with deliberate indifference in violation of the Eighth and Fourteenth Amendments because

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DEPARTMENT OF JUVENILE CORRECTIONS TO THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT CONSENT DECREE 21–22 (November 2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/244085.pdf>. Currently, Arizona does not allow punitive solitary confinement, but only allows separation if the youth is a danger to themselves, others, or if they self-refer. Kraner et al., *supra* note 28, at 10. A hearing is required after twenty-four hours of confinement. *Id.*

<sup>154</sup> See *generally* Order, *S.H. v. Reed*, No. 2:08-CV-00475 (S.D. Ohio 2015), [https://scholar.google.com/scholar\\_case?case=3198521333530402483&hl=en&cas\\_sdt=6&cas\\_vis=1&coi=scholar](https://scholar.google.com/scholar_case?case=3198521333530402483&hl=en&cas_sdt=6&cas_vis=1&coi=scholar).

<sup>155</sup> Order, *supra* note 154 at 2.

<sup>156</sup> FRED COHEN, FINAL FACT-FINDING REPORT, *S.H. v. STICKRATH* ii (Jan. 2008), <http://www.dys.ohio.gov/DNN/LinkClick.aspx?fileticket=lDovnn7P96A%3D>.

<sup>157</sup> *R.J. v. Jones*, *supra* note 10.

<sup>158</sup> Class Action Complaint at 1–2, *R.J. v. Bishop*, No. 1:12-cv-07289 (N.D. Ill. Sept. 12, 2012), <http://www.aclu-il.org/wp-content/uploads/2013/08/R.J.-v.-Bishop-Complaint-of-9-12-12.pdf>.

<sup>159</sup> *Id.* at 11.

<sup>160</sup> *R.J. v. Jones*, *supra* note 10.

<sup>161</sup> BARRY KRISBERG, PROGRESS OF THE SAFETY AND WELFARE REMEDIAL PLAN: R.J. ET AL., V JONES 11, 18–19 (2015), <http://www.aclu-il.org/wp-content/uploads/2013/08/RJ-Krisberg-Nov-2015-report.pdf>.

“[t]here can be no doubt that solitary confinement of juveniles is objectively harmful, as authorities from state, federal, international and scientific communities agree that such confinement is extremely damaging to youth.”<sup>162</sup> As of the publication of this Note, the case is still pending. It is the author’s hope that Tennessee will ban the practice. Kentucky, too, should join its neighbors who have recognized the objectively harmful effects of solitary confinement and ban the practice.

#### IV. INTO CLASSROOMS AND OUT OF COURTROOMS: MAINTAINING PUNITIVE SOLITARY CONFINEMENT IS CONTRARY TO THE GOALS OF THE RECENT JUVENILE JUSTICE REFORMS OF SENATE BILL 200

Senate Bill 200 (the “Bill”), which “substantially overhaul[s] Kentucky’s juvenile justice system,”<sup>163</sup> seeks to keep children within their homes and out of state care by “steering more young offenders into community-based treatment instead of locking them up in detention centers.”<sup>164</sup> Senate Bill 200 was the result of the work of the Unified Juvenile Code Task Force, and most reforms contained in the Bill were to take effect in the summer of 2015.<sup>165</sup> Senate Bill 200 represents a shift in the way legislatures in Kentucky view children and the role of state detention in their lives.

Many within the juvenile justice community recognize the harmful effects of incarceration on children and tout Senate Bill 200 as a solution to this problem. The rationale behind Senate Bill 200 can be summed up in this comment by Kentucky’s Director of the Department for Behavioral Health Developmental and Intellectual Disabilities: “It has been well established that detention and incarceration do not provide for positive outcomes for youth. This legislation will facilitate early identification of children and youth in need of behavioral health services and keep them in our classrooms, not our courtrooms.”<sup>166</sup> However, the Bill did not ban juvenile solitary confinement, despite its focus on rehabilitation and protecting children from remaining in state disciplinary care. Regulations explicitly promoting solitary confinement in juvenile facilities were updated on January 4, 2016, six months after the enactment of Senate Bill 200.<sup>167</sup>

Juvenile solitary confinement directly contradicts any hope for these positive youth outcomes. As discussed, solitary confinement can permanently alter the way a child thinks and can cause the child to remain in an immature and impulsive state.

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<sup>162</sup> First Amended Complaint – Class Action Complaint at 4, 13, 18–19, *Doe v. Hommrich* No. 3-16-cv-00799 (M.D. Tenn. May 18, 2015), <http://www.aclu-tn.org/wp-content/uploads/2016/06/Juvenile-Solitary-Amended-Complaint-REDACTED.pdf>.

<sup>163</sup> Christina Weeter, *Senate Bill 200*, KY. DEPT OF EDUC. (June 23, 2015 11:25 AM), <http://education.ky.gov/school/sdfs/Pages/Senate-Bill-200.aspx>.

<sup>164</sup> Beshear Ceremonially Signs Juvenile Justice Law, *supra* note 128.

<sup>165</sup> Weeter, *supra* note 163.

<sup>166</sup> *Id.*

<sup>167</sup> *See* DJJ 323, *supra* note 23.



The goals of Senate Bill 200 mirror the concerns of the federal government, numerous agencies supporting youth and mental health, and the Supreme Court: detention and incarceration, and especially isolation, do not provide positive outcomes for children. Rather, juvenile solitary confinement prevents children from reforming or rehabilitating.

Senate Bill 200 is also motivated by a desire to decrease the state's juvenile facilities budget.<sup>168</sup> Before the enactment of Senate Bill 200, more than half of the state's \$102 million budget for the Department of Juvenile Justice was spent on secure and non-secure facilities.<sup>169</sup> It is reported that this juvenile justice reform bill will reduce the amount spent on incarcerating juveniles by \$24 million over the next five years.<sup>170</sup> This money will be reinvested into programs to help prevent juvenile incarceration.<sup>171</sup> However, Kentucky's isolation practices contradict these goals by causing the child to remain in an immature state with poor impulse control, which increases rates of recidivism and will drive up the costs of incarceration. If Kentucky truly wants to reform the juvenile justice system to keep children out of the courtroom and decrease the costs of incarceration, it should follow the example of many other states and abolish punitive juvenile solitary confinement.

#### V. DIGGING OUT OF THE HOLE: ALTERNATE APPROACHES AND CONCLUSION

This Note argues for the eradication of punitive juvenile solitary confinement in Kentucky. Many states have placed limitations on the amount of time children may be placed in solitary confinement or clarified the offenses necessary to isolate a child.<sup>172</sup> Kentucky should align itself and abolish punitive juvenile solitary confinement because children are fundamentally different from adults, the practice violates due process, the prohibition against cruel and unusual punishment, and the practice is contrary to Kentucky's recent efforts to reform juvenile justice. Confining juveniles permanently changes their ability to make rational decisions, leading to increased rates of recidivism, destroying their ability to mature, and defeating the goals of rehabilitation. Many children do not survive solitary confinement, as the isolation leads to increased rates of suicide, and those who do survive are more likely to commit suicide upon release.

If Kentucky elects to continue this damaging practice, it should place a cap on the amount of time children may be placed in punitive solitary confinement. Although the regulations mandate a maximum of five days *per offense*, this time

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<sup>168</sup> *Kentucky's 2014 Juvenile Justice Reform*, *supra* note 13, at 7.

<sup>169</sup> *Id.* at 1.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *See* Kraner et al., *supra* note 28.

may be extended by the director of medical services or the chief of mental health services. Additionally, no regulations prevent the child from gaining new offenses while in solitary confinement, extending their time in isolation indefinitely. Eliminating administrators' ability to indefinitely postpone release from solitary confinement and placing a five-day maximum, regardless of the number of offenses, would lessen the risk of long lasting psychological harm and increasing recidivism.

Additionally, Kentucky should limit the number of infractions that would place a child in solitary confinement and clarify the eligible offenses. Ambiguous terms, such as "serious disruption to the program," or "dangerous contraband" leave room for discretion and do not provide sufficient guidance for children attempting to avoid solitary confinement. The legislature should clarify these terms, reducing administrator's discretion and increasing stability to the facility. Finally, Kentucky should require facilities to report the number of isolations and the duration of isolation in a certain period. This would allow advocates to track the use of isolation in DOJ facilities and monitor how long children remain isolated.

Kentucky's practice of allowing indefinite solitary confinement not only endangers the children it has a duty to protect, it contradicts United States Supreme Court precedent, federal legislative action, direct admonitions from the President, and the policies behind Kentucky's own Senate Bill 200. While dissenters may argue that facilities require isolation to impose order on otherwise dangerous and unruly children, it is clear from scientific research that isolating them for indefinite periods of time does far more than impose order: it fundamentally alters their brain chemistry and makes them less likely to practice self-control and more likely to reoffend. In order to comply with the goals of Kentucky's Senate Bill 200, which seeks to reduce the rate of juvenile placement outside of the home and save money, the state should end punitive solitary confinement.

