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# Kentucky Legislature Needs to Get Ahead of Juvenile Solitary Confinement

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Kentucky is one of 18 states that still permits juvenile solitary confinement,<sup>[2]</sup> leaving the continued constitutionality of Kentucky’s outdated practice in serious doubt. As a result, Kentucky’s Legislature should confront this issue immediately – even if some other authority ends the practice – because detention centers across the Commonwealth will need cultural and structural change.

The end of juvenile solitary confinement in Kentucky could come from a judicial ruling that the practice is per se unconstitutional as “cruel and unusual punishment.”<sup>[3]</sup> What constitutes cruel and unusual punishment is a moving target, changing along with the standards of society.<sup>[4]</sup> The inquiry is two-fold: an objective analysis looking at the facts surrounding opposition to the practice and a subjective analysis in which the court must make its own judgment as to proportionality of the contested practice.<sup>[5]</sup>

The objective facts about juvenile solitary confinement today are similar to the ones the Court considered in *Roper v. Simmons*, in which it struck down the imposition of the death penalty on juveniles.<sup>[6]</sup> Both then and today, a majority of states and the federal government banned the contested practice, and the general trend was constant.<sup>[7]</sup> This is corroborated by the fact that many jurisdictions have changed their rules to ban the practice within just the past two years.<sup>[8]</sup> As it pertains to the subjective analysis, the argument against proportionality<sup>[9]</sup> boils down to scientific data showing that solitary confinement on juveniles imposes a high risk of development or exacerbation of mental health issues.<sup>[10]</sup> Hence, the objective and subjective considerations lead to the conclusion, supported by other scholars, that the use of solitary confinement on juveniles is out of step with our national standards of decency.<sup>[11]</sup>

Nevertheless, courts have been reluctant to hold that juvenile solitary confinement is per se unconstitutional, instead limiting their decisions to specific individuals who experienced extended confinement akin to sensory deprivation.<sup>[12]</sup> Just last summer, isolation pods at the Fayette Regional Juvenile Detention Center (FRJDC) were of this type; juveniles committing infractions could be placed in small windowless cells on a separate unit that contained just a sink, toilet, and concrete ledge for sitting (a mattress was brought in at night).<sup>[13]</sup> A report commissioned by the DJJ said, “A court would almost certainly find that the use of these isolation cells ... is a violation of a youth’s constitutional rights.”<sup>[14]</sup>

The FRJDC has since changed some practices with their isolation cells, but the use of room confinement as punishment is still widespread in Kentucky.<sup>[15]</sup> According to regulations on the DJJ



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website, confinement is permissible for up to 5 days.<sup>[16]</sup> However, officials within the DJJ say that they are in the process of changing their punishment system and limiting room confinement.<sup>[17]</sup> In the meantime, the real possibility that a Kentucky court or the U.S. Supreme Court rules juvenile solitary confinement to be unconstitutional remains.

Regardless of who causes juvenile solitary confinement to end in Kentucky, the Kentucky Legislature will need to get involved. Confinement is an easy fix for negative behavior which ignores the root causes and institutionalized failures behind the behavior.<sup>[18]</sup> Kentucky officials admit that taking away this fix overnight is not possible; it will take cultural change.<sup>[19]</sup>

To do so, the Kentucky Legislature will have to consider what resources to allocate to the detention centers, measuring the need for increased wages and personnel as well as the potential need for building more appropriate detention structures. Other legislatures are currently considering the same issues.<sup>[20]</sup> As the injustice this Commonwealth has done to its incarcerated youths is great, the corresponding response must be greater.

<sup>[1]</sup> J.D. Expected (2019).

<sup>[2]</sup> Eli Hager, *Ending Solitary Confinement for Juveniles: A Goal Grows Closer*, THE MARSHALL PROJECT (Aug. 1, 2017), <https://www.themarshallproject.org/2017/08/01/ending-solitary-for-juveniles-a-goal-grows-closer>.

<sup>[3]</sup> See U.S. Const. Amend. VIII; U.S. Const. Amend. XIV; *Robinson v. California*, 370 US 660 (1962) (applying the Eighth Amendment to the states through the Fourteenth Amendment); KY Const. § 17 (prohibiting “cruel” punishment), *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003) (holding that Section 17 of the Kentucky Constitution is co-extensive with the Eighth Amendment).

<sup>[4]</sup> *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86 (1958)) (“The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

<sup>[5]</sup> *Id.* at 312.

<sup>[6]</sup> 543 U.S. 551 (2005).

<sup>[7]</sup> *Id.* at 564–567.

<sup>[8]</sup> Hager, *supra* note 2.

<sup>[9]</sup> The test for proportionality is whether a punishment measurably serves legitimate ends. See *Atkins*, 536 U.S. at 319. In the context of prison discipline, this issue turns on whether “force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.” *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986). The extent of injury inflicted is a relevant consideration. *Id.* at 321.

<sup>[10]</sup> Abigail Cooper, *Beyond the Reach of the Constitution: A New Approach to Juvenile Solitary Confinement Reform*, COLUM. J. L. & SOC. PROB. 344, 351–52 (2016).

<sup>[11]</sup> See, e.g., Anthony Giannetti, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment?*, 30 BUFF. PUB. INT. L. J. 31, 34 (2012).

<sup>[12]</sup> Cooper, *supra* note 10, at 359.

<sup>[13]</sup> John Chives, *Kentucky Overuses Isolation Cells for Youths Even After Girl's Death, Report Says*, KENTUCKY HERALD-LEADER (Dec. 30, 2017), <http://www.kentucky.com/news/politics-government/article192156839.html>.

<sup>[14]</sup> Kate Howard, *Critical Safety Issues Plague Kentucky's Juvenile Detention Centers, Report Says*, KENTUCKY CENTER FOR INVESTIGATIVE REPORTING (Nov. 21, 2017), <http://kycir.org/2017/11/21/critical-safety-issues-plague-state-juvenile-detention-centers-report-says/>.

<sup>[15]</sup> Chives, *supra* note 13; Kate Howard, *Youth Detention Center Fails on Basic Services, Report Says*, LEO WEEKLY (Jan. 24, 2018), <https://www.leoweekly.com/2018/01/youth-detention-center-fails-basic-services-report-says/>.

<sup>[16]</sup> JUSTICE AND PUBLIC SAFETY CABINET DEP'T OF JUVENILE JUSTICE POLICY AND PROCEDURES, DJJ 323, (2016), *available at* <https://djj.ky.gov/300%20Policy%20Manual/DJJ%20323%20Isolation.pdf>.

<sup>[17]</sup> Chives, *supra* note 13.

<sup>[18]</sup> See Cooper, *supra* note 10, at 361–63.

<sup>[19]</sup> Kate Howard, *supra* note 15.

<sup>[20]</sup> Todd Richmond, *Bill Would Close Youth Prison in 2020, Create New Facilities*, ASSOCIATED PRESS (Feb. 13, 2018), <https://www.usnews.com/news/best-states/wisconsin/articles/2018-02-13/bill-would-close-youth-prison-in-2020-create-new-facilities>. (discussing recent legislation in Wisconsin).

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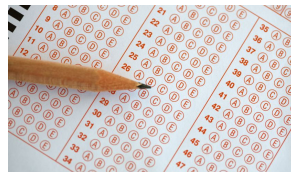
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