

UNLOCKING YOUTH

Legal Strategies to End Solitary Confinement in Juvenile Facilities



Authored by Jessica Feierman, Karen U. Lindell, and Natane Eaddy

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Juvenile
Law
Center advancing the rights and
well-being of children in jeopardy

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Juvenile Law Center is the oldest public interest law firm for children in the United States. Juvenile Law Center uses an array of legal strategies and policy advocacy to promote fairness, prevent harm, ensure access to appropriate services, and create opportunities for success for youth who come into contact with the child welfare and justice systems.

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I. INTRODUCTION

I would tell a legislator—think about these kids’ futures. You may be really destroying these kids emotionally and mentally before they have a chance to mature as people. Some of these kids may not be able to recover. These experiences are very detrimental to ... these kids, and to the community.

If we don’t build on these young people, we’re reducing these young people emotionally. If we can’t grow with our emotions, what kind of person are we? We’re being hindered in so many ways. But to compound everything by being in solitary confinement, being by ourselves, not being able to socialize with other people. You’re taking away young people’s ability to socialize with others and to understand the importance of socializing.

—EDDIE ELLIS, FOUNDER OF ONE BY 1,
A NON-PROFIT DEDICATED TO SUPPORTING YOUTH AND PREVENTING INCARCERATION,
REFLECTING ON HIS OWN EXPERIENCES IN JUVENILE SOLITARY CONFINEMENT.¹

The American criminal justice system adopted the use of solitary confinement in the mid-1800’s as a means to “inspire true regret in the hearts of convicts.”² But the practice of holding individual prisoners alone in their cells ostensibly to promote rehabilitation quickly raised constitutional and humanitarian concerns, and the experiment failed. Almost immediately, jails and prisons that had adopted the practice began reporting widespread mental health consequences; early studies raised similar concerns.³ Indeed, as early as 1890, the United States Supreme Court granted relief to a death row inmate subjected to solitary confinement, citing studies showing that prisoners exposed to isolation, even for a short time, often fell into “a semi-fatuous condition,” “became violently insane,” or committed suicide.⁴

And yet, more than 125 years later, the United States still routinely subjects some of the most vulnerable members of our society—youth involved in the juvenile justice system—to the harmful effects of solitary confinement. In the century since the Supreme Court first expressed concerns about the practice, our understanding of its harms—particularly for youth—has only grown. Research confirms that youth are uniquely vulnerable and that they are at a heightened risk of long-term harm from time spent in solitary confinement.⁵ Many correctional experts now agree that solitary confinement is counterproductive to the aims of the juvenile justice system,⁶ and there is a growing consensus among medical professionals and correctional administrators that solitary confinement of children must end.⁷ Policymakers in many states have responded, imposing significant restrictions on the practice,⁸ and in 2016 President Obama banned the use of solitary confinement for youth in federal prisons.⁹

WHAT IS SOLITARY CONFINEMENT?

The practice of placing a youth alone in a cell is referred to by many different names. For purposes of this report, solitary confinement is the “involuntary restriction of a youth alone in a cell, room, or other area for any reason other than a temporary response when youth behavior presents an immediate risk of physical harm.”¹⁰ Throughout this report, the terms “isolation” and “room confinement” are used interchangeably and refer more broadly to all instances of involuntary placement of a youth alone in a cell.

Despite this progress at the federal level and in a growing number of states, solitary confinement of youth remains widespread, with a disproportionate impact on youth of color (predominantly Black and Latinx youth), gender non-conforming youth, LGBTQ youth, and youth with disabilities. Moreover, we still lack comprehensive data on the use of solitary confinement in juvenile facilities, sufficient information about effective alternatives, and input from youth, families, and the communities most affected. This report relies on legal research, psychological research, surveys of public defenders and state protection and advocacy agencies, and conversations with youth, families, and advocates to fill those gaps and to offer recommendations for reform.

Although this report focuses on reforms *within* facilities, it is worth noting that the most effective way to end the practice is to keep youth at home with their families and in their communities, providing quality supports and services when necessary. Moreover, as described throughout the report, thoughtful partnerships with families, community members, and other advocates can help align efforts to end solitary confinement with broader de-incarceration efforts.

Our reform recommendations include:

■ Policy Reforms:

Ensure that policies prohibit, rather than alter or ameliorate, solitary confinement. Reform must include a ban on solitary confinement for any reason other than to prevent immediate harm, with clear limits on its use even under emergency circumstances; a clear definition of the term; support for positive alternatives and de-escalation tactics; and requirements for data collection.

■ Litigation Strategies:

Argue for a doctrinal analysis under the Eighth or Fourteenth Amendments that incorporates current scientific research regarding children and adolescents, rather than parroting the adult constitutional analysis. Several recent solitary confinement cases have successfully relied upon the series of decisions from the Supreme Court recognizing the effect of adolescent development research on constitutional standards.

Bring education claims in support of ending solitary confinement. Claims challenging the failure to provide a meaningful education can be a key part of litigation seeking to end solitary confinement. However, the goal must be to get youth out of solitary confinement, not to improve the conditions by adding educational opportunities to youth in room restriction, and litigation strategies must all support this ultimate goal.

Challenge discriminatory policies and practices. Federal disability law can offer a more protective standard than classic conditions of confinement claims, and other discrimination claims should be considered when appropriate.

■ Strong Juvenile Defense:

Ensure post-disposition representation. Many, if not most, uses of solitary confinement in juvenile facilities occur post-adjudication in juvenile correctional facilities, making post-dispositional representation an essential advocacy strategy.

Ask targeted questions. Youth and families may not immediately share information about harsh conditions of confinement unless defenders ask specific questions and invite discussion on the issue.

Visit local facilities. By visiting their clients' placements, witnessing conditions, and reviewing facility records, defenders can better advocate for clients and can also serve as a vital source of information to other stakeholders and advocates.

Enlist the court. Raising constitutional and statutory challenges to solitary confinement in individual cases can be an effective form of advocacy, and court orders can assist in getting youth appropriate services or supports.

File licensing complaints and grievances. By reporting uses of solitary confinement that may violate facility policy, licensing requirements, or other regulations, advocates create a written record of the problem and can potentially prompt an investigation or other responsive action.

Work with advocates engaged in system reform. By partnering with other organizations, such as the local Protection & Advocacy (P&A) agency, defenders can expand the resources available to challenge uses of solitary confinement.

■ **Community Partnerships:**

Work with youth, parents, and other community advocates. Such collaborations are essential to any reform effort. Community groups can help defenders, litigators, and policy advocates identify abuses, shape the broader reform effort, and elevate issues not easily presented as legal arguments.

II. BACKGROUND: WHAT WE KNOW ABOUT SOLITARY CONFINEMENT IN JUVENILE FACILITIES

It's very secretive, and they don't talk to parents about the conditions their kids are under. The families get the letters and they listen and they read the letters. And they feel helpless because there is limited access to knowing how your kid is living. How would you know? I didn't know this before my son's situation.

—K.G., MOTHER OF A YOUNG MAN WHO WAS HELD IN SOLITARY CONFINEMENT.¹¹

To effectively challenge the use of solitary confinement in juvenile facilities, advocates must understand the circumstances under which it is imposed, what makes it so harmful, and the available alternatives. Unfortunately, data on the use of solitary confinement is limited, and even family members and lawyers for youth often lack access to vital information about youth experiences in juvenile facilities.

This section describes the current research on the prevalence and impact of solitary confinement in juvenile facilities, including reports from juvenile defenders on local practices around the country, accounts from youth who have experienced solitary confinement, and interviews with correctional experts who have essentially eliminated the use of solitary confinement in their jurisdictions.

KEY ADVOCACY TOOLS AND RESOURCES

- **Stop Solitary for Kids:** *A partnership among four national juvenile justice reform organizations, this national campaign uses public education, research, legislative education and other strategies to end solitary confinement of children in juvenile and adult facilities. The campaign's website is a valuable source for news, current data, and other resources relating to solitary confinement of youth.*ⁱ
- **Advocacy Toolkit: Ending the Solitary Confinement of Youth in Juvenile Detention and Correctional Facilities:** *This 2014 toolkit developed by the ACLU National Prison Project and the ACLU Center for Justice includes messaging materials, sample interview questions, advocacy resources, and national standards to aid in the design of state or local campaigns to end youth solitary.*ⁱⁱ
- **Council of Juvenile Correctional Administrators Toolkit: Reducing the Use of Isolation:** *This 2015 toolkit was developed for states to use as a guide to reduce the use of isolation in juvenile facilities. It demonstrates the widespread recognition in the juvenile correctional field of the harms of solitary confinement. It can also help advocates understand why facilities use solitary confinement and how to advocate for effective alternatives.*ⁱⁱⁱ
- **51-Jurisdiction Survey of Juvenile Solitary Confinement Rules in Juvenile Justice Systems:** *This 2016 survey by the Lowenstein Center for the Public Interest provides each state's laws and regulations governing the use of solitary confinement in juvenile correctional facilities. It is a helpful resource for understanding the legal framework in different states, with a primary focus on laws and regulations pertaining to punitive solitary confinement.*^{iv}

A. Solitary Confinement in Juvenile Justice Facilities Remains Too Widespread

Far too many children are still locked up in solitary confinement in juvenile facilities around the country.¹² Although current data is insufficient to pinpoint the precise number of youth confined in solitary each year, a 2010 national report revealed that more than a third of the roughly 100,000 youth placed in juvenile residential facilities spent time in solitary confinement—many for days or weeks at a time.¹³ Since then, the total population of youth in juvenile facilities has decreased by almost half, and many more states now have policies imposing limits on the use of solitary confinement.¹⁴ But many of these policies contain significant loopholes, and no state has entirely eliminated solitary confinement of children.¹⁵ According to a 2016 data snapshot from the Office of Juvenile Justice and Delinquency Prevention, almost half of juvenile detention facilities and training schools reported that they isolate youth for more than four hours to control behavior.¹⁶ And, despite the lack of hard data, anecdotal reports from advocates around the country suggest reliance on the practice is still too common throughout the juvenile justice system.

To better assess the prevalence of solitary confinement, Juvenile Law Center conducted two surveys: one of juvenile defenders around the country and another of Protection and Advocacy (P&A) organizations, the agencies in each state federally mandated to enforce the rights of individuals with disabilities. Results from both surveys confirmed the excessive use of solitary confinement. More than two-thirds of public defender respondents reported that they had clients who spent time in solitary confinement for periods ranging from just a few hours to seven months.¹⁷ The reported reasons for solitary confinement varied among states and facilities—defenders explained that youth are isolated for punitive reasons, protective purposes (avoiding harm to the youth or others), or administrative reasons, such as during shift changes or when a youth is first confined.¹⁸ P&A agencies around the country also reported frequent use of solitary confinement of youth, including in states that have been working to eliminate the practice.¹⁹

i <http://www.stopsolitaryforkids.org/>.

ii <http://njdc.info/wp-content/uploads/2014/10/ACLU-Advocacy-Toolkit-Ending-the-Solitary-Confinement-of-Youth-in-Juvenile-Detention-and-Correctional-Facilities.pdf>.

iii <http://cjca.net/attachments/article/751/CJCA%20Toolkit%20Reducing%20the%20Use%20of%20Isolation.pdf>.

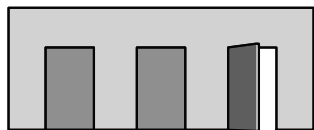
iv <https://www.lowenstein.com/files/upload/51-Jurisdiction%20Survey%20of%20Juvenile%20Solitary%20Confinement%20Rules.PDF>.

From the Field

Juvenile Defenders Report on Solitary Confinement

Solitary confinement of youth is...

Common



More than two-thirds

of respondents reported that they had clients who spent time in solitary confinement.

Imposed for many different reasons

Discipline
Prevention of self-harm
Protection of others



In case of emergency
Understaffing
Administrative convenience



Imposed with few due process protections



More than two-thirds

of respondents reported youth "never" receive a hearing before placement in solitary confinement



None

reported that youth "always" receive a hearing

Called by different names



Room confinement

Lockdown

Time out

Special management

The hole

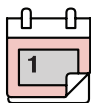
Administrative detention

Isolation

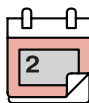
Programming

Disciplinary detention

Applied unevenly around the country



several hours



3 months



The amount of time youth spend in solitary ranges from several hours to more than six months.

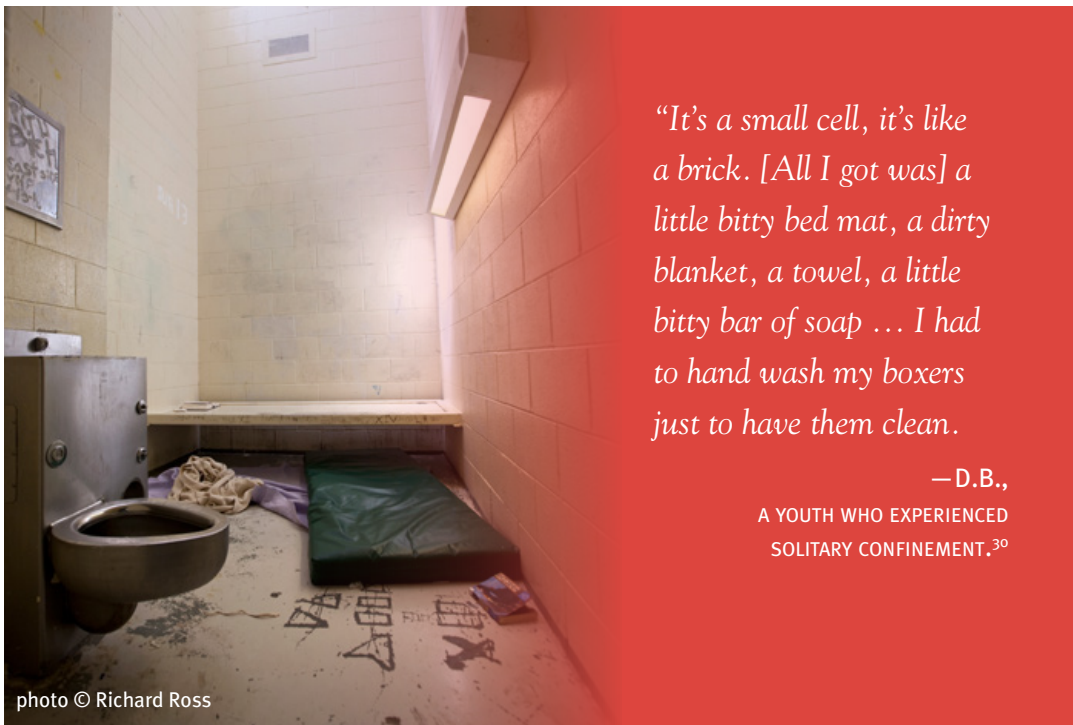
7 months

This information is based on responses to Juvenile Law Center's 2016 national survey of juvenile defenders. Juvenile Law Center received 56 survey responses via SurveyMonkey.

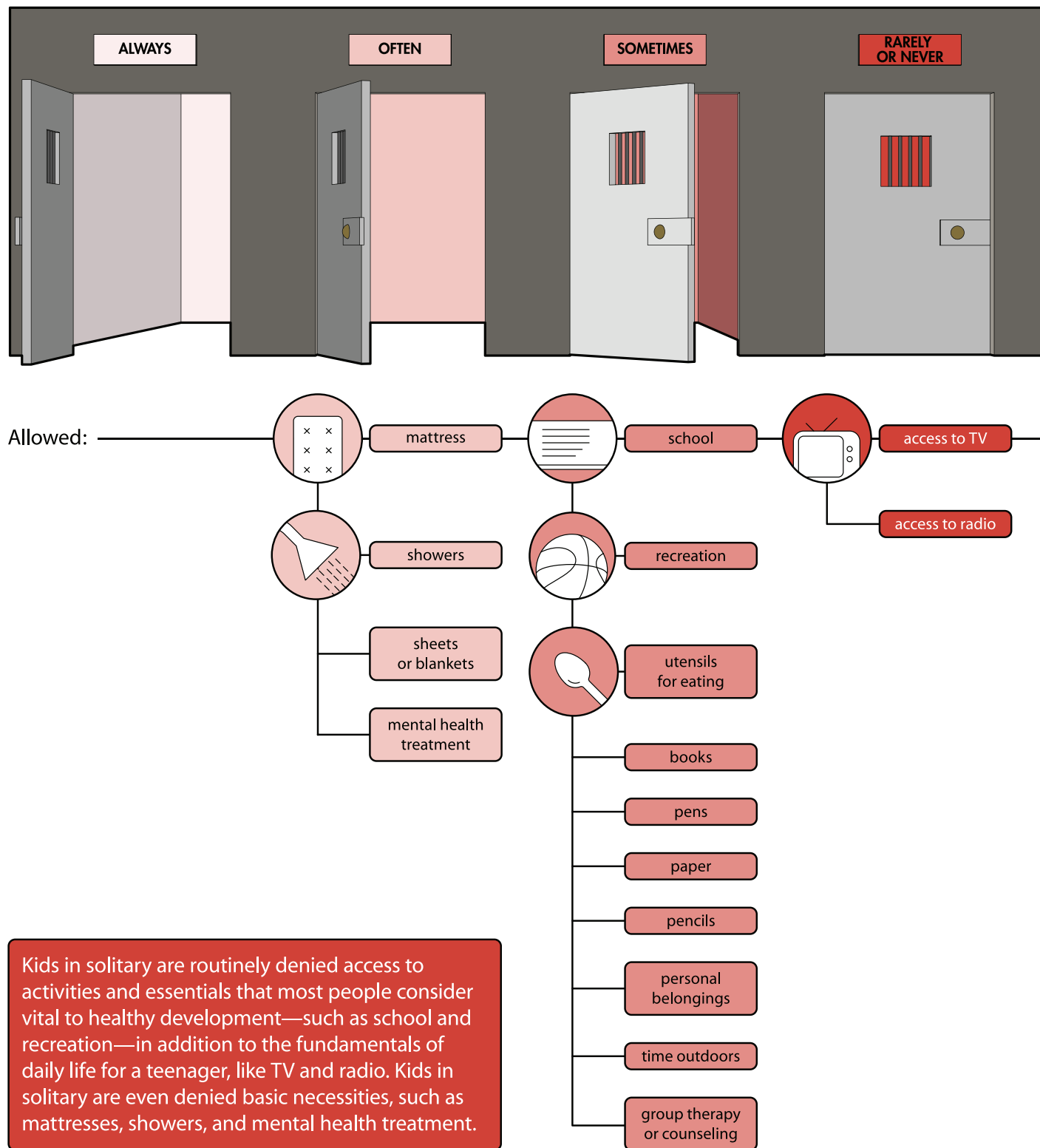
Individual cases and media reports have also exposed alarming uses of solitary confinement on youth. In 2017 alone, advocates in at least four states have been working to address particularly abusive practices. South Carolina's P&A organization issued a report demonstrating that up to 20% of the children housed in one juvenile facility are held in segregation.²⁰ The ACLU of Washington has filed suit on behalf of a 16-year-old repeatedly held in a padded cell or isolation room in a juvenile detention facility,²¹ and Colorado advocates have shown that the state's Division of Youth Corrections continues to rely on solitary confinement despite new legislative limits.²² The ACLU of Wisconsin and Juvenile Law Center also recently won injunctive relief in a suit against two Wisconsin juvenile facilities after investigations revealed extreme uses of solitary confinement, restraints, and pepper spray to control youth behavior.²³

The conditions experienced by youth in solitary confinement can be truly appalling. The recent Wisconsin investigation revealed that youth in solitary confinement spend 22-23 hours per day in a continuously illuminated eight-by-ten foot cell.²⁴ Many are forced to spend their one hour of "exercise" chained to a table. They are also deprived of virtually all personal property or educational materials.²⁵

Unfortunately, too many youth must endure these conditions. In Juvenile Law Center's survey, juvenile defenders reported that their clients in solitary confinement are routinely deprived of basic necessities such as mattresses, sheets, showers, utensils for eating, and mental health treatment.²⁶ Youth subjected to solitary confinement are rarely or never permitted personal belongings, pens or pencils, or access to any electronic devices, including TV, radio or computers.²⁷ Young people we spoke with echoed these findings. D.B., for example, described his cell this way: "It's a small cell, it's like a brick. [All I got was] a little bitty bed mat, a dirty blanket, a towel, a little bitty bar of soap ... I had to hand wash my boxers just to have them clean."²⁸ P&A advocates expressed similar concerns, also noting that facilities regularly deprive youth in solitary confinement of educational opportunities, undermining the rehabilitative mission of the juvenile justice system.²⁹



A Kid's Life In "The Box": The Harsh Reality of Solitary Confinement



SOURCE: Juvenile Law Center, Attorney Survey on Solitary Confinement (2016).

B. Solitary Confinement is Harmful

Not only is the practice of solitary confinement widespread—its effects are often devastating and long-lasting. Even brief periods of solitary can cause an individual to “become impaired,” “incapable of processing external stimuli,” or “hyperresponsive” to his or her surroundings.³¹ Solitary confinement often leads to the onset of debilitating mental health conditions, deprivation of social interactions, or, at worst, loss of life. The consequences for youth are particularly troubling. This section explores these unique risks for youth.

It was all brick walls, metal bed, chrome-looking sink. We was behind a door, not bars. We could see out of the door. There was a little window. You could hear other people screaming out the door, talking to each other. A lot of times it was so loud, people trying to talk to each other.

A lot of us wasn't held as long. I didn't know why. I didn't understand how the system works. Some people went out sooner than other people, and some people didn't. To this day, I really don't know why.

The average day was a miserable day. I tried to work out. I tried to exercise. I always felt sad. I just wanted to lay down and be to myself. When we did get to come out once a day or once every other day, it was like going in this pit of hell, that's what I felt like.

Most of the detention center staff treated us right. Some tried to verbally be aggressive toward us. Some of us asked questions, some of them tried to push us around physically, threaten to hold our food longer than they held other people's food because we asked questions.

To me it was very depressing. I was wondering why these adults were treating us like this. We were asking when we would go to court. Some kids were asking when they would go home. They hadn't been in the system long enough to understand how the system works.

I didn't feel safe in solitary, not when it came to some of the officers. I was concerned about unnecessary aggression from the officers. We would come out, they would curse us, push us, tell us to stop walking slow, just do your time.

It was one of the breaking points for me as a young person ... Me realizing now, it was one of the first times I really knew I was depressed. I really didn't want to do anything, I didn't have an appetite. I became really frustrated and angry for being in there. I can't come out, I can't be around my fellow residents. As a kid, never been through this, it's a very traumatic experience ... I became depressed again, knowing I gotta go back into the cell ... That's when I started verbally lashing out at staff because of my frustration being in there and being held in there for no reason that I thought was important. You don't understand, you don't get the answers you're looking for. Getting in trouble. I responded in negative ways, because [of] being held for so long ...

—Eddie Ellis³²

Risk of harm to a youth's neurological development

The human brain continues developing until an individual is in his or her mid-20s.³³ During adolescence, the brain reaches what is referred to as the “second period of heightened malleability,” characterized by enhanced neuroplasticity.³⁴ An advantage of increased neuroplasticity is that the brain is responsive to environmental changes. However, increased neuroplasticity can also make it difficult to recover from adverse experiences.³⁵ As a

result, during adolescence and emerging adulthood, youth are particularly susceptible to environmental influences, which can impact social, psychological, and neurological growth.³⁶ Researchers have found that if there is “[a] lack of stimulation or aberrant stimulation” for youth during this period, the results can lead to “lasting effects on physical and mental health in adulthood.”³⁷ For this reason, researchers suggest that solitary confinement may be particularly problematic for youth and young adults.³⁸

Adolescents are also vulnerable to heightened emotional reactions as a result of solitary confinement. Youth typically react more impulsively than adults because, during this stage of life, the limbic system—the brain’s emotional center—is highly active, but the frontal lobe, which governs rational decision-making, is not yet fully developed. Youth therefore process information in an “emotionally charged” manner,³⁹ making them particularly susceptible to increased frustration and anger, which are typical responses to solitary confinement and can also be used as reasons by facility staff in recommending that a youth be placed in isolation.⁴⁰ For instance, one youth who spent almost six months in confinement at Mecklenburg County’s Jail North in Charlotte, North Carolina, reportedly damaged his cell and flung human waste at the correctional facility’s staff, leading to an extension of his time in “disciplinary detention.”⁴¹ When the youth was asked why he reacted in such a manner, his response was that “he gets bored in there.”⁴²

Solitary confinement may also cause or exacerbate many of the mental health conditions that commonly emerge in adolescence and early adulthood, including severe depression, post-traumatic stress disorder, paranoia, and psychosis.⁴³ Studies have shown that youth exposed to solitary confinement may be at heightened risk of suicidal ideation.⁴⁴ Indeed, more than 50% of suicides in juvenile justice facilities occur while a young person is in a room by him or herself.⁴⁵

Youth we spoke with consistently described feeling lost, confused, and depressed.

D.B. explained:

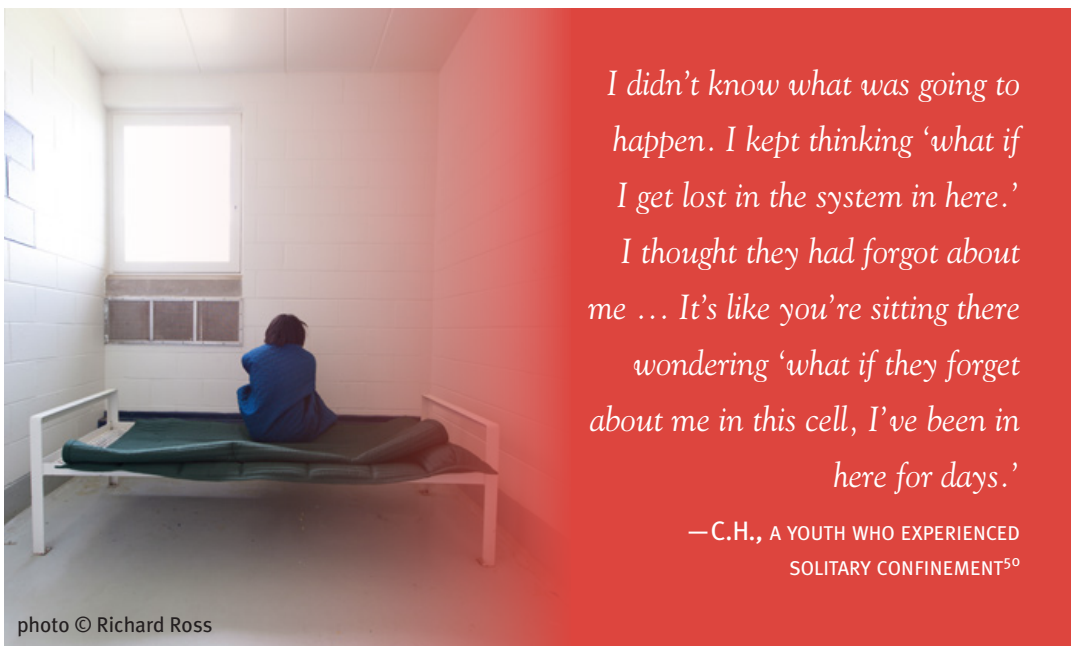
I was lost. I didn’t know what was going on. I was confused ... I didn’t get to contact nobody. No family, none of that ... Am I getting out? They don’t let you know nothing ... I didn’t leave out the cell not one time ... I didn’t go to class or nothing. During that 72 hours I ate, I took one shower, the rest of the time I laid down ... I was messed up. I was just sleeping it out. I was like, “I just can’t wait till somebody comes here.”

I was talking to my cousin through the vent. It’s so dusty in there. I’m talking to my cousin. He was like, “Cuz, I can’t do this man. I’m gonna throw up.” I was like, “Man, just lay down and go to sleep. Just sleep it out. They going to have to let us go.” Three o’clock in the morning and he was waking up. He ain’t never been in no trouble.⁴⁶

Eddie Ellis also described how solitary confinement led to lethargy and depression:

It had to be 10, 12, 13 hours a day that I would sleep. For me, I was a very energetic person. Played sports all my life, loved sports, couldn’t stand still. For some reason, being in there just took all the energy out of me ... As a teen, for me, I was dealing with some depression, a little bit. But when I got locked up, the depression became tenfold. I couldn’t talk to anyone that I needed to function.⁴⁷

S.J. had a similar reaction after having been in solitary for a week, not even coming out for a shower. She explained, “It’s frustrating because I’m not used to being in a room for so long and can’t come out, can’t shower or anything like that ... [I wore the same clothes for a whole week]. I was ... frustrated. I couldn’t do nothing so I was just sitting there ... I slept, like, all day.”⁴⁸ C.H. also felt lost and afraid: “I didn’t know what was going to happen. I kept thinking ‘what if I get lost in the system in here.’ I thought they had forgot about me ... It’s like you’re sitting there wondering ‘what if they forget about me in this cell, I’ve been in here for days.’”⁴⁹



Youth have varying reactions to solitary confinement. Many, however, describe it as a time when they lost their sense of self,⁵¹ often in ways that persisted into adulthood.⁵² As Eddie Ellis explained, “When I came home, out of nowhere I started having mini-panic attacks and things like that. It used to depress me. That’s when I started smoking weed, trying to take that depression away.”⁵³ As an adult, Eddie was diagnosed with PTSD. He explained, “I still deal with it. I confine myself to my room a lot.”⁵⁴ Josh reported that he “started to feel like [he] was going crazy” while he was in solitary.⁵⁵ After his release from isolation, he explained that he continued to have “irrational thoughts,” developed “low self-esteem” and left the system “hardened.”⁵⁶

In short, the developmental differences between youth and adults create heightened risks of harm for youth subjected to solitary confinement.⁵⁷

Risk of harm to a youth’s social development

Research confirms the importance of healthy social interactions for youth. By depriving youth of human interaction, solitary confinement impairs a young person’s ability “to develop a healthy functioning adult social identity.”⁵⁸ Individuals explore and begin to understand the complexity of relationships, including peer pressure and rejection, during this stage of life.⁵⁹ Exclusion from interaction with others “threatens four fundamental psychological needs: self-esteem, belonging, control, and a sense of meaningful existence.”⁶⁰ Social isolation, such as the experience of solitary confinement, can “impact how adolescents interact in social situations.”⁶¹ Youth are even less likely than adults to recover from isolation given that “they are in an uncertain, unformed state of social identity.”⁶² Moreover, for youth with trauma histories, placement in solitary confinement may often result in more pronounced reactions to being isolated.

The youth we spoke with confirmed that solitary confinement undermined their social connectedness even after their release. C.H., for example, explained that:

Being arrested from school and put into solitary made me not want to go back to school. I kept associating school with being put on hold [for] 72 hours. I had never been in trouble before. I’m not that type of kid, I kind of stay to myself. To be taken from school and put in that situation made me afraid to go to school because any given day they could accuse me of something and I’d have to go back to being alone in that cell for like three days.⁶³

Similar responses are also evident in the case law. T.D., who was known for being social, “decompensated and demonstrated grave mental health problems” while being held in isolation for 180 days.⁶⁴

These reactions to confinement highlight the importance of social interactions for youth that permit them to navigate complex relationships and develop the decision-making skills they need to mature into healthy adults. Social interactions help youth “readjust to the broader social environment” and “reintegrate into the broader community upon release from imprisonment,” fulfilling a major goal of the juvenile justice system—rehabilitation.⁶⁵

PROFESSIONAL ASSOCIATIONS OPPOSING SOLITARY CONFINEMENT

In light of the significant risks of harm to youth who experience solitary confinement, a growing number of professional associations and other organizations have condemned the practice or called for significant reforms, including:

National Task Force on Children Exposed to Violence: Recommends abolishing solitary confinement for youth.^v

American Academy of Child & Adolescent Psychiatry: Policy statement approved in April 2012 opposes disciplinary solitary confinement for youth, noting that the majority of suicides in juvenile facilities occur when a youth is isolated or in solitary confinement.^{vi}

American Correctional Association: Opposes disciplinary solitary confinement for youth, permitting solitary only “to prevent immediate harm to the youth or others.”^{vii}

American Medical Association: Opposes disciplinary solitary confinement for youth, permitting solitary confinement only in extraordinary circumstances such as those that involve protection of the juvenile, staff, or other detainees.^{viii}

American Psychological Association: Supports efforts to eliminate youth solitary confinement, including the bipartisan MERCY Act, which would prohibit disciplinary solitary confinement and limit solitary confinement to three hours if there is a serious risk that a youth may harm another person, or 30 minutes if there is serious risk that the youth may engage in self-harm.^{ix}

American Public Health Association: Issued a policy statement opposing solitary confinement for youth under age 18 in juvenile or adult correctional facilities.^x

National Commission on Correctional Health Care: 2016 position statement opposes all solitary confinement for youth.^{xi}

Council of Juvenile Correctional Administrators: Opposes solitary confinement as punishment and believes that any form of isolation should be for a short period and supervised.^{xii}

National Council of Juvenile and Family Court Judges: Adopted a resolution on August 8, 2016, opposing solitary confinement for youth except where absolutely necessary for the safety of the youth, others, or the facility.^{xiii}

v: <https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>.

vi: http://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx.

vii: <http://www.stopsolitaryforkids.org/wp-content/uploads/2016/04/ACA-Support-Letter.pdf>.

viii: <http://psychnews.psychiatryonline.org/doi/full/10.1176/appi.pn.2014.12b13>.

ix: <http://www.apa.org/about/gr/pi/news/2015/juvenile-confinement.aspx>.

x: <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue>.

xi: <http://www.ncchc.org/solitary-confinement>.

xii: <http://cjca.net/attachments/article/751/CJCA%20Toolkit%20Reducing%20the%20Use%20of%20Isolation.pdf>.

xiii: http://www.ncjfcj.org/sites/default/files/Final_SolitaryConfinementResolution_8_6-2016.pdf.

C. Solitary Confinement is Unfairly Applied

Although solitary confinement is harmful to all youth, a youth's race, sexual orientation or gender identity, and disability status may influence his or her likelihood of being placed in solitary, as well as his or her experience once there.

Race

Racial bias within the American criminal justice system compromises our governing principles of fair and equitable justice for all.⁶⁶ Juvenile justice data consistently show a disproportionate number of minority youth in detention and other correctional facilities, including camp programs, in comparison to White youth.⁶⁷ Disparities persist even where youth are charged with similar offenses.⁶⁸ According to a report by The Sentencing Project, “[y]outh of color remain far more likely to be committed than White youth,”⁶⁹ and the most recent federal OJJDP Survey of Youth in Residential Placement from 2010 found that more Black youth were in correctional placements than youth of other races or ethnicities.⁷⁰ Thus, simply as a result of disparities at other decision points in the juvenile justice system, from arrest through adjudication, youth of color are at heightened risk of being placed in solitary confinement.⁷¹

No national data tracks placement in solitary confinement by race. The limited research regarding adult facilities suggests that individuals of color are subject to disparate treatment within facilities, including disparate exposure to solitary confinement. Adult minorities, specifically Black and Latinx individuals, have been found to be “overrepresented in solitary confinement compared to the general prison population” and also subjected to “longer intervals” in isolation.⁷² A study from the 1980s found that the race of an individual “was correlated with the disciplinary decisions of correctional officers”⁷³ and that “implicit bias [by correctional staff] could lead to enhanced or more severe punishments for Black inmates than for White inmates committing the same violation.”⁷⁴ While further research is needed, we know that implicit racial bias also pervades the juvenile justice system,⁷⁵ suggesting similar disparate treatment would likely be found in the use of solitary confinement in juvenile facilities as well.

Gender, Gender Identity, and Sexual Orientation

Lesbian, gay, and transgender youth are overrepresented in the juvenile justice system,⁷⁶ and research suggests they are at a heightened risk of solitary confinement. One study found that 7.3% of individuals in solitary confinement in adult correctional facilities identified as transgender,⁷⁷ in contrast to 0.6% of the general population who identify as transgender.⁷⁸ Transgender individuals are often inappropriately placed in isolation to protect them from harm,⁷⁹ despite the serious harm caused by solitary confinement itself.

While boys still outnumber girls in the juvenile justice system, increasing numbers of girls are entering the system and being placed in juvenile justice facilities.⁸⁰ Once in solitary confinement, girls and gender non-conforming youth may be at a particularly high risk of harm.⁸¹ One report specifically examining female youth in detention and other correctional facilities found that “[t]he juvenile justice system remains under-equipped to handle the increased presence of girls.”⁸²

Another report found that young women who were subjected to solitary confinement were more likely to engage in self-harm than young men in confinement.⁸³ Solitary confinement may also place girls and gender non-conforming youth at increased risk of physical or sexual abuse. Bianca, who remained in solitary for six months, felt that isolation was less safe than being in the general population, because “there are no cameras” to document abuse.⁸⁴ Lino described her experience in isolation as “a waking nightmare,”⁸⁵ and Maverick emphasized that solitary confinement “collapse[s] you emotionally.”⁸⁶

Girls and gender non-conforming youth are also particularly likely to enter the justice system with histories of physical and/or sexual abuse and other trauma, and such trauma may cause youth to

behave in ways that are perceived as “non-compliant.”⁸⁷ Transgender youth are almost “twice as likely to have experienced family conflict, child abuse, and homelessness as other youth.”⁸⁸ For F.T., who “was molested by her father and has struggled with psychiatric illness and drug abuse,” being held in isolation triggered several attempts of self-harm.⁸⁹ She believed that no one cared about her and being in solitary only encouraged her to reflect on her “problems.”⁹⁰ Experiencing solitary confinement can “re-traumatize [youth] and further impede their rehabilitation.”⁹¹

Disability Status

A disproportionate number of youth with developmental, physical, and/or intellectual disabilities are placed in detention and other correctional facilities.⁹² Approximately “65-70% of youth in the justice system meet the criteria for a disability, a rate that is more than three times higher than the general population.”⁹³ Youth with disabilities may be at a heightened risk of being placed in solitary confinement, particularly when deprived of needed mental health services. Individuals with physical disabilities have sometimes been placed in isolation “because there were no available cells that could accommodate them in a less restrictive environment.”⁹⁴ Facilities also justify the use of solitary confinement to protect these youth from the general population or from self-harm.

However, placement in solitary confinement fails to account for a youth’s specific needs,⁹⁵ may at times exacerbate underlying conditions,⁹⁶ and risks causing further harm to a youth’s ability to function.⁹⁷ Youth are often deprived of rehabilitative services while in solitary confinement, including essential special education and mental health supports.⁹⁸ The ACLU of New Jersey recently filed a lawsuit alleging, among other things, that the education of youth with disabilities in solitary confinement in adult prisons consisted “of receiving worksheets” and not the educational services they are entitled to under the law.⁹⁹

While more research is needed to better understand the particular experiences of youth with disabilities in solitary confinement, advocates and policy-makers should be aware of the unique risks youth with disabilities likely face.

D. Solitary Confinement is Unnecessary and Counterproductive

In addition to being harmful, solitary confinement of youth is also unnecessary and counterproductive. Solitary confinement may often make facilities less safe for both youth and staff. In contrast, alternatives to solitary confinement can decrease violence and disruption in juvenile facilities. The following examples illustrate that juvenile justice systems can be run safely and effectively without reliance on solitary confinement.

All federal facilities in the United States are prohibited from using solitary confinement against youth.¹⁰⁰ The practice is also banned internationally. Uruguay, Uganda, Brazil, and France, for instance, have all banned solitary confinement for youth under any circumstances,¹⁰¹ and France prohibits solitary confinement for youth under the age of 15. Domestically, recent reforms highlight how shifting perspectives, responding to data, and providing evidence-based interventions can allow facilities to eliminate solitary confinement and *increase* safety for both youth and staff.

In Ohio, where solitary confinement has been drastically limited, its use dropped 88.6 percent between 2014 and 2015;¹⁰² during the same time period, rates of violence decreased by over 20 percent.¹⁰³ Massachusetts also recently changed their policies, resulting in an average confinement of less than an hour.¹⁰⁴ For both states, reducing reliance on solitary confinement required a significant culture shift. Harvey J. Reed, Director of the Ohio Department of Youth Services, explained, “Our biggest effort was to get our staff to treat these kids like they are our kids. Once they did that, it got embedded in what we do every day, and that has been a game-changer.”¹⁰⁵ Peter Forbes, Commissioner of the Massachusetts Department of Youth Services reinforced this point: “You can’t think if you just eliminate room confinement, you’ve won the war. The war is really about running quality programs ... You need a good environment, strong programs.”¹⁰⁶ He explained that their goal was to “hold kids accountable, and still treat them as kids.” In contrast, he explained, the old system of docking points all day “was a toxic strategy where 25% of kids didn’t buy into it—couldn’t invest, couldn’t figure it out.”¹⁰⁷

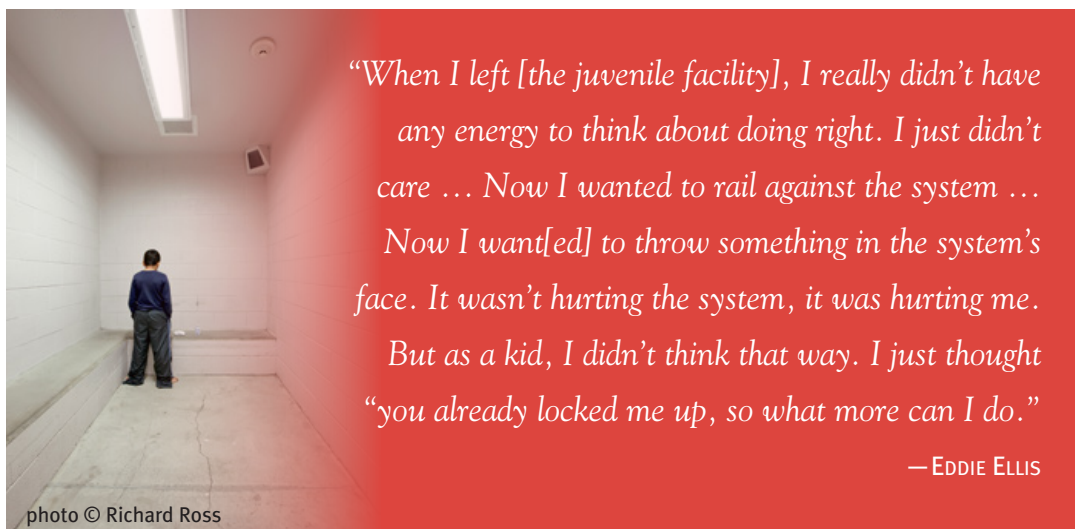
Eddie Ellis's experience demonstrates how harsh practices like solitary confinement can have this "toxic" effect. He explained: "When I left [the juvenile facility], I really didn't have any energy to think about doing right. I just didn't care ... Now I wanted to rail against the system ... Now I want[ed] to throw something in the system's face. It wasn't hurting the system, it was hurting me. But as I kid, I didn't think that way. I just thought "you already locked me up, so what more can I do."¹⁰⁸ Assistant Director of the Ohio Department of Youth Services Linda Janes explained that the key was engaging youth "in a more positive way," rather than having them "sitting around all day."¹⁰⁹

To decrease reliance on solitary confinement, Ohio's Department of Youth Services scheduled activities seven days per week and provided religious services; apprenticeship programs; increased visiting hours; access to family contact through webcams and video calls; a "Baby Elmo" program teaching young fathers how to involve their children in their lives; life skills courses about budgeting, managing checking accounts, turning on utilities; enhanced educational programming; and more short-term incentives youth actually want, such as movie nights, football games, and guest speakers.¹¹⁰ Massachusetts increased staff training on de-escalation, motivational interviewing, and adolescent development.¹¹¹

Data confirms that reducing the use of solitary confinement makes facilities safer.¹¹² It can also be key to gaining staff support for reforms.¹¹³ In Massachusetts, real-time data available to the administration also allowed them to track problematic patterns and intervene immediately to make needed changes.¹¹⁴

Both jurisdictions also relied on evidence-based therapeutic models as key components of their culture shift. Massachusetts, for example, uses Dialectical Behavioral Therapy (DBT) as a strategy to help youth manage their own behavior and gain insight about their decision-making.¹¹⁵ DBT combines cognitive behavior therapy strategies with dialectical philosophy (acceptance of clients while working toward change) and mindfulness practice.¹¹⁶ This model encourages therapists to start where the youth is emotionally "while also acknowledging that they need to change in order to reach their goals."¹¹⁷ Research has shown that DBT has positive outcomes in reducing recidivism rates, decreasing aggression, and "improving social and global functioning."¹¹⁸ DBT is also effective in reducing suicidal behavior, as well as non-suicidal self-injury.¹¹⁹ Not only do Massachusetts facilities have DBT groups for youth, they also have DBT signage, and staff—even those who are not therapists—with a working knowledge of the approach.¹²⁰ Similarly, Ohio provides Cognitive Behavioral Therapy (CBT) to youth under their supervision, teaching youth to identify negative beliefs and restructure them into positive and healthy beliefs.¹²¹ Ohio also employs social workers, psychiatric nurses, psychologists, and occupational therapists as an integrated team to address issues affecting youth in secure placement.¹²²

While the goal should always be to treat youth in their homes and communities, for those youth in facilities, these therapeutic approaches do the least harm possible. They minimize anger, frustration, and violence, and create opportunities for youth to develop problem-solving skills.



III. USING THE LAW FOR REFORM

Why was [T.D.] in that hallway [instead of locked in a cell]? Are you kidding me? The minute they found out [the youth] were represented and not just doing it by phone, there was a tremendous drop [in] kids being put in isolation ... “Call my lawyer” gave kids power. And they didn’t abuse it.

—LISA GEIS, ATTORNEY, REFLECTING ON HER EXPERIENCES
PROVIDING POST-DISPOSITIONAL REPRESENTATION AS A FELLOW IN THE
RUTGERS LAW SCHOOL CHILDREN’S JUSTICE CLINIC¹²³

The need for reform is urgent. Legal advocacy can be a powerful lever for change, whether in pursuit of policy reforms, civil litigation, or legal defense in individual cases. Moreover, these strategies are interconnected. Frequently, juvenile defenders have information about institutional practices that warrant impact litigation or policy reform. Impact litigation often triggers policy reform. Engaging and working with youth, their families and other supports, as well as community activists and organizations, is crucial to identifying abuses, clarifying a vision for change, and providing pressure on policy makers. Early conversations with and among key stakeholders can facilitate a successful path to reform.

A. Policy Reforms

The primary goal of juvenile justice reform should be to keep youth in their communities whenever possible. If youth are placed in secure settings, advocates should work for comprehensive reforms to eliminate solitary confinement.

Policy change should be carefully crafted to prohibit, rather than modify, solitary confinement. Few jurisdictions ban solitary confinement entirely. Many jurisdictions that have reformed their solitary confinement policies still permit the practice when a youth poses a risk of physical harm to him or herself or others. In 2016, the Lowenstein Sandler Center for the Public Interest found that “of the 29 states that ban punitive solitary confinement, at least 25 continue to use solitary confinement for other purposes, such as safety concerns,” and that many permit indefinite extensions of time limits.¹²⁴ Since the Lowenstein survey, California has prohibited solitary confinement for disciplinary purposes and D.C. has enacted a law that prohibits the use of room confinement against a youth “for the purposes of discipline, punishment, administrative convenience, retaliation, or staffing shortages.”¹²⁵ The following recommendations focus on eliminating the use of solitary confinement for more than three hours regardless of the circumstances or the purposes for confinement.

DEINCARCERATION: THE BEST POLICY REFORM

While beyond the scope of this report, the most effective way to eliminate solitary confinement is to keep youth at home with their families or in their communities, with appropriate services and resources as needed. Keeping youth close to home decreases recidivism and increases positive youth outcomes,¹²⁶ which also keeps communities safer. Limiting placement also keeps youth safe from the hazards and trauma posed by institutions.¹²⁷

Reliance on large, congregate facilities has “resulted in scandalous abuses, unconstitutional conditions, and poor public safety outcomes almost since their inception, sometimes despite yeoman efforts to improve them.”¹²⁸ The model is “inherently flawed,” as it undermines rehabilitation.¹²⁹ Moreover, the adverse consequences of institutional placement fall disproportionately on youth of color.¹³⁰

To reduce institutionalization, advocates should seek reforms that close youth facilities, narrow the offenses eligible for incarceration of youth, decrease length of stay, eliminate fines and fees in the youth justice system, and develop monitoring and enforcement mechanisms or procedures.¹³¹

With approximately 60,000 youth incarcerated in the United States daily, legislation to end solitary confinement is still vital. Advocates working to end solitary should coordinate with others working to reduce incarceration to ensure that these efforts—and related communication and messaging—are mutually supportive.

Effective policies on solitary confinement should ensure that:

- (1) Solitary confinement is clearly and comprehensively defined.** The definition of solitary confinement must cover all separation or exclusion of youth from the facility’s general population, regardless of whether a youth can communicate to another through an opening, such as a door or window, or if a youth remains in their “own” cell.

EXAMPLE: The MERCY Act, bi-partisan federal legislation, provides that “the term ‘room confinement’ means the involuntary placement of a ... juvenile alone in a cell, room, or other area for any reason,”¹³² and sets forth clear restrictions on such room confinement.

EXAMPLE: The settlement agreement in a 2013 lawsuit against a juvenile facility in Contra Costa County, California, specified in its definition of “room confinement” that a youth is considered “alone” “even where there are sporadic short visits or check-ins” on the youth, and it made clear that short visits or check-ins do not extend the time caps placed on room confinement.¹³³

- (2) Solitary confinement is prohibited for disciplinary or punitive purposes, for administrative convenience, and for any reason other than when necessary to prevent immediate harm.** Solitary confinement should not be permitted for administrative convenience, discipline, punishment, to address a young person’s threats of self-harm, or for protective custody. If suicide is a concern, staff should provide a heightened level of supervision, engage youth in social interaction and provide appropriate supports and services, and allow youth the opportunity to participate in school and other activities.¹³⁴ For other safety concerns, the facility should develop an individualized plan for youth rather than resorting to isolation.¹³⁵

EXAMPLE: Massachusetts law provides that youth may only be kept “involuntarily in a room during non-sleep hours” to “calm a youth who is exhibiting seriously disruptive or dangerous behavior”; “for population management”; “for the

safety and security of a youth”; and “for the investigation of an incident.” The law also places clear limits on those uses of solitary confinement, providing that confinement to calm a youth may only be used “for the least amount of time required for the youth to regain control”; that “involuntary room confinement shall never be used as a sanction for non-compliance or punishment”; that confinement for population management or for incident investigation may only last for “the amount of time reasonably necessary” to resolve the issue; and that “involuntary room confinement shall not be used with any youth who is on any suicide watch status.”¹³⁶

- (3) Solitary confinement is limited to no more than three hours; youth are released as soon as they are calm and safe to exit the cell.** Youth should not be placed in solitary for a period that exceeds a brief “cooling off” period and should be released as soon as they have regained self-control. Supports, such as a social worker who regularly works with youth, should be notified and made available to speak with the youth to assist him or her in calming down. In no circumstances should solitary confinement extend beyond three hours. If the youth is still in solitary confinement after three hours and still poses a serious risk of physical harm, a different intervention is needed—including possible referral to a different facility or location—with guidance from a licensed mental health professional.

EXAMPLE: The MERCY Act provides that, if a juvenile is placed in solitary confinement because of a serious risk of physical harm, the juvenile shall be released “immediately when the covered juvenile has sufficiently gained control” or “not later than” three hours after being placed in room confinement. If there is still a risk of harm after the maximum period of confinement, the juvenile must be transferred to another facility where services can be provided or referred, with the guidance of a mental health professional, to a location that can meet the juvenile’s needs.¹³⁷

EXAMPLE: In Washington, D.C., the Comprehensive Youth Justice Amendment Act provides that after six hours of room confinement, a youth must be returned “to the general population, transported to a mental health facility upon the recommendation of a mental health professional, transferred to the medical unit in the facility, or provided special individualized programming” that provides “concrete goals that the juvenile understands and that he or she can work toward to be removed from special programming.”¹³⁸

EXAMPLE: Pennsylvania regulations make clear that “a restrictive procedure [such as solitary confinement] shall be discontinued when the child demonstrates he has regained self-control.”¹³⁹

- (4) Staff must use the least restrictive alternatives, including de-escalation.** Before any room confinement may be imposed, de-escalation strategies that do not involve the use of physical restraints, such as CBT or de-escalation teams, must be employed to help calm a young person.¹⁴⁰ Staff must be trained in such strategies.

EXAMPLE: The REDEEM Act, proposed federal legislation, provides that, “[b]efore a staff member of a juvenile facility places a covered juvenile in room confinement, the staff member shall attempt to use less restrictive techniques, including— (I) talking with the covered juvenile in an attempt to de-escalate the situation; and (II) permitting a qualified mental health professional, or a staff member who has received training in de-escalation techniques and trauma-informed care, to talk to the covered juvenile.”¹⁴¹

EXAMPLE: Pennsylvania regulations make clear that before a child may be subject to a “restrictive procedure” such as room confinement, “(1) every attempt shall be

made to anticipate and de-escalate the behavior using methods of intervention less intrusive than restrictive procedures; (2) a restrictive procedure may not be used unless less intrusive techniques and resources appropriate to the behavior have been tried but have failed.”¹⁴²

- (5) Facilities must offer individualized services that address persistent behavior concerns to avoid use of solitary confinement.** Individualized programming, including positive behavior support, must be available to address persistent behavior problems. Solitary confinement cannot be used as a substitute for such programming.

EXAMPLE: Under the Contra Costa settlement agreement, staff are required to “develop special individualized programming for youth ... [that] includes the following:

- a. Development of an individualized plan designed to improve the youth’s behavior, created in consultation with the youth, County Mental Health staff, and the youth’s family members, when available.
- b. The plan identifies the causes and purposes of the negative behavior, as well as concrete goals that the youth understands and that he or she can work toward to be removed from special programming.
- c. In-person supervision by and interaction with staff members.
- d. In-person provision of educational services.
- e. Involvement of the youth in other aspects of the facility’s programming unless such involvement threatens the safety of youth or staff or the security of the facility.
- f. A guarantee that the youth will not be denied any of his or her basic rights.
- g. Daily review with the youth of his or her progress toward the goals outlined in his or her plan.”¹⁴³

- (6) Comprehensive data collection, analysis, and dissemination is essential.** Data must track the use of solitary confinement, including the length of time in confinement, the reasons for the use of isolation, and youth demographics—age, gender, gender identity, gender expression, sexual orientation, race, ethnicity, and disability status, among others. Such information should be made publicly available, while still protecting the identity of youth. Policies should make clear how corrective action will be taken if problematic practices or trends are uncovered.

EXAMPLE: A 2015 settlement agreement with the Illinois Department of Juvenile Justice in the case *R.J. v. Jones*, No. 12-cv-7289 (N.D. Ill.), requires that the Department “maintain cumulative data on all confinement decisions.”¹⁴⁴

EXAMPLE: Nebraska’s Revised Statute, Chapter 83, §134.01 (2016) provides that “[t]he juvenile facility shall submit a report quarterly to the Legislature on the number of juveniles placed in room confinement; the length of time each juvenile was in room confinement, the race, ethnicity, age, and gender of each juvenile placed in room confinement; facility staffing levels at the time of confinement; and the reason each juvenile was placed in room confinement. The report shall specifically address each instance of room confinement of a juvenile for more than four hours, including all reasons why attempts to return the juvenile to the general population of the juvenile facility were unsuccessful.”¹⁴⁵

Codifying these provisions in federal, state and local policy through statutory and regulatory reform will protect youth from the harms of solitary confinement and guide facilities to rely on safer and more effective strategies for interacting with youth.

B. Litigation Strategies

Litigation is a key component of any campaign to eliminate solitary confinement. While legal challenges to solitary confinement and other harsh conditions of confinement achieved some success in the 1970s,¹⁴⁶ the subsequent “tough on crime” era produced few legal victories. The Supreme Court’s recent rulings recognizing how children are developmentally different from adults for the purposes of sentencing under the Eighth Amendment¹⁴⁷ present new opportunities for legal challenges today. Advocates in several states have successfully challenged the use of solitary confinement in juvenile facilities, including obtaining injunctive relief proscribing its use for punitive purposes or reaching settlement agreements imposing strict limits on the practice. Below are promising legal strategies emerging from those cases.

Argue for a Child-Specific Constitutional Standard

Solitary confinement of youth is generally challenged as an unconstitutional condition of confinement, either because it is “cruel and unusual punishment” under the Eighth Amendment or because it “amounts to punishment” under the Fourteenth Amendment.¹⁴⁸ These two constitutional standards are similar in that each requires demonstrating that solitary confinement is harmful to children and that corrections officials acted with a sufficiently culpable state of mind.¹⁴⁹ The primary difference between the standards is that the Fourteenth Amendment is more protective—it prohibits conditions or restrictions intended to punish or humiliate, rather than just those that rise to the level of “cruel and unusual,” and the defendants’ intent can be analyzed using an objective, rather than a subjective, standard.¹⁵⁰

There is a strong argument that the Fourteenth Amendment provides the appropriate standard for juvenile conditions of confinement cases. The Supreme Court has held that the Fourteenth Amendment standard applies in situations where the primary purpose of the confinement is not punitive, such as when inmates are detained pretrial or when individuals with mental health conditions are involuntarily committed.¹⁵¹ In light of the rehabilitative purpose of the juvenile justice system, many courts have concluded that the more protective Fourteenth Amendment standard, rather than the Eighth, protects juvenile offenders from harsh conditions of confinement.¹⁵²

Using this standard, some courts have identified a right to rehabilitative treatment for youth in state custody, which can provide yet another legal avenue to challenge the use of solitary confinement.¹⁵³ For instance, a Wisconsin district court recently concluded that juvenile offenders have “a right to rehabilitation and . . . the use of solitary confinement violates” that right. The court explained that solitary confinement not only disrupts rehabilitative programming, it also “engenders antisocial behavior and it aggravates mental illness” in a way that “fundamentally interferes” with the rehabilitation of youth.¹⁵⁴

Regardless of which constitutional provision applies, however, the Supreme Court has been clear that courts must take into account the distinctive developmental characteristics and particular needs of adolescents in a host of constitutional contexts; advocates should rely on these arguments in challenging juvenile solitary confinement. Beginning with its 2005 decision in *Roper v. Simmons*, the Supreme Court has repeatedly held that juveniles enjoy greater constitutional protections than adults under the Eighth Amendment, emphasizing in each case that adolescents differ from adults in their maturity, susceptibility to outside influences, and capacity for change.¹⁵⁵ More generally, the Court has repeatedly reaffirmed that youth “have a very special place in life which law should reflect,” and it has applied this principle in a diverse array of constitutional contexts.¹⁵⁶

This emphasis on the unique developmental characteristics of youth—including their heightened vulnerability to psychological harm—has particular relevance in challenges to the use of solitary confinement. Youth are more vulnerable than adults in myriad social, emotional, psychological and physical ways, and the risk of serious harm posed by solitary confinement is more substantial for youth than for adults. Therefore, conditions that courts may find constitutionally acceptable for adults may be unduly harsh or harmful for youth under either the Eighth or the Fourteenth Amendment standard.

Furthermore, juvenile corrections officials arguably have a greater duty to understand adolescents' developmental characteristics and appreciate the risk of harm posed by practices such as solitary confinement. As a result, the rule in adult cases requiring a showing of deliberate indifference based on actual knowledge and disregard of harms may not be controlling in cases involving juveniles, where it should be sufficient to show that correctional officials should have known about the harms.¹⁵⁷ Courts have found developmentally based arguments such as these persuasive in at least three recent solitary confinement cases (see below). Widespread media coverage of the use and harms of solitary confinement can also be useful in showing deliberate indifference. For examples of media coverage, visit <http://www.stopsolitaryforkids.org/articles-short-form/>.

Bring Education Claims in Support of Ending Solitary Confinement

Education is often denied to youth placed in solitary confinement. Using the denial of educational programming—either regular education or special education—may be a wedge issue to force administrators to address more fully their use of solitary confinement and the conditions under which children are held. Education claims should not be viewed as a means of improving the conditions of solitary confinement, however, but rather as a way of hastening its demise.

When challenging the denial of education, the Individuals with Disabilities Education Act (“IDEA”), which entitles students with disabilities to many educational rights, has been a successful driver of reform in several legal challenges (see examples below). IDEA claims may include failure to identify and provide services for students with disabilities; failure to provide students with disabilities with a “free appropriate public education”; procedural problems with the development of a student’s Individualized Education Program (“IEP”) or failure to implement the services provided for in the IEP; and violations of the requirement that students with disabilities be educated in the “least restrictive environment” possible.¹⁵⁸ Similar claims may also be brought under Section 504 of the Rehabilitation Act of 1973, which broadly precludes the exclusion of individuals with disabilities from programs or activities receiving federal financial assistance on the basis of that disability.¹⁵⁹

For students without disabilities, legal challenges to deprivations of education can be more difficult, as there is no explicit federal constitutional right to education. Some states have codified this right either in statute or their state constitution, and state claims in this area have been a part of successful solitary confinement litigation.¹⁶⁰ More generally, denial of opportunities may be subsumed in the overall claim that the conditions of confinement that youth experience are harsh and pose a substantial risk of harm.

Challenge Discriminatory Policies and Practices

A strong federal legal framework supports challenges to disability-based discrimination in solitary confinement. Both the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act prohibit discrimination on the basis of a disability—the ADA in the context of employment, public services, and public accommodations, and Section 504 in the administration of programs and activities that receive federal financial assistance.¹⁶¹ Under these protections, facilities cannot place individuals in isolation because of their disabilities.¹⁶² Facilities are also required to make “reasonable modifications” to their programs to accommodate the needs of a person with a disability.¹⁶³ Based on these requirements, youth with disabilities could challenge aspects of the process that resulted in their placement in solitary—including lack of appropriate mental health treatment—or could request modifications to their conditions while *in* solitary. Placement of youth with disabilities in solitary confinement can also violate the ADA’s “integration mandate,” which requires that public entities administer services in “the most integrated setting appropriate to the needs” of the individual.¹⁶⁴ These claims each potentially offer a legal standard that “bans conditions milder than those reachable by an Eighth Amendment deliberate indifference lawsuit.”¹⁶⁵

Other federal anti-discrimination laws, such as Title VI of the Civil Rights Act of 1964 and the equal protection clause of the Fourteenth Amendment, may support challenges to solitary confinement practices that discriminate on the basis of race, ethnicity, or national origin, as well as potentially gender, gender identity, or sexual orientation.¹⁶⁶ Although there are many legal and factual hurdles to bringing these claims—in particular, the evidence necessary to prove discriminatory intent is often elusive or difficult to obtain—there have been some successful examples. For instance, adult transgender inmates have successfully challenged prison policies that automatically place transgender inmates in segregation for their protection.¹⁶⁷ Additionally, raising these legal arguments can illustrate the significant disparities and underlying biases around race or gender identity that pervade the justice system, thus supporting policy reform efforts.

RECENT CASE HIGHLIGHTS

- *J.J. v. Litscher*, Western District of Wisconsin (case filed 2017, oral ruling on June 23, 2017): This class action, brought by the ACLU of Wisconsin and Juvenile Law Center, raises Eighth and Fourteenth Amendment challenges to the widespread use of punitive solitary confinement, pepper spray, and mechanical restraints at two juvenile facilities in Wisconsin. In an oral ruling finding that plaintiffs are entitled to preliminary injunctive relief on all claims, the court held that the facilities' use of solitary confinement violates the Fourteenth Amendment right to rehabilitative treatment. The court further held that defendants' policies and practices reflect deliberate indifference to a substantial risk of serious harm under the Eighth Amendment, concluding that defendants had "demonstrated a callous indifference to the acute and permanent harm that residents [of the facilities] are suffering."¹⁶⁸
- *Doe v. Hommrich*, Middle District of Tennessee (case filed 2016, preliminary injunction issued March 22, 2017): This class action brought Eighth and Fourteenth Amendment conditions of confinement claims against the Rutherford County Detention Facility. Plaintiffs emphasized the developmental vulnerabilities of adolescents and the international condemnation of solitary confinement of children. Relying on the Supreme Court's recent decisions in this area, the district court agreed that plaintiffs had shown they were likely to succeed on their claims that youth "being detained in solitary confinement or isolation for punitive or disciplinary purposes constitutes ... inhumane treatment," in violation of the Eighth Amendment. The preliminary injunction barred all solitary confinement of youth as punishment or discipline.¹⁶⁹
- *V.W. v. Conway*, Northern District of New York (case filed 2016, preliminary injunction issued February 22, 2017): This case involved Eighth and Fourteenth Amendment challenges to the Onondaga County Justice Center's use of solitary confinement on 16- and 17-year-old inmates and detainees in adult facilities, and it included a subclass of youth with disabilities bringing IDEA claims. In addition to emphasizing the harms of solitary on all youth, plaintiffs highlighted the lack of specific educational services available to youth with disabilities while they were held in solitary confinement. The court found that the local school district had failed to provide educational services in accordance with the youths' specific IEPs and that youth with disabilities were held in isolation "in violation of the 'manifestation hearing' requirement of the IDEA." Additionally, the court explicitly noted the disproportionate use of disciplinary isolation against youth of color in the facility. The court concluded that punitive solitary confinement of youth violates the Eighth Amendment, citing the "broad consensus among the scientific and professional community that juveniles are psychologically more vulnerable than adults."¹⁷⁰

■ *G.F. v. Contra Costa County*, Northern District of California (case filed 2013, settlement reached in 2015): This case challenged the use of solitary confinement and corresponding educational deprivations on behalf of a class consisting of all youth with disabilities detained at the facility. Plaintiffs brought claims under the IDEA, the ADA, Section 504, and California state education law. There were no federal constitutional claims. The case resulted in two settlement agreements—one with the county administering the facility and one with the local education department—that require broad reforms to the practices and services provided to youth with disabilities. Under the terms of the settlement, the county agreed not to “use room confinement for discipline, punishment, administrative convenience, retaliation, staffing shortages or reasons other than a temporary response to behavior that threatens immediate harm to the youth or others.”¹⁷¹ Where confinement is used, in accordance with the settlement agreement, youth cannot remain in isolation for more “than four hours.”¹⁷²

C. Strong Juvenile Defense

Juvenile defenders play a key role in eliminating the use of solitary confinement by zealously advocating for their individual clients and raising awareness of the issue generally. Here are a few strategies to consider:

Ensure Post-Disposition Representation

Although youth have the right to counsel in delinquency proceedings, that right often ends at adjudication, leaving youth without counsel once sentenced. Yet post-disposition is the point at which youth are most likely to be placed in solitary confinement. The National Juvenile Defender Center (NJDC) hosts a comprehensive database with resources that can guide defenders who are interested in assisting their clients through post-dispositional proceedings.¹⁷³ In jurisdictions with post-dispositional representation, such as Massachusetts and Pennsylvania, defenders can ask key questions and take needed steps to advocate on conditions of confinement, as outlined below.¹⁷⁴ In jurisdictions without such representation, defenders can work toward policy reforms or identify law school clinical partners or others who may be able to offer representation pro bono. For example, advocates in Illinois and New Jersey created legal clinics at local law schools to assist youth with post-dispositional representation.¹⁷⁵

Ask Targeted Questions

A key aspect of effective representation involves regular communication between an attorney and his or her client. Speaking directly with youth is the best way to gather data and information about the use of solitary confinement in a particular jurisdiction. Defenders should not expect a client or his or her parents to volunteer information about time spent in solitary confinement. Youth may avoid talking about such a difficult subject or may not label their experience as “solitary confinement.” Defenders should be prepared to ask several questions to elicit information from the young person about the day-to-day experiences of confinement. As Juvenile Law Center’s survey of juvenile defenders revealed, attorneys are often left in the dark about what their clients are experiencing on a day-to-day basis. Attorneys should find out how much time youth spend by themselves and under what conditions, inquire frequently about mental health concerns or other disability issues, and craft questions with sensitivity to the risk of retraumatizing youth. While attorneys should speak with their clients directly, they should also talk to the youth’s parents and other supports, such as teachers or caseworkers. If permissible, they should also make inquiries directly to facility staff. Moreover, defenders should request and review the facility’s records of their clients.

QUESTIONS FOR YOUTH

Potential questions juvenile defenders can ask youth include:

- *Do you ever spend time in your room or cell by yourself? How often does that happen? How long do you usually spend there?*
- *What's the longest time you've ever had to spend in a room or cell by yourself?*
- *Do you ever spend all day, or almost all day, in your cell? Are you by yourself?*
- *Is there anything called "the box," "the hole," or the SHU in your facility? Have you ever spent time there?*
- *What happens to kids who get in trouble? Has that ever happened to you?*

For more guidance on talking to youth about solitary confinement, see the youth interview guide in the [ACLU's toolkit on ending the solitary confinement of youth in juvenile detention and correctional facilities](#).¹⁷⁶

Visit Local Facilities

Another way to find out whether and to what degree youth may be exposed to solitary confinement is to visit the facilities where youth are placed. Understanding and viewing the conditions of a facility, in addition to requesting and reviewing facility documentation related to youth, can enhance a defender's representation strategy at trial. An attorney can better speak to whether the facility will be able to or has met the youth's needs. By regularly visiting placements and educating themselves about their practices and policies, defenders can also serve as a vital source of information to other stakeholders in the system, including judges and policy advocates. If a facility refuses access to specific records related to an attorney's client, seeking a court order or submitting a Freedom of Information Act request can be effective in soliciting necessary information to further ensure a youth's rights are not violated.

QUESTIONS FOR FACILITY STAFF

Potential questions juvenile defenders can ask during a facility visit include:

- *What is the policy for addressing youth who may be considered disruptive or non-compliant? How do staff determine what constitutes a disruption or non-compliant behavior?*
- *Is there a team of health professionals (including medical, behavioral, mental, dental, etc.) available to meet the needs of youth on-site? If not, how are these services accessed for youth both in emergency and non-emergency situations?*
- *Have all correctional staff been trained on how to use de-escalation techniques? What specific de-escalation techniques do staff use?*
- *Is room confinement used at the facility? For what purpose and for how long?*
- *What is the facility's grievance policy and process for youth, parents, attorneys, or other interested parties? How long does it take for a grievance to receive a response?*

A useful resource in understanding how to navigate facilities and ask facility staff specific questions about room confinement is the [Juvenile Detention Alternatives Initiative's Guide to Juvenile Detention Reform](#).¹⁷⁷

Enlist the Court

When a youth is placed in solitary confinement, or if an attorney is concerned that a client may be isolated, these concerns should be brought to the attention of the court. At a disposition or review hearing, defenders can ask the judge to issue an order that a client not be placed in isolation as punishment or that the judge be notified in writing if the youth is placed in isolation. Judges can also order staff to notify defenders and provide written copies of all disciplinary reports. This will allow defenders to gain more access into the often hidden practices inside facilities. All of the same constitutional and statutory arguments described above are available in individual cases as well, and can be highly effective at keeping individual youth out of solitary. Additionally, requesting court orders can be effective when there are difficulties getting appropriate services or supports for youth. These services can help avoid placements in solitary and can force institutions to address the underlying problems that result in the use of such harmful practices.

Moreover, the National Council of Juvenile and Family Court Judges (NCJFCJ) has shown its support in reducing the use of solitary confinement through its 2016 resolution.¹⁷⁸ Among the NCJFCJ's resolutions that defenders may consider using to enlist the court's assistance is that judges should "continually review policies and practices related to solitary confinement of youth."¹⁷⁹

File Licensing Complaints and Grievances

When a facility's use of solitary confinement violates facility policy, licensing requirements, or other regulations, defenders should use the available complaint or grievance mechanisms to report the issue. Defenders can also assist youth or families in filing grievances or making complaints. Using these complaint mechanisms calls attention to the issue, creates a written record of the problem, and can potentially prompt an investigation or other responsive action. Youth may also be required under the Prison Litigation Reform Act (PLRA) to make use of available grievance processes at the facility before litigation challenging solitary confinement can be brought.¹⁸⁰

Work with Advocates Engaged in System Reform

In a defender agency without the capacity for significant system reform efforts, connect with local advocacy groups, including impact litigators, Protection & Advocacy (P&A) agencies, and others to move the agenda. Notably, P&A agencies, which exist in each state, have both the investigative authority to enter facilities that house individuals with disabilities *and* the ability to file legal challenges or take other actions to enforce disability laws. Juvenile Law Center also serves as a resource to advocates around the country.

D. Community Partnerships

Working in partnership with youth, parents, and other community advocates is essential for any successful reform effort. Community groups can help identify abuses and can make a record that helps litigation. Often, parents, youth, and engaged community members identify facilities with particularly abusive practices. For parents in particular, having a child taken from home and held in a harmful environment can be highly distressing. As one parent explained: "Just the whole process was devastating. When I first went to visit him, I thought my heart was going to rip out of my chest. I had to separate all of it to stay strong for my son to give him home and having him keep going. It's hell."¹⁸¹ Yet this same connection to youth means that families are experts and key partners in "designing new approaches aimed at helping youth succeed."¹⁸² Similarly, no one understands the experience youth in the system better than youth themselves. For this reason, it's vital to "[e]ngage youth as advocates ... by integrating their voice and vision as agents of change in their own lives, among their peers and in their communities."¹⁸³

Working in collaboration with others, attorneys will be better able to demonstrate that correctional officials have been “deliberately indifferent” to the need for reform—a necessary standard to meet under many of the potential claims in solitary confinement litigation.

Community partners and grassroots activists also play a vital role in helping to determine the role of conditions litigation in broader reform efforts. For example, conditions litigation can support local and national movements to close youth prisons and bring youth home to their communities. This is particularly true when community partners and legal advocates work together on communication and messaging strategies. In some circumstances, however, the timing of litigation or the goal of a narrower policy win on solitary confinement may unintentionally undermine community efforts to close facilities. By reaching out early and often to community-based advocates, discussing the advantages and challenges of litigation, and collectively deciding on strategies, attorneys can identify the optimal time, location, and case to pursue.



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“Just the whole process was devastating. When I first went to visit him, I thought my heart was going to rip out of my chest. I had to separate all of it to stay strong for my son to give him home and having him keep going. It’s hell.”

—L.S., THE PARENT OF A YOUTH IN SOLITARY¹⁸⁴

Working with community partners can also elevate and shed greater light on the issues associated with the use of solitary confinement that do not fit easily into the legal arguments. In particular, racial disparities and other disproportionate uses of solitary confinement may not be readily translated into legal claims, but they are integral to understanding the harms of the practice on individuals and communities. Here, again, community advocacy and communications strategies can add depth to the reform efforts otherwise at risk of being circumscribed by the legal framework. Where troubling patterns and practices—such as racial disparities or discrimination against LGBTQ youth—emerge, defenders should actively engage and connect with grassroots organizations, parents, youth, and impacted communities to learn about youth experiences from a different perspective and collaborate on reforms. Attorneys should be mindful of their role in helping with reform efforts. That is, a reform approach may not always require formal legal advocacy, and attorneys should be responsive to youth, family members, and community members in determining the most effective strategies.¹⁸⁵

IV. CONCLUSION

Legal advocates should seize this moment to push for the elimination of solitary confinement of youth. The field is ripe for reform: research confirms the distinctive vulnerabilities of youth; medical, correctional, and other professional organizations support elimination of the practice; and the Supreme Court has recognized that children deserve heightened constitutional protections. As one youth concluded, “we need to come out more, contact our people more.” Being in solitary “messes with your head.”¹⁸⁶ By shedding light on the harms of solitary confinement and of youth incarceration generally, and by implementing legal strategies for reform, advocates can work to ensure that no child is forced to spend days, weeks, or months locked away in isolation from their peers, families, and communities.

ENDNOTES

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- 147 See *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (striking down mandatory imposition of life without parole sentences for juveniles); *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (adopting a “reasonable child” standard for determining the scope of the *Miranda* protections, in recognition that children “are more vulnerable or susceptible to ... outside pressures” than adults” (quoting *Roper v. Simmons*, 543 U.S. 551, 569) (alteration in original)); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (striking down life without parole sentences for juveniles convicted of nonhomicide offenses); *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (striking down the juvenile death penalty as unconstitutional); see also *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016) (holding *Miller* retroactive on collateral review).
- 148 See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (articulating the general Eighth Amendment conditions of confinement standard); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (holding that exposing pretrial detainees to conduct that “amount[s] to punishment” violates the Fourteenth Amendment’s due process protections).

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- 150 See *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015) (applying an objective intent standard in a Fourteenth Amendment excessive force case and reiterating that the Fourteenth Amendment is a more protective standard).
- 151 See *Bell*, 441 U.S. at 535 (pretrial detainees); *Youngberg*, 457 U.S. at 324 (involuntarily committed individuals).
- 152 See, e.g., *A.M. v. Luzerne Cnty. Juvenile Detention Ctr.*, 372 F.3d 572, 579 (3d Cir. 2004) (analyzing conditions claims that arose both before and after plaintiff's delinquent adjudication under the *Youngberg* standard); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987) (applying the Fourteenth Amendment standard because "the Oregon juvenile justice system is noncriminal and nonpenal"); *Santana v. Collazo*, 714 F.2d 1172, 1180-83 (1st Cir. 1983) (concluding that the Fourteenth Amendment applies because juveniles have not been convicted of crimes and so are entitled to a higher level of scrutiny of their conditions of confinement); cf. *Tribble v. Arkansas Dept. of Human Servs.*, 77 F.3d 268, 270 (8th Cir. 1996) (applying the 8th Amendment standard to a juvenile conditions of confinement case).
- 153 See *Nelson v. Heyne*, 491 F.2d 352, 358, 360 (7th Cir. 1974) (identifying a "right to treatment" under the Fourteenth Amendment for juveniles in state custody that includes the "right to minimum acceptable standards of care and treatment for juveniles" and "the right to individualized care and treatment").
- 154 Transcript Excerpt from Second Day of Motion Hearing at 6-7, *J.J. v. Litscher*, No. 17-CV-47 (W.D. Wisc. June 23, 2017); see also Patrick Marley, Judge: 'Ted Kaczynski Has Less Restrictive Confinement' Than Lincoln Hills Teen Inmates, MILWAUKEE JOURNAL SENTINEL (June 23, 2017), <http://www.jsonline.com/story/news/2017/06/23/federal-judge-rule-case-wisconsins-lincoln-hills-teen-prison/423051001/>.
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