

THE BEGINNING OF THE END: USING OHIO’S PLAN TO
ELIMINATE JUVENILE SOLITARY CONFINEMENT AS A
MODEL FOR STATUTORY ELIMINATION OF JUVENILE
SOLITARY CONFINEMENT

TABLE OF CONTENTS

| | |
|--|------|
| INTRODUCTION | 1020 |
| I. THE HARMFUL EFFECTS OF SOLITARY CONFINEMENT ON JUVENILES | 1025 |
| <i>A. Physical and Developmental Harm</i> | 1026 |
| <i>B. Psychological Harm</i> | 1027 |
| <i>C. Recidivism</i> | 1029 |
| II. EXISTING FEDERAL AND STATE POLICIES AND NATIONAL STANDARDS ON SOLITARY CONFINEMENT IN JUVENILE CORRECTIONAL FACILITIES | 1032 |
| <i>A. State Laws</i> | 1032 |
| <i>B. Federal Statutes</i> | 1037 |
| <i>C. National Standards and Best Practices</i> | 1039 |
| III. CASE LAW CONCERNING SOLITARY CONFINEMENT IN JUVENILE CORRECTIONAL FACILITIES | 1040 |
| <i>A. Courts Describing a Right to Treatment</i> | 1041 |
| <i>B. Courts Holding There Is No Right to Treatment</i> | 1043 |
| IV. THE OHIO SETTLEMENT AGREEMENT AND PROPOSED STATUTORY REFORMS | 1047 |
| <i>A. Ohio’s Plan to Reduce and Eliminate Solitary Confinement</i> | 1047 |
| <i>1. Prevention Strategies</i> | 1049 |
| <i>2. Immediate Intervention Strategies</i> | 1049 |
| <i>3. Strategies for the Aftermath</i> | 1050 |
| <i>B. Proposed Reforms</i> | 1050 |
| CONCLUSION | 1054 |

INTRODUCTION

William, a fifteen-year-old boy, was committed to a juvenile correctional facility in New Jersey for 225 days.¹ For 178 of those days, William was placed in solitary confinement in a cell measuring seven feet by seven feet.² He had no access to books, auditory stimulation, or any opportunities to interact with others.³ Just a few days after being placed in solitary confinement, William started experiencing auditory and visual hallucinations and throwing his bodily fluids at the cell walls.⁴ After only a week in solitary confinement, William began self-mutilating by cutting himself.⁵ Not long after that, he attempted suicide by hanging himself in his cell on five separate occasions.⁶

Unfortunately, William's experience is not unique in modern juvenile detention facilities in the United States. Solitary confinement, a controversial practice used nationwide in state juvenile justice systems, can have devastating psychological, physical, and developmental effects on youth.⁷ Research has demonstrated that solitary confinement is especially damaging for adolescents, yet juvenile detention facilities often use the practice as a disciplinary measure.⁸ Recent efforts at reform, however, provide a framework for ending experiences like William's for adolescents across the country.

On May 21, 2014, Ohio's Department of Youth Services entered a landmark settlement agreement with the United States Department of Justice (DOJ) to phase out and eventually end the use of solitary confinement in its juvenile correctional facilities, while also

1. Sandra Simkins et al., *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U. J.L. & POL'Y 241, 256 (2012).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 257.

7. See AM. CIVIL LIBERTIES UNION [ACLU], ALONE & AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT AND ISOLATION IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES 3-5 (2014), <https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf> [<https://perma.cc/GW4H-HCMA>].

8. See *id.* at 6.

agreeing to provide more mental health services in those facilities.⁹ After beginning an investigation in 2007 at Ohio's Scioto and Marion Juvenile Correctional Facilities, the DOJ found numerous potentially unconstitutional flaws with Ohio's lack of mental health care and use of solitary confinement in its juvenile correctional facilities.¹⁰ In particular, the DOJ found that the facilities often imposed solitary confinement on juveniles as a "knee-jerk, prolonged first response" to even minor behavioral infractions and that it was frequently used as a means of isolating mentally ill youth instead of providing them with psychological treatment.¹¹

Although Ohio and the DOJ entered a consent decree in 2008 that aimed to remedy these deficiencies,¹² the DOJ discovered in 2013 that the State was not complying with the terms of the consent decree.¹³ By May 2014, Ohio and the DOJ had reached a new, more comprehensive agreement to end entirely the use of solitary confinement in all of the State's juvenile correctional facilities.¹⁴ This settlement agreement was in place until December 2015, when the DOJ and the State agreed to terminate the consent decree as a result of Ohio's substantial compliance with the terms of the settlement agreement.¹⁵

9. See Press Release, U.S. Dep't of Justice [DOJ], Justice Department Settles Lawsuit Against State of Ohio to End Unlawful Seclusion of Youth in Juvenile Correctional Facilities (May 21, 2014), <http://www.justice.gov/opa/pr/justice-department-settles-lawsuit-against-state-ohio-end-unlawful-seclusion-youth-juvenile> [<https://perma.cc/D42T-NBYQ>] [hereinafter Ohio Settlement Press Release].

10. See *id.* These flaws included potential violations of the Eighth and Fourteenth Amendments.

11. Letter from Wan J. Kim, Assistant Attorney Gen., DOJ, to the Honorable Ted Strickland, Governor of Ohio 1, 7, 10 (May 9, 2007), http://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/scioto_findlet_5-9-07.pdf [<https://perma.cc/B49N-TQR7>].

12. The 2008 consent decree aimed, among other things, to decrease the use of solitary confinement on youth with mental illnesses at the Marion and Scioto juvenile correction facilities. See *United States v. Ohio*, No. 2:08-cv-475 (S.D. Ohio Nov. 23, 2009) (order adopting proposed modifications to the stipulation for injunctive relief); *United States v. Ohio*, No. 2:08-cv-475, at 1, 6-8 (S.D. Ohio June 24, 2008) (order approving stipulation for injunctive relief).

13. See Ohio Settlement Press Release, *supra* note 9.

14. See *United States v. Ohio*, No. 2:08-cv-475 (S.D. Ohio May 21, 2014) (order detailing actions required to be taken by defendant). The 2014 settlement agreement is broader than the 2008 settlement agreement and aims to end the use of solitary confinement for all youth, not only mentally ill youth, in all of the State's juvenile correctional facilities. See *id.*

15. See Press Release, DOJ, Justice Department Agrees to Termination of Consent Decree Concerning Children in Ohio Juvenile Correctional Facilities (Dec. 15, 2015), <http://www.justice.gov/opa/pr/justice-department-agrees-termination-consent-decree-concerning-children->

Ohio's promise to end the use of solitary confinement is notable because the State sought to completely end the use of solitary confinement for youth in all of its facilities instead of merely modifying existing policies regarding the practice.¹⁶ The agreement signals that policies concerning solitary confinement in juvenile correctional centers may soon begin to evolve nationwide.¹⁷ Several civil rights advocacy organizations have long argued that solitary confinement is particularly psychologically and developmentally harmful for children.¹⁸ These organizations are hopeful that Ohio's settlement agreement is an important first step toward nationwide juvenile justice reform.¹⁹

There are approximately 70,000 children in juvenile justice facilities throughout the country on any given day.²⁰ Although each state has its own set of regulations and policies regarding its juvenile justice system, these systems share similarities nationwide.²¹ Because children are developmentally different from adults, the juvenile justice system attempts to approach juveniles less punitively.²² Unlike the adult criminal justice system, which aims to deter crime and punish criminals, the main purposes of the juvenile justice system are rehabilitation and treatment, in addition to community protection.²³ Courts adjudicate juveniles as "delinquent"—rather than guilty—and typically offer a wide range of treatment options, including placement in juvenile correctional facilities.²⁴

ohio-jvenile [https://perma.cc/D4CS-FE68]. The consent decree was terminated due to the "remarkable improvement" in conditions of confinement at DYS juvenile facilities," including the end of "disciplinary solitary confinement" and improved mental health services. *Id.*

16. *See id.*

17. *See* Editorial, *A Model for Juvenile Detention Reform*, N.Y. TIMES (June 8, 2014), http://www.nytimes.com/2014/06/09/opinion/a-model-for-juvenile-detention-reform.html?_r=0 [https://perma.cc/CKD3-BWDQ]; *see also* Steven Hsieh, *Ohio Will Stop Using Solitary Confinement to Punish Kids*, NATION (May 21, 2014), <http://www.thenation.com/blog/179975/ohio-will-stop-using-solitary-confinement-punish-kids> [https://perma.cc/8YGX-GRB6].

18. *See, e.g.*, ACLU, *supra* note 7, at 3-5.

19. *See, e.g.*, Hsieh, *supra* note 17.

20. *See* ACLU, *supra* note 7, at 6.

21. *See Juvenile vs Adult Justice*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/juvvsadult.html> [https://perma.cc/MQ4Z-4WU9] (last visited Feb. 21, 2016).

22. *See id.*

23. *See id.*

24. *Id.*

Solitary confinement is widespread in American correctional institutions, including juvenile correctional facilities.²⁵ Solitary confinement, also known in juvenile correctional facilities by harmless-sounding names like “room confinement,” “restricted engagement,” “seclusion,” or “reflection,”²⁶ is routinely used as a means of punishing disobedient youth.²⁷ Children can spend days, weeks, or even months in solitary confinement.²⁸ Research has shown that solitary confinement has particularly adverse effects on youth, resulting in or exacerbating existing mental health problems like agitation and depression and elevating the risk of suicide.²⁹ Much of the research suggests that confining youth in juvenile correctional facilities *increases* their recidivism rates, whereas providing

25. See *US: Look Critically at Widespread Use of Solitary Confinement*, HUM. RTS. WATCH (June 18, 2012), <https://www.hrw.org/news/2012/06/18/us-look-critically-widespread-use-solitary-confinement> [<https://perma.cc/2UUC-3MYR>].

26. ACLU, *supra* note 7, at 2; see also Ohio Settlement Press Release, *supra* note 9.

27. Youth in adult correctional facilities are also frequently held in solitary confinement, but those youths are sometimes confined to protect them from the population of adult inmates—an administrative, not disciplinary, purpose. See Tamar R. Birkhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 19-20 (2015). Solitary confinement of youth in adult facilities is also a problematic practice that can be extremely damaging to youth, but it has a very different function in adult facilities. Reforming adult facilities presents additional challenges that reforming youth facilities does not present, such as diverting youth from the adult justice system. See Symposium, *Juveniles in Solitary Confinement: Rehabilitation or Torture?*, 20 CARDOZO J.L. & GENDER 689, 697-98 (2014) [hereinafter *Juveniles in Solitary Confinement*]. To address these concerns, President Obama recently announced that he will take executive action to ban placing juveniles in solitary confinement in federal prisons. See Barack Obama, Opinion, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?tid=a_inl [<https://perma.cc/KA29-BHGT>]; see also Juliet Eilperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html [<https://perma.cc/A8Y8-A9ZG>]. Although laudable, President Obama’s reforms affect only juveniles held in federal facilities for adults, not juveniles in state-run juvenile correctional facilities, and are not part of any permanent statutory reform.

The separate concerns regarding children in federal facilities in adult prisons are also beyond the scope of the Ohio settlement agreement, which concerned only state-run juvenile correctional facilities. Due to the different nature of solitary confinement of youth in adult correctional facilities, this Note will instead focus on solitary confinement of youth in juvenile correctional facilities.

28. *Juveniles in Solitary Confinement*, *supra* note 27, at 698.

29. See *infra* Part I.B.

adequate mental health treatment lowers these rates.³⁰ Additionally, certain research postulates that the damaging effects of solitary confinement increase rates of recidivism among juveniles.³¹ Because of the damaging effects that solitary confinement has on youth, it should no longer be used as a disciplinary measure in juvenile correctional facilities.³²

The Supreme Court has never directly addressed the issue of juvenile solitary confinement, although there are a handful of federal cases that have addressed the constitutionality of certain conditions of solitary confinement in juvenile correctional facilities.³³ Some lower courts have recognized a right to rehabilitative treatment for juveniles held in juvenile correctional facilities using Eighth and Fourteenth Amendment arguments.³⁴ These courts held that conditions of solitary confinement were unconstitutional.³⁵

But most courts hearing lawsuits challenging the conditions of juvenile correctional facilities have not recognized that a right to treatment exists.³⁶ In fact, in *Youngberg v. Romeo*, an unrelated case about the conditions of state-run asylums, the Supreme Court indicated that there might not be such a right to treatment at all.³⁷ As a result, sweeping reform of the juvenile justice system and the nationwide use of solitary confinement likely will not be achieved through constitutional challenges in federal or state courts.

By implementing statutes mirroring the language used in Ohio's plan to eliminate solitary confinement, however, state legislators

30. See *infra* Part I.C.

31. See *infra* Part I.C.

32. Although rare situations may arise in juvenile correctional facilities that will require disruptive, violent, or dangerous youth to be isolated for disciplinary reasons, Ohio's reforms aim to limit the duration of such seclusion. See *infra* notes 209-13 and accompanying text. Concerns about the harmful effects of solitary confinement on children are tantamount to concerns about the safety of staff and youth in juvenile correctional facilities and must still be addressed. This Note proposes, however, that states can address these safety and disciplinary concerns more effectively without using solitary confinement, especially as a first response to misbehavior. See *infra* Part IV.

33. See *infra* Part III.

34. See *infra* Part III.A.

35. See *infra* Part III.A.

36. See *infra* Part III.B.

37. See 457 U.S. 307, 320-22, 324 (1982) (holding that a court's evaluation of whether a person's constitutional rights have been violated requires the balancing of liberty interests against relevant state interests).

could eventually end the use of a harmful and potentially life-threatening practice while improving mental health treatment and making their juvenile justice systems more effective. This Note will argue that states should implement reforms paralleling those that Ohio has undertaken by eliminating the use of solitary confinement in their juvenile correctional facilities. This approach balances the states' interests in the safety and security of their facilities with youths' interest in a more rehabilitative, less harmful experience in the juvenile justice system.

Part I describes the harmful effects that solitary confinement has on juveniles and demonstrates how solitary confinement is a counterproductive, inefficient practice. Part II discusses the current national standards and state policies that address solitary confinement. It illustrates how these policies are often broadly worded or inadequately designed to prevent the damaging effects of solitary confinement. Part III describes courts' reluctance to recognize a right to treatment and suggests that litigation alone is not an adequate means of eliminating the use of solitary confinement in juvenile detention facilities. Instead, Part III argues that state legislation is a better vehicle to achieve this goal. Part IV outlines Ohio's settlement with the DOJ and recommends that states implement provisions of the settlement in statutes to eliminate the use of solitary confinement in juvenile correctional facilities while balancing the need for safety and security.

I. THE HARMFUL EFFECTS OF SOLITARY CONFINEMENT ON JUVENILES

Solitary confinement is defined as physical and social isolation for between twenty-two and twenty-four hours each day for one day or more.³⁸ In juvenile correctional facilities, youth in solitary confinement are often placed in unfurnished, cramped cells for days, weeks, or months at a time.³⁹ While juveniles are held in solitary

38. See Juan E. Méndez (Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 26, U.N. Doc. A/66/268 (Aug. 5, 2011).

39. See ACLU, *supra* note 7, at 2.

confinement at juvenile correctional facilities, they are often denied or deprived of access to various services, including psychological care, educational programming, and recreational or physical activity.⁴⁰ For instance, the American Civil Liberties Union has reported that youth are sometimes not even given access to schoolbooks.⁴¹ Solitary confinement is distinguishable from brief interventions like short-term emergency seclusion or isolation in the event of disruptive behavior.⁴² Solitary confinement is not a mere “time out,” but instead a more extreme, longer-lasting form of seclusion with a disciplinary purpose.⁴³

A. Physical and Developmental Harm

There is unfortunately only limited research on the effects of prolonged isolation on youth.⁴⁴ Existing studies, however, demonstrate that solitary confinement of youth correlates with high rates of suicide, depression, and future criminal activity.⁴⁵ Youth are still developing physically and mentally when they are held in juvenile correctional facilities.⁴⁶ Solitary confinement can negatively impact their physical, psychological, and developmental health.⁴⁷ For instance, when youth are placed in solitary confinement for

40. See Simkins et al., *supra* note 1, at 252.

41. See ACLU, *supra* note 7, at 2.

42. Such brief periods of emergency seclusion occur as short-term, immediate responses to interrupt the disruptive behavior of youth who are “acting out.” ACLU & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 21 (2012), <http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf> [<https://perma.cc/2L7A-H7AY>] [hereinafter GROWING UP LOCKED DOWN]. Because of its duration, this form of seclusion is a separate practice from solitary confinement, although the Juvenile Detention Alternatives Initiative recommends that this brief seclusion in response to acting out last no longer than four hours at a time. *Id.* at 21 n.49. Accredited bodies, such as the American Academy of Child and Adolescent Psychiatry and the National Commission of Correctional Healthcare, support the use of such brief seclusion, but not the use of solitary confinement, in juvenile correctional facilities. See Juvenile Justice Reform Comm., *Solitary Confinement of Juvenile Offenders*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Apr. 2012), https://www.aacap.org/aacap/policy_statements/2012/solitary_confinement_of_juvenile_offenders.aspx [<https://perma.cc/6CY4-JNP3>].

43. See Laura Anne Gallagher, Note, *More than a Time Out: Juvenile Solitary Confinement*, 18 U.C. DAVIS J. JUV. L. & POL'Y 244, 246-49 (2014).

44. See Birckhead, *supra* note 27, at 10.

45. See *id.* at 10-12, 14, 16.

46. See *id.* at 14-15.

47. See *id.*

extended periods of time, they are deprived of the opportunity for meaningful out-of-cell physical exercise, which is needed to support adequate muscle and bone development.⁴⁸ Additionally, youth in solitary confinement are often cut off from educational programming, access to reading materials, and contact with loved ones or other privileges that allow them to socialize with others.⁴⁹ As a result, youth are denied the opportunity to develop socially or pursue an education.⁵⁰ Furthermore, denying adolescents the opportunity to acquire or master new skills may decrease their ability to successfully reintegrate into their communities when they are released from a correctional facility.⁵¹

B. Psychological Harm

Solitary confinement's psychological effects on youth are perhaps even more disturbing than its detrimental physical and developmental effects. Even brief amounts of time in isolation have grave consequences for juveniles' psychological health.⁵² For instance, a 2002 DOJ study revealed that juveniles who had been in isolation for even a few hours experienced higher levels of anxiety, depression, and paranoia.⁵³ Prolonged periods of solitary confinement can have even more severe effects on youth. Several studies have found that adults who are placed in solitary confinement experience several negative symptoms, including hypersensitivity to stimuli; headaches; problems sleeping; memory loss; confusion; increased anxiety and nervousness; agitation; aggression; fits of rage; chronic

48. See ACLU, *supra* note 7, at 5.

49. See, e.g., Letter from Wan J. Kim, Assistant Attorney Gen., DOJ, to the Honorable Robert R. Altice, Jr. et al., Exec. Comm., Marion Cty. Superior Court (Aug. 6, 2007), http://www.justice.gov/crt/about/spl/documents/marion_juve_ind_findlet_8-6-07.pdf [<https://perma.cc/GGF4-UX4A>]. As a result of a DOJ investigation of conditions at Marion County Juvenile Detention Center in Indiana, investigators found that youth placed in isolation typically did not receive "mental health care services, special educational services, regular access to medical care, or daily large muscle exercise." *Id.* at 12; see also Simkins et al., *supra* note 1, at 257-58.

50. See ACLU, *supra* note 7, at 5.

51. See Matt Olson, *Kids in the Hole*, PROGRESSIVE, Aug. 1, 2003, at 26.

52. See ROBERT L. LISTENBEE, JR. ET AL., REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 178 (2012), <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf> [<https://perma.cc/2GF4-CJT4>].

53. *Id.*

depression; hallucinations; and psychosis.⁵⁴ Because of their age, juveniles are more developmentally vulnerable than adults.⁵⁵ As a result, juveniles are often at greater risk for experiencing these adverse reactions to solitary confinement than more developmentally mature adults.⁵⁶

Additionally, even brief periods of isolation can cause retraumatization of youth.⁵⁷ Many youth in juvenile correctional facilities have experienced neglect, abuse, or have been exposed to violence or other traumas.⁵⁸ As a result of experiencing past trauma, delinquent youth often have histories of mood disorders, difficulty trusting others, substance abuse, and aggression.⁵⁹ Even short periods of isolation or solitary confinement are capable of “activat[ing] painful memories” of these past traumas, causing revictimization that makes youth feel powerless and alone.⁶⁰ Such retraumatization can undermine progress that youth have made to overcome such trauma and its negative effects.⁶¹

Most concerning is that the juveniles placed in solitary confinement in juvenile correctional facilities represent approximately half of all incidents of self-harm and suicide in juvenile correctional facilities.⁶² Solitary confinement is associated with higher incidence of self-harm and suicide among juveniles.⁶³ Even juveniles who have never previously thought of harming themselves can experience desperation and feelings of hopelessness while in solitary confinement, which can lead to suicidal ideation.⁶⁴ One study found that 62 percent of suicide victims in juvenile correctional facilities were held

54. See, e.g., Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 133-34 (2003); Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 CRIM. BEHAV. & MENTAL HEALTH 85, 90-91 (1997).

55. See ACLU, *supra* note 7, at 3-4.

56. See Juvenile Justice Reform Comm., *supra* note 42.

57. See Simkins et al., *supra* note 1, at 257-59.

58. See *id.* at 258-59.

59. See *id.*

60. *Id.*

61. See *id.*

62. See ACLU, *supra* note 7, at 5.

63. See *id.*

64. See Simkins et al., *supra* note 1, at 259.

in solitary confinement at some point, and 50 percent had been in solitary confinement at the time of their suicide.⁶⁵

Furthermore, solitary confinement amplifies the risks of serious psychological, developmental, and physical problems for children with disabilities or preexisting behavioral or mental health problems.⁶⁶ Youth in juvenile correctional facilities frequently have preexisting behavioral or mental health problems, which can result in misbehavior or disobedience.⁶⁷ Instead of using mental health treatment to change the behavior of juveniles with preexisting behavioral or mental health problems—or perhaps because of a lack of availability of mental health services to youth in such facilities—personnel at juvenile correctional facilities often choose to discipline unruly youth by placing them in solitary confinement.⁶⁸ Time spent in isolation then exacerbates these behavioral and mental health problems.⁶⁹ Although staff at juvenile correctional facilities must be able to properly discipline youth for bad behavior, the staff frequently place youth in solitary confinement for even minor infractions.⁷⁰

C. *Recidivism*

Proponents of the use of solitary confinement in juvenile correctional facilities argue that solitary confinement is necessary and justified in order to punish children when they break rules or are disruptive or violent.⁷¹ The use of solitary confinement, however, often causes youth to become even more dangerous as a result of the

65. LINDSAY M. HAYES, NAT'L CTR. ON INSTS. & ALTS., JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY 24, 28 (2004), <https://www.ncjrs.gov/pdffiles1/ojdp/grants/206354.pdf> [<https://perma.cc/46GG-6LW7>].

66. See Simkins et al., *supra* note 1, at 257-61.

67. See Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001, 1086-91 (2005).

68. See Simkins et al., *supra* note 1, at 260-61.

69. See *id.*; see also GROWING UP LOCKED DOWN, *supra* note 42, at 2.

70. See Abrams, *supra* note 67, at 1024; see also Letter from Deval L. Patrick, Assistant Attorney Gen., DOJ, to the Honorable Mike Foster, Governor of La., <http://www.justice.gov/crt/louisiana-children-louisiana-findings-letter> [<https://perma.cc/3DGV-MHPL>] (last updated Aug. 6, 2015) (describing how guards often place youth at Louisiana's Monroe and Tallulah Correctional Centers for Youth in solitary confinement for even minor disciplinary infractions).

71. See ACLU, *supra* note 7, at 6-7.

deleterious mental health consequences, lack of interaction with others, and generally poor treatment in solitary confinement.⁷² Youth who are placed in solitary confinement tend to become “more dangerous, more antisocial, more likely to reoffend, ... and more likely to suffer a lifetime [of] mental illness.”⁷³

Research indicates that solitary confinement actually results in higher recidivism rates, whereas access to alternative educational and vocational programs has been linked with decreased rates of recidivism.⁷⁴ Although research specifically focusing on recidivism in juvenile facilities is currently limited, research on adults who have been held in solitary confinement suggests that inmates held in solitary confinement are at a significant disadvantage compared to their peers in the general population.⁷⁵ Shira Gordon argues that this disadvantage results from inmates’ restricted access to educational, vocational, and rehabilitative programming.⁷⁶ Solitary confinement provides inmates fewer chances to “learn how to manage interpersonal conflict or to develop reentry plans, which can be critical to successful transition back into society.”⁷⁷ Access to this programming, however, as well as family visitation, “lead[s] to fewer disciplinary violations during incarceration, reductions in recidivism, increases in employment opportunities, and to increases in participation in education upon release.”⁷⁸

Despite current gaps in the available research on solitary confinement and recidivism among juveniles, the research suggests that less restrictive environments put youth at a lower risk for reentering the juvenile or adult criminal justice system in the future.⁷⁹ For

72. See Gary Gately, *Juvenile Solitary Confinement: Modern-Day ‘Torture’ in the US*, JUV. JUST. INFO. EXCHANGE (Mar. 5, 2014), <http://www.jjie.org/juvenile-solitary-confinement-modern-day-torture-in-the-u-s> [https://perma.cc/A28D-L4ND].

73. *Id.*

74. See Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 498 (2014). For instance, a study of 1247 adult prisoners found that 24.2 percent of prisoners held in solitary confinement were reconvicted of violent crimes, compared to 20.5 percent of prisoners in the general population. *Id.* at 520-21.

75. See *id.* at 518.

76. See *id.*

77. *Id.* (quoting Daniel P. Mears & William D. Bales, *Supermax Incarceration and Recidivism*, 47 CRIMINOLOGY 1131, 1138 (2009)).

78. *Id.* (quoting Gerald Gaes et al., *Adult Correctional Treatment*, 26 CRIME & JUST. 361, 402-03 (1999)).

79. See *id.* at 518-19.

instance, juveniles who are placed in less restrictive correctional environments tend to recidivate at lower rates than their peers in more restrictive environments.⁸⁰ Additionally, juveniles who are in juvenile correctional facilities tend to recidivate at higher rates than their peers in less restrictive community-based programs.⁸¹ Gordon argues that because detention leads to recidivism for juveniles, solitary confinement—the most restrictive kind of confinement available in juvenile facilities—may increase recidivism to an even greater degree.⁸² Such a trend suggests that solitary confinement is counterproductive as a disciplinary measure, especially against the backdrop of the juvenile justice system’s rehabilitative goals.⁸³

Very short periods of isolation, measured in minutes, are perhaps appropriate in rare emergencies and to resolve incidents of violence.⁸⁴ But children are often placed in solitary confinement, a longer-lasting form of isolation, for even minor infractions and for unnecessary lengths of time. Those periods of solitary confinement restrict access to privileges like visitation, as well as to exercise, therapy, and education programs.⁸⁵ Based on data from a 2003 survey, one-third of the approximately 35,000 children in custody had been isolated with no contact with other youth at some point in their detention.⁸⁶ Of those who had been isolated, over half were held in solitary confinement for longer than twenty-four hours.⁸⁷ Although it is perhaps appropriate to use isolation for very brief intervals of time to neutralize violent outbursts or disobedience, it is counterproductive and unnecessary to use solitary confinement to address behavioral issues in juvenile correctional facilities.

As a result of solitary confinement’s harmful and potentially life-threatening effects on youth, civil rights organizations,⁸⁸ medical

80. *Id.*

81. *Id.* at 518.

82. *Id.* at 519.

83. See *supra* notes 22-24 and accompanying text. More restrictive punishments, on average, tend to demonstrate higher rates of recidivism. By eliminating solitary confinement, legislatures could perhaps lower these rates.

84. ACLU, *supra* note 7, at 7; see also GROWING UP LOCKED DOWN, *supra* note 42, at 21.

85. See ACLU, *supra* note 7, at 7; see also Gordon, *supra* note 74, at 518.

86. See ACLU, *supra* note 7, at 7.

87. See *id.*

88. See *id.*

professionals,⁸⁹ and even the United States Attorney General⁹⁰ have vocalized their opposition to its use in juvenile correctional facilities. Although national standards and state policies place some limits on the use of solitary confinement in juvenile correctional facilities, Part II will discuss how these standards and policies do not adequately restrict the use of isolation or solitary confinement in light of its harmful physical, developmental, and psychological effects on youth.

II. EXISTING FEDERAL AND STATE POLICIES AND NATIONAL STANDARDS ON SOLITARY CONFINEMENT IN JUVENILE CORRECTIONAL FACILITIES

There are several already-existing federal and state policies that address the use of solitary confinement in juvenile correctional facilities.⁹¹ This Part will first address relevant state laws before discussing federal statutes and national standards concerning solitary confinement in juvenile corrections.

A. State Laws

Policies regarding time limits and the use of solitary confinement in juvenile correctional facilities vary widely across the states. For instance, twenty states prohibit placing juveniles in solitary confinement for punitive reasons for more than twenty-four hours.⁹² Eleven

89. The American Academy of Child and Adolescent Psychiatry, for instance, has stated that it “opposes the use of solitary confinement in correctional facilities for juveniles.” Juvenile Justice Reform Comm., *supra* note 42.

90. Former Attorney General Eric Holder has criticized solitary confinement, stating: Solitary confinement can be dangerous, and a serious impediment to the ability of juveniles to succeed once released Let me be clear, there may be times when it becomes necessary to remove a detained juvenile from others in order to protect staff, other inmates, or the juvenile himself from harm. However, this action should be taken only in a limited way where there is a valid reason to do so, and for a limited amount of time.

Press Release, DOJ, Attorney General Holder Criticizes Excessive Use of Solitary Confinement for Juveniles with Mental Illness (May 14, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-criticizes-excessive-use-solitary-confinement-juveniles-mental> [https://perma.cc/H4UR-TML8].

91. See ACLU, *supra* note 7, at 8-9.

92. See Birkhead, *supra* note 27, at 39.

states cap solitary confinement between one and four days.⁹³ Eleven other states limit solitary confinement of juveniles to between five and ninety days,⁹⁴ and ten states place no time limits at all on the duration of solitary confinement for youth.⁹⁵ Although limiting solitary confinement in juvenile correctional facilities is certainly preferable to having no limits on its duration, these time limits ignore the harmful effects that even short amounts of time in isolation have on youth.⁹⁶ Additionally, these limits alone do not restrict the ability of staff in juvenile correctional facilities to use solitary confinement at their discretion.

Six states have statutory limits on the use of solitary confinement in their juvenile facilities.⁹⁷ These states include Alaska,⁹⁸ Connecticut,⁹⁹ Maine,¹⁰⁰ Nevada,¹⁰¹ Oklahoma,¹⁰² and West Virginia.¹⁰³ These statutes generally ban punitive juvenile solitary confinement or require special approval to use solitary confinement, and even then allow its use only for predetermined amounts of time. Although these statutory prohibitions on solitary confinement aim to reduce or eliminate the use of solitary confinement in juvenile correctional facilities, they have several flaws and ambiguities that make their desired outcome difficult to achieve.

The language of Alaska's statute, for instance, prohibits the use of solitary confinement in some, but not all, situations, which still allows staff at juvenile correctional facilities the discretion to place youth in solitary confinement.¹⁰⁴ The text of the statute forbids

93. *Id.* These states are Illinois, Iowa, Maine, Hawaii, Louisiana, Mississippi, Nevada, North Carolina, Rhode Island, Washington, and Montana. *Id.* at 39 n.269.

94. *Id.* Florida, Indiana, Kentucky, Minnesota, New Jersey, South Dakota, and Virginia limit solitary confinement to five days, while California, Kansas, Nebraska, and Wisconsin set maximums of five days or longer. *Id.* at 39 n.270.

95. *Id.* Statutes from Alabama, Georgia, Massachusetts, Michigan, Missouri, Ohio, Oregon, Tennessee, Texas, and South Carolina do not set maximum limits for juvenile solitary confinement. *Id.* at 39 n.271. Ohio, however, has recently agreed to end solitary confinement for juveniles for any length of time. *See supra* notes 9-15 and accompanying text.

96. *See supra* Part I.

97. *See* ACLU, *supra* note 7, at 8, 25-26.

98. ALASKA DELINQUENCY R. 13 (LexisNexis 2015).

99. CONN. GEN. STAT. ANN. § 46b-133(e) (West 2015).

100. ME. REV. STAT. ANN. tit. 34-A, § 3032(5) (2015).

101. NEV. REV. STAT. ANN. § 62B.215 (LexisNexis 2014).

102. OKLA. ADMIN. CODE § 377:35-11-4 (2015).

103. W. VA. CODE ANN. § 49-4-721(a)(1) (LexisNexis 2015).

104. *See* ACLU, *supra* note 7, at 24.

confining juveniles for “punitive reasons” but does not prohibit the use of solitary confinement for disciplinary, safety, or security reasons.¹⁰⁵ Similarly, Maine’s statute prohibits using solitary confinement as a *punishment* in juvenile correctional facilities but does not expressly forbid the use of solitary confinement in other situations.¹⁰⁶

Some states have statutes that supposedly forbid solitary confinement yet authorize the use of solitary confinement in certain situations, or as a sanction for certain offenses. Oklahoma’s statute, for example, bans punitive juvenile solitary confinement,¹⁰⁷ but the Oklahoma Administrative Code describes how solitary confinement may still be used under emergency conditions.¹⁰⁸ Similarly, West Virginia’s statute forbids “lock[ing a youth] alone in a room” for punitive reasons¹⁰⁹ or “impos[ing] ... solitary confinement” to punish youth,¹¹⁰ but allows “room confinement” tantamount to solitary confinement for up to ten days as a sanction for certain offenses in juvenile correctional facilities.¹¹¹

To be clear, these statutes are flawed not because they allow staff to reestablish order and safety in these facilities, but instead because they allow staff to use discretion when deciding whether solitary confinement is appropriate.

Unlike these other four states, Connecticut’s statute bans all solitary confinement for children.¹¹² The statute is flawed, however, because solitary confinement itself is not defined, creating ambiguity in the statute’s enforcement.¹¹³ As a result, youth are still held in conditions that could be described as solitary confinement.¹¹⁴

105. ALASKA DELINQUENCY R. 13 (LexisNexis 2015).

106. ME. REV. STAT. ANN. tit. 34-A, § 3032(5) (2015); *see also* ACLU, *supra* note 7, at 24.

107. OKLA. STAT. ANN. tit. 10A, § 2-7-603(B) (West 2015).

108. OKLA. ADMIN. CODE § 377:35-11-4(a) (2015).

109. W. VA. CODE ANN. § 49-4-721(a)(1) (LexisNexis 2015).

110. *Id.*

111. JUVENILE JUSTICE COMM’N, W. VA. SUPREME COURT OF APPEALS, 2014 ANNUAL REPORT 25-27 (2014), http://www.courtswv.gov/court-administration/juvenile-justice-commission/JJ_Cannualreport_2014.pdf [<https://perma.cc/9ND4-VK73>] (describing parameters of and reasons for room confinement for safety concerns, including immediate sanction up to three days, or ten days for severe cases); *see also* ACLU, *supra* note 7, at 25.

112. CONN. GEN. STAT. ANN. § 46b-133(e) (West 2015).

113. *See* ACLU, *supra* note 7, at 24.

114. *See, e.g., Connecticut DCF: Transgender Girl ‘Jane Doe’ Found After Escaping from Therapeutic Program*, NEW HAVEN REG. (Sept. 16, 2014, 12:32 PM), <http://www.nhregister.com>.

Finally, Nevada requires special approval to use solitary confinement on any child in a juvenile correctional facility if staff have exhausted less restrictive options to modify the child's behavior and ensure safety and security.¹¹⁵ The statute limits the use of "corrective room restriction" to no longer than seventy-two hours.¹¹⁶ Although Nevada's statute laudably aims to first exhaust alternatives to solitary confinement before approving its use, the statute ignores the potentially harmful effects of even a few hours spent in isolation by allowing confinement to continue for up to three consecutive days.¹¹⁷

Several states lack statutes that expressly prohibit the use of solitary confinement. Notably, however, certain states like Missouri take unique approaches to their juvenile justice systems that largely preclude the need to use solitary confinement.¹¹⁸ Missouri undertook a series of significant reforms beginning in the 1970s that have transformed its juvenile justice system into a highly regarded national model for rehabilitation.¹¹⁹ By focusing on providing mental health care to youth in small regional facilities as part of a "multi-layered treatment experience," Missouri aims to help troubled teens "make lasting behavioral changes and prepare for successful transitions back to the community."¹²⁰ Missouri's juvenile correctional facilities serve small groups of ten to twelve youth supervised by staff.¹²¹ When youth "act out" by becoming disruptive, disrespectful,

com/general-news/20140916/connecticut-dcf-transgender-girl-jane-doe-found-after-escaping-from-therapeutic-program [https://perma.cc/K52X-Z7JK].

115. See NEV. REV. STAT. ANN § 62B.215 (LexisNexis 2014).

116. *Id.*; see also ACLU, *supra* note 7, at 24.

117. See *supra* Part I.

118. See, e.g., RICHARD A. MENDEL, ANNIE E. CASEY FOUND., THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS (2010), http://static1.1.sqs.pcdn.com/static/f/658313/9749173/1291845016987/aecf_mo_fullreport_webfinal.pdf?token=0uB1HfvM6GNoHi7Zox9iu%2Fw9Xls%3D [https://perma.cc/SW7Q-XC25]. New York has also implemented programs to preclude the use of solitary confinement. See N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVS., *Division of Juvenile Justice and Opportunities for Youth*, <http://ocfs.ny.gov/main/rehab/Default.asp> [https://perma.cc/75PE-RMAU] (last visited Feb. 21, 2016).

119. See MENDEL, *supra* note 118, at 17. The so-called Missouri Model has been recognized by the American Youth Policy Center as a "guiding light" for juvenile justice reform and is widely considered a great success. *Id.* at 5 (quoting RICHARD A. MENDEL, AM. YOUTH POLICY FORUM, LESS COST, MORE SAFETY: GUIDING LIGHTS FOR REFORM IN JUVENILE JUSTICE (2001)).

120. *Id.* at 5.

121. *Id.* at 20.

or destructive, they are asked to explain their thoughts and feelings and reflect on their misbehavior with the group instead of facing isolation or solitary confinement.¹²² Missouri's rehabilitation-focused system produces far lower recidivism rates than other state systems, and Missouri's youth tend to be better prepared to rejoin their communities upon release.¹²³ Although Missouri does not expressly ban solitary confinement in its juvenile correctional facilities, its approach to juvenile justice largely eliminates the need to use solitary confinement while producing positive outcomes.

Notably, the Contra Costa County youth corrections system in California¹²⁴ and the Illinois Department of Juvenile Justice¹²⁵ have recently entered settlement agreements to end the use of solitary confinement in juvenile correctional facilities. The terms of these settlement agreements, when enacted, will largely mirror the terms of Ohio's settlement agreement:¹²⁶ increasing the amount of time that juveniles are allowed outside of their cells each day; requiring juveniles in isolation to receive mental health and educational services; and permitting disciplinary isolation for only short periods of time.¹²⁷ Nevertheless, like the lawsuit in Ohio that is the focus of this Note, these lawsuits took a number of years to settle and speak to the urgent need for state legislatures to take affirmative measures to eliminate their own solitary confinement practices before more youth are harmed.

122. *Id.*

123. *See id.* at 6-9. In 2005, out of 1120 youth in Missouri's Division of Youth Services' residential facilities, 66 percent were law-abiding with no recommitment to the Division of Youth Services or an adult prison within three years after being discharged. *Id.* at 7. Only 24 percent of the youth in Missouri's facilities were reincarcerated within three years, compared to 43 percent of youth in Texas and 52 percent of youth in Arizona. *Id.*

124. *See* Lee Romney, *Contra Costa County to End Solitary Confinement for Juveniles*, L.A. TIMES (May 19, 2015, 12:12 PM), <http://www.latimes.com/local/lanow/la-me-ln-contra-costa-county-solitary-confinement-20150519-story.html> [<https://perma.cc/E328-5RH8>]. The settlement agreement applies only to Contra Costa County, not to juvenile facilities in other California counties. *See id.*

125. *See* Julie Bosman, *Lawsuit Leads to New Limits on Solitary Confinement at Juvenile Prisons in Illinois*, N.Y. TIMES (May 4, 2015), <http://www.nytimes.com/2015/05/05/us/politics/lawsuit-leads-to-new-limits-on-solitary-confinement-at-juvenile-prisons-in-illinois.html> [<https://perma.cc/ZAK3-9ND9>].

126. *See infra* Part IV.A.

127. *See* Bosman, *supra* note 125; Romney, *supra* note 124.

There have not been many recent efforts to reform solitary confinement of youth at the state legislative level. In February 2014, California State Senator Leland Yee introduced state-level legislation that would have limited the use of solitary confinement at California's juvenile correctional facilities.¹²⁸ The bill provided that solitary confinement be used only when youth posed an "immediate and substantial risk of harm to others" and when less restrictive options had been exhausted.¹²⁹ Further, it prohibited minors from being deprived of rights while confined.¹³⁰ The bill had "little chance of passing," however, once Senator Yee was indicted on corruption charges.¹³¹ A new bill restricting the use of solitary confinement, authored by State Senator Mark Leno, recently passed in California's Senate but has not been voted on by the rest of the state legislature.¹³² Otherwise, there are no current bills that would reform solitary confinement in juvenile correctional facilities at the state level.¹³³

B. Federal Statutes

There are also federal laws in place to restrict the use of solitary confinement on juveniles.¹³⁴ These laws, however, do very little to actually prevent the use of solitary confinement in juvenile

128. See Birkhead, *supra* note 27, at 66 & n.439.

129. David Greenwald, *Court Watch: Statewide Reforms on Solitary Confinement and Bail*, PEOPLE'S VANGUARD OF DAVIS (Feb. 17, 2014), <http://www.davisvanguard.org/2014/02/court-watch-statewide-reforms-on-solitary-confinement-and-bail/> [https://perma.cc/B36H-LBRT].

130. See *id.*

131. Trey Bundy, *Inside Calif. Juvenile Hall, Rare Glimpse at Solitary Confinement Cells*, CTR. FOR INVESTIGATIVE REPORTING (Apr. 17, 2014), <http://cironline.org/reports/inside-calif-juvenile-hall-rare-glimpse-solitary-confinement-cells-6268> [https://perma.cc/DGP3-SAWG].

132. See *Bill Limiting Use of Solitary Confinement in Juvenile Facilities Clears Senate*, SENATOR MARK LENO (June 2, 2015), <http://sd11.senate.ca.gov/news/2015-06-02-bill-limiting-use-solitary-confinement-juvenile-facilities-clears-senate> [https://perma.cc/57KC-24FT]. Problematically, this bill merely places time and situational limits on solitary confinement, rather than eliminating its use. See *id.*

133. Legislators recently introduced bills to reform solitary confinement in Florida, Montana, Nevada, New York, and Texas, but these bills did not pass. See Ian M. Kysel, *Solitary Confinement Makes Teenagers Depressed and Suicidal. We Need to Ban the Practice.*, WASH. POST (June 17, 2015, 8:34 AM), <https://www.washingtonpost.com/posteverything/2015/wp/06/17/solitary-confinement-makes-teenagers-suicidal-we-need-to-ban-the-practice/> [https://perma.cc/TA4U-FPEL].

134. See ACLU, *supra* note 7, at 8.

correctional facilities. The Prison Rape Elimination Act (PREA) applies primarily to adult correctional facilities that house juvenile inmates, but certain provisions also apply to juvenile correctional facilities.¹³⁵ PREA dictates that to the extent possible, any young person who is separated or isolated for disciplinary or protective reasons should have access to daily large-muscle exercise, access to educational programming, daily visits from medical and mental health providers, and access to other programming.¹³⁶ Although PREA aims to improve conditions of solitary confinement for youth, it is still permissible under PREA to subject youth to solitary confinement.¹³⁷ In reality, few juvenile correctional facilities allow youth to access the services mandated under PREA while in solitary confinement.¹³⁸ As various DOJ investigations have indicated, many juvenile correctional facilities do not have the resources to provide such programming or opt not to provide the programming to youth in solitary confinement.¹³⁹

Moreover, even if youth were guaranteed access to certain services while in solitary confinement, research suggests that prolonged periods of extreme isolation are still harmful to juveniles.¹⁴⁰ Even when correctional facilities provide juveniles with proper access to educational, medical, and mental health programming, the potentially life-threatening effects of isolation cannot be lightly dismissed. Furthermore, several less restrictive but effective alternatives to solitary confinement are available when youth need to be separated from others for disciplinary or safety purposes.¹⁴¹ Because of the highly restrictive nature of solitary confinement, the inherent lack of normal social interaction that comes with it, and the increased risk of recidivism that results from such isolation,

135. *Frequently Asked Questions*, NAT'L PREA RES. CTR., <http://www.prearesourcecenter.org/faq#n1072> [<https://perma.cc/TGZ9-AWDT>] (last visited Sept. 26, 2015).

136. 28 C.F.R. §§ 115.342(b), 115.378(b) (2012); *see also* ACLU, *supra* note 7, at 8-9.

137. *See* ACLU, *supra* note 7, at 8-9.

138. *See supra* Part I.

139. *See, e.g., Special Litigation Section Case Summaries*, DOJ, <http://www.justice.gov/crt/special-litigation-section-case-summaries> [<https://perma.cc/9KHT-L6LC>] (last updated Dec. 30, 2015).

140. *See supra* Part I.

141. *See* ACLU, *supra* note 7, at 11. Such alternatives include brief periods of isolation lasting no longer than four hours at a time. *See infra* Part II.C.

solitary confinement poses enormous problems to juveniles and society as a whole.¹⁴²

Members of Congress have recently recognized the harmful effects of solitary confinement on juveniles. In 2014, Senator Dick Durbin (D-Ill.) led a Senate panel discussing banning solitary confinement for juveniles, pregnant women, and mentally ill prisoners, leading Representative Tony Cardenas (D-Cal.) to introduce a House bill that would ban solitary confinement in juvenile facilities.¹⁴³ Afterwards, Senators Cory Booker (D-N.J.) and Rand Paul (R-Ky.) proposed a bill called the REDEEM Act,¹⁴⁴ which would “severely restrict[] juvenile solitary confinement as part of a legislative package designed to incentivize states to increase the age of criminal responsibility to age eighteen.”¹⁴⁵ Since the bill was referred to the Senate Judiciary Committee in July 2014, however, Congress has taken no further action to discuss or enact it.¹⁴⁶

C. National Standards and Best Practices

In addition to the currently existing state and federal statutes, national standards and best practices exist that describe appropriate restrictions on solitary confinement and isolation in juvenile correctional facilities.¹⁴⁷ Although these standards do not have the force of law, they account for the potential harmful effects of solitary confinement on youth. For instance, the DOJ’s Standards for the Administration of Juvenile Justice “limit isolation to a maximum

142. See ACLU, *supra* note 7, at 11.

143. See Birkhead, *supra* note 27, at 65-66.

144. John Kelly, *Sens. Rand Paul and Cory Booker Reach Cross Aisle for Bill on Juvenile Records, Solitary Confinement*, CHRON. SOC. CHANGE (July 9, 2014), <https://chronicleofsocial-change.org/news-2/sens-rand-paul-and-cory-booker-cross-aisle-for-bill-on-juvenile-records-solitary-confinement/7451> [<https://perma.cc/33P2-5ZD8>].

145. See Birkhead, *supra* note 27, at 66.

146. *S.2567 - REDEEM Act*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/2567/text> [<https://perma.cc/JC2Q-CANM>] (last visited Feb. 21, 2016). In January 2016, President Obama announced that he will take executive action to ban solitary confinement for juveniles held at adult federal correctional facilities, but such executive action lacks the permanence of statutory reform and will not ban the practice in state-run facilities. See *supra* note 27 and accompanying text.

147. See ACLU, *supra* note 7, at 8.

period of 24 hours.”¹⁴⁸ Additionally, the Juvenile Detention Alternatives Initiative has issued standards that recommend that “room confinement” should be used only as a “temporary response to behavior that threatens immediate harm” to the child or others and only after staff have unsuccessfully used less restrictive de-escalation techniques.¹⁴⁹ The standards further forbid periods of isolation that last longer than four hours at a time.¹⁵⁰

Current state and national policies regarding solitary confinement of youth in juvenile correctional facilities are lacking and often do not adhere to nationally recommended standards that account for the harmful effect of isolation and solitary confinement on youth. Reforms are necessary because of the patchwork of policies regarding solitary confinement in place across the country. Although reforms are often precipitated in the courts, Part III will discuss why the judiciary is not, thus far, the appropriate place to pursue blanket bans on solitary confinement. Because of courts’ reluctance to recognize a right to treatment for children in the juvenile justice system, Part IV will urge that legislation correcting current statutory weaknesses and mirroring Ohio’s recent settlement agreement with the DOJ is the more effective force for change.

III. CASE LAW CONCERNING SOLITARY CONFINEMENT IN JUVENILE CORRECTIONAL FACILITIES

The Supreme Court has never found solitary confinement *per se* unconstitutional. Although the Supreme Court has addressed conditions of confinement in juvenile correctional facilities in the past, the Court has not yet directly addressed the constitutionality of solitary confinement for youth in juvenile correctional facilities. Other courts, however, have discussed the conditions of solitary confinement in state juvenile justice systems. In the 1970s and 1980s, advocates filed various lawsuits on behalf of children in juvenile correctional facilities in different parts of the country; several of

148. *Id.*; *see also* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DOJ, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE § 4.92 (1980) (“Room confinement of more than twenty-four hours should never be imposed.”).

149. *See* JUVENILE DETENTION ALTS. INITIATIVE, ANNIE E. CASEY FOUND., JUVENILE DETENTION FACILITY ASSESSMENT: A GUIDE TO JUVENILE DETENTION REFORM 177 (2014).

150. *See id.* at 178.

these cases involved children held in solitary confinement.¹⁵¹ This Part will first discuss early court decisions that suggested a right to treatment exists before describing more recent jurisprudence indicating that courts no longer recognize such a right.

A. Courts Describing a Right to Treatment

Using a combination of Eighth and Fourteenth Amendment arguments on behalf of children in juvenile correctional facilities, advocates have argued that juveniles in state-run detention centers have a due process right to rehabilitative treatment while in state custody.¹⁵² They argued that conditions that were not rehabilitative in nature per se constituted cruel and unusual punishment.¹⁵³ Advocates reasoned that, because the purpose of the juvenile justice system, unlike the adult justice system, was rehabilitation, juveniles had a right to rehabilitative treatment while in state custody.¹⁵⁴ That right to treatment, they argued, precluded the use of harsh conditions of punishment and, in some cases, the use of solitary confinement altogether.¹⁵⁵

Arguments advancing a right to treatment concerned conditions in juvenile correctional facilities as well as access to medical and psychological care.¹⁵⁶ Although some courts seemed willing to recognize a right to treatment for juveniles in juvenile correctional facilities,¹⁵⁷ courts have generally been reluctant to do so.¹⁵⁸ The Supreme Court has even indicated that a right to rehabilitative treatment may not exist.¹⁵⁹

151. See generally Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791 (1995).

152. See *id.* at 1793.

153. See *id.*

154. See *id.* at 1792-93.

155. See *id.* at 1796-97.

156. See *id.* at 1797-98.

157. See, e.g., *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974) (holding that the juveniles incarcerated in juvenile correctional institutions had the right, under the Due Process Clause, to rehabilitative treatment and were protected from cruel and unusual punishment under the Eighth Amendment when conditions of confinement were not rehabilitative).

158. See Holland & Mlyniec, *supra* note 151, at 1810-11.

159. See *id.* at 1806-07 (discussing *Farmer v. Brennan*, 511 U.S. 825 (1994), which “emphasized that the Eighth Amendment was about punishment and not prison conditions”).

A handful of federal courts have held that juveniles at juvenile correctional facilities have due process protections that amount to a right to treatment. As a result, these courts have held that the conditions or use of solitary confinement at certain facilities unconstitutionally violate this right.¹⁶⁰

In *Lollis v. New York State Department of Social Services*, a precursor to later cases that would explicitly articulate that juvenile offenders have a right to treatment, the Southern District of New York ruled that using solitary confinement as a treatment in a juvenile detention facility was “punitive, destructive, defeat[ed] the purpose of any kind of rehabilitative efforts and harken[ed] back to medieval times.”¹⁶¹ Antoinette Lollis, a fourteen-year-old at New York’s Hudson Training School, was held in solitary confinement for two weeks after fighting with a staff member.¹⁶² Lollis’s requests to meet with a psychiatrist while confined were denied.¹⁶³ The court indicated support for affidavits from a psychologist who concluded that there was no justification for using solitary confinement “unless one want[ed] to dehumanize a young person in trouble and want[ed] to create more trouble with such a person in the future.”¹⁶⁴

Building on the *Lollis* court’s reasoning, the District of Rhode Island found that isolating young boys in a state-run juvenile correctional facility in cold, dark isolation cells equipped with only a toilet and a mattress constituted cruel and unusual punishment.¹⁶⁵ The court held that the state’s primary interest in keeping juveniles in its custody post-adjudication was to rehabilitate youth, and, as a result, when the state confines youth to juvenile correctional facilities, it must ensure that they receive rehabilitative treatment.¹⁶⁶ Taking into account expert testimony that solitary confinement was particularly psychologically damaging to youth, the court held

160. *See id.* at 1810-11.

161. 322 F. Supp. 473, 481 (S.D.N.Y. 1970).

162. *Id.* at 475-76.

163. *Id.* at 476.

164. *Id.* at 481.

165. *See Inmates of the Boys’ Training Sch. v. Affleck*, 346 F. Supp. 1354, 1359, 1366-67 (D.R.I. 1972).

166. *See id.* at 1364-65.

solitary confinement under such conditions violated this right to treatment while in state custody.¹⁶⁷

In 1974, the Seventh Circuit explicitly held that juveniles incarcerated in correctional facilities had a due process right to rehabilitative treatment and thus were protected under the Eighth Amendment from punishments that did not advance these rehabilitative goals.¹⁶⁸ Other courts would use the reasoning adopted in this case, *Nelson v. Heyne*, to find that juveniles' right to treatment precluded states from using certain kinds of solitary confinement in juvenile correctional facilities. In *Morgan v. Sproat*, for example, the Southern District of Mississippi ruled that juveniles at a state institution for delinquent boys were afforded a right to treatment under the Due Process Clause and protected from cruel and unusual punishment by the Eighth Amendment.¹⁶⁹ The court found that boys who had been assigned to the Intensive Treatment Unit, which was a solitary confinement unit, were not afforded their due process rights or their Eighth Amendment rights under the then-existing conditions of confinement in the Intensive Treatment Unit.¹⁷⁰

B. Courts Holding that There Is No Right to Treatment

Despite various federal court decisions finding that correctional institutions had infringed on inmates' constitutional rights, subsequent Supreme Court decisions have made lower courts less willing to find that constitutional violations exist in various kinds of correctional facilities. In *Bell v. Wolfish*, the Supreme Court held that lower courts ought to give prison administrators' decisions broad deference and avoid interfering with day-to-day operations at prisons.¹⁷¹ Moreover, if correctional institutions allegedly infringe on individuals' constitutional rights, those allegations must be weighed against administrators' need to ensure that conditions are safe.¹⁷²

Furthermore, although the aforementioned lower court decisions demonstrate a willingness to adopt the right to treatment

167. See *id.* at 1366.

168. See *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974).

169. See 432 F. Supp. 1130, 1140 (S.D. Miss. 1970).

170. See *id.*

171. See 441 U.S. 520, 547 (1979); see also *Holland & Mlyniec*, *supra* note 151, at 1807-08.

172. See *Bell*, 441 U.S. at 547; see also *Holland & Mlyniec*, *supra* note 151, at 1807.

reasoning concerning the conditions of juveniles' confinement, many courts have rejected the argument that a right to treatment exists in light of *Youngberg v. Romeo*.¹⁷³ *Youngberg* addressed the rights of disabled people in state-run mental hospitals, not the rights of people in the custody of the criminal justice system.¹⁷⁴ The respondent, Romeo, had been involuntarily committed to a state-run hospital for severely mentally handicapped adults.¹⁷⁵ Romeo claimed that he had due process rights to safe conditions, freedom from bodily restraint, and habilitation (training to develop necessary self-care skills).¹⁷⁶ The *Youngberg* Court held that although Romeo had the right to safe accommodations and freedom from restraint, the respondent was entitled only to "*minimally adequate* or reasonable training to ensure safety and freedom from undue restraint."¹⁷⁷ The *Youngberg* Court used the deferential approach from the earlier *Bell v. Wolfish*, which held that decisions about the kinds of treatment available should be left to qualified professionals at the state-run institution and that those decisions would be considered presumptively correct.¹⁷⁸

Although *Youngberg* did not address juvenile justice, the case reduced the amount of juvenile justice litigation in the courts by ruling narrowly on the right to treatment in state-run facilities.¹⁷⁹ *Youngberg* obligates states to provide only the bare minimum of training or services necessary to ensure that those in state custody are safe and free from unnecessary bodily restraint.¹⁸⁰ This ruling is thus at odds with prior reasoning requiring that the state ensure youth in detention receive rehabilitative services and not be punished in ways that contravene this rehabilitation. In other words, the reasoning from the *Youngberg* decision rebuts legal arguments that

173. See Holland & Mlyniec, *supra* note 151, at 1793.

174. See *id.*

175. See *Youngberg v. Romeo*, 457 U.S. 307, 309-10 (1982).

176. Self-care skills in this case referred to those commonly taught to mentally handicapped individuals, such as feeding, showering, dressing, and toilet training themselves, as well as interacting with others. See *id.* at 309, 311 n.7.

177. *Id.* at 319 (emphasis added).

178. See *id.* at 323; see also Holland & Mlyniec, *supra* note 151, at 1807-08.

179. See Holland & Mlyniec, *supra* note 151, at 1801-03.

180. See *id.*

solitary confinement in juvenile correctional facilities is unconstitutional because of its lack of rehabilitative value.¹⁸¹

Since the *Youngberg* decision, numerous courts have interpreted the rights of juveniles under the Eighth Amendment without considering the due process arguments for a right to rehabilitative treatment.¹⁸² For instance, in *Santana v. Collazo*, the First Circuit rejected arguments that there was a broad right to rehabilitative treatment for juveniles and held that the state has no constitutional obligation to rehabilitate juveniles in its custody.¹⁸³ Although the district court held that the conditions of confinement at a Puerto Rican correctional facility that housed juveniles violated the Eighth Amendment, it did so because the conditions of confinement were a legitimate safety hazard for the youth confined there.¹⁸⁴ The First Circuit thus applied *Youngberg's* reasoning, which requires safe living conditions but no rehabilitative training beyond the need to ensure those safe conditions.

More recently, in *Alexander S. v. Boyd*, a district court echoing the reasoning of *Santana* and *Youngberg* found that the state needed to provide only minimally adequate or reasonable services and training necessary to protect the interests of juveniles in state custody.¹⁸⁵ The court held that states do not have an affirmative duty to correct juveniles' behavior.¹⁸⁶ Although the court recognized juveniles are entitled to adequately trained staff, some programming (such as anger management therapy), and safe conditions, the court declined to accept all of the recommendations of expert witnesses.¹⁸⁷ As a result, the court held that the state did not violate juveniles'

181. *See id.*

182. *See id.* at 1810.

183. *See* 714 F.2d 1172, 1177 (1st Cir. 1983); *see also* Holland & Mlyniec, *supra* note 151, at 1810.

184. *See* *Santana v. Collazo*, 533 F. Supp. 966, 989-90 (D.P.R. 1982), *aff'd in part, vacated in part*, 714 F.2d 1172 (1st Cir. 1983).

185. *See* 876 F. Supp. 773 (D.S.C. 1995); *see also* Holland & Mlyniec, *supra* note 151, at 1811.

186. *See Alexander S.*, 876 F. Supp. at 798 ("Although such a standard may be desirable, it is not constitutionally mandated. All that is required is that juveniles be housed under conditions that provide them with a reasonable opportunity to correct their behavior.").

187. *See id.* at 798-99.

rights by placing them in austere “lock-up cells” akin to solitary confinement for disciplinary purposes.¹⁸⁸

Litigation is still a strategy used to attempt to reform the juvenile justice system’s use of solitary confinement. As Tamar Birckhead observed, however, the process of making reforms through litigation will be slow unless the Supreme Court holds that solitary confinement of youth is per se unconstitutional.¹⁸⁹ Because of general improvement in the safety of facility conditions, fewer cases are filed today concerning the conditions of confinement in juvenile correctional facilities than were filed in the past.¹⁹⁰ Several states’ juvenile justice systems, however, remain poorly prepared to provide the resources that troubled juveniles need in order to hold delinquent youth accountable for their actions while helping them to reenter society successfully.¹⁹¹ The Supreme Court’s decisions in *Bell* and *Youngberg* made other courts less willing to interfere with correctional policies or to find that a right to rehabilitative treatment exists.¹⁹² Courts are thus more hesitant to issue remedial orders that would improve conditions of confinement at juvenile correctional facilities based on the need to rehabilitate youthful offenders.¹⁹³ Consequently, courts seem less willing to issue orders that would restrict the use of solitary confinement due to its lack of rehabilitative value. Because of this hesitation, litigation alone is unlikely to eliminate solitary confinement in the juvenile justice system.

As explained in Parts I and II, solitary confinement should nevertheless be eliminated from the juvenile justice system in order to allow for more effective treatment and rehabilitation of juveniles in these facilities. Although changes in policies regarding solitary confinement in certain juvenile correctional facilities have taken place through litigation,¹⁹⁴ courts remain reluctant to consider

188. *See id.* at 785. The court, however, recognized that the use of individual padlocks on the lock-up cells presented a fire safety hazard because opening each cell was a time-consuming process and mattress fires in the cells often did not set off the sprinkler systems quickly enough. *Id.* at 786.

189. *See* Birckhead, *supra* note 27, at 69.

190. *See* Holland & Mlyniec, *supra* note 151, at 1793-94.

191. *See id.* at 1794.

192. *See id.* at 1808, 1811.

193. *See id.*

194. *See, e.g.,* Birckhead, *supra* note 27, at 67-68 (noting that settlements have been reached or are in the process of being reached in New Jersey, California, Illinois, Montana,

whether youth are entitled to rehabilitative treatment while in state custody and whether solitary confinement inhibits the potential for rehabilitation. Consequently, as the case law has shown, litigation alone cannot fully address the dangers of using solitary confinement in juvenile correctional facilities. Instead, creating a major shift in policies regarding solitary confinement across the country through state lawmakers is a more realistic, more effective method.

The recent settlement agreement laid out in *United States v. Ohio* provides a framework for eliminating the use of solitary confinement in juvenile correctional facilities and ensuring that juveniles receive proper mental and behavioral treatment while in state custody.¹⁹⁵ This agreement can be used to spur reform in states throughout the country, and state legislatures should adopt it in order to phase out and eventually end the use of solitary confinement. Part IV suggests statutory language mirroring the terms of the Ohio settlement agreement to correct weaknesses and ambiguities in current statutes that restrict solitary confinement. This language also provides a framework by which other states could eliminate the use of solitary confinement.

IV. THE OHIO SETTLEMENT AGREEMENT AND PROPOSED STATUTORY REFORMS

This Part will first describe the investigation and settlement agreement in *United States v. Ohio*. Subsequently, this Part will discuss statutory language that states should adopt to eliminate the use of solitary confinement in juvenile correctional facilities.

A. *Ohio's Plan to Reduce and Eliminate Solitary Confinement*

The Special Litigation Section of the DOJ's Civil Rights Division has authority under § 14141 of the Violent Crime Control and Law Enforcement Act to investigate conditions and practices in juvenile detention facilities and juvenile courts.¹⁹⁶ Typically, the Special

Florida, Louisiana, and Indiana); *see also supra* Part III.A.

195. *See United States v. Ohio*, No. 2:08-cv-475 (S.D. Ohio May 21, 2014).

196. *See* 42 U.S.C. § 14141 (2012); *see also Rights of Juveniles*, DOJ, <http://www.justice.gov/crt/rights-juveniles> [<https://perma.cc/E4BC-PF5S>] (last updated Aug. 8, 2015) [hereinafter

Litigation Section investigates alleged civil rights violations to identify patterns or practices of unconstitutional behavior.¹⁹⁷ If the Special Litigation Section identifies such patterns or practices, it issues findings letters to the appropriate state officials either to enter consent decrees or to initiate litigation proceedings, if necessary.¹⁹⁸

In *United States v. Ohio*, the Special Litigation Section undertook an investigation of Ohio's Department of Youth Services (DYS).¹⁹⁹ DOJ investigators examined the conditions of confinement in Ohio's juvenile justice facilities because of concerns about the conditions in the facilities, including concerns about the use of solitary confinement on mentally ill youth.²⁰⁰ After the United States filed a motion asking for a temporary restraining order to stop the use of solitary confinement in DHS facilities, DOJ and DHS entered settlement negotiations to address the constitutional issues at hand.²⁰¹ DHS agreed to improve its mental health services and to reduce dramatically and eventually eliminate the use of solitary confinement for *all* youth in DHS facilities, not only youth with existing mental health disorders.²⁰² DHS also agreed to begin the process of reducing the number of youth in solitary confinement as of July 31, 2014.²⁰³ The consent decree implementing this settlement agreement was in place until December 2015, when DOJ and DHS agreed to terminate the consent decree due to Ohio's substantial compliance with the terms of the settlement agreement.²⁰⁴

The settlement agreement in *United States v. Ohio* had three prongs: prevention strategies, immediate intervention strategies,

Rights of Juveniles].

197. See *Rights of Juveniles*, *supra* note 196.

198. *Id.* Government offices like the Special Litigation Section serve an important function by performing these investigations and providing states with models to use in order to exercise best practices and protect juveniles' civil rights. Due to limited resources and the duration of investigations, however, such offices cannot possibly address all the problems in each state's juvenile justice system.

199. See *supra* notes 9-15 and accompanying text.

200. See Letter from Wan J. Kim, *supra* note 11, at 1, 4.

201. See Ohio Settlement Press Release, *supra* note 9.

202. See *United States v. Ohio*, No. 2:08-cv-475, at 2 (S.D. Ohio May 21, 2014).

203. See *id.* at 2-3.

204. See Ohio Settlement Press Release, *supra* note 9; *supra* note 9 and accompanying text; see also *United States v. Ohio*, No. 2:08-cv-475, (S.D. Ohio Dec. 9, 2015) (order terminating consent decree and describing DHS's substantial compliance with terms of settlement agreement).

and strategies for the aftermath of seclusion.²⁰⁵ The settlement aimed to reduce violence in DYS facilities while simultaneously improving mental health services and eliminating the use of solitary confinement in all DYS facilities.²⁰⁶

1. Prevention Strategies

The prevention strategies prong aimed to ensure that DYS properly implemented mental health treatment, developed clinical and diagnostic tools reflected in youth's individual treatment plans, and conducted internal and external review of individual treatment plans each month.²⁰⁷ Furthermore, DYS also promised to reduce violence in its facilities and to decrease the number of youth who engage in acts of violence on a regular basis by properly diagnosing and treating mental health and behavioral problems.²⁰⁸

2. Immediate Intervention Strategies

The immediate intervention strategies prong aimed to limit the reliance on solitary confinement by eliminating its use for "high severity activity,"²⁰⁹ unless off-site emergency medical treatment is needed, by September 1, 2014.²¹⁰ Before completely eliminating the use of solitary confinement, DYS aimed to reduce the duration of juveniles' time in solitary confinement to no longer than seventy-two hours during a month, and for no more than twenty-four consecutive hours without special approval.²¹¹

DYS also sought to reduce the duration of seclusion by shortening the minimum amount of time that a juvenile can spend in short-term seclusion to two hours.²¹² Additionally, DYS promised to reduce the amount of time youth are permitted to be in seclusion

205. *See Ohio*, No. 2:08-cv-475 at Exhibit A.

206. *See id.* at 2.

207. *See id.* at Exhibit A.

208. *See id.* at Exhibit A, 1, 3, 6.

209. DYS defines "high severity activities" as activities including fights or consensual sexual activity. *Id.* at Exhibit A, 1.

210. *See id.*

211. *See id.* at Exhibit A, 2.

212. *See id.*

for various kinds of violent acts.²¹³ To reduce the harmful effects of time spent in solitary confinement, DYS planned to allow youth one hour outside of confinement for every four hours spent confined.²¹⁴ DYS agreed to ensure that youth in solitary confinement had appropriate access to educational, recreational, and treatment services.²¹⁵ Lastly, and most importantly, DYS agreed to reduce the number of youth in seclusion by completely eliminating the use of all solitary confinement six months after implementing the order.²¹⁶

3. Strategies for the Aftermath

The strategies for the aftermath prong was designed to enable DYS to review the treatment plans of juveniles within two days of an act of violence. DYS sought to review treatment goals and interventions as well as increase the intensity of mental health treatment in the wake of confinement.²¹⁷ Additionally, these strategies mandated the use of a special review team to inspect juveniles' treatment plans after multiple severe acts of violence until behavior improves.²¹⁸

B. Proposed Reforms

Ohio's plan incorporated best practices and national standards that limit short-term isolation to four hours at a time after other less restrictive de-escalation techniques have failed.²¹⁹ The settlement agreement carefully balanced DYS's important interest in the safety and security of its facilities by recognizing the need to properly control violent behavior while still aiming to address the unique needs of youth in the juvenile justice system. Moreover, by focusing on improving access to mental health treatment, the settlement agreement shifted the focus of Ohio's juvenile correctional facilities from one of punishment to one of rehabilitation. In particular,

213. *See id.* at Exhibit A, 2-3.

214. *See id.* at Exhibit A, 4.

215. *See id.* at Exhibit A, 4.

216. *See id.* at Exhibit A, 5.

217. *See id.* at Exhibit A, 1.

218. *See id.* at Exhibit A, 2.

219. *See id.* at Exhibit A, 1-2.

Ohio's plan integrated strategies designed to inflict the least amount of harm on youth, such as allowing them to access mental health and educational services and reducing the amount of time juveniles are isolated, while still holding them accountable for their actions. Because DYS was able to implement the terms of its settlement agreement with the DOJ successfully, this plan will hopefully prove useful for reducing recidivism and producing positive outcomes that more effectively rehabilitate the troubled youth in juvenile correctional facilities across the country.²²⁰ Ultimately, adopting Ohio's plan to end solitary confinement in juvenile correctional facilities would reduce the need for solitary confinement in the first place.

Although Ohio only recently implemented its settlement plan, DYS's consent decree with DOJ was terminated because of the "remarkable improvement" in conditions of confinement at Ohio's juvenile correctional facilities.²²¹ This framework, therefore, will hopefully prove effective in the future as well. The successful transformation of Ohio's juvenile justice system is not surprising, however, based on reforms that have taken place in other states that put an added emphasis on addressing mental health needs of youth in the juvenile justice system.²²² For instance, when Missouri altered the structure of its juvenile justice system to focus more on mental health in juvenile correctional facilities, it began approaching juvenile discipline from a treatment perspective instead of a punitive perspective.²²³ As a result, when youth in Missouri's juvenile correctional facilities exhibit violent or inappropriate behavior, the staff asks them to explain their thoughts and feelings in order to hold them accountable.²²⁴ This kind of treatment de-escalates violence and often precludes the need to consider the use of solitary confinement at all in Missouri.²²⁵

220. *See supra* Part I.

221. *See* Ohio Settlement Press Release, *supra* note 9.

222. In fact, terms similar to the ones in the Ohio Settlement Agreement appeared in recently finalized settlement agreements in Illinois and Contra Costa County. *See supra* notes 124-26 and accompanying text.

223. *See supra* Part II.A.

224. *See supra* Part II.A.

225. *See supra* Part II.A.

If other states were to implement the strategies outlined in Ohio's settlement agreement, which resemble some of the strategies already used in Missouri, there would likely be fewer instances of the misbehavior that would have previously triggered the use of solitary confinement.²²⁶ States should adopt statutory language that implements the terms of Ohio's settlement agreement and that resolves ambiguities or weaknesses in their current statutes.

First, state legislatures should unambiguously eliminate the use of any solitary confinement in juvenile correctional facilities for any length of time and for any purpose while permitting the use of short-term isolation in emergency situations, such as when youth pose a substantial risk of harm to others or threaten security. Specifically, states should expressly distinguish the definition of solitary confinement, which lasts twenty-four hours or longer, from short-term isolation, which should last no longer than four hours at a time. This approach balances states' interest in the safety and security of their facilities and staff with the interest of protecting the physical, psychological, and developmental well-being of confined youth.²²⁷ Furthermore, this approach would properly eliminate the ambiguities present in other statutes that are intended to restrict the use of solitary confinement.²²⁸

Second, states should expressly mandate that short-term isolation may be used only after staff have tried and failed to use less restrictive crisis intervention techniques, such as de-escalation. States should also mandate that short-term isolation be permissible only after staff have obtained special approval to use such short-term isolation. These measures would likely be more effective than using solitary confinement as a knee-jerk reaction to smaller infractions or disobedience. As a result, they would prevent the overuse of isolation.²²⁹ This change would encourage staff at state juvenile

226. See MENDEL, *supra* note 118, at 2-3 (describing how Missouri's focus on rehabilitation has produced lower recidivism rates than other states, led to an impressive safety record, and resulted in positive outcomes for youth).

227. See *supra* Part II (noting that existing state statutes that limit the use of solitary confinement often allow it in emergency situations or when there are safety concerns).

228. See *supra* Part II.

229. For instance, the Maine State Prison recently implemented several alternatives to long-term solitary confinement, including verbal de-escalation techniques and temporary loss of visitation privileges that "work much better" than solitary confinement as a means of disciplining inmates. See ZACHARY HEIDEN, ACLU OF ME., CHANGE IS POSSIBLE: A CASE STUDY

correctional facilities to hold youth accountable for their behavior while preventing greater harm as a result of prolonged time in solitary confinement.²³⁰

Third, states must unequivocally provide that staff will not restrict access to medical, mental health, and educational programming or services for juveniles in short-term isolation. This language would allow states to mitigate the harmful effects of isolation on youth, while recognizing that short-term isolation may occasionally be necessary to defuse violent outbursts.²³¹

Fourth, states should develop programs and policies to fund comprehensive preventive mental health treatment for their juvenile correctional facilities as a part of the plan to eliminate solitary confinement. These programs would likely help decrease incidents of violent behavior or disobedience, as well as help reduce rates of recidivism.²³² Moreover, improved access to mental health treatment would address the aftermath of short-term isolation by encouraging youth to reflect on their bad behavior and allowing DYS to adjust youth treatment plans if necessary.²³³ This approach is similar to the approach used so effectively in Missouri's juvenile justice system.²³⁴ It is also aligned with Ohio's settlement agreement, which implemented these programs in response to short-term isolation.²³⁵

Lastly, states should provide clear, rigid deadlines that would allow staff at juvenile correctional facilities to first reduce the use and duration of solitary confinement before eliminating solitary confinement in juvenile correctional facilities altogether. For example, states should first curb the amount of time per month that juveniles may be placed in solitary confinement to seventy-two hours or less before entirely eliminating the use of solitary confinement. Just as

OF SOLITARY CONFINEMENT REFORM IN MAINE 31 (2013). Additionally, Simkins recommends that juvenile facilities use individual psychological treatment to teach juveniles to respond to situations without aggression. *See* Simkins et al., *supra* note 1, at 278. New York and Massachusetts have recently developed these kinds of treatment programs, similar to programs used in Missouri, which have reduced the use of isolation by teaching juveniles non-aggressive ways to respond to traumatic situations. *See id.* at 279-80.

230. *See supra* Part I.

231. *See supra* Part II.A.

232. *See supra* Part I.C.

233. *See* Simkins et al., *supra* note 1, at 278-80.

234. *See supra* Part II.A.

235. *See* United States v. Ohio, No. 2:08-cv-475, at Exhibit A (S.D. Ohio May 21, 2014).

the settlement agreement in *United States v. Ohio* provided DYS staff at the state's various facilities time to implement new,²³⁶ dramatically different procedures and protocols, states should be permitted to gradually adjust to these new requirements.

CONCLUSION

Although the framework described in Ohio's settlement agreement with the DOJ is dramatic and sweeping, it appropriately balanced the state's interests in safety and security with youth's interests in proper rehabilitation and overall well-being. Solitary confinement is a life-threatening, counterproductive practice that creates a higher risk for recidivism and mental illness in youth. Although some courts in the past have been willing to recognize that youth in juvenile correctional facilities have a right to rehabilitative treatment, modern courts are reluctant and unwilling to find that conditions of solitary confinement for juveniles are per se unconstitutional. Nevertheless, because of the potential developmental, physical, and psychological harms that even short amounts of time in solitary confinement have on youth in juvenile correctional facilities, and because the juvenile justice system aims to rehabilitate delinquent youth, solitary confinement should be eliminated in juvenile correctional facilities. Although safety and security are extremely important, states must dramatically alter their current statutes regarding the use and duration of solitary confinement and isolation of youth. By adopting clear statutory language that echoes the provisions of Ohio's recent settlement agreement, states have a chance to begin the end of a practice that has no place in juvenile correctional facilities.

*Elizabeth M. Rademacher**

236. *Id.* at 3.

* J.D. Candidate 2016, William & Mary Law School; B.A. 2013, *summa cum laude*, American University. I would like to thank Henry Alderfer, Aaron Gold, and Christopher Kaltsas for their invaluable comments and helpful suggestions. I would also like to thank the editors and staff of the *William & Mary Law Review*, particularly Elizabeth Berry, Mark Cramer, and Jacob Derr, for their tireless work in preparing this Note for publication. Last, and most importantly, I would like to thank my family and friends for their constant support and encouragement. All errors are, of course, my own.