

## SOLITARY CONFINEMENT REFORM ACT: A BLUEPRINT FOR RESTRICTED USE OF SOLITARY CONFINEMENT OF JUVENILES ACROSS THE STATES

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### I. INTRODUCTION

On May 15, 2010, Kalief Browder and his friend were walking home from a party in the Bronx.<sup>1</sup> The two teenage boys noticed a police car driving toward them.<sup>2</sup> The police officers got out of the vehicle and told Browder and his friend that a man just reported that they robbed him of his backpack.<sup>3</sup> The two boys denied the allegations but were arrested and the officers told them they had to go to the police station, but they most likely could go home.<sup>4</sup> Unfortunately, that was not the case.

In the days after his arrest, Browder was interrogated and charged with robbery, grand larceny, and assault.<sup>5</sup> Browder continued to maintain his innocence.<sup>6</sup> Because Browder was on probation at the time of his arrest, he was held on a \$3000 bond.<sup>7</sup> His family could not afford his bail, and Browder was sent to Rikers Island.<sup>8</sup>

Browder spent three years on Rikers Island “waiting for a trial that never happened.”<sup>9</sup> Of those three years, Browder spent roughly two of them

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<sup>1</sup> See Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>.

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

<sup>7</sup> *See Gonnerman, supra* note 1.

<sup>8</sup> *See id.*

<sup>9</sup> Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>; *see also* Michael Schwartz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/nyregio>

in solitary confinement, known on Rikers Island as the “bing.”<sup>10</sup> While in solitary confinement, Browder attempted suicide several times.<sup>11</sup> In February 2012, Browder ripped his bedsheets to shreds and attempted to hang himself from the light fixture hanging from his cell’s ceiling.<sup>12</sup> Eventually, the prosecutor dismissed the charges, and Browder was released from Rikers Island;<sup>13</sup> however, the emotional and psychological scars remained.<sup>14</sup> After his release, Browder struggled to reintegrate into society.<sup>15</sup> On June 6, 2015, Browder committed suicide at his home in the Bronx.<sup>16</sup> He had just turned twenty-two.<sup>17</sup> Browder hanged himself by creating a cord made of shredded bed sheets, the same way he tried to kill himself on Rikers Island.<sup>18</sup> The night before he committed suicide, he told his mother, “Ma, I can’t take it anymore.”<sup>19</sup>

Browder’s tragic experience and suicide gained national attention,<sup>20</sup> but sadly, his story is not unique. Juvenile solitary confinement is a nationwide problem. According to the Department of Justice (DOJ), on any given day, in the more than 2000 juvenile facilities around the country, there are over 60,000 juveniles, of which roughly one in five are held in isolation.<sup>21</sup>

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<sup>10</sup> Gonnerman, *supra* note 1.

<sup>11</sup> Schwirtz & Winerip, *supra* note 9.

<sup>12</sup> Gonnerman, *supra* note 9.

<sup>13</sup> Gonnerman, *supra* note 1.

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

<sup>15</sup> *Id.*

<sup>16</sup> See Jennifer Gonnerman, *Kalief Browder Learned How to Commit Suicide on Rikers*, NEW YORKER (June 2, 2016), <http://www.newyorker.com/news/news-desk/kalief-browder-learned-how-to-commit-suicide-on-rikers>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Gonnerman, *supra* note 9.

<sup>20</sup> See Barack Obama, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-](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&utm_term=.8537e801ea42)

0607e0e265ce\_story.html?tid=a\_inl&utm\_term=.8537e801ea42 (speaking of Browder’s treatment on Rikers Island and suicide); see also Kory Grow, *Jay Z Talks Kalief Browder Doc, Inhumanity of Solitary Confinement*, ROLLING STONE (Oct. 6, 2016), <http://www.rollingstone.com/movies/news/jay-z-talks-kalief-browder-doc-solitary-confinement-w443715>.

Famous rapper and producer, Jay Z visited Browder after hearing about his story. *Id.* Jay Z recently announced the release of a six-part documentary of Browder’s story. *Id.*; Gonnerman, *supra* note 9. In 2014, Rosie O’Donnell invited Browder on the television show “The View.” *Id.*

<sup>21</sup> Garrett Therolf, *Advocates Seek to End Solitary Confinement Options for Young Offenders*, L.A. TIMES (May 28, 2015, 4:00 AM), <http://www.latimes.com/local/crime/la-me-solitary-juvenile-20150528-story.html>.

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Solitary confinement has detrimental, and often life-threatening, effects on juveniles.<sup>22</sup> Although solitary confinement has adverse effects on inmates of all ages, this Comment will specifically discuss its effects on juveniles. Part II of this Comment will briefly introduce solitary confinement and the harmful physical, psychological, and developmental effects it has on juveniles. Part III will discuss the growing national consensus that solitary confinement is a problem and in need of reformation. It will also address how solitary confinement has recently entered the national spotlight through reports of hunger strikes and suicides, like the story of Kalief Browder. Part IV will explore the drastic differences among the states in their practice of solitary confinement. Part V will discuss the history of federal legislation and the Solitary Confinement Reform Act (SCRA), which was introduced in Congress in September 2016. Part VI will argue that the SCRA should serve as a model for the states to promote uniformity in the practice of solitary confinement. The SCRA can shed more light on the issues of solitary confinement and galvanize the states to reach a more restricted practice of solitary confinement. Finally, Part VII will conclude.

## II. SOLITARY CONFINEMENT AND ITS EFFECTS

Solitary confinement is an extreme form of isolation that involves physical and social isolation in a cell for twenty-two to twenty-four hours per day.<sup>23</sup> While in solitary confinement, an inmate has virtually no human contact.<sup>24</sup> The inmate uses a small slot in the cell door to receive meals and communicate with prison officers.<sup>25</sup> Juvenile facilities often use different terms for solitary confinement including “‘time-out,’ ‘room confinement,’ [or] ‘restricted engagement.’”<sup>26</sup> Although these other terms may refer to isolation practices that are less severe than solitary confinement—in that they do not isolate the juvenile for twenty-two hours a day—they are still harmful.<sup>27</sup>

The government generally justifies the use of solitary confinement on two grounds. The first is administrative solitary confinement, which is used to manage the safety and security of the facility.<sup>28</sup> Administrative

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<sup>22</sup> See *infra* Part II.

<sup>23</sup> AM. CIVIL LIBERTIES UNION, ALONE & AFRAID: CHILDREN HELD IN SOLITARY CONFINEMENT AND ISOLATION IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES 2 (2014), <https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf> [hereinafter ACLU].

<sup>24</sup> FAQ, SOLITARY WATCH, <http://solitarywatch.com/facts/faq/> (last visited Apr. 11, 2018).

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

<sup>26</sup> See ACLU, *supra* note 23.

<sup>27</sup> See *id.*

<sup>28</sup> See Tamar R. Bireckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50

confinement may be used when an inmate is waiting to be transferred, or when an inmate must be protected from other inmates.<sup>29</sup> The second type is “disciplinary” solitary confinement, which is used for punitive purposes.<sup>30</sup> Regardless of the justification, solitary confinement can have serious physical, psychological, and developmental effects on juveniles.<sup>31</sup> Children are more vulnerable to the negative effects of solitary confinement compared to adults because isolation can severely inhibit children’s natural growth and development.<sup>32</sup> These adverse effects are heightened when a juvenile is held in solitary confinement in an adult jail or prison, since these facilities are poorly equipped to handle the necessary accommodations for a juvenile’s well-being.<sup>33</sup>

#### A. *Physical Harm*

When juveniles enter a facility, they are often “physically immature.”<sup>34</sup> A study conducted by the American Civil Liberties Union (ACLU) found that juveniles held in solitary confinement in adult facilities were deprived of adequate exercise and nutrition.<sup>35</sup> While in solitary confinement, a juvenile gets between one and two hours out of the cell, which he can spend in a hallway, dayroom, or a metal cage where he can walk around and exercise.<sup>36</sup> Even though this time is already limited, some youth have been deprived of recreation time altogether.<sup>37</sup>

In addition to the lack of adequate exercise, there is also often a lack of adequate nutrition, which can result in physical changes and stunted growth.<sup>38</sup> The ACLU and Human Rights Watch conducted a study by communicating with 125 juveniles in solitary confinement in nineteen different states.<sup>39</sup> Many of these juveniles reported that they go to sleep

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WAKE FOREST L. REV. 1, 4–5 (2015).

<sup>29</sup> *Id.*

<sup>30</sup> *See id.* at 5.

<sup>31</sup> *See id.* at 11.

<sup>32</sup> ACLU, *supra* note 23, at 4.

<sup>33</sup> *See* AM. CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 38–40 (2012), [https://www.aclu.org/sites/default/files/field\\_document/us1012webwcover.pdf](https://www.aclu.org/sites/default/files/field_document/us1012webwcover.pdf) [hereinafter ACLU & HUMAN RIGHTS WATCH].

<sup>34</sup> *See id.* at 37.

<sup>35</sup> ACLU, *supra* note 23, at 5. The ACLU is heavily involved in criminal justice reform. ACLU & HUMAN RIGHTS WATCH, *supra* note 33. The organization has released multiple in-depth reports that outline the effects of solitary confinement on juveniles. *See generally* ACLU & HUMAN RIGHTS WATCH, *supra* note 33; ACLU, *supra* note 23.

<sup>36</sup> *See* ACLU & HUMAN RIGHTS WATCH, *supra* note 33, at 37.

<sup>37</sup> *See id.*

<sup>38</sup> *See* Birkhead, *supra* note 28, at 14.

<sup>39</sup> ACLU & HUMAN RIGHTS WATCH, *supra* note 33, at 2–3.

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hungry night after night.<sup>40</sup> In isolation, the food is usually less nutritional and considered worse than the food provided in general population.<sup>41</sup> In some facilities, juveniles are not given the opportunity to buy food or snacks from the commissary while in solitary confinement.<sup>42</sup> The juveniles also reported that they experienced weight and hair loss from stress.<sup>43</sup> Female juveniles reported that they stopped menstruating while in solitary confinement, which is likely linked to stress, trauma, and inadequate nutrition.<sup>44</sup>

### B. *Psychological Harm*

Solitary confinement causes serious harmful effects on adult inmates, such as, but not limited to, hypersensitivity to stimuli, perceptual distortions, hallucinations, increased anxiety, nervousness, rage, and severe and chronic depression.<sup>45</sup> Stuart Grassian, “a board-certified psychiatrist and former faculty member at Harvard Medical School, has interviewed hundreds of prisoners in solitary confinement . . . [and] found that roughly a third of solitary inmates were ‘actively psychotic and/or acutely suicidal.’”<sup>46</sup> It can be reasonably concluded that if adult inmates experience these psychological issues, juveniles experience the same, but likely to an even worse extent. The psychological effects caused by isolating juveniles are often the most devastating and long-lasting.<sup>47</sup> Isolating a juvenile can exacerbate existing mental health issues and even cause them in a juvenile without a preexisting mental health issue.<sup>48</sup> In the report published by the ACLU and Human Rights Watch, several juveniles reported that in order to cope with solitary confinement, they attempted to disassociate by developing imaginary friends or playing make-believe.<sup>49</sup> For example, an inmate who was fourteen years old when he was held in solitary confinement remembered having conversations with himself and making up a gibberish language that only he could understand.<sup>50</sup> Other juveniles used sleep to cope with the isolation.<sup>51</sup>

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<sup>40</sup> See *id.* at 39.

<sup>41</sup> See *id.* at 39–40.

<sup>42</sup> See *id.* at 39.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 40.

<sup>45</sup> ACLU, *supra* note 23, at 4.

<sup>46</sup> Jason M. Breslow, *What Does Solitary Confinement Do to Your Mind?* FRONTLINE (Apr. 22, 2014), <http://www.pbs.org/wgbh/frontline/article/what-does-solitary-confinement-do-to-your-mind/>.

<sup>47</sup> See ACLU & HUMAN RIGHTS WATCH, *supra* note 33, at 23–36.

<sup>48</sup> *Id.* at 23.

<sup>49</sup> *Id.* at 24.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 26.

For example, one fifteen year old who participated in the study reported that he would sleep roughly eighteen to twenty hours a day to pass the time in solitary confinement.<sup>52</sup>

Furthermore, solitary confinement can cause juveniles to suffer from anxiety attacks and uncontrollable rage.<sup>53</sup> Many juveniles have reported that, while in solitary confinement, they often go from anxious and sad to angry and aggressive, in a short period of time.<sup>54</sup> While participating in the report by the ACLU and Human Rights Watch, one juvenile wrote, “[It] makes you more wild; makes you feel like a lion in a cage.”<sup>55</sup> These severe outbursts of anxiety and rage can cause an inability to sleep, which in turn can exacerbate other mental health problems.<sup>56</sup>

Additionally, there is undoubtedly a correlation between solitary confinement and suicide, and an alarming relation between solitary confinement and self-harm.<sup>57</sup> It is concerning that more than half of the suicides committed by juveniles occurred while the juvenile was in isolation.<sup>58</sup> A group of medical doctors and psychologists conducted a study of the New York City jail system, which is the nation’s second largest in admissions, to analyze the correlation between solitary confinement and the risk of self-harm.<sup>59</sup> The study found that “a small proportion of inmates, those in solitary confinement, with [serious mental illness], and aged 18 years or younger, accounted for the majority of acts of self-harm.”<sup>60</sup> A juvenile held in solitary confinement when he was fourteen years old said, “You get depressed and wonder if [life] is even worth living. Your thoughts turn over to the more death-oriented side of life. . . . I want[ed] to kill myself.”<sup>61</sup> These psychological issues from time spent in solitary confinement often have long-lasting effects, even after an inmate is removed from isolation.<sup>62</sup> Kalief Browder, for example, committed suicide two years after he was released from Rikers Island.<sup>63</sup> The effects of solitary confinement plagued Browder and left him unable to reintegrate back into

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<sup>52</sup> *Id.*

<sup>53</sup> ACLU & HUMAN RIGHTS WATCH, *supra* note 33, at 24.

<sup>54</sup> *Id.* at 26–27.

<sup>55</sup> *Id.* at 27 (alteration in original).

<sup>56</sup> *See id.* at 28–29.

<sup>57</sup> *Id.* at 30.

<sup>58</sup> ACLU, *supra* note 23, at 5.

<sup>59</sup> *See* Homer Venters et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH, 442, 445 (2014), <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742>.

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

<sup>61</sup> ACLU & HUMAN RIGHTS WATCH, *supra* note 33, at 31.

<sup>62</sup> *See* Birkhead, *supra* note 28, at 12.

<sup>63</sup> Gonnerman, *supra* note 1.

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his normal life.

Concerns are heightened because many juveniles entering the juvenile justice system or criminal justice system already have mental disabilities or histories of trauma and abuse.<sup>64</sup> Approximately seventy percent of incarcerated youth have at least one mental health issue, and many suffer from multiple disorders.<sup>65</sup> Adding to the problem is the fact that some mental disorders do not fully manifest until late adolescence.<sup>66</sup> This results in juveniles dealing with these psychological issues alone in solitary confinement without appropriate access to mental health treatment, regardless of whether the mental disorders were preexisting or newly developed.<sup>67</sup> Additionally, the youth in juvenile facilities usually have preexisting behavioral problems, which can result in misbehavior.<sup>68</sup> As a result, a juvenile may be more likely to be placed in punitive solitary confinement, which only exacerbates the behavioral issues. The vicious cycle continues.

### C. *Developmental and Social Harm*

There are severe developmental and social effects when a juvenile is placed in solitary confinement.<sup>69</sup> When children are placed in solitary confinement, they are often denied access to programming provided to other youth in the facility.<sup>70</sup> Depending on the facility, juveniles in solitary confinement may not have access to educational programs or writing or reading materials.<sup>71</sup> When a facility limits or completely withholds access to education, a juvenile is unlikely to be able to develop into a functional and contributing member of society. The denial of education also undermines the purpose of juvenile justice, which is to rehabilitate juveniles so that they can successfully reintegrate back into their lives on the outside.<sup>72</sup> Craig Haney, a psychology professor at University of California at Santa Cruz, explained:

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<sup>64</sup> See ACLU, *supra* note 23, at 5; Birkhead, *supra* note 28, at 13.

<sup>65</sup> See Birkhead, *supra* note 28, at 13.

<sup>66</sup> ACLU & HUMAN RIGHTS WATCH, *supra* note 33, at 32.

<sup>67</sup> See *id.* at 35.

<sup>68</sup> See Elizabeth M. Rademacher, Note, *The Beginning of the End: Using Ohio's Plan to Eliminate Juvenile Solitary Confinement as a Model for Statutory Elimination of Juvenile Solitary Confinement*, 57 WM. & MARY L. REV. 1019, 1029 (2016).

<sup>69</sup> See ACLU & HUMAN RIGHTS WATCH, *supra* note 33, at 41.

<sup>70</sup> See Birkhead, *supra* note 28, at 16.

<sup>71</sup> See ACLU & HUMAN RIGHTS WATCH, *supra* note 33, at 43.

<sup>72</sup> See Birkhead, *supra* note 28, at 16.

The political stereotype is that a fourteen- or sixteen-year-old who commits an adult crime must be as sophisticated as an adult when paradoxically these kids are most often younger than their age emotionally. Regardless of what they have done, they are in an uncertain, unformed state of social identity. These are kids who are the least appropriate to place in solitary confinement. Not only are you putting them in a situation where they have nothing to rely on but their own, underdeveloped internal mechanisms, but you are making it impossible for them to develop a healthy functioning adult social identity. You're basically taking someone who's in the process of finding out who they are and twisting their psyche in a way that will make it very, very difficult for them to ever recover.<sup>73</sup>

Children in solitary confinement are usually denied visits with their families.<sup>74</sup> In some facilities, children are denied all access to family contact—no visits, letters, or phone calls.<sup>75</sup> Sometimes the prohibition of family contact is used to punish a child, while in other instances it is simply the result of being in solitary confinement, no matter what the reason.<sup>76</sup> In other facilities, a juvenile may be able to visit with family members, but only while in a cage, behind glass, or via a video conference.<sup>77</sup> In a report by the ACLU and Human Rights Watch, many juveniles stressed the importance of physical touch.<sup>78</sup> The importance of physical touch and interaction with loved ones is understandable to adults, and it is even more important to children.<sup>79</sup> Research shows that children who are allowed to visit with family have improved behavior and school performance.<sup>80</sup>

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<sup>73</sup> Matt Olson, *Kids in the Hole*, THE PROGRESSIVE, Aug. 2003, at 27.

<sup>74</sup> ACLU & Human Rights Watch, *supra* note 33, at 41.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

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

<sup>78</sup> *Id.* at 42 (“The hardest part is being behind glass when your family visits and you can’t hold your family.”).

<sup>79</sup> Evan L. Ardiel & Catharine H. Rankin, *The Importance of Touch in Development*, 15 PAEDIATR CHILD HEALTH 3 156 (Mar. 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2865952/pdf/pch15153.pdf> (“[T]he importance of touch is undeniable.”). Studies show that lack of sensory stimulation and touch can cause developmental harm that is difficult to reverse. *See id.*

<sup>80</sup> *See Birkhead, supra* note 28, at 16.



### III. SOLITARY CONFINEMENT ENTERS THE SPOTLIGHT AS A NATIONAL PROBLEM

Solitary confinement has become a nationally recognized problem. Although there have been critiques about the practice for over a century,<sup>81</sup> the problem of solitary confinement did not gain much public attention until recently.<sup>82</sup> The widespread use of solitary confinement was not well known, and there was no reliable estimate of the total number of inmates being housed in solitary confinement in American jails and prisons.<sup>83</sup> Section A addresses the ways in which solitary confinement has been gaining national attention by looking at key milestones that have captured the nation's attention such as hunger strikes and suicides. Section B discusses the ability of the president and the federal government to shine light on the problem, and Section C introduces the way advocacy groups and litigation have been used as tools to gain attention. These are not necessarily specific to solitary confinement of juveniles.

#### A. *Hunger Strikes and Suicide*

Hunger strikes have been used as a tool for reform, and a way to shed light on the issue of solitary confinement.<sup>84</sup> In 2012, at the Red Onion State Prison in Virginia, more than forty prisoners engaged in a hunger strike because they felt that the changes to isolation policies were not happening fast enough.<sup>85</sup> The strike only lasted one week, and it was unclear whether the prison addressed the strikers' demands.<sup>86</sup> Arguably, the most infamous strikes were three hunger strikes in California between 2011 and 2013.<sup>87</sup> The

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<sup>81</sup> In 1890, the United States Supreme Court recognized that time spent in solitary confinement could have serious psychological effects. *In re Medley*, 134 U.S. 160, 168 (1890). The Court noted that after even a short time in solitary confinement, prisoners became "violently insane" and those that were released from confinement were "not generally reformed." *Id.* The Court was addressing adult inmates, but it can be assumed that these effects would likely be the same for juveniles, if not worse.

<sup>82</sup> See Marie Gottschalk, *Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails*, 125 YALE L. J. FORUM 253, 255 (2016), [http://www.yalelawjournal.org/pdf/Gottschalk\\_PDF\\_qo5ndnyz.pdf](http://www.yalelawjournal.org/pdf/Gottschalk_PDF_qo5ndnyz.pdf); see also Erica Goode, *Solitary Confinement: Punished for Life*, N.Y. TIMES (Aug. 3 2015), <http://www.nytimes.com/2015/08/04/health/solitary-confinement-mental-illness.html> ("In recent weeks, the use of prolonged solitary confinement, a practice that has been widespread in the United States, has received unprecedented levels of attention.").

<sup>83</sup> See Gottschalk, *supra* note 82, at 255.

<sup>84</sup> See Christine Maui-Duc, *Prison Hunger Strikes in the U.S. Are Few, and Rarely Successful*, L.A. TIMES (Aug. 5, 2015, 6:37 PM), <http://www.latimes.com/la-na-nn-utah-prisoner-hunger-strike-20150804-story.html>.

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> *Fact Sheet, Background: Hunger Strikes in California Prisons*, CAL. DEP'T OF CORRECTIONS AND REHABILITATION (Oct. 2013), <http://www.cdcr.ca.gov/stg/docs/Fact%20S>

largest strike began at California's Pelican Bay State Prison during the summer of 2013.<sup>88</sup> Thirty thousand prison inmates across the state of California participated in a hunger strike to protest long-term, indefinite incarceration in solitary confinement.<sup>89</sup> The hunger strike was coordinated by four alleged leaders of rival gangs.<sup>90</sup> One of the men who began the strike had been in solitary confinement for more than twenty years.<sup>91</sup> The hunger strike was the largest organized prison hunger strike in American history.<sup>92</sup> The California Department of Corrections and Rehabilitation (CDCR) has since changed its solitary confinement policies.<sup>93</sup> Although the CDCR denies that the hunger strike influenced the changes, that fact is disputed.<sup>94</sup> Regardless of whether the reforms were underway before the strike, or as a result of it, the strike gained national attention and the CDCR ultimately reformed its policies.<sup>95</sup>

Another hunger strike protesting solitary confinement conditions began at Waupun Correctional Institution in Wisconsin in June 2016.<sup>96</sup> The inmates called the strike "Dying to Live," and they protested the indefinite confinement in administrative segregation units.<sup>97</sup> One of the inmates participating in the strike had been in solitary confinement for over twenty-seven years.<sup>98</sup> As the strike entered its third week, at least three inmates were being force-fed by the Wisconsin Department of Corrections (DOC).<sup>99</sup> Since

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<sup>88</sup> *Id.*

<sup>89</sup> See *How 4 Inmates Launched a Statewide Hunger Strike from Solitary*, NPR (Mar. 6, 2014), <http://www.npr.org/2014/03/06/286794055/how-four-inmates-launched-a-statewide-hunger-strike-from-solitary>.

<sup>90</sup> See *id.*

<sup>91</sup> See Benjamin Wallace-Wells, *The Plot from Solitary*, N.Y. MAG. (Feb. 26, 2014), <http://nymag.com/news/features/solitary-secure-housing-units-2014-2/>. The inmate who coordinated the hunger strike told Wells, "I have not had a normal face-to-face conversation with another human being in 23 years." *Id.*

<sup>92</sup> See *id.*

<sup>93</sup> Sal Rodriguez, *California Prison Hunger Strikes Sparked Solitary Reforms, Internal Documents Show*, SOLITARY WATCH (Sept. 2, 2015), <http://solitarywatch.com/2015/09/02/california-prison-hunger-strikes-spurred-solitary-reforms-internal-documents-show/>.

<sup>94</sup> *Id.*

<sup>95</sup> See *id.*

<sup>96</sup> See Sarah Blatt-Herold, "Dying to Live": *Hunger Strike in Wisconsin Prison Protests Indefinite Solitary Confinement*, SOLITARY WATCH (June 23, 2016), <http://solitarywatch.com/2016/06/23/dying-to-live-hunger-strike-in-wisconsin-prison-protests-indefinite-solitary-confinement/>.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See Dee J. Hall, *Wisconsin Prison Officials Begin Force Feedings as Solitary Confinement Protest Continues*, WISCONSIN WATCH (June 23, 2016), <http://wisconsinwatch.org/2016/06/wisconsin-prison-officials-begin-force-feedings-as-solitary-confinement-protest-continues/>.

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the strike, the DOC has announced that it plans to reform its use of solitary confinement.<sup>100</sup>

Suicide has been another relatively frequent result that has brought solitary confinement to the forefront of criminal justice reform.<sup>101</sup> According to a report by Human Rights Watch, children held in adult jails are more than eight times more likely to commit suicide than children held in juvenile detention facilities.<sup>102</sup> According to the Campaign for Youth Justice, juveniles are “19 times more likely to kill themselves in isolation than in general population.”<sup>103</sup> Kalief Browder’s tragic story garnered national attention when Browder committed suicide after spending almost two years in solitary confinement.<sup>104</sup> His story was even noted by President Barack Obama.<sup>105</sup> Suicide attempts often increase while in solitary confinement. For example, Ian Manuel spent fifteen years in solitary confinement where he attempted to kill himself at least five times.<sup>106</sup> Raistlen Katka, who was seventeen when he was placed in solitary confinement, attempted to kill himself twice by biting through his wrist.<sup>107</sup>

#### B. Executive Action and the Federal Government

In July 2015, President Barack Obama gave a speech at the National Association for the Advancement of Colored People (NAACP) National Convention, in which he announced that he had asked the Attorney General to conduct a review of the “overuse of solitary confinement across American

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<sup>100</sup> Blatt-Herold, *supra* note 96.

<sup>101</sup> See, e.g., Nigel Morris, *Surge in Number of Prisoners Killing Themselves in Solitary Confinement Revealed by Report*, INDEPENDENT (June 9, 2015), <http://www.independent.co.uk/news/uk/crime/surge-in-number-of-prisoners-committing-suicide-in-solitary-confinement-revealed-by-report-10306379.html> (stating that in 2015, the number of prisoners who committed suicide in solitary confinement reached a nine-year high).

<sup>102</sup> Olson, *supra* note 73, at 27. Children in adult jails usually do not have a choice but to enter protective custody, in which they are basically put in solitary confinement. *Id.* The conditions in isolation are “especially conducive to suicidal behavior.” *Id.*

<sup>103</sup> SOLITARY WATCH, *supra* note 24.

<sup>104</sup> Gonnerman, *supra* note 9.

<sup>105</sup> Obama, *supra* note 20.

<sup>106</sup> SOLITARY WATCH, *supra* note 24.

<sup>107</sup> See *id.*; see also Charlie Savage, *Chelsea Manning Tried Committing Suicide a Second Time in October*, N.Y. TIMES (Nov. 4, 2016), <http://www.nytimes.com/2016/11/05/us/chelsea-manning-tried-committing-suicide-a-second-time-in-october.html>. Manning was a former Army intelligence analyst. See *id.* She was serving a thirty-five-year prison sentence for leaking secret documents to WikiLeaks. See *id.* Manning’s first suicide attempt resulted in her being put in solitary confinement, and she attempted to kill herself again while in solitary confinement. *Id.* Before leaving office, President Obama commuted all but four months of Manning’s thirty-five-year sentence. See Charlie Savage, *Chelsea Manning to Be Released Early as Obama Commutes Sentence*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html>.

Prisons.”<sup>108</sup> The President requested recommendations of how to limit the use of solitary confinement.<sup>109</sup> When the DOJ released its findings, it recommended specific “guiding principles,” which suggested that juveniles should not be placed in solitary confinement, except in “very rare situations.”<sup>110</sup> In those situations, the report recommended that isolation be a temporary response and a time for the juvenile to “cool down.”<sup>111</sup>

On January 25, 2016, President Obama wrote an op-ed piece for the Washington Post in which he officially adopted the guiding principles published by the DOJ.<sup>112</sup> Aside from rare circumstances, the President banned solitary confinement for juvenile offenders held in the federal prison system through an executive order.<sup>113</sup> President Obama cited to the potential “devastating, lasting psychological consequences” of solitary confinement.<sup>114</sup> He also noted that prisoners, especially juveniles, in solitary confinement are more likely to commit suicide.<sup>115</sup> In the op-ed, President Obama said that holding prisoners in solitary confinement does not make communities safer, and it is counterproductive in many cases.<sup>116</sup>

President Obama’s ban on solitary confinement for juveniles, with the exception of rare situations,<sup>117</sup> was a major step in the right direction toward the ultimate goal of ending solitary confinement for youth. The President’s acknowledgement of the harmful effects of isolation sheds additional light on this problem. Despite the message that the President’s action sends, it is only an executive order and, therefore, lacks the relative durability of a statute. Nevertheless, President Obama’s op-ed piece was a powerful statement that can set a standard for the states to follow and re-think their overuse of solitary confinement.<sup>118</sup>

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<sup>108</sup> U.S. DEPARTMENT OF JUSTICE, U.S. DEP’T OF JUSTICE REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 1 (Jan. 2016), <https://www.justice.gov/dag/file/815551/download>.

<sup>109</sup> *Id.*

<sup>110</sup> *See id.* at 101.

<sup>111</sup> *Id.*

<sup>112</sup> Obama, *supra* note 20.

<sup>113</sup> *See id.*; Marina Koren, *Obama’s Executive Actions on Solitary Confinement*, ATLANTIC (Jan. 26, 2016), <http://www.theatlantic.com/politics/archive/2016/01/obama-solitary-confinement/427056/>.

<sup>114</sup> Obama, *supra* note 20.

<sup>115</sup> *See id.*

<sup>116</sup> Michael D. Shear, *Obama Bans Solitary Confinement of Juveniles in Federal Prisons*, N.Y. TIMES (Jan. 25, 2016), <http://www.nytimes.com/2016/01/26/us/politics/obama-bans-solitary-confinement-of-juveniles-in-federal-prisons.html>.

<sup>117</sup> Obama, *supra* note 20.

<sup>118</sup> *See* Editorial Board, *Obama Is Right to Reduce the Use of Solitary Confinement*, WASH. POST (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/obama-is-right-to-reduce-the-use-of-solitary-confinement/2016/01/25/db5aea3c-c3b6-11e5-9693-933a4d31bcc8\\_story.html?utm\\_term=.d5cb45e7db25](https://www.washingtonpost.com/opinions/obama-is-right-to-reduce-the-use-of-solitary-confinement/2016/01/25/db5aea3c-c3b6-11e5-9693-933a4d31bcc8_story.html?utm_term=.d5cb45e7db25).

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Donald Trump's presidency could result in a drastic change in course. Trump has promised to "cancel every unconstitutional executive action, memorandum and order issued by President Obama,"<sup>119</sup> leaving Obama's executive order, restricting limiting solitary confinement of juveniles except for the most serious situations, subject to repeal. Jeff Sessions, as Attorney General, could also adversely affect recent reform efforts.<sup>120</sup> The DOJ Civil Rights Division has expressed anxiety over Sessions's term because of Sessions's history of "insensitivity to civil rights."<sup>121</sup> It appears that Trump's presidency and his tough "law-and-order stance" could hinder recent federal reform to limit the use of solitary confinement,<sup>122</sup> which would make state and local reform even more important and necessary.

### C. *Advocacy Groups and State and Federal Litigation*

The activism of advocacy groups such as the ACLU and National Religious Campaign Against Torture (NRCAT) have helped bring the issues of solitary confinement to the national spotlight. The ACLU has produced several reports exploring the effects of solitary confinement and suggesting ways to reform the policy.<sup>123</sup> NRCAT has recently started a national campaign called "Together to End Solitary."<sup>124</sup> On the twenty-third of each month, NRCAT invites people across the country to hold monthly actions to call for the end of solitary confinement.<sup>125</sup> The creation of the blog, Solitary Watch, has further helped to shed light on the nationwide practice of solitary confinement.<sup>126</sup> Solitary Watch is a source of articles, reports, and commentary on issues regarding the practice of isolation all over the country.<sup>127</sup>

Furthermore, litigation has been another useful tool to bring attention to the problem of solitary confinement.<sup>128</sup> In many lawsuits against juvenile corrections agencies, part of the settlement agreements include the facilities

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<sup>119</sup> Jean Casella & James Ridgeway, *What Trump and Sessions Could Mean for Solitary Confinement in America's Prisons*, SOLITARY WATCH (Nov. 18, 2016), <http://solitarywatch.com/2016/11/18/what-trump-and-sessions-could-mean-for-solitary-confinement-in-americas-prisons/>.

<sup>120</sup> *See id.*

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

<sup>122</sup> *Id.*

<sup>123</sup> *See generally*, ACLU, *supra* note 23; ACLU & HUMAN RIGHTS WATCH, *supra* note 33.

<sup>124</sup> *Together to End Solitary: Monthly Nationwide Actions*, NAT'L RELIGIOUS CAMPAIGN AGAINST TORTURE, <http://www.nrcat.org/torture-in-us-prisons/together-campaign> (last visited Apr. 9, 2018).

<sup>125</sup> *See id.*

<sup>126</sup> *See* Gottschalk, *supra* note 82, at 254.

<sup>127</sup> *See id.*

<sup>128</sup> *See* Birkhead, *supra* note 28, at 67.

agreeing to reduce and restrict the use of solitary confinement for juveniles.<sup>129</sup> Other lawsuits have resulted in large damage awards.<sup>130</sup> In 2014, the New York Civil Liberties Union (NYCLU) and the New York State Department of Community Corrections settled a lawsuit that banned the use of solitary confinement for inmates younger than eighteen in state prisons.<sup>131</sup> Even more recently, in March 2016, a federal district court approved a settlement that will result in a complete overhaul of solitary confinement in New York's fifty-four state prisons.<sup>132</sup> During the settlement negotiations between the plaintiff inmates' lawyers and the state Department of Corrections and Community Supervision, the Department agreed not to impose solitary confinement on sixteen- and seventeen-year-old inmates except for extraordinary circumstances.<sup>133</sup>

Despite these settlements, it takes time for the policies to actually be implemented. On September 21, 2016, the NYCLU and Legal Services of Central New York filed a lawsuit in federal district court against the Onondaga County Sheriff's Office for putting sixteen- and seventeen-year-olds in solitary confinement for months at a time.<sup>134</sup> The lawsuit contends that the use of solitary confinement by the Sheriff's Office violated the United States Constitution and federal education laws.<sup>135</sup> The suit was filed on behalf of six juveniles who had been in solitary confinement for reasons ranging from singing Whitney Houston in their cells to wearing shower shoes at the wrong time.<sup>136</sup>

Furthermore, the Supreme Court has recently weighed in on the issue of solitary confinement and its detrimental effects.<sup>137</sup> In 2015, in *Davis v. Ayala*, Justice Kennedy, in a concurring opinion, noted the history of solitary confinement as well as the recent growing public awareness of corrections

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<sup>129</sup> See *id.*

<sup>130</sup> See ACLU, *supra* note 23, at 6. In 2013, two boys in New Jersey won a \$400,000 settlement against the state's Juvenile Justice Commission. *Id.* One of the plaintiffs, a sixteen-year old, spent 178 days in solitary, and the other, a fifteen-year-old, spent fifty days in solitary. *Id.*

<sup>131</sup> See Birkhead, *supra* note 28, at 67.

<sup>132</sup> See Mark Hamblett, *Judge Signs Pact to Curtail Solitary Confinement in NY*, N.Y. L.J. (Apr. 1, 2016), <https://www.law.com/newyorklawjournal/almID/1202753801939/Judge-Signs-Pact-to-Curtail-Solitary-Confinement-in-NY/?slreturn=20180309202426>.

<sup>133</sup> See *id.*

<sup>134</sup> Class Action Complaint at 1-2, *V.W. v. Conway*, 9:16-CV-1150-DNH-DEP (N.D.N.Y. Sept. 21, 2016), [https://www.scribd.com/document/324820743/Syracuse-Solitary-Final-Signed#from\\_embed](https://www.scribd.com/document/324820743/Syracuse-Solitary-Final-Signed#from_embed); see also Press Release, NYCLU, *Lawsuit: Syracuse Jail Is Harming Children with Abusive Solitary Confinement Conditions* (Sept. 21, 2016), <http://www.nyclu.org/news/lawsuit-syracuse-jail-harming-children-with-abusive-solitary-confinement-conditions>.

<sup>135</sup> See Class Action Complaint, *supra* note 134, at 4, 41.

<sup>136</sup> See *id.* at 4-5, 26, 32.

<sup>137</sup> *Davis v. Ayala*, 135 S. Ct. 2187 (2015); *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

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and solitary confinement in particular.<sup>138</sup> Justice Kennedy discussed the lack of transparency in prisons.<sup>139</sup> He also recognized that the Court might soon be called upon to decide whether there are “workable alternatives” to solitary confinement, and whether correctional facilities should be required to adopt them.<sup>140</sup> The Supreme Court has never held that solitary confinement is *per se* unconstitutional.

#### IV. THE PATCHWORK OF STATES’ POLICIES

Absent the Supreme Court holding that the use of solitary confinement of juveniles is *per se* unconstitutional, the reformation of solitary confinement will ultimately be left to the states. Some states have taken steps to reform their practice of solitary confinement, but these policies vary widely across the country. Not only is there a lack of uniformity among the states, but there is also varying practices within the same state.<sup>141</sup>

Nevertheless, the nation appears to be moving away from the practice of punitive solitary confinement for juveniles.<sup>142</sup> Twenty-nine jurisdictions in the country prohibit the use of punitive solitary confinement outright.<sup>143</sup> Although these states prohibit the use of solitary confinement as a form of punishment, many of them allow juveniles to be isolated for administrative or protective reasons.<sup>144</sup> It does not matter the reason for the isolation, as it will still have the same adverse effects.<sup>145</sup> For example, Alaska prohibits punitive solitary confinement, but it permits confinement for the protection of the juvenile or prison staff for up twenty-four hours.<sup>146</sup> The use of confinement must then be reviewed every twenty-four hours and cannot

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<sup>138</sup> 135 S. Ct. at 2209–10 (Kennedy, J., concurring). Justice Kennedy notes that his concurrence is only in response to the “one factual circumstance, mentioned at oral argument but with no direct bearing on the precise legal questions presented by this case.” *Id.* at 2208.

<sup>139</sup> *Id.* at 2208–10 (“Prisoners are shut away-out of sight, out of mind.”).

<sup>140</sup> *Id.* at 2210.

<sup>141</sup> See, e.g., Sal Rodriguez, *Children Held in Solitary Confinement in Nebraska for “Days, Weeks, Even Months”*: New ACLU Report Finds Widespread Use of Isolation in State’s Juvenile Jails, SOLITARY WATCH (Jan. 12, 2016), <http://solitarywatch.com/2016/01/12/children-held-in-solitary-confinement-in-nebraska-for-days-weeks-even-months/>.

<sup>142</sup> 2014 was one of the most significant years for reform in the United States, which was likely a “response to a highly-publicized hunger strike, two corrections commissioners sleeping in solitary, and a New York Times exposé.” Eli Hager & Gerald Rich, *Shifting away from Solitary*, THE MARSHALL PROJECT (Dec. 23, 2014), <https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary#.uv6dVOVGd>.

<sup>143</sup> Natalie J. Kraner et al., *51-Jurisdiction Survey of Solitary Confinement Rules in Juvenile Justice Systems*, LOWENSTEIN CTR. FOR THE PUB. INTEREST, 2 (July 26, 2016), <https://www.lowenstein.com/files/upload/51-Jurisdiction%20Survey%20of%20Juvenile%20Solitary%20Confinement%20Rules.PDF>.

<sup>144</sup> *Id.* at 7.

<sup>145</sup> See *infra* Part II.

<sup>146</sup> ALASKA ADMIN. CODE tit. 7, § 52.310(b) (2016).

exceed five consecutive twenty-four periods.<sup>147</sup> Likewise, Maine prohibits solitary confinement as a punishment in juvenile correctional facilities; however, solitary confinement can be used as punishment in all other correctional facilities.<sup>148</sup> This still poses a problem because juveniles can be held in adult facilities, and the practice can be unrestricted.

By contrast, Colorado has prohibited the use of punitive solitary confinement and has also placed extensive restrictions on the use of administrative and protective solitary confinement.<sup>149</sup> The Colorado statute prohibits the use of solitary confinement as a “sanction,” but allows it in the case of an emergency if other less restrictive measures have failed.<sup>150</sup> Even then, the confinement of a juvenile cannot exceed four hours, unless it is necessary under the individual’s specific circumstances.<sup>151</sup> If confinement exceeds four hours, a facility director must be notified each hour after the four-hour mark.<sup>152</sup> In addition to these regulations, in May 2016, the Colorado legislature codified limitations on the use of solitary confinement.<sup>153</sup> The legislation also includes recording requirements to promote transparency.<sup>154</sup>

Approximately fifteen states allow punitive solitary confinement, but limit the amount of time a juvenile can be isolated.<sup>155</sup> The time limits imposed can range from six hours<sup>156</sup> to sixty days.<sup>157</sup> Although these states claim to place time limits on the use of punitive solitary confinement, there are problems with the exceptions included in the statutes. For instance, Washington allows punitive “room confinement” for up to three days.<sup>158</sup> “Room confinement” can be used for punitive purposes at the staff’s discretion.<sup>159</sup> Moreover, “programmed room confinement” is allowed for up

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

<sup>148</sup> ME. REV. STAT. ANN. tit. 34-A, § 3032(5)(A) (West 2016); *see also* ACLU, *supra* note 23, at 24.

<sup>149</sup> *See* Kraner et al., *supra* note 143, at 16–19.

<sup>150</sup> 12 COLO. CODE REGS. § 2509-8:7.713.24(G)(2) (LexisNexis 2012).

<sup>151</sup> *See* Kraner et al., *supra* note 143, at 18.

<sup>152</sup> *See id.*

<sup>153</sup> *See id.*, at 19; *see also*, Press Release, ACLU Colorado, *Colorado Legislature Passes Bill to Protect Children from Solitary Confinement* (May 9, 2016), <http://aclu-co.org/colorado-legislature-passes-bill-protect-children-solitary-confinement/>.

<sup>154</sup> *See* Press Release, *supra* note 153.

<sup>155</sup> These states are Delaware, Mississippi, Nevada, Rhode Island, Washington, Indiana, Louisiana, Minnesota, Kentucky, South Dakota, Virginia, California, North Carolina, West Virginia, and Wisconsin. Kraner et al., *supra* note 143, at Attachment 1.

<sup>156</sup> 9-100-105 DEL. ADMIN. CODE § 9.6.1.3 (2018) (limiting solitary confinement to six non-consecutive hours within a twenty-four-hour timeframe).

<sup>157</sup> WIS. ADMIN. CODE DOC § 373.80(3)(c) (2018).

<sup>158</sup> *See* Kraner et al., *supra* note 143, at 82.

<sup>159</sup> *See id.*



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to fourteen days or longer with administrative approval.<sup>160</sup> “Programmed room confinement” can also be used for punitive purposes, but requires that the juvenile spend no more than half of waking hours in confinement.<sup>161</sup>

The Washington statute exemplifies another difference among state statutes: the use of different terms for solitary confinement. The lack of uniformity can cause problems because it may appear that a state has prohibited solitary confinement, yet it allows “room confinement”<sup>162</sup> or “corrective room restriction.”<sup>163</sup> Both of these practices are used for punitive purposes and are essentially solitary confinement, thus causing the same detrimental effects as solitary confinement. Even states that supposedly prohibit punitive solitary confinement use different terms or authorize isolation for other purposes.<sup>164</sup> For example, West Virginia, by way of statute, does not allow solitary confinement to be used as punishment, but it allows the use of “room confinement,” which can last up to ten days for certain offenses.<sup>165</sup>

There are still seven states in the country that do not place any restrictions on the amount of time a juvenile can spend in solitary confinement, or allow indefinite extensions of the time limit through administrative approval.<sup>166</sup> For example, Alabama limits punitive solitary confinement to eight hours, but the time can extend indefinitely with administrative approval.<sup>167</sup>

#### V. FEDERAL LEGISLATION AND THE SOLITARY CONFINEMENT REFORM ACT

The disjointed practice of solitary confinement across the country should not continue. In American jurisprudence, it is often said that the states are free to act as “laboratories of democracy”;<sup>168</sup> however, this Comment contends that, in the realm of solitary confinement for juveniles, this is not the most effective approach. Solitary confinement is a human rights issue, and it has been proven to have serious, permanent effects on

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<sup>160</sup> See *id.* at 83.

<sup>161</sup> See *id.*

<sup>162</sup> See *id.* at 82 (citing WASHINGTON JUVENILE JUSTICE & REHAB. ADMIN., JR POLICY 22, ASSIGNING ISOLATION AND ROOM CONFINEMENT II (4) (Mar. 20, 2014), <https://www.dshs.wa.gov/sites/default/files/JJRA/jr/documents/JR-Policies/Policy5.50.pdf>).

<sup>163</sup> NEV. REV. STAT. ANN. § 63.505(1) (LexisNexis 2018).

<sup>164</sup> See Rademacher, *supra* note 68, at 1034.

<sup>165</sup> W. VA. CODE ANN. § 49-4-721(a) (LexisNexis 2015); Kraner et al., *supra* note 126, at 85.

<sup>166</sup> Kraner et al., *supra* note 143, at 2.

<sup>167</sup> See ALA. ADMIN. CODE r. 950-1-6-.05(3)(g) (2017).

<sup>168</sup> See, e.g., *Evenwel v. Abbott*, 136 S. Ct. 1120, 1141 (2016) (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673 (2015)).

juveniles.<sup>169</sup> It is inadequate for states to vary so significantly in their policies of isolation. There should be general uniformity among the states to strive towards abolition of the practice. While there has been movement on the federal level and bills addressing solitary confinement have been introduced, none have been successful. A federal statute would affect the small number of juveniles held in the federal prison system, but in order to have the greatest impact, federal legislation must encourage reform in the states. The most recent bill introduced to Congress, the SCRA,<sup>170</sup> should serve as a model to the states in order to promote a more uniform, limited practice of solitary confinement.

#### A. *History of Federal Legislation*

In addition to the wide variety of policies among the states, there has been movement at the federal level addressing the issue of solitary confinement. The Prison Rape Elimination Act (PREA) applies primarily to adult facilities, but it has some provisions that also apply to juvenile correctional facilities.<sup>171</sup> PREA requires that juveniles held in isolation for disciplinary or protective reasons receive daily exercise, access to educational services, daily visits from a medical or mental health personnel, and access to programs and work opportunities, if possible.<sup>172</sup> Although PREA is beneficial to regulate the isolation of juveniles, it still allows juveniles to be held in solitary confinement without time limitations. Additionally, DOJ investigations have indicated that many juvenile correctional facilities simply do not have the resources to provide juveniles with these types of programs.<sup>173</sup>

There has been a recent push in Congress, suggesting the growing recognition of the need for reform. For example, in 2014, Senator Dick Durbin led a Senate panel that discussed banning the use of solitary confinement for juveniles, pregnant women, and the mentally ill.<sup>174</sup> Senator Durbin described solitary confinement as a “human rights issue we can’t ignore.”<sup>175</sup> After the hearing, Representative Tony Cardenas introduced a House bill banning the use of solitary confinement in federal juvenile facilities and requiring a recording system of juveniles in isolation.<sup>176</sup> The

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<sup>169</sup> See *infra* Part II.

<sup>170</sup> Solitary Confinement Reform Act, S. 3432, 114th Cong. (2016).

<sup>171</sup> Rademacher, *supra* note 68, at 1038.

<sup>172</sup> See ACLU, *supra* note 23, at 8–9.

<sup>173</sup> See Rademacher, *supra* note 68, at 1038.

<sup>174</sup> See Birkhead, *supra* note 28, at 65.

<sup>175</sup> See *id.*

<sup>176</sup> See *id.* at 65–66.

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bill eventually died in the House.<sup>177</sup> Senator Cory Booker introduced the Maintaining dignity and Eliminating unnecessary Restrictive Confinement of Youths Act of 2015 (MERCY Act) to the Senate, which called for the ban of solitary confinement of juveniles except in emergency situations.<sup>178</sup> In 2017, Senator Booker reintroduced the MERCY Act, and the bill has been referred to the Committee on the Judiciary.<sup>179</sup>

#### B. *The SCRA*

On September 28, 2016, Democratic Senators Dick Durbin, Christopher Coons, Patrick Leahy, Cory Booker, and Al Franken introduced the SCRA in Congress.<sup>180</sup> Compared to the bills introduced to Congress in the past,<sup>181</sup> the SCRA is the most comprehensive and significant bill introduced to date. The bill has been called a “landmark” and “ground-breaking.”<sup>182</sup> Since the SCRA’s introduction in September 2016, more than a dozen advocacy groups have endorsed the bill.<sup>183</sup>

First, the bill applies to solitary confinement generally, but it has specific restrictions on the solitary confinement of juveniles. The bill calls for solitary confinement to be limited to the “briefest term” and the “least restrictive conditions practicable.”<sup>184</sup> The bill also provides that an inmate in solitary confinement receive at least four hours of out-of-cell time every day, unless the inmate poses a serious immediate threat.<sup>185</sup> Moreover, the bill states that an inmate must have “as much meaningful interaction with others” as is practicable and must have the opportunity to participate in programs.<sup>186</sup> This bill recognizes the problems associated with solitary

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<sup>177</sup> See Protecting Youth from Solitary Confinement, H.R. 4124, 113th Cong. (2014).

<sup>178</sup> MERCY Act, S. 1965, 114th Cong. (2015).

<sup>179</sup> MERCY Act, S. 329, 115th Cong. (2017).

<sup>180</sup> Solitary Confinement Reform Act, S. 3432, 114th Cong. (2016); see also Joshua Manson, *Senate Democrats Introduce Landmark Bill to Reform Solitary Confinement in Federal Prisons*, SOLITARY WATCH (Oct. 7, 2016), <http://solitarywatch.com/2016/10/07/senate-democrats-introduce-landmark-bill-to-reform-solitary-confinement-in-federal-prisons/>.

<sup>181</sup> See Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003) (codified as amended at 34 U.S.C. § 30301 (2012)); Record Expungement Designed to Enhance Employment (REDEEM) Act, S. 675, 114th Cong. (2015); MERCY Act, S. 1965, 114th Cong. (2015); MERCY Act, S. 329, 115th Cong. (2017).

<sup>182</sup> Manson, *supra* note 180.

<sup>183</sup> See *id.* According to Manson, the Solitary Confinement Reform Act has been endorsed by the American Civil Liberties Union, National Religious Campaign Against Torture, the Leadership Conference on Civil and Human Rights, Human Rights Watch, Just Detention International, Campaign for Youth Justice, Center for Children’s Law and Policy, Human Rights Campaign, National Alliance on Mental Illness, and Washington Lawyers’ Committee for Civil Rights. See *id.*

<sup>184</sup> Solitary Confinement Reform Act, S. 3432 § 4050(b)(1).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

confinement and the practice of isolating an inmate in a cell for twenty-three hours a day without any social interaction.

Furthermore, the bill specifically addresses the solitary confinement of “vulnerable populations,” which includes inmates “younger than 18 years of age.”<sup>187</sup> The bill bans the use of solitary confinement of juveniles unless the confinement is temporary and de-escalation techniques have been exhausted.<sup>188</sup> De-escalation techniques include penalizing the inmate through loss of privileges, speaking with the inmate, and allowing a licensed mental health professional to provide appropriate care.<sup>189</sup> If a juvenile must be isolated because less restrictive means were unsuccessful, the bill places strict limits on the amount of time the juvenile can be isolated.<sup>190</sup> The bill also provides for the situation in which the juvenile does not calm down after the maximum amount of time allowed in solitary confinement, in which case the juvenile should be transferred to a facility that can offer the appropriate care.<sup>191</sup>

There are two notable provisions of the SCRA that have not been present in other federal legislation. First, there is a provision that would create protective custody units.<sup>192</sup> These units would provide a “sheltered general population housing” in order to protect inmates from harm without holding them in solitary confinement.<sup>193</sup> If an inmate requests to be put in solitary confinement, confinement must be limited to no more than five days.<sup>194</sup> Another notable provision of the SCRA is the creation of the Office of the Civil Rights Ombudsman (the Office).<sup>195</sup> The Office would address the “notorious lack of transparency” that surrounds solitary confinement in the United States.<sup>196</sup> The bill provides that the Office will be an expert on the effects of prolonged solitary confinement.<sup>197</sup> The duties of the Office would include reviewing and investigating all civil rights complaints, identifying areas in which the policies of solitary confinement can be improved, and identifying how the use of solitary confinement can be

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<sup>187</sup> *Id.* § 4050(b)(4)(A).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* § 4050(b)(4)(A)(ii)(I)–(III).

<sup>190</sup> Solitary Confinement Reform Act, S. 3432 §4050(b)(4)(A)(iii) (limiting isolation to three hours if the inmate posed a substantial threat to others, or thirty minutes if the inmate posed a substantial threat only to himself or herself).

<sup>191</sup> *Id.* § 4050(b)(4)(A)(iv).

<sup>192</sup> *Id.* § 4050(b)(3).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* § 4050(e)(1).

<sup>196</sup> Manson, *supra* note 180.

<sup>197</sup> *See* Solitary Confinement Reform Act, S. 3432 § 4050(e)(1)–(2).

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reduced altogether.<sup>198</sup>

### C. *Limitations of the SCRA*

Although the SCRA is the most comprehensive bill introduced to Congress thus far, it still has several limitations. First, the bill only affects inmates that are held in federal prisons, which amounts to less than ten percent of the total incarcerated population.<sup>199</sup> Most inmates are held in state and local custody. Further, the number of juveniles held by the federal government is nominal—in March 2018 there were only twenty.<sup>200</sup>

Another limitation of the SCRA is it allows for the use of solitary confinement in administrative maximum facilities.<sup>201</sup> According to the bill, an administrative maximum facility means “a maximum-security facility, including the Administrative Maximum facility in Florence, Colorado.”<sup>202</sup> According to the Federal Bureau of Prisons, there are approximately 21,565 inmates housed in high or maximum-security.<sup>203</sup> The bill allows for those inmates that are held in administrative maximum facilities to be held in solitary confinement if the inmates pose an “ongoing significant and serious threat” to others and cannot be addressed through “alternative housing.”<sup>204</sup> This exception could potentially undermine the bill’s larger objective to limit solitary confinement to the “briefest term,” since inmates held in these facilities would fall under this category of inmates.<sup>205</sup>

To the dismay of civil rights and human rights advocates, the bill falls short of completely eliminating the use of solitary confinement. The bill still allows for inmates to spend time in solitary confinement, ranging from hours to days.<sup>206</sup> There are also provisions that may invite prison staff to take advantage of the exceptions and abuse their discretion in determining when

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<sup>198</sup> *Id.* § 4050(e)(5).

<sup>199</sup> *See* Manson, *supra* note 180.

<sup>200</sup> *Inmate Age*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_age.jsp](https://www.bop.gov/about/statistics/statistics_inmate_age.jsp) (last visited Apr. 10, 2018).

<sup>201</sup> Solitary Confinement Reform Act, S. 3432 § 4050(b)(7).

<sup>202</sup> *Id.* § 4050(a)(1). The United States Penitentiary Administrative Maximum Facility in Florence, Colorado is the highest-security federal prison in the country. Eli Hager, *My Life in the Supermax*, THE MARSHALL PROJECT (Jan. 8, 2016, 7:15 AM), <https://www.themarshallproject.org/2016/01/08/my-life-in-the-supermax#.roEN0zeRI>. Inmates are held in solitary confinement. *Id.* There are approximately 407 inmates in the facility. *USP Florence Admax*, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/flm/> (last visited Apr. 10, 2018).

<sup>203</sup> *Prison Security Levels*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_sec\\_levels.jsp](https://www.bop.gov/about/statistics/statistics_inmate_sec_levels.jsp) (last visited Apr. 10, 2018).

<sup>204</sup> Solitary Confinement Reform Act, S. 3432 § 4050(b)(7).

<sup>205</sup> *See id.* §4050(a)(1); Manson, *supra* note 180.

<sup>206</sup> *See* Solitary Confinement Reform Act, S.3432 § 4050(b)(4), (b)(7).

an inmate poses a substantial threat to himself, herself, or others.<sup>207</sup> These limitations of the bill, however, should not eradicate the SCRA's significance.

## VI. SCRA: A BLUEPRINT FOR THE STATES AND THE NEED FOR UNIFORMITY

The SCRA is a well-written, comprehensive bill that should serve as a blueprint for the states. The bill can galvanize the states to adopt a more uniform and restrictive use of solitary confinement. Even though the bill was not passed, it should not go quietly. The bill's primary objective—to reduce solitary confinement to the “briefest term” and as a practice of last resort—is the approach that the states should develop.<sup>208</sup> Moreover, the bill's ban on solitary confinement for juveniles and its strict restrictions on the amount of time a juvenile can spend in solitary confinement provide the states with a concrete and uniform practice of solitary confinement for juveniles. Currently, states vary in the amount of time a juvenile can spend in solitary confinement, ranging from hours to months.<sup>209</sup> The need for uniformity among the states centers on two basic arguments: human rights and efficiency.

### A. Human Rights

The practice of solitary confinement deprives an inmate of basic human rights.<sup>210</sup> Human rights advocates contend that prolonged solitary confinement constitutes cruel and unusual punishment in direct violation of the Eighth Amendment of the United States Constitution.<sup>211</sup> Prolonged isolation has severe, and often irreparable, effects.<sup>212</sup> There is a growing human rights movement to end solitary confinement both in the United States and internationally.<sup>213</sup> Moreover, without the Supreme Court ruling

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<sup>207</sup> See, e.g., *id.* § 4050(b)(7) (permitting the practice of solitary confinement for unlimited amount of time for inmates in an administrative maximum facility who pose an “ongoing significant and serious threat” to others safety).

<sup>208</sup> *Id.* § 4050(b)(1)(A).

<sup>209</sup> See *infra* Part IV.

<sup>210</sup> See *Solitary Confinement: The Use of Torture in U.S. Prisons*, CTR. FOR CONST. RTS. <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/torture-use-solitary-confinement-us-prisons> (last updated Mar. 25, 2018).

<sup>211</sup> See *id.*; see also U.S. CONST. amend. VIII.

<sup>212</sup> See *infra* Part III.

<sup>213</sup> International human rights experts have condemned the prolonged use of solitary confinement and argue that the practice is a “human rights abuse” and amounts to torture. See CTR. FOR CONST. RTS., *supra* note 210. Juan Méndez, the UN Special Rapporteur on Torture, has said that holding juveniles in solitary confinement can amount to cruel and unusual punishment and can even rise to the level of torture. See U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at 2, U.N. Doc. A/66/268

that solitary confinement is unconstitutional, the deprivation of human rights can be addressed only through federal and state legislation.<sup>214</sup>

Several provisions of the SCRA address the human rights arguments against the practice of solitary confinement. First, if states adopt the SCRA, or language similar to it, this could affect inmates of all ages. The bill is not limited to juveniles, but it attempts to reform the practice of solitary confinement generally. States that adopt the language of the SCRA would limit the amount of time spent in solitary confinement to hours, and in certain situations, only thirty minutes.<sup>215</sup> Isolating juveniles for hours, instead of days, weeks, or even months, is more in line with the research and the known adverse effects on juveniles.<sup>216</sup> Limiting isolation to several hours is more like a “time out,” rather than solitary confinement.<sup>217</sup>

States should also follow the SCRA by creating an ombudsman position to address the current lack of transparency that plagues state administrations. Unless people become more aware of the effects of solitary confinement and just how many children are being subjected to this practice, solitary confinement of juveniles will continue. This result can be mitigated by the creation of an office specifically devoted to reviewing and investigating the complaints of children being held in solitary confinement. Like the SCRA, the states should require that the ombudsman annually report the use of solitary confinement and ways to improve its policies.

Lastly, the states should take notice and adopt the provision of the SCRA regarding protective housing units.<sup>218</sup> Children that are held in adult jails and prisons are often placed in permanent protective solitary confinement.<sup>219</sup> Although this practice may be necessary to protect the juvenile from adult inmates, the practice is unfair because these inmates are protected in the same way that they are punished. Juveniles are placed in solitary confinement simply because they are juveniles in adult facilities. Therefore, the states should uniformly use general protective housing units. There, juveniles could be safe from adult inmates while still being able to

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(Aug. 5, 2011), <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>. A number of international human rights organizations, including the United Nations Guidelines for the Prevention of Juvenile Delinquency, the Committee on the Rights of the Child, and the Inter-American Commission on Human Rights, have declared that solitary confinement of juveniles violates human rights laws and have called for the practice to be banned. See ACLU, *supra* note 23, at 10.

<sup>214</sup> See *infra* Part III.C.

<sup>215</sup> See Solitary Confinement Reform Act, S. 3432, 114th Cong. § 4050(b)(4) (2016).

<sup>216</sup> See Laura Anne Gallagher, *More Than a Time Out: Juvenile Solitary Confinement*, 18 U.C. DAVIS J. JUV. L. & POL'Y 244, 257 (2014); see also Rademacher, *supra* note 68, at 1039–40.

<sup>217</sup> See Gallagher, *supra* note 216, at 256.

<sup>218</sup> Solitary Confinement Reform Act, S. 3432 § 4050(b)(3).

<sup>219</sup> See ACLU & HUMAN RIGHTS WATCH, *supra* note 33, at 53–54.

interact with others. If facilities had a general protective housing unit, prison staff could maintain the juveniles' safety while also maintaining their mental health by not placing them in solitary confinement.

### B. *Efficiency*

The fact that solitary confinement does not achieve the goals of punishment and does not make prisons safer<sup>220</sup> only strengthens the argument that the states should adopt strict limitations on solitary confinement. Solitary confinement is often used to punish inmates; however, research shows that juveniles often become more violent and dangerous as a result of being in solitary confinement.<sup>221</sup> Studies suggest that there may be a causal link between solitary confinement and increased violence between inmates and prison staff.<sup>222</sup> Moreover, there is little evidence that solitary confinement increases prison safety and that the lack of solitary confinement decreases safety.<sup>223</sup> Until recently, it was a common belief that solitary confinement decreased recidivism rates by deterring inmates from committing future crimes; however, studies that matched inmates held in solitary confinement with those held in general population found that solitary confinement increased recidivism rates.<sup>224</sup>

It is also much more expensive to house an inmate in solitary confinement than in general housing.<sup>225</sup> According to a congressional hearing to address the issue of solitary confinement, it costs approximately \$78,000 a year to house an inmate in solitary in the federal prison system—three times as much as it costs to house someone in a general unit.<sup>226</sup> Housing inmates in solitary confinement is more expensive because of the need for enhanced surveillance and security, enhanced technology, and more prison staff.<sup>227</sup> Moreover, states that have decreased the number of inmates

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<sup>220</sup> See Gary Gately, *Juvenile Solitary Confinement: Modern-Day 'Torture' in the US*, JUV. JUST. INFO. EXCHANGE (Mar. 5, 2014), <http://jjie.org/2014/03/05/juvenile-solitary-confinement-modern-day-torture-in-the-u-s/>.

<sup>221</sup> See Rademacher, *supra* note 68, at 1029–30.

<sup>222</sup> Shira E. Gordon, *Note, Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 515 (2014).

<sup>223</sup> ALISON SHAMES ET AL., SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES, VERA INST. OF JUS. 18 (May 2015), [http://archive.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report\\_1.pdf](http://archive.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf).

<sup>224</sup> See Gordon, *supra* note 222.

<sup>225</sup> See SHAMES ET AL., *supra* note 223.

<sup>226</sup> *Solitary Confinement Costs \$78K per Inmate and Should Be Curbed*, Critics Say, THE TWO-WAY, NPR (Feb. 25, 2014 9:44 PM), <http://www.npr.org/sections/thetwo-way/2014/02/25/282672593/solitary-confinement-costs-78k-per-inmate-and-should-be-curbed-critics-say>.

<sup>227</sup> SHAMES ET AL., *supra* note 223.



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housed in solitary confinement have saved money.<sup>228</sup> For example, in 2010, a Mississippi prison attempting to decrease violence transferred so many prisoners to general population that it closed the solitary confinement unit and saved more than five million dollars.<sup>229</sup> Without evidence of a need for solitary confinement to make prisons or communities safer, solitary confinement should not continue without concrete restrictions in every state.

## VII. CONCLUSION

Solitary confinement is a national problem that has serious physical, psychological, and developmental effects on juveniles. Although a majority of states have taken positive steps toward reducing and restricting solitary confinement, these steps are not enough. There is a need for the states to move toward abolition of the practice. Because solitary confinement is a human rights issue, varying practices among the states should not continue. Moreover, the fact that solitary confinement does not make prisons safer or decrease recidivism rates further proves that the practice should be reconsidered and strictly limited. It is also substantially more expensive.

The SCRA, introduced in the Senate in September 2016, is a well-written, comprehensive, and groundbreaking bill that would seriously limit the use of solitary confinement. Although it is unlikely, and perhaps ill advised, to completely eradicate the practice of isolation, there must be strict limits on its use. The SCRA provides strict limitations. Regardless of the bill's future, states should look to the bill as a blueprint to inform their own reform and policies. Not only is the bill important for its substance, but it is also important for its symbolic nature. This bill represents a cultural shift in the use of solitary confinement in the United States.<sup>230</sup> If the states used the SCRA as a model, then there would be a move toward the ultimate goal of completely eliminating the use of solitary confinement for juveniles, and furthermore, tragedies like the death of Kalief Browder could be avoided.

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<sup>228</sup> Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html>.

<sup>229</sup> *Id.*

<sup>230</sup> See Manson, *supra* note 180.