

## The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation

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September 2009, the first client referral: three guards escorted sixteen-year-old Troy to the interview. Despite years of experience, I was shocked. In leg-irons and with his hands cuffed behind his back, he wore no real clothes and no prison-issued jumpsuit. His body was covered with a sleeveless thigh-length robe, held together by a few

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Velcro strips.<sup>1</sup> It was painful to watch him try to sit in the chair. Just when he seemed to manage the handcuffs and the outfit, one of his flip flops would slide off.

I asked one of the guards if Troy could have his hands cuffed in front of him. The left flank guard, wearing dark sunglasses, complied without speaking. With Troy's arms in front of me, I found it difficult not to stare. Self-mutilation scars, too numerous to count, covered his arms.

Documents later confirmed what Troy told me that first day: he had spent twenty-four hours a day in an isolation-type cell for approximately 180 of the 225 days he had spent in the facility.<sup>2</sup> The 7' x 7' cell had a mattress (no sheets or blankets), a sink, a toilet, and a small sealed window near the ceiling. Nothing else was permitted in the cell. All meals were eaten in the cell. There was no school or books. There was no exercise. The only time he got out of the cell was to shower.

I filed an emergency court motion for his immediate release. Days later he was transferred to a psychiatric hospital. A federal lawsuit is pending.<sup>3</sup>

Post-disposition representation has long been recognized as a critical stage in juvenile court proceedings: a stage where zealous advocacy is needed.<sup>4</sup> The goal of the New Jersey post-disposition

1. We later learned that this was called a "ferguson gown."

2. For additional information see *Troy D. and O'Neill S. v. Mickens et al.*, JUV. L. CENTER, [http://www.jlc.org/litigation/troy\\_d\\_and\\_oneill\\_s\\_v\\_mickens\\_et\\_al](http://www.jlc.org/litigation/troy_d_and_oneill_s_v_mickens_et_al) (last visited Oct. 30, 2011).

3. For additional information regarding the federal lawsuit, see *Troy D. v. Mickens*, No. 10-2902 (JEL/AMD), 2011 WL 3793920 (D.N.J. Aug. 25, 2011); *Troy D. and O'Neill S. v. Mickens et al.*, *supra* note 2.

4. See NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 25 (2005) [hereinafter JUVENILE DELINQUENCY GUIDELINES], available at <http://www.ncjfcj.org/images/stories/dept/pdcd/pdf/JDGjuvntelidelinquencyguidelinescompressed.pdf> (holding delinquency judges responsible for providing children with access to counsel at every stage of the proceedings, from before the initial hearing through post disposition and reentry); JUVENILE DEFENDERS ASS'N OF PA., PERFORMANCE GUIDELINES FOR QUALITY AND EFFECTIVE JUVENILE DELINQUENCY REPRESENTATION 14 (2010), available at [http://www.jdap.info/file/juvenile\\_performance\\_guidelines.pdf](http://www.jdap.info/file/juvenile_performance_guidelines.pdf); ROBIN WALKER STERLING ET AL., NAT'L JUVENILE DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 19 (2009), available at [http://www.njdc.info/pdf/njdc\\_role\\_of\\_counsel\\_book.pdf](http://www.njdc.info/pdf/njdc_role_of_counsel_book.pdf); NAT'L JUVENILE DEFENDER CTR., TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY

project<sup>5</sup> was to fill a systemic gap and provide juveniles with post-disposition access to counsel. The project was intended to focus on reducing recidivism by ensuring that programs are meeting the individual needs of the child and assisting with re-entry. Unfortunately, the project quickly became consumed with the conditions issues experienced by the children in facilities, particularly violence and isolation. This Article focuses on the excessive use of punitive isolation (a practice which has been known for centuries to cause harm in adults), on how isolation type practices harm children, and on strategies that advocates might employ to eliminate this harmful practice.

Part I of this Article describes the components of our post-disposition project, including an outline of the legal parameters of New Jersey juvenile law as it relates to post-disposition representation. Part II addresses the issue of isolation in juvenile facilities. This section looks at the current definition of isolation and available research concerning the harmful effects that isolation has on the juvenile population, featuring the work of clinical psychologist Dr. Marty Beyer. It also reviews the judicial response to the use of isolation in juvenile facilities and examines how isolation is used in New Jersey facilities and the legal structure that permits this. Part II concludes with a review of the national standards of juvenile isolation, and highlights the various investigations conducted across the country.

Part III uses *In Re O.S.*<sup>6</sup> to illustrate the problems we found in New Jersey's secure juvenile facilities and the challenges we faced when trying to use the existing New Jersey structure to address those problems. Part IV first shows that isolation does not have the purported benefits of safety, punishment, or deterrence in juvenile

REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS 3 (2d ed. 2008), available at [http://www.njdc.info/pdf/10\\_Core\\_Principles\\_2008.pdf](http://www.njdc.info/pdf/10_Core_Principles_2008.pdf).

5. "The Juvenile Indigent Defense Action Network (JIDAN) is a Model for Change-supported effort . . . to engage leadership in targeted strategies to improve juvenile indigent defense policy and practice." *Juvenile Indigent Defense Action Network (JIDAN)*, MODELS FOR CHANGE, <http://www.modelsfchange.net/about/Action-networks/juvenile-indigent-defense.html> (last visited Nov. 1, 2011).

6. *New Jersey et rel. O.S.*, No. A-5366-09T1, 2011 N.J. Super. Unpub. LEXIS 955 (Apr. 19, 2011).

facilities, demonstrates that juvenile facilities can manage youth more effectively with treatment instead of isolation, and proposes strategies for the future and suggests how the juvenile defender community might respond.

#### I. COMPONENTS OF THE POST-DISPOSITION PROJECT AND LEGAL PARAMETERS OF NEW JERSEY POST-DISPOSITION LAW

##### *A. Across a River but a World Apart: New Jersey Juveniles Have Significantly Less Due Process Protections*

Prior to coming to New Jersey, I had practiced in Philadelphia,<sup>7</sup> where there was a legal culture of excellent post-disposition advocacy driven by mandatory six month review hearings.<sup>8</sup> As a public defender, I was thoroughly taught that some of the most important advocacy happens after the judge makes his disposition ruling. I had seen first-hand how vulnerable children become once they are placed in a facility.<sup>9</sup> I knew that when judges send children

7. From 2001–2006, I served as the assistant chief of the Juvenile Unit of the Defender Association of Pennsylvania. See LAVAL S. MILLER-WILSON & PATRICIA PURITZ, AM. BAR ASS'N, PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 64 (2003) [hereinafter PENNSYLVANIA ASSESSMENT], available at <http://www.jdc.org/files/publications/aaassessment.pdf> (“Also impressive is the Defender Association’s post-disposition advocacy for youth in placement. Despite vast geographical separation from their clients, the Defender Association investigates and monitors the treatment of clients placed in out-of-home facilities.”).

8. 42 P.A. CONS. STAT. § 6353 (2011). The statute states, in relevant part:  
No child shall initially be committed to an institution for a period longer than four years or a period longer than he could have been sentenced by the court if he had been convicted of the same offense as an adult, whichever is less. The initial commitment may be extended for a similar period of time, or modified, if the court finds after hearing that the extension or modification will effectuate the original purpose for which the order was entered. The child shall have notice of the extension or modification hearing and shall be given an opportunity to be heard. The committing court shall review each commitment every six months and shall hold a disposition review hearing at least every nine months.

Id. § 6353(a).

9. Sandra Simkins, *Road Trip! A Simple Solution for Protecting Girls from Institutional Abuse*, 8 WOMEN GIRLS & CRIM. JUST. 7 (2007); Marty Beyer, Gillian Blair, Sarah Katz, Sandra Simkins, & Annie Steinberg, *A Better Way to Spend \$500,000: How the Juvenile Justice System Fails Girls*, 18 WIS. WOMEN’S L.J. 51, 64, 66–67, 69 (2003); Doron Taussig, *Restraining Disorder*, PHILA. CITYPAPER (May 19, 2005), <http://archives.citypaper.net/articles/2005-05-19/cover.shtml>.

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to facilities to “get help,” an advocate is essential to make sure that (1) the programs are held accountable and (2) that the rehabilitative needs of the child do not fall through the cracks.

New Jersey is different than Pennsylvania in significant ways in terms of providing post-disposition representation to juveniles. In New Jersey, once a juvenile judge orders a disposition:

- (1) There are no automatic, regularly scheduled review hearings, (regardless of the length of sentence);
- (2) The statewide Office of the Public Defender routinely closes their files (unless an appeal is filed or other specific post-conviction relief is sought); and
- (3) Children are rarely, if ever, visited by lawyers in facilities.<sup>10</sup>

Recognizing this important systemic gap in children’s access to counsel, the New Jersey statewide Office of the Public Defender and two law school professors submitted a grant proposal to the MacArthur Foundation.<sup>11</sup> The goal of the application was to participate in a National Initiative to enhance legal representation for indigent children and expand the capacity of the Office of the Public Defender. Upon receipt of the JIDAN<sup>12</sup> grant, we created the post-disposition pilot project. In order to expand capacity and enhance representation, the idea was to have juvenile public defenders from two pilot counties refer post-disposition cases to law school clinical programs. The clinical programs would assume post-disposition representation and visit the child while they were in placement. As a result of the post-disposition pilot project, New Jersey children in facilities would have access to lawyers for the first time.

10. New Jersey recognizes that children are entitled to an attorney “at every critical stage” of the delinquency process. N.J. STAT. ANN. § 2A:4A-39(a) (West 2011). Unfortunately, due to the structure of the indigent defense delivery system, public defenders are not contracted to do post-dispositional work. See § 2A:4A-39(a). Most children by their very status are indigent, and most children in the juvenile justice system come from low-income families and qualify for court-appointed counsel. See James Garbarino, *Forward: Pathways from Childhood Trauma to Adolescent Violence and Delinquency*, in TRAUMA AND JUVENILE DELINQUENCY: THEORY, RESEARCH AND INTERVENTIONS, at XIX, XXI–xxiii (Rickly Greenwald ed., 2002).

11. See *infra* app.

12. See *id.*

## B. Components of the New Jersey JIDAN Post-Disposition Project

### 1. Choosing Pilot Counties

As indicated in the grant application chart,<sup>13</sup> the available data and geographic considerations made Camden County in South Jersey and Essex County in Northern Jersey obvious choices for pilot counties. First, both counties are located in large urban environments. Second, these counties comprise approximately 50 percent of the total juveniles sent to juvenile justice facilities.<sup>14</sup> Third, these two counties contain New Jersey's two state law schools (Rutgers School of Law-Camden and Rutgers School of Law-Newark), and two members of the New Jersey JIDAN team ran clinical programs at these schools.<sup>15</sup>

### 2. Focusing on Secure Care Facilities: Children at the Deep End of the Juvenile Justice System

All juvenile programs in New Jersey are run by the Juvenile Justice Commission (JJC), a statewide agency created in 1995 to reform New Jersey's juvenile justice system.<sup>16</sup> The project's choice of which population to work with was difficult. There was much discussion. Should it focus on the children at the deep end: those in large secure care facilities who tend to have failed a number of prior programs and were generally older? Or should it focus on children who were being sent to their very first juvenile placement in an attempt to prevent them from going any deeper? Both populations present compelling interests. For deep end children, this would be the

13. See *infra* app.

14. *Id.*

15. For information regarding the Rutgers School of Law Newark Urban Legal Clinic see <http://law.newark.rutgers.edu/clinics/urban-legal-clinic> (last visited Feb. 2, 2012). For information regarding the Rutgers School of Law-Camden, Children's Justice Clinic see <http://law.rutgers.edu/childrens-justice-clinic> (last visited Feb. 2, 2012).

16. Act of Dec. 15, 1995, ch. 284, 1995 N.J. Laws 1796 (codified as amended at N.J. STAT. ANN. §§ 52:17B-169 to -178 (West 2011)) (establishing the JJC). The JJC is "responsible for operating State services and sanctions for juveniles involved in the juvenile justice system and responsible for developing a Statewide plan for effective provision of juvenile justice services and sanctions at the State, county and local level. . . ." N.J. STAT. ANN. § 52:17B-169(k) (West 2011); see also *Introduction to the New Jersey Juvenile Justice Commission*, OFF. ATT'Y GEN., [http://www.nj.gov/oag/jjc/info\\_intro.htm](http://www.nj.gov/oag/jjc/info_intro.htm) (last visited Oct. 26, 2011).

last opportunity to prevent them from going into the adult system. For first placement juveniles, there was an opportunity to prevent further educational and program failure.

Ultimately, the project to begin by representing the juveniles in the large secure care juvenile facilities for the following reasons:

- First, in looking at the data, it was clear that a large number of children in secure care had significant special education needs, mental health issues and prior Division of Youth & Family Services involvement.<sup>17</sup>
  - Second, geographically, the facilities were centrally located to both counties and housed many juveniles from each of the pilot counties.<sup>18</sup>
  - Third, good programming and effective re-entry are crucial to avoid adult criminal involvement.
  - Finally, national research has revealed that large secure care facilities frequently have problems that negatively impact the juveniles they are designed to serve.<sup>19</sup>
3. Leveraging Clinical Resources: Creating a Referral System Between the Office of the Public Defender and Two Law School Clinical Programs

Next, we created a referral system with the Office of the Public Defender. Our goal was to make the process as easy for public defenders as possible. It was important that our project create as little extra work as possible, given the high volume practice in most urban environments.<sup>20</sup> We created the program as follows:

17. Data for original grant was provided in 2006 by the New Jersey Administrative Office of the Courts. For current demographics, see <http://www.nj.gov/oag/jjc/stats/01-20-12-Juvenile-Demographics-and-Stats.pdf> (last updated Jan. 20, 2012).

18. See *id.* at 13.

19. AMANDA PETERUTI ET AL., JUSTICE POLICY INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 9 (2009), available at [http://www.justicepolicy.org/images/upload/09\\_05\\_REP\\_CossoftConfinement\\_JJ\\_PS.pdf](http://www.justicepolicy.org/images/upload/09_05_REP_CossoftConfinement_JJ_PS.pdf).

20. See PATRICIA PURITZ ET AL., AM. BAR ASS'N JUVENILE JUSTICE CENTER, A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN

- Developed a referral form<sup>21</sup>
- Trained all juvenile defenders in each pilot county to explain to juvenile public defenders why post-disposition representation was important and the protocol of the post-disposition project
- Explained the referral form, and asked juvenile public defenders to fill out the form and have the child (and parent) sign it whenever a child from the pilot county was sent to the Juvenile Justice Commission
- After the form was filled out and signed, it was faxed to one of the two law school clinics
- The clinic then screens and assigns the case to a clinic student or a JIDAN fellow.<sup>22</sup> Either the team or the fellow would then make arrangements to visit the juvenile and begin post-disposition representation.<sup>23</sup>

### C. *Relevant New Jersey Post-Disposition Law*

The Office of the Public Defender does not routinely engage in post-dispositional advocacy for juveniles,<sup>24</sup> however, the plain language of the law appeared to support zealous post-disposition advocacy. There are several statutes in the New Jersey Code of Juvenile Justice (the “Juvenile Code” or “Code”), Court Rules, and caselaw that address juvenile post-disposition.<sup>25</sup> I elaborate on a New Jersey statute and court rule below.

DELIQUENCY PROCEEDINGS 46 (1995) (discussing pervasive problem of high caseloads), available at <http://www.njdc.info/pdf/cjfull.pdf>.

21. See *infra* app.
22. For both the JIDAN post-disposition project in North and South Jersey we had a JIDAN fellow. These recent law school graduates worked on the post-disposition project approximately twenty to thirty hours per week.
23. See Chart of Full Protocol, *infra* app. at 287.
24. *Id.* (Unless there is an appeal pending, or other post conviction relief is specifically sought, or if the juvenile is returned to court for a probation violation).
25. See N.J. STAT. ANN. § 2A:4A-43(b)-(c) (West 2011) (giving juvenile judges a wide array of disposition options); § 2A:4A-45 (providing that juvenile judges retain jurisdiction over the case); N.J. CT. R. 5:24-6 (allowing juvenile judges to modify the disposition upon a

#### 1. Juvenile Judges Retain Jurisdiction Throughout Disposition and Can Modify a Disposition At Any Time

New Jersey’s Juvenile Code explicitly states that a juvenile court retains jurisdiction over any case in which it has entered a disposition . . . and may at any time for the duration of that disposition, if after hearing, and notice to the prosecuting attorney, it finds violation of the conditions of the order of disposition, substitute any other disposition which it might have made originally.<sup>26</sup>

In addition, New Jersey’s Court Rules provide that a juvenile court “may correct, change or modify an order of disposition at any time pursuant to law and may entertain an application for post-disposition relief.”<sup>27</sup> Furthermore, the comment to this rule states that “[t]he rule makes clear the court’s power both to modify its disposition and to grant post-conviction relief. *The rule permits modification of the order at any time.*”<sup>28</sup>

#### 2. The Expansive, Flexible, Overarching Goal of Rehabilitation: The Empowering Language of *In re C.V.*

Statute 2A: 4a-45 was recently interpreted by the New Jersey Supreme Court in *State ex rel. C.V.*<sup>29</sup> There, the Supreme Court of New Jersey upheld the adjudication of the Family Part in denying the juvenile’s request to credit her suspended sentence for the time she spent in two residential treatment programs, pursuant to N.J.S.A. 2A:4A-45(b).<sup>30</sup> In upholding jurisdiction, the Supreme Court cited the “flexibility” of the Juvenile Code in carrying out its “rehabilitative” purpose.<sup>31</sup> In particular, the court pointed to the Senate Judiciary Committee’s intention to significantly broaden [the] arsenal of dispositions . . . when sentencing a juvenile offender. Specifically, the legislative history provides:

recall motion); § 2A:4A-44(d)(2) (“[T]he juvenile’s attorney . . . may make a motion . . . for the return of the [incarcerated] child from a juvenile facility prior to his parole.”).

26. § 2A:4A-45.
27. N.J. CT. R. 5:24-6.
28. N.J. CT. R. 5:24-6, cmt. 2281 (2012).
29. 990 A.2d 640 (N.J. 2010).
30. *Id.*
31. *Id.* at 648.

This bill recognizes that the public welfare and the best interests of juveniles can be served . . . while broadening family responsibility and the use of alternative dispositions for juveniles committing less serious offenses. Moreover, the provisions of this bill and the other accompanying bills reflect a philosophy which is *pragmatic and realistic in nature rather than bound to any particular ideology*.<sup>32</sup>

Additional language in the opinion appears to give the judge vast power in order to achieve the rehabilitative purposes of the New Jersey Code.<sup>33</sup> In addition to *C.V.*, there are other cases which emphasize the purpose of the code and the judge's ability to craft an appropriate disposition.<sup>34</sup>

## II. UNDERSTANDING THE USE OF ISOLATION IN JUVENILE FACILITIES—NATIONAL STANDARDS, PSYCHOLOGICAL RESEARCH, JUDICIAL RESPONSE

*"It's an awful thing, solitary. . . . It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment."*<sup>35</sup>

Despite a Supreme Court ruling made over one hundred years ago<sup>36</sup> that deemed the solitary confinement of adult prisoners unconstitutional, the practice of confining a prisoner "alone and removed from sustained contact with other human beings"<sup>37</sup> continues. Many studies, including one dating back to 1787,<sup>38</sup> have

32. SENATE JUDICIARY COMM., STATEMENT TO ASSEMBLY, S. 200-641, 1st Sess., at 1 (N.J. 1982).

33. *Id.* at 642 ("New Jersey's Code of Juvenile Justice provides a comprehensive scheme that empowers Family Part judges to tailor dispositions toward aiding and rehabilitating juveniles charged with delinquent acts, while simultaneously ensuring protection of the public from dangerous and/or repetitive juvenile offenders.");

34. *In re R.M.*, 141 N.J. 434, 453 (1995).

35. Atul Gawande, *Hellhole*, NEW YORKER (Mar. 30, 2009), [http://www.newyorker.com/reporting/2009/03/30/090330fa\\_fact\\_gawande](http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande) (quoting John McCain).

36. *In re Medley*, 134 U.S. 160 (1890).

37. *Berch v. Stahl*, 373 F. Supp. 412, 420 (W.D.N.C. 1974).

38. *In re Medley*, 134 U.S. at 168; Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997).

found that solitary confinement in secure facilities is detrimental to the mental and physical health of prisoners. The United Nations Human Rights Committee has found that isolation of prisoners may be considered torture.<sup>39</sup> Courts across the United States have ruled that the use of isolation is debilitating and, in some cases, inhuman. For example, it is uncivilized to deprive a person of his clothes<sup>40</sup> or to isolate a child in a room stripped of everything but a mattress.<sup>41</sup>

If the juvenile justice system is designed to be more rehabilitative and less punitive, then how is the use of solitary confinement, segregation, room restriction, or any other means of isolation permitted? We would be outraged if it was found that a parent was confining her child to a small room for days at a time, with minimal human contact, no educational or medical services, and very limited sensory stimuli. Although this scenario would seem to be child abuse, youth in rehabilitate facilities throughout the country are regularly subjected to this kind of treatment.

### A. What is Isolation?

#### 1. Defining Isolation

Juvenile facilities use a variety of terms and acronyms when referring to instances of isolation. Youth placed in secure facilities refer to it as being "put in the box,"<sup>42</sup> "lockdown," "seg," or "the hole."<sup>43</sup> In juvenile facility manuals, removal of a juvenile from his cell and separating him from other residents may be referred to as segregation, pre-hearing confinement, protective custody, seclusion, behavior modification unit, close watch, or room restriction, among other things.<sup>44</sup> Regardless of what a facility's policy and procedure

39. Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18, 23, U.N. Doc. A/63/175 (July 28, 2008) [hereinafter *Interim Report*].

40. *Berch*, 373 F. Supp. at 421.

41. *Lollis v. N.Y. Dep't of Soc. Servs.*, 322 F. Supp. 473 (S.D.N.Y. 1970).

42. This knowledge is based on more than seventy-five client interviews conducted by Lisa Geis as part of the NJ post-disposition representation program.

43. Interview by Marty Beyer with juvenile clients.

44. STATE OF NEW JERSEY DEP'T OF LAW & PUB. SAFETY, JUVENILE JUSTICE COMM'N, NEW JERSEY TRAINING SCHOOL, HANDBOOK ON RULES, REGULATIONS, AND DISCIPLINE REV.

guidebook calls such placement, it is, definitively, isolation or solitary confinement.

Isolation is usually described as placing a youth alone in an unfurnished cell for as much as twenty-three hours a day, usually for disciplinary, safety or administrative purposes. Isolation typically includes extensive surveillance and security controls, the absence of ordinary social interaction, and abnormal environmental stimuli (e.g., many isolation units are noisy and cold). Isolated individuals are often allowed only five hours a week of solitary recreation and little, if any, educational, vocational, or other purposeful activities. They may be handcuffed and/or shackled when they leave their cells.<sup>45</sup>

Courts use isolation and solitary confinement synonymously and they have been clear in their definition. The District Court in North Carolina in *Berch v. Stahl* aptly defined solitary confinement as “confinement alone and removed from sustained contact with other human beings.”<sup>46</sup> The court held that solitary confinement’s “severity as punishment is drastically increased when the isolation is accompanied by the ‘sensory deprivation’ which is . . . attached to the isolation.”<sup>47</sup> The court then explained that sensory deprivation occurs if “visual contact and effective voice communication with others” is barred and if an inmate is prevented from “read[ing], writ[ing], [or] work[ing] on projects,” concluding that the person’s “[m]ental and emotional stability are both threatened, and mental health may be impaired.”<sup>48</sup>

In a report concerning “torture, and other cruel, inhuman or degrading treatment or punishment,” the United Nations General Assembly defined solitary confinement as “the physical isolation of individuals who are confined to their cells for twenty-two to

Feb. 2010); N.J.A.C. 13:92 (2011); N.J.A.C. 13:95-11; N.J.A.C. 13:101-5.3; Interviews with Post-disposition program clients.

45. Marty Beyer addition.

46. *Berch v. Stahl*, 373 F. Supp. 412, 420 (W.D.N.C. 1974).

47. *Id.*

48. *Id.* Because the court in *Morales v. Turman* was aware of the various names applied to isolation in juvenile facilities, it defined solitary confinement as the placement of an “inmate alone in a [room] other than a room in the inmate’s own locked or otherwise secured room or cell dormitory.” *Morales v. Turman*, 364 F. Supp. 166, 177 (E.D. Tex. 1973). The court also defined “dormitory confinement” and “security” in a similar fashion. *Id.*

twenty-four hours a day.”<sup>49</sup> The same report specifically recommends that the use of isolation should be strictly prohibited for use on children under the age of eighteen and for prisoners with mental illness.<sup>50</sup>

Several years earlier, the General Assembly adopted the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty. Rule 67 prohibits the use of “closed or solitary confinement” of juveniles.<sup>51</sup> The Rule qualifies such punishment as “cruel, inhuman or degrading treatment.”<sup>52</sup> In 1980, Amnesty International defined solitary confinement in a report on prison conditions as all “forms of incarceration that totally remove a prisoner from inmate society.”<sup>53</sup> The organization explained that such confinement removes the prisoner “visually and acoustically” from other inmates resulting in “no personal contact with them.”<sup>54</sup> International treaty bodies and human rights experts, including the Human Rights Committee, the Committee against Torture, and the U.N. Special Rapporteur on Torture, conclude that long term isolation may amount to cruel, inhuman, or degrading treatment in violation of the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment.<sup>55</sup>

## 2. Psychological Effects of Isolation in Secure Facilities

There is limited isolation research pertaining to its use in juvenile detention facilities but extensive research has been done on the use of

49. *Interim Report*, *supra* note 39, at 18.

50. *Id.* at 25.

51. United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, R. 67, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

52. *Id.*

53. AMNESTY INT’L, AMNESTY INTERNATIONAL’S WORK ON PRISON CONDITIONS OF PERSONS SUSPECTED OR CONVICTED OF POLITICALLY MOTIVATED CRIMES IN THE FEDERAL REPUBLIC OF GERMANY: ISOLATION AND SOLITARY CONFINEMENT 9 (1980), available at <http://www.amnesty.org/en/library/asset/EUR23/001/1980/en/44963516-773f-4a2d-b753-50ab1c34c493/eur230011980en.pdf>.

54. *Id.*

55. Jeffrey L. Metzner & Jamie Felner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & LAW 104-08(2010).

isolation with adult prisoners. Findings show that “[f]isolation can be psychologically harmful to any prisoner, with the nature and severity of the impact depending on the individual, the duration, and particular conditions (e.g., access to natural light, books, or radio). Psychological effects can include anxiety, depression, anger, cognitive disturbances, perceptual distortions, obsessive thoughts, paranoia, and psychosis.”<sup>56</sup>

Craig Haney, in the *From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities* project,<sup>57</sup> reported that the use of isolation on adults has the following negative results:

- Impaired sense of identity, hypersensitivity to stimuli, confusion, memory loss, irritability, and anger.
- Aggression & rage: attacks on staff, destruction of property, and collective violence.
- Lethargy, helplessness, hopelessness, and depression.
- Self-mutilation, suicidal ideation, and emotional breakdowns.
- Psychosis, hallucinations, and paranoia.
- Overall deterioration of mental and physical health.
- Produces indices of psychological trauma & psychopathic behaviors.<sup>58</sup>

In 1997, Dr. Haney and Mona Lynch published an article that extensively explored the use of isolation in adult prisons.<sup>59</sup> In compiling their data, they studied the use of isolation in a variety of situations: German wartime prison camps, soldiers stationed in Antarctica, male and female adult prisoners in various facilities

56. *Id.*

57. CRAIG HANEY, THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATIONS FOR POST-PRISON ADJUSTMENT 14 (2001), available at <http://aspe.hhs.gov/hsp/prison2home02/haney.pdf>.

58. *Id.*

59. See Haney & Lynch, *supra* note 38.

throughout the world, and, in some cases, in voluntary research projects.<sup>60</sup> In these varied settings, the effects of isolation were the same: the prisoners experienced a range of “stress-related, dysfunctional, and destructive behavior.”<sup>61</sup> In interviews with hundreds of prisoners many reported that they experienced “rage, panic, loss of control, breakdowns . . . and a build-up of physiological and psychic tension that led to incidents of self-mutilation.”<sup>62</sup>

Psychiatrist and noted isolation expert Dr. Stuart Grassian has published research concerning the psychiatric effects of solitary confinement in prisons for the state and federal courts in New York, California, Massachusetts, and Kentucky. Dr. Grassian found that solitary confinement often causes “severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness.”<sup>63</sup> After being isolated, many of the prisoners Dr. Grassian studied developed psychiatric syndromes including hypersensitivity to external stimuli; perceptual distortions, illusions, and hallucinations; panic attacks; difficulties with thinking, concentration, and memory; intrusive obsessional thoughts and emergence of primitive aggressive ruminations; overt paranoia; and impulse control problems.<sup>64</sup>

In an earlier article, Dr. Grassian reported that isolation can cause “severe psychiatric harm” to prisoners.<sup>65</sup>

This harm includes a psychiatric syndrome which has been reported by many clinicians in a variety of settings. . . . In more severe cases, this syndrome is associated with agitation, self-destructive behavior, and overt psychotic disorganization. More than half the prisoners [in isolation] reported a progressive inability to tolerate ordinary stimuli . . . . Almost a third described hearing voices, often in whispers, often saying frightening things to them. Well over half the inmates

60. *Id.* at 511–25.

61. *Id.* at 525.

62. *Id.* at 518.

63. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 333 (2006).

64. *Id.* at 335–36.

65. Grassian, *supra* note 63.



interviewed described severe panic attacks while in SHU [isolation] . . . Many reported difficulties in concentration and memory . . . Almost half the prisoners reported the emergence of primitive aggressive fantasies of revenge, torture, and mutilation of the prison guards. . . . Almost half the prisoners interviewed reported paranoid and persecutory fears.<sup>66</sup>

Although the level of psychological harm varies and some symptoms may subside upon release from solitary confinement, the damage suffered by prisoners subjected to isolation continues to present itself once the prisoner is released back into the prison population or into society at large. Dr. Grassian concluded:

This harm is most commonly manifested by a continued intolerance of social interaction, a handicap which often prevents the inmate from successfully readjusting to the broader social environment of general population in prison and, perhaps more significantly, often severely impairs the inmate's capacity to reintegrate into the broader community upon release from imprisonment.<sup>67</sup>

Many of these behaviors were demonstrated by sixteen-year-old William, a New Jersey's post-disposition project client:

*Case example:* William, a fifteen year-old boy at a New Jersey secure juvenile facility, spent approximately 178 of his 225 day commitment in isolation. The cell measured approximately seven feet by seven feet. He had no access to books or other reading materials, auditory stimulation, or substantial conversation. Prior to his commitment, William was diagnosed with mental health issues as well as displaying a history of aggressive behaviors and a need for psychiatric treatment. Within a few days of being placed in the "seg unit", William began to report auditory and visual hallucinations and demonstrated outrageous behaviors such as throwing bodily fluids. Within a week he began to self-mutilate by "cutting."

Soon thereafter, he attempted suicide by hanging himself on five different occasions.<sup>68</sup>

Based on a variety of studies and expert opinions, it is undisputed that the psychological effects of isolation are detrimental to both the mind and the spirit. Although little research has been done on the effects of solitary confinement on juveniles, based on what is known about adolescent development and teen brain studies, isolation is likely to be more damaging to a juvenile than to an adult.

#### *B. The Harmful Effects of Isolation on Juveniles*

Because isolation is so detrimental to the mental health of juveniles, mental health and correction professionals generally agree that the use of such measures should be limited to those rare occasions when a young person poses an imminent threat to others' safety.

Isolation, even for brief periods, is harmful for adolescents for two reasons: (1) Youth in isolation cannot participate in programs, including education, designed to rehabilitate them; and (2) Isolation has negative psychological consequences, including increasing risk of suicide, re-traumatizing, depression and agitation. Interactive treatment programs have more success in reducing problem behavior and mental health problems in youth than does isolation, which in fact provokes and worsens these problems.

As is evidenced in adult prisoners, isolation can exacerbate a young person's emotional crisis.<sup>69</sup> Isolation practices can have the following negative consequences on juveniles. First, isolation causes depression. Often, youth in isolation are denied reading materials, programming (including school and therapy), and exercise. Being alone and having nothing to do gives youth too much time to ruminate, which can lead to the onset of depression. "Depression is common but often not diagnosed in delinquent youth. Their behavioral problems become the focus rather than their underlying sadness, isolation and loss. Irritability is a frequent symptom of

66. *Id.* at 1-4.

67. Grassian, *supra* note 63.

68. See *supra* text accompanying notes 2, 3.

69. NAT'L ADVISORY COMM. FOR JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STANDARDS FOR THE ADMIN. OF JUVENILE JUSTICE § 4.52 (1980).

adolescent depression, and annoys staff and peers and makes it more difficult to involve the adolescent in positive activities."<sup>70</sup> Adolescents may not be able to see the temporariness of isolation and, as a result, cannot pull themselves out of their depression. Youth in isolation are deprived of whatever socialization is available to youth in the general population. They usually eat their meals alone in the cells. Recreation and exercise activities are solitary. They may have no one to talk with other than by yelling through the cell door. Isolation prevents youth from meeting their social needs, which further contributes to depression. Depression in adolescents can cause a variety of behavioral problems, which usually result in more punishment. Whether or not a youth is depressed before being isolated, usually he/she will feel disturbed from being alone and having nothing to do.

Second, isolating juveniles causes agitation. During adolescence, young people gradually define their moral values—and tend to be moralistic—and insistent upon what should be and are intolerant of anything that seems unfair. Juveniles view isolation as unfair. Adolescents do not have the adult cognitive abilities to say, "This is not unfairness directed at me personally; isolation is the consequence for certain behaviors for all residents." Especially for youth of color, isolation may be perceived as degrading and racist; girls may also object to isolation as discriminatory. It is normal for youth to protest unfairness, and when their protest does not get attention, they are likely to become more agitated. Their trust in adults, on whom they remain dependent and who they expect to be fair and kind, is violated when they are isolated and their protests of the perceived unfairness of their confinement are unheard. Youth may believe that "confinement is an overt attempt by authorities to 'break them down' psychologically . . . [and] the product of an arbitrary exercise of power, rather than the fair result of an inherently reasonable process."<sup>71</sup>

Third, isolation causes juveniles to feel victimized, which can be re-traumatizing. Many youth in juvenile facilities experience abuse,

neglect, significant loss, exposure to violence, and other trauma. Some youth in delinquency facilities are previously known to child protective services agencies and may have had multiple placements in foster care. Trauma slows down development and can cause disturbances of emotional regulation, relationships, and communication.<sup>72</sup> The depression, difficulties trusting others, fearfulness, aggression, substance abuse, and concentration problems common in delinquent youth are often caused by untreated trauma. Abuse of power by an adult can provoke in traumatized youth a combination of self-blame and a sense of betrayal, which can lead to self-destructiveness or aggression. For those who have been abused and/or neglected, isolation is likely to activate painful memories and may be experienced as re-victimization. Isolation could make a traumatized youth feel once again that they cannot control hurtful things that happen to them. Such powerlessness is damaging and can undermine the progress the youth has made in recovering from earlier trauma.<sup>73</sup>

Fourth, isolation causes an increased risk of suicide. In 1999, the Office of Juvenile Justice and Delinquency Prevention released a national study of suicides in public and private juvenile facilities. The study found that 50 percent of youth who committed suicide were in isolation at the time of their suicide and 62 percent had previously been in isolation. Even youth who had not previously expressed thoughts of harming themselves can become desperate, hopeless and suicidal in isolation. For youth who are already talking about or who have previously attempted suicide, isolation is a dangerous practice that should be prohibited. While regularly checking on a suicidal teen in isolation may prevent death, the young person's mental health deteriorates. Suicidal youth must spend most of each day in activities and interacting with peers and staff. Further, isolation is not the only means of staff observation of troubled teens; they can just as easily be observed outside of isolation without the negative psychological consequences of isolation.

70. Michael D. Cohen et al., *Health Services for Youth in Juvenile Justice Programs*, in CLINICAL PRACTICE IN CORRECTIONAL MEDICINE, 120, 124 (Michael Pustis ed., 2d ed. 2006).

71. Grassian, *supra* note 63, at 333.

72. Marty Beyet, *A Developmental View of Youth in Juvenile Justice System*, in JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE (Francine Sherman & Francine Jacobs eds., 2011).

73. *See id.*

Finally, youth in isolation are frequently denied the education to which they are entitled. In juvenile detention and commitment facilities, youth are required to attend school, and educational benefits should not be denied because they are being punished. As many as half of the youth in detention and commitment facilities have disabilities that substantially affect their learning abilities and either have or should have been identified for special education. The individuals with Disabilities Education Act services should be designed to prevent the behaviors that might lead to punishment, such as isolation.<sup>74</sup> When youth are deprived of educational services, not only do they lose that aspect of rehabilitation, but they also lose an important source of self-esteem building.

Facilities use isolation to manage behavior, but the reality is that isolation makes things worse. Isolation is "a reaction to day-to-day crises and evolve[s] into an institutional practice with its foundation never being questioned."<sup>75</sup> Juveniles isolated for behavior problems

74. As Joe Tuhman described in the ABA publication *Representing Juvenile Status Offenders*, youth who have or should have been identified for special education have the right not to be excluded from school, even if facility staff are disciplining the youth for rule violations. Joseph B. Tuhman, *Using Special Education Advocacy to Avoid or Resolve Status Offense Charges*, in AM. BAR ASS'N, REPRESENTING JUVENILE STATUS OFFENDERS 89-120 (Sally Small Inada & Claire S. Chiamulera eds., 2010).

75. Jeff Mitchell & Christopher Varley, *Isolation and Restraint in Juvenile Correctional Facilities*, 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 251-55 (1990). The authors describe their work with a juvenile detention center that closed its isolation unit despite the objections of staff and instituted a behavior modification program. Jeff Mitchell & Christopher Varley, *Isolation and Restraint in Juvenile Correctional Facilities*, 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 251, 253 (1990). The incidence of behavior problems decreased dramatically. *Id.*

It is essential for juvenile correctional programs to provide their residents with stimulating recreational programs, educational programs, well-administered behavior management programs . . . and team-generated, individualized service plans . . .

[T]hese recommendations . . . improve behavioral management. Administrators who eliminate abusive isolation . . . practices find that they are in more control of their programs. It is presumed that their residents recognize this and behave accordingly.

*Id.* at 254-55. "[P]rograms relying on excessive isolation experience high rates of aversive behaviors among residents." *Id.* at 253.

While as many as 65%-75% of youthful offenders have one or more diagnosable psychiatric disorders, most juvenile detention facilities do not have the capacity to serve them. This situation is aggravated by multiple problems, including overcrowding, dilapidated institutions, inadequate funding for services and programs,

tend to be youth who act out as a result of perceived harassment and threats due to past trauma. Behind problematic youth behavior is a combination of immature thinking and identity, learning disabilities, and trauma.<sup>76</sup> And, as a result of isolation, the very behaviors that are the cause for placement in isolation are exacerbated. This is particularly alarming among juveniles because often the residents are subjected to isolation because they have "acted out" in some way or are not able to conform to the rules of the facilities.

### C. Judicial Response to the Use of Isolation in Juvenile Facilities

For well over a century, courts have ruled that the use of isolation in secure facilities violates the Eighth and Fourteenth Amendments to the U.S. Constitution because such treatment is detrimental to the health of prisoners. In 1890, the Supreme Court discharged a prisoner on the basis of wrongful imprisonment due to solitary confinement.<sup>77</sup> The Court looked to a 1787 study of Philadelphia prisoners held in

and inadequately trained custodial and mental health staff. These factors are associated with an increased risk of suicide, physical assaults, and accidental injuries.

Kim J. Masters & Joseph V. Penn, *Practice Information, Juvenile Justice + Interventions = Fragmentation*, J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (July/Aug. 2005), available at [http://www.aacap.org/cs/root/member\\_information/practice\\_information/jul/aug\\_2005\\_aacap\\_news\\_seclusion\\_restraint\\_juvenile\\_justice\\_interventions\\_fragmentation](http://www.aacap.org/cs/root/member_information/practice_information/jul/aug_2005_aacap_news_seclusion_restraint_juvenile_justice_interventions_fragmentation).

76. "Aggressive youth overreact to perceived threat, typically because it is reminiscent of past victimization. These youth do not see these responses as excessive. They may have little experience expressing their thoughts and resolving their feelings verbally rather than through aggression. These youth may feel helpless about regulating their behavior." Cohen, *supra* note 70, at 124. Some teenagers who have been victimized in the past react to limit-setting as if it is personalized, or a form of harassment against them. Any "No" from an adult can be seen as victimization. Some of these youth misinterpret and are offended by relatively benign things that others say and do. They perceive hostility coming from others, and their reactions cause adults to view them as difficult and oppositional.

Reacting to perceived threats is characteristic of traumatized teenagers. When there is a history of repeated physical and sexual abuse, a young person is likely to feel more threatened and is more likely than other teens to be on the alert.

Afterwards, it may appear that a frightened teenager over-reacted, but threat can only be evaluated from the perspective of each young person at the time that he/she felt in danger (no matter how well-intentioned the adult was). It is not unusual for traumatized youth to be surprised by their angry outbursts when memories of their victimization are triggered. A traumatized teenager may have no way of responding to harassment or a perceived threat, feeling out of control and experience a primitive, unthinking reflex. It is these youth who are often punished with isolation.

77. *In re Medley*, 134 U.S. 160 (1890).

solitary confinement that found that a "considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide."<sup>78</sup> Although that ruling involved an adult prisoner, courts have repeatedly found that the continued use of isolation in juvenile facilities is not only unconstitutional but detrimental to rehabilitation.

However, Courts have chosen not to totally abolish the use of isolation in juvenile facilities as there is an understanding that, at times, a child may need to be separated from others if he is a risk to himself or others and that a complete prohibition on the use of isolation would completely tie the hands of a facility's administration at such times. However, in those situations, courts seem to agree that the period of isolation must be short and the child must be closely monitored on a regular basis.<sup>79</sup>

Courts agree with mental health professionals that excessive use of isolation is detrimental to the rehabilitation of a child.

Courts often rely on the reports and evaluations of mental health experts when rendering decisions in cases concerning the use of isolation in juvenile facilities. In *Lollis v. New York Department of Social Services*, the District Court looked to the affidavits of seven specialists when it held that isolation violated the Eighth Amendment.<sup>80</sup> All seven specialists were "unanimous in their condemnation of extended isolation as imposed on children, finding it not only cruel and inhuman, but counterproductive to the development of the child."<sup>81</sup>

Two years later, the United States District Court in Rhode Island, in *Inmates of the Boys' Training School v. Affleck*, ruled that the use of isolation with juveniles is "psychologically damaging, anti-rehabilitative, and, at times inhumane."<sup>82</sup> The court stated:

To confine a boy without exercise, always indoors, almost always in a small cell, with little in the way of education or reading materials, and virtually no visitors from the outside world is to rot away the health of his body, mind, and spirit. To then subject a boy to confinement in a dark and stripped confinement cell with inadequate warmth and no human contact can only lead to his destruction.<sup>83</sup>

A month before *Affleck* was decided, the district court in *Nelson v. Heyne* held that the use of isolation at the Indiana Boys School was "both cruel and unusual punishment."<sup>84</sup> According to the regulations, boys could be placed in confinement for five to thirty days.<sup>85</sup> It was found that this time limit was not always followed and boys were locked in eighty-six square foot rooms with a toilet and bed with only a Bible to read for periods ranging from several days to, as was found in one case, fifty-seven consecutive days.<sup>86</sup> Once again the court relied on experts who testified that such treatment was "emotionally and psychologically debilitating and serves neither treatment nor punitive goals."<sup>87</sup>

Often referencing expert studies and opinions, courts have been clear in finding that any type of prolonged separation from one's peers is psychologically damaging. Such treatment is in direct opposition to the rehabilitative goals of the juvenile justice system.

Courts have repeatedly found that the isolation of a juvenile is a violation of his rights under the Eighth and Fourteenth amendments. Often, the decision to place a juvenile in isolation is done at the discretion of correctional officers for a reason that does not warrant such an intense level of corrective action. Further, isolation is often used in a strictly punitive capacity and not as a diversionary tactic. Worse, the decision to separate the juvenile from his peers for a prolonged time is usually done without any due process.<sup>88</sup> Courts

78. *Id.* at 168.

79. *Morales v. Thurman*, 569 F.Supp. 332, 345-46 (1983); *Lollis v. N.Y. Dep't of Soc. Servs.*, 322 F. Supp. 473, 482 (S.D.N.Y. 1970).

80. *Lollis*, 322 F. Supp. at 480.

81. *Id.*

82. *Inmates of the Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354, 1372 (D.R.I. 1972).

83. *Id.* at 1365-66.

84. *Nelson v. Heyne*, 355 F. Supp. 451, 456 (N.D. Ind. 1972).

85. *Id.* at 455.

86. *Id.* at 455-56.

87. *Id.* at 456.

88. This is a frequent occurrence in New Jersey, where juveniles are routinely placed in pre-hearing room restriction ("PHRR") for several days while an "investigation" occurs. There

hold that such treatment is in violation of a juvenile's constitutional rights under the Eighth and Fourteenth Amendments.

In *Lollis*, the district court applied a two-prong test to determine whether or not placing a child in isolation amounted to a violation of the Eighth Amendment.<sup>89</sup> First, it had to be determined that the severity of the punishment was disproportionate to the offense that was committed.<sup>90</sup> "[S]econd, the severity . . . of the [punishment must be] measured by 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'"<sup>91</sup> Experts testified that placing a young girl in a bare room without recreational facilities or reading materials was "cruel and inhumane" as well as "equivalent to 'sensory deprivation'" and that such treatment is "punitive, destructive, defeats the purposes of any kind of rehabilitation efforts and harkens back to medieval times."<sup>92</sup> Therefore, the court held that such treatment violated the Constitution's ban on cruel and unusual punishment under the Eighth Amendment.<sup>93</sup>

In deciding *Affleck*, the court looked to the Supreme Court's decision in *In re Gault*.<sup>94</sup> *Gault* firmly established the right to the due process of law in juvenile cases while defining the juvenile system as having rehabilitative objectives rather than punitive goals.<sup>95</sup> Relying on *Gault*, the court in *Affleck* held that placing a child in isolation was anti-rehabilitative and therefore deprived that child of Due Process under the Fourteenth Amendment.<sup>96</sup>

The district court in *Morales v. Thurman* expanded the "right to treatment" theory of due process under the Fourteenth Amendment.<sup>97</sup> The juveniles were often locked in single cells for periods as long as a month, being permitted to leave only for daily showers and meals.<sup>98</sup>

are numerous examples of juveniles being placed in PHRR for days, only to have their "charges" dismissed after the "investigation". See case example of *Destiny*, pp. X.

89. *Lollis v. N.Y. Dep't of Soc. Servs.*, 322 F. Supp. 473, 480-83 (S.D.N.Y. 1970).

90. *Id.* at 480 (citing *Weems v. U.S.*, 217 U.S. 349 (1909)).

91. *Id.* (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

92. *Id.* at 481.

93. *Id.* at 482.

94. *In re Gault*, 387 U.S. 1 (1967).

95. *Id.* at 16-29.

96. *Inmates of the Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354, 1364-67 (D.R.I. 1972).

97. *Morales v. Thurman*, 364 F. Supp. 166 (E.D. Tex. 1973).

98. *Id.* at 171.

Many of the youth received minimal or no counseling or educational services.<sup>99</sup> The court held that the withholding of rehabilitative services, the failure to allow participation of family or friends in the program, and the failure to provide access to an uninterested party to whom the juveniles could seek administrative relief without fear of retaliation, all constituted violations of the state and federal right to treatment under Due Process.<sup>100</sup>

But there are circumstances that warrant the use of isolation in a juvenile facility. Courts reason that isolation may be acceptable when a juvenile is at risk of hurting himself or others, but even then, only when the appropriate precautions are in place.<sup>101</sup> However, such situations do not give a facility carte blanche to isolate a juvenile for a prolonged period of time without a system of checks in place to prevent further harm from being done. In *Lollis*, the court made clear that isolation, used within permissible bounds, is constitutional, and courts should be reluctant to interfere with the management of juvenile facilities.<sup>102</sup>

#### *D. New Jersey's Use of Isolation: The "Box" and The "E Rule"*

*Case example:* Denise is a thirteen-year-old girl who was a resident at the Hayes facility, New Jersey's most secure juvenile facility for girls. According to Denise, she was assaulted by an older girl in the classroom. Another girl got on top of Denise to protect her from the blows, but Denise was still punched and kicked about the body. She was taken directly to pre-hearing room restriction ("PHRR") where she remained for over forty-eight hours while an investigation was conducted. The room was approximately seven-by-seven feet. It had a slab bed with a mattress, a sheet, and a toilet. Her meals were brought to her by the guards. All charges against her were dismissed.<sup>103</sup>

99. *Id.* at 172.

100. *Id.* at 174-75.

101. *Morales*, 369 F. Supp. at 345-46.

102. *Lollis v. N.Y. Dep't of Soc. Servs.*, 322 F. Supp. 473, 483-84 (S.D.N.Y. 1970).

103. Clients reported incidents to the post-disposition project attorney during their attorney-

Such stories are commonplace. Youth in New Jersey's secure care facilities are very familiar with "the box" and with the "e rule." The "box" is what the children are placed in when they are removed from their peers. Such separation is often referred to as pre-hearing room restriction ("PHRR"), segregation ("seg"), medical isolation, close watch, behavior modification unit, or protective custody. The terms are different, but the effect is the same. The child is placed alone in the cell for long periods of time, usually without any reading or educational materials, no personal effects whatsoever, and often without any human interaction.

Sometimes, the reason for placement in "the box" is a result of a serious disciplinary problem, like rioting or fighting. However, the post-disposition project found numerous examples of the JJC disregarding its own policies designed to minimize the use of isolation in the first place.<sup>104</sup>

The New Jersey Juvenile Justice Commission's policy states that "[d]isciplinary sanctions shall be objectively administered and proportionate to the gravity of the rule and severity of the violation."<sup>105</sup> It goes on to state that "[t]emporary restriction of a juvenile to his or her sleeping room, or isolation room, shall be used as a last resort only after other less restrictive measures have failed."<sup>106</sup> and that "[f]loom restriction shall not be used for punitive purposes, but rather to gain control of an acting-out juvenile and [to] ensure the security and safety of the facility, staff and other juveniles."<sup>107</sup>

Juveniles have reported being in "the box" as a first response for a wide array of rule infractions including: writing on the wall, cursing, horseplay, and singing songs with inappropriate lyrics.<sup>108</sup> Others report being placed in isolation for being the victim of assault, awaiting medical treatment, and population management.<sup>109</sup>

client visits. The names of all clients have been changed.

104. *Id.*

105. N.J. ADMIN. CODE § 13:92-7.3(e) (2011).

106. § 13:92-7.4(a) (emphasis added).

107. § 13:92-7.4(b).

108. See *supra* text accompanying note 103.

109. See *Lollis v. N. Y. Dep't of Soc. Servs.*, 322 F. Supp. 473 (S.D.N.Y. 1970).

*Case example:* Darren and Charles were removed from their cottage and placed in "the box" because there were too many boys from their county in their cottage. They were assigned to the segregation unit for two days while awaiting new cottage assignments.

*Case example:* Shortly before his release from custody, Oliver was attacked by another resident, who fractured his cheek bone and made several lacerations to his face. He spent the final two weeks of his disposition in isolation "for his own protection." He was not permitted to bring personal effects or reading materials into his cell.

*Case example:* John was "accidentally" punched in the nose by a corrections officer. He was placed in room restriction for two days. At the end of the second day, John was asked to sign a release, stating that he did not feel threatened by the officer. If he refused to sign, he was told that he would remain in protective room restriction for forty-five days while a full investigation of the incident was conducted.<sup>110</sup>

According to the New Jersey Administrative Code's regulations on juvenile discipline, there are limitations to the use of room restriction as a disciplinary sanction:

(a) "A juvenile may receive up to five days in room restriction as a sanction for each violation charged, whether arising out of a single or separate incident. However, no juvenile may spend more than five consecutive days in room restriction, whether because of separate sanctions imposed for distinct charges or for any other reason, except as set forth in (e) below."

(b) "At least two consecutive days out of room restriction must follow a period of five consecutive days served in room restriction before any succeeding term of room restriction may be imposed."

110. See *id.*

(c) "A juvenile shall not serve an aggregate time in room restriction in excess of 10 days in any 30 day period."

(e) "Nothing in this section shall prevent the placement of a juvenile in room restriction for the minimum time necessary to eliminate an immediate threat to the safety of either the juvenile, staff or other juveniles, or to the orderly operation of the facility."<sup>111</sup>

Unfortunately for the children in New Jersey, the exception found in subsection (e) of this regulation swallows up any limitation. The "e rule" is completely discretionary. Often, a resident will be placed in PHRR while facing in house charges for three to five days. Once the facility's internal court process has been completed, the youth will often be placed on Behavior Modification Unit status for an additional period of time. This is usually just a change of status in the juvenile's file but not a change in the conditions of confinement as the youth will generally stay in the same segregated cell throughout this process.<sup>112</sup> Although the youth's "status" has changed, the conditions of confinement have not as the juvenile usually does not even change rooms.

#### *E. A Review of the National Standards for the Use of Juvenile*

##### *Isolation, and the Various Investigations Done by the*

##### *Department of Justice*

#### 1. National Standards for Use of Isolation in Juvenile Facilities

Four national bodies have drafted standards that they recommend govern the use of juvenile isolation. The Juvenile Detention Alternatives Initiative of the Annie E. Casey Foundation established the most current standards for juvenile isolation.<sup>113</sup> "Room confinement" and "isolation" are distinguished. "Room confinement"

is a disciplinary procedure used for serious rule violations, usually limited to four hours and not routinely used for twenty-four hours.<sup>114</sup> The facility director must authorize the use of room confinement for longer than twenty-four hours and the youth must be seen by a mental health professional.<sup>115</sup> "Isolation" is defined as placing a youth in a room if the youth's behavior threatens imminent harm to self or others or serious destruction of property and is limited to four hours.<sup>116</sup> Prior to placing a juvenile in isolation or room restriction, the staff must utilize less restrictive techniques to de-escalate the youth. While in isolation, a mental health professional must provide crisis intervention.<sup>117</sup>

The United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Standards for the Administration of Juvenile Justice provide that no juvenile should be placed in room confinement for more than twenty-four hours.<sup>118</sup>

The American Bar Association (ABA) Juvenile Justice Standards Relating to Corrections Administration permit the isolation of juveniles for up to ten days for major infractions and five days for minor infractions.<sup>119</sup> The ABA standards recommend that "isolation . . . be accomplished in the juvenile's own room" or, if "specially designated" rooms are used, that those rooms "resemble, as nearly as possible, the ordinary rooms of the facility."<sup>120</sup> Recognizing the severity of isolation, the ABA Standards condemn the use of special dietary restrictions or "extraordinary sensory or physical deprivations" during isolation beyond the confinement itself, require access to reading materials,<sup>121</sup> one hour of recreation in every twenty-four-hour period of isolation,<sup>122</sup> and visits "at least hourly by a specially designated and trained staff person."<sup>123</sup> A "staff member should remain with the juvenile" unless safety considerations "make

114. See *supra* ANNIE E. CASEY FOUND., DETENTION FACILITY SELF-ASSESSMENT, at 93.

115. *Id.* at 94.

116. *Id.* at 92.

117. *Id.* at 89.

118. NAT'L ADVISORY COMM. FOR JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEPT. OF JUSTICE, STANDARDS FOR THE ADMIN. OF JUVENILE JUSTICE § 4.52 (1980).

119. JUVENILE JUSTICE STANDARDS RELATING TO CORR. ADMIN. § 8.7(B)-(C) (1980).

120. *Id.* § 7.11(H)(4)-(5).

121. *Id.* § 7.11(H)(7).

122. *Id.* § 7.11(H)(8).

111. § 13:101-6.17 (emphasis added).

112. See *supra* text accompanying note 103.

113. See ANNIE E. CASEY FOUND., DETENTION FACILITY SELF-ASSESSMENT: A PRACTICE GUIDE TO JUVENILE DETENTION REFORM 84 (2006), <http://www.aecf.org/upload/PublicationFiles/fia10507.pdf>; ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE ISOLATION 7 (2011).

it impossible for the staff member to remain, [in which case] the staff member should maintain constant observation of the juvenile."<sup>123</sup>

The Council of Juvenile Correctional Administrators ("CJCA") and the American Correctional Association ("ACA") also set standards for the use of isolation in juvenile facilities. Performance-based Standards published by the CJCA ("CJCA Performance-based Standards") provide that isolation should not be used punitively, but rather to neutralize out of control behavior and redirect it into positive behavior.<sup>124</sup> The standards require that facility staff record each time a youth is held in isolation and that each incident be reviewed to determine if isolation was appropriate and if it could have been avoided or shortened.<sup>125</sup> The ACA recommends that juveniles spend no more than a maximum of five days in isolation.<sup>126</sup>

## 2. Isolation in Juvenile Facilities and Department of Justice Investigations

Despite continued condemnation of the use of isolation of youth for prolonged periods, solitary confinement is practiced routinely at detention facilities across the country. Regardless of United States Department of Justice investigations and federal lawsuits, states continue to permit such practices even though regulations and standards caution against the misuse of isolation.

In May 2011, Nancy Campbell, appointed by the State of California to oversee the state's juvenile facilities, confirmed the findings of an audit conducted by the California Department of Corrections and Rehabilitation in a letter to the Prison Law Office.<sup>127</sup> The California Division of Juvenile Justice requires that youth

123. *Id.*

124. Council of Juvenile Correctional Administrators, *Goals, Standards, Outcome Measures, Expected Practices and Processes*, PBSSSTANDARDS\_9\_37 (April 2010), available at [http://www.juvenilejusticechange.com/wp-content/uploads/2011/01/PBS\\_Standards\\_April\\_2010.pdf](http://www.juvenilejusticechange.com/wp-content/uploads/2011/01/PBS_Standards_April_2010.pdf).

125. *Id.*

126. AM. CORR. ASSOC., STANDARDS FOR JUVENILE DETENTION FACILITIES 67 (3d ed. 1990).

127. Email from Nancy M. Campbell, Special Master *Farrell v. Cate*, to Sara Norman, Managing Attorney, Prison Law Office (May 20, 2011), available at <http://media.baycitizen.org/uploads/documents/2011/6/nancy-campbell-may-20-letter/NancyCampbellLetter.pdf>.

receive a minimum of three hours of out-of-room time.<sup>128</sup> According to the audit, over a fourteen week period (January 16, 2011 to April 30, 2011), juvenile facilities throughout the state had failed to meet the out-of-room requirements for juveniles placed in Temporary Detention ("TD") or on Temporary Intervention Plans ("TIP") on nearly 250 occasions.<sup>129</sup>

In early 2011, the U.S. Department of Justice, Civil Rights Division, ("DOJ") released findings from its 2010 investigation of the conditions at the Terrebonne Parish Juvenile Detention Center in Louisiana. The DOJ found that the "amount of isolation at Terrebonne is excessive and disproportionate to the underlying disciplinary offense."<sup>130</sup> Because of the excessive and unnecessary use of isolation, the Center was found to be in violation of juveniles' rights by "subjecting them to harmful and unnecessary restraint in isolation rooms."<sup>131</sup> The DOJ suggests the use of "proper behavior management techniques and sound verbal de-escalation skills" before implementing isolation when attempting to prevent violence and out-of-control behavior.<sup>132</sup>

The DOJ conducted a similar investigation at Indiana's Marion County Juvenile Detention Center in late 2006 and early 2007. The Department found that the facility used isolation excessively when attempting to deal with the facility's residents.<sup>133</sup> The report pointed to the center's arbitrary use of isolation and revealed that isolation was used for all infractions, ranging from assaults on other youth to failing to follow instructions.<sup>134</sup> Finally, it was found that isolated youth did not receive required services such as "mental health care

128. 15 CCR 1371e (2011).

129. *Id.*

130. Letter from Thomas E. Perez, Assistant Attorney Gen., to the Honorable Michel Claudet, President, Terrebonne Parish (Jan. 18, 2011), available at [http://www.justice.gov/crt/about/spl/documents/TerrebonneDPC\\_findlet\\_01-18-11.pdf](http://www.justice.gov/crt/about/spl/documents/TerrebonneDPC_findlet_01-18-11.pdf).

131. *Id.* at 12.

132. *Id.* at 9.

133. Letter from Wan Kim, Assistant Attorney Gen., to the Honorable Robert Alice et al., Exec. Comm., Marion Cmty Superior Court (Aug. 6, 2007), available at [http://www.justice.gov/crt/about/spl/documents/marion\\_juve\\_ind\\_findlet\\_8-6-07.pdf](http://www.justice.gov/crt/about/spl/documents/marion_juve_ind_findlet_8-6-07.pdf).

134. *Id.* at 11.



services, special education services, regular access to medical care, or daily large muscle exercise."<sup>135</sup>

As recently as December 2011, the DOJ released an investigative report that addressed the use of isolation in secure juvenile facilities.<sup>136</sup> The Department was concerned with practices at two Florida facilities, the Arthur G. Dozier School for Boys and the Jackson Juvenile Offender Center. The report called attention to the harsh conditions in the isolation units and the various terms used by the facilities that refer to what amounts to solitary confinement.<sup>137</sup>

The investigation team found that the youth subjected to isolation were not afforded the opportunity to challenge the charges that resulted in placement in the isolation units and that those charges were "minor violations" such as "horseplay," "being uncooperative," and "name calling."<sup>138</sup> Further, while in isolation, the youth did not regularly receive educational services, mental health treatment, or exercise.<sup>139</sup> The DOJ concluded that "the confinement units "did not serve any rehabilitation purpose" and because the units "only served as punishment to uncooperative youth and a warning to others," the use of the units "violated the youths' constitutional rights."<sup>140</sup> It must be noted that Florida's Department of Juvenile Justice closed both facilities on June 30, 2011, for budgetary reasons.<sup>141</sup>

In May 2007, the U.S. magistrate judge appointed an independent fact finder to conduct an investigation in *S.H. v. Stickrath*, a class action suit brought by juvenile residents against the Ohio Department of Youth Services ("ODYS"). The team reported that the "excessive use of isolation, some of it extraordinarily prolonged, is endemic to the ODYS system"<sup>142</sup> and that "imposing prolonged and highly

135. *Id.* at 12.

136. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE ARTHUR G. DOZIER SCHOOL FOR BOYS AND THE JACKSON JUVENILE OFFENDER CENTER, MARIANNA, FLORIDA, (Dec. 1, 2011), available at [www.justice.gov/ert/about/spl/documents/dozier\\_findtr\\_12-1-11.pdf](http://www.justice.gov/ert/about/spl/documents/dozier_findtr_12-1-11.pdf).

137. *Id.* at 17-18. The size of the individual cells were 9.8 feet by 5.5 feet with nothing more than a concrete slab that served as a bed.

138. *Id.*

139. *Id.*

140. *Id.* at 18.

141. *Id.* at 5.

142. FRED COHEN, FINAL FACT FINDING REPORT, *SH V. STICKRATH*, ii (Jan. 2008), available at <http://www.dys.ohio.gov/DNN/LinkClick.aspx?fileticket=D0vnm7P96A%3D&tab>

deprivational isolation, whether in the name of treatment, behavior modification, or punishment is not constitutionally permissible."<sup>143</sup> In some cases, the team found that isolation lasted for months. It also found that youth in isolation units throughout Ohio did not receive adequate treatment or educational services.

### III. ARE NEW JERSEY JUDGES POWERLESS TO INTERVENE IF A JUVENILE IS HARMED IN A JUVENILE FACILITY? *In re O.S.* A 2011 CASE STUDY

Petitioner O.S. was sent to a secure JJC facility because he ran away from a residential placement. Consequently he was placed in the most secure JJC facility, JMSF.<sup>144</sup> Throughout his placement at JMSF,<sup>145</sup> the sixteen-year-old was repeatedly assaulted. The assaults included beatings by other residents who gained access to his cell, and injuries incurred during a large-scale riot.<sup>146</sup> After the riot, the Rutgers School of Law-Camden Children's Justice Clinic, entered an appearance on behalf of O.S., and the clinic continued to represent him post-disposition.

The assaults on O.S. continued. On April 5, 2010, O.S. was attacked by two residents. O.S., trying to follow the advice of counsel, did not fight back and simply curled up in a ball on the floor. After the beating, O.S. was locked in a cell, a.k.a. "medical isolation." On the fourth day of medical isolation, x-rays revealed that his jaw was fractured.<sup>147</sup>

Upon learning of the assault and the fractured jaw, counsel filed a recall motion, pursuant to N.J.S.A. 2A:4A-44(g) (2), with O.S.'s committing judge requesting review of the disposition "to evaluate

<sup>143</sup> *Id.* at iii.

<sup>144</sup> JMSF stands for Juvenile Medium Secure Facility. See *JJC Secure Care Facilities*, OFFICE OF THE ATTORNEY GENERAL, [http://www.nj.gov/oag/jjc/secure\\_bordentown.htm#jmsf](http://www.nj.gov/oag/jjc/secure_bordentown.htm#jmsf) (last visited Feb. 2, 2012).

<sup>145</sup> O.S. was originally ordered to serve a fifteen month custodial sentence for conspiracy to distribute drugs.

<sup>146</sup> In addition to his injuries, O.S. was charged with aggravated assault, riot and possession of a weapon in the riot. The clinic also represented him in that case.

<sup>147</sup> Thereafter, O.S. remained in his cell for three more days (seven days total), waiting to see the oral surgeon. During these seven days, he was not allowed to contact family or counsel, go to school or receive counseling. See O.S. Recall Motion (on file with author).

juvenile placement due to safety concerns.”<sup>148</sup> The judge, however, refused to hear any testimony, asserting that he did not retain jurisdiction to address the issues raised. The decision was appealed to the appellate division and oral argument was held.

While the appellate decision was pending, O.S. was assaulted again. Facility reports indicate that although O.S. “offered no resistance” he was “extremely bloodied from the assault.”<sup>149</sup> Emergency medical treatment confirmed a fractured orbital wall.<sup>150</sup> An emergency application was filed with the Appellate Division.<sup>151</sup>

On April 19, 2011, the Appellate Division panel in an unpublished opinion<sup>152</sup> agreed that the juvenile judge lacked jurisdiction to intervene:

Once the Family Part judge determines that incarceration is the proper disposition, the place of confinement and the day-to-day issues that arise during that confinement, *no matter the magnitude of those issues*, are not a concern that affects the fundamental decision of whether the needs of the juvenile and the public require incarceration. No matter how O.S. attempts to couch his argument, to do as O.S. suggests inserts the Family Part judge into the day-to-day management of the place of confinement. That is manifestly beyond his authority.<sup>153</sup>

148. *Id.* at 1.

149. Petition for Certification to the New Jersey Supreme Court at exhibit 10-12, *New Jersey ex rel. O.S.*, No. A-5366-09T1, 2011 N.J. Super. Unpub. LEXIS 955 (Apr. 19, 2011) (exhibits on file with authors).

150. *Id.* at exhibit 14.

151. The emergent application was denied. *Id.* at exhibit 15.

152. Regarding unpublished opinions, N.J. Rule 1:36-3 states:

No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all other relevant unpublished opinions known to counsel including those adverse to the position of the client.

153. *New Jersey ex rel. O.S.*, No. A-5366-09T1, 2011 N.J. Super. Unpub. LEXIS 955, at \*7 (Apr. 19, 2011) (emphasis added).

We do not mean to suggest that O.S. is without a remedy to address threats to his personal safety. We have been informed that he and others have filed a complaint in the United States District Court. We simply hold that the Family Part judge does not have the authority under the guise of a recall motion to address whether the facility to which a juvenile has been assigned is appropriate, whether the classification at a facility is appropriate, whether particular sanctions or restrictions are appropriate, or whether the JFC is discharging its serious responsibilities to the juveniles who have been committed to its custody and care.<sup>154</sup>

A Petition for Certification to the New Jersey Supreme Court was filed but was unanimously denied. Meanwhile, *O.S.* is used in other cases to prevent juvenile court judges from hearing recall motions involving safety concerns.<sup>155</sup>

*In re O.S.* disempowers judges. Ignoring the rehabilitative purpose of the New Jersey juvenile code, the plain language of the statutes, and recent case law, *In re O.S.* holds that a judge must wash his hands once a juvenile is placed with the Juvenile Justice Commission, and cannot intervene, despite evidence of harm to the juvenile. So, the question remains: Given the holding of *O.S.*, what recourse does a juvenile have if he is abused in a New Jersey facility?<sup>156</sup>

154. *Id.* at \*7.

155. In two subsequent client post-disposition issues, in two different counties, *O.S.* has been relied upon to preclude juvenile court jurisdiction. Juvenile legal files at Rutgers School of Law-Camden, Children's Justice Clinic (on file with author).

156. The attorney general has argued that the recall motion is improper and that there are administrative remedies and these remedies must be exhausted. For example, under N.J.A.C. 13:95-8.5, a juvenile assigned to a secure facility may make a request for a change in assignment or status by completing a special classification request Form J081 and submitting it to his social worker. The attorney general has also argued that there are civil remedies available. See generally, *New Jersey ex rel. O.S.*, No. A-5366-09T1, 2011 N.J. Super. Unpub. LEXIS 955 (Apr. 19, 2011).

The reality is that for children, the only connection they have to the court is their juvenile court judge. As over half of the children in JFC custody have been classified as special education, it is unlikely that they would be able to exhaust the administrative remedies. In addition, as most of the children in juvenile facilities are indigent, it is unlikely that they would have access to a civil lawyer.

#### IV. STRATEGIES FOR THE FUTURE/RESPONSE OF JUVENILE DEFENDERS

##### *A. Isolation Does Not Have the Purported Benefits of Safety, Punishment, or Deterrence in Juvenile Facilities*

"The use of extended isolation as a method of behavior control is an import from the adult system that has proven both harmful and counterproductive when applied to juveniles. It too often leads to increased incidents of depression and self-mutilation among isolated juveniles, while also exacerbating their behavior problems. We know that the use of prolonged isolation leads to increased, not decreased, acting out, particularly among juveniles with mental illness."<sup>157</sup>

Psychiatric facilities for youth have also used isolation for youth who present a danger to themselves or others, but "research has found seclusion to be harmful to patients and not related to positive patient outcomes. . . . There is no . . . theoretical foundation for the use of seclusion with children. Evidence has been building for more than 30 years that the practice of seclusion does not add to therapeutic goals. . . ."<sup>158</sup>

157. Steven Rosenblum, Chair, Civil Rights Div., U.S. Dept. of Justice, Remarks Before the Fourteenth Annual National Juvenile Corrections and Detention Forum (May 16, 1999), available at <http://www.justice.gov/crt/about/spl/documents/juvspeech.php>.

158. Linda M. Finke, *Use of Seclusion is not Evidence-Based Practice*, 14 J. OF CHILD & ADOLESCENT PSYCHIATRIC NURSING 186, 186, 189 (2001), available at <http://galenet.gale.com/serve?iOURL?iOURL=sain79627&site=6&prod=HWRG&docNum=A81761745>. "Programs relying on excessive isolation experience high rates of aversive behaviors among residents." *Id.* at 189. While as many as 65-75 percent of youthful offenders have one or more diagnosable psychiatric disorders, Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES OF GEN. PSYCHIATRY, 1133-43(2002), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1404441/>; G. WASSERMAN ET AL., MENTAL HEALTH ASSESSMENTS IN JUVENILE JUSTICE: REPORT ON THE CONSENSUS CONFERENCE, 42 J. AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY 752-61 (2003), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1404441/>; and G. WASSERMAN ET AL., MENTAL HEALTH ASSESSMENTS IN JUVENILE JUSTICE: REPORT ON THE CONSENSUS CONFERENCE, 42 J. AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY 752-61 (2003), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1404441/>. most juvenile detention facilities do not have the capacity to serve them. This situation is aggravated by multiple problems including overcrowding, dilapidated institutions, inadequate funding for services and programs, and inadequately trained custodial and mental health staff. These factors are associated with an increased risk of suicide, physical assaults, and accidental injuries. Isolation is "a reaction to day-to-day crises and evolve[s] into an institutional practice with its foundation never being questioned." Jeff Mitchell & Christopher Varley, *Isolation and Restraint in Juvenile Correctional Facilities*, 29 J. AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY 251 (1990). The authors describe their work with a juvenile detention center that

Juveniles isolated for behavior problems tend to be those who are particularly susceptible to harassment and perceived threats because of their past trauma.<sup>159</sup> Because they need acceptance from others, teenagers have more difficulty than adults in ignoring what others say. It is not easy to have high self-esteem or self-confidence when stigmatized by others. When adults do not protect teenagers from being picked on, they are likely to become preoccupied with the unfairness of being mistreated. When teased or when not protected by adults, their behavioral reactions may cause them to be deemed "uncooperative."<sup>160</sup>

##### *B. Juvenile Facilities Can Manage Youth More Effectively With Trauma-Responsive Care Instead of Isolation*

Traumatized youth typically need nurturing as if they were much younger than their chronological age. However, they may be

closed its isolation unit, despite the objections of staff, and instituted a behavior modification program. The incidence of behavior problems decreased dramatically.

"It is essential for juvenile correctional programs to provide their residents with stimulating recreational programs, educational programs, well-administered behavior management programs and team-generated, individualized service plans . . . these recommendations . . . improve behavioral management. Administrators who eliminate abusive isolation . . . practices find that they are in more control of their programs. It is presumed that their residents recognize this and behave accordingly."

*Id.* 159. MICHAEL PUISIS, CLINICAL PRACTICE IN CORRECTIONAL MEDICINE 124 (2d ed. 2006)

("Aggressive youth overreact to perceived threat, typically because it is reminiscent of past victimization. These youth do not see these responses as excessive. They may have little experience expressing their thoughts and resolving their feelings verbally rather than through aggression."). Some teenagers who have been victimized in the past react to limit-setting as if it is personalized, or a form of harassment of them. Any "No" from an adult can be seen as victimization. Some of these youth misinterpret and are offended by relatively benign things that others say and do. They perceive hostility coming from others, and their reactions make adults view them as difficult and oppositional. Reacting to perceived threats is characteristic of traumatized teenagers. When there is a history of repeated physical and sexual abuse, a young person is likely to feel more threatened and likely to be on the alert more than other teens. Afterwards it may appear that a frightened teenager over-reacted, but the threat can only be evaluated from the perspective of each young person at the time he/she felt in danger (no matter how well-intentioned the adult was). It is not unusual for traumatized youth to be surprised by their angry outbursts. A traumatized teenager may have no way of responding to harassment or perceived threat, feeling out of control and experiencing primitive and unthinking reflexes. But these youth are often punished with isolation.

160. *See id.*

reluctant to accept such nurturing because their trust has been violated in the past. Program interventions should be based on an understanding of the role of unresolved trauma in the youth's behaviors. Traumatized youth need to know that they will be protected from harassment or touch; learn to soothe themselves when they become anxious and before those feelings escalate; have help to separate past trauma from present provocations; and understand themselves as victimized rather than as "bad."

Individual trauma treatment (to learn to differentiate mistreatment and loss in the past from limit-setting and teasing in the present) and self-soothing techniques (essential skills) are needed so that traumatized teenagers can avoid reacting to every provocation out of an unresolved pool of anger and hurt. Aggressive young people who overreact must be taught how to hear and observe others differently and to respond without aggression. It takes patient teaching to help youth see that they are misinterpreting what others say and do, and that most people are not hostile towards them. An important aspect of skill-building is learning to use self-calming techniques instead of lashing out. Avoiding power struggles, de-escalation before the youth's behavior gets out of control, learning not to be so rejection-sensitive, and how to handle their anger are crucial elements of caring for traumatized teenagers.

Adult actions can prevent most of their behavior problems. Staff who work with traumatized teenagers require training on how to respond (and not respond) to reactive youth and how to avoid exacerbating their behavior and effectively de-escalating them.

Use of isolation is the result of punitive programming in juvenile facilities. Behavioral problems are typically the focus of institutions rather than residents' underlying sadness, isolation, and sense of loss. Aggressive responses to youth anger and aggression have led to a harmful pathology-oriented, punitive approach in juvenile facilities.

There must be close supervision to assure safety and consequences for rule violations, but the consequences must be seen by residents as fair, or they will be counter-productive.

An environment of rigid external control produces chronic crises due to behavior management problems and staff who are frustrated that youth do not improve.

The usual adult reaction to adolescent rule violations or other misbehaviors is anger or punishment, which only increases the probability that problem behaviors will continue. Staff can get caught up in residents' aggression. A perceived provocation gets an angry reaction that causes a more aggressive response, and so on, in an escalating cycle.

Avoiding this cycle by preventing confrontation, deescalating provocative situations, and modeling reduced reactivity to insults and threats, creates an environment where staff are not afraid of residents and who do not use physical force against them.<sup>161</sup>

### *C. Promising Approaches to reduce reliance on Isolation*

New York State is implementing a juvenile justice approach that engages rather than punishes youth. The NY Model is a synthesis of evidence-based and promising practice programs, treatments and philosophies that have proven to be effective in working with juvenile justice involved adolescents in a variety of settings. By using an environmental and philosophical infrastructure that is both trauma-informed and trauma-responsive, and applying empirically validated treatment paradigms for the emotional and behavioral problems which frequently arise in response to trauma exposure, the NY Model creates a treatment supportive milieu which is designed to ready youth for independent, self-regulated and effective behavior. The NY Model emphasizes establishing (or re-establishing) and maintaining the connections between the youth in care, their family and community supports, and other available community resources in order to facilitate an expeditious and successful reintegration to their homes and neighborhoods. The NY Model thus creates a treatment-focused, trauma responsive continuum of care, wherein youth and families are supported in pursuing self-determined goals with reliance on external supports and services as needed, gradually moving toward system independence.<sup>162</sup>

<sup>161</sup> *Id.* at 124-25.

<sup>162</sup> Joseph Tomassone, Chief of Treatment of Services, Bureau of Behavioral Health

Dr. Stuart Ablon of Massachusetts General Hospital has developed a program called the "Collaborative Problem Solving Approach" ("CPS") that has demonstrated success in reducing the use of isolation and restraints for juveniles. The premise of the program is that youth lack certain cognitive and social skills and need to be taught to develop those skills. Over-simplified, the approach requires the youth and adult to identify the youth's concern about an issue, then identify the adult's concern, and together brainstorm a way of addressing it. This approach equips youth with the critical skills necessary to overcome the frustration, attention-seeking behaviors, and to limit the testing behaviors.<sup>163</sup>

This approach was used at the Maine Youth Development Center (which had previously been shut down due to use of four-point restraints and long periods of isolation with young teens). Implementation of CPS in the high custody unit of the Mountain View Youth Development Center was associated with a significant decrease in the number of assaults, the use of force, placements in seclusion (by at least 50%) and also far less workers' compensation claims due to injury. The CBS approach was also utilized in the Ohio Hospital for Psychiatry. The results were as follows: one year seclusion free, 95% reduction in restraints, staff turnover under 3%. When the CBS approach was used at the Yale-New Haven Children's Hospital Inpatient Psychiatry Unit, restraints dropped from 263 to 7 and seclusion dropped from 432 to 133.

A four-country study recently concluded that seclusion should always be the last resort when it comes to dealing with aggressive episodes involving young offenders with psychiatric disorders.<sup>164</sup> The forensic units studied ranged from eight to twelve beds, treating young offenders with severe mental health disorders, delinquent, violent and non-compliant behavior and impulse control problems in

Services, Division of Juvenile Justice and Opportunities for Youth, NYS Office of Children and Family Services, *Personal Communication* (forthcoming).

163. ROSS W. GREEN & J. STUART ABLON, TREATING EXPLOSIVE KIDS: THE COLLABORATIVE PROBLEM SOLVING APPROACH (2005) (discussing this approach and its impressive impacts); see also THINK: KIDS, <http://www.thinkkids.org> (last visited Feb. 2, 2012).

164. Johanna Berg et al., *Management of Aggressive Behaviour Among Adolescents in Forensic Units: A Four-County Perspective*, 18 J. OF PSYCHIATRIC AND MENTAL HEALTH NURSING 776-85 (Nov. 2011).

the UK, Belgium, the Netherlands and Finland. Mental and unit staff on the units found that the most effective response to problem behaviors was verbal intervention that was clear, structured and used in the early stages of aggression. Sometimes the aggressor was separated from other adolescents for five to fifteen minutes to give them a chance to calm down. Talking about the incident afterwards was also important, so that both the adolescent and staff could reflect on why it happened and how it could be prevented. Teamwork was crucial and all members of the multi-disciplinary team had to be committed to therapeutic aggression management. Staff endeavored to cooperate with the adolescent as long as possible and to avoid coercive measures, while still maintaining the safety of others.

A juvenile facility must have policies that forbid isolation, limit the use of physical restraint and PRN medication for behavior control, and forbid secluding suicidal youth. Not only must the facility train staff in these policies, but it must also coach staff specifically in how to de-escalate easily triggered youth. Just as important is a juvenile institutional environment that is developmentally and trauma-informed where youth feel respected and where restraint is seen as a rare last resort when all other efforts to de-escalate the young person have failed.

#### *D. Strategies for Individual Juvenile Defenders*

If your state has mandatory review hearings, bring these issues to the judge's attention at that time and cite the harmful effects of isolation-type practices. If your state does not have mandatory review hearings, but the juvenile court judge retains jurisdiction, it is important to have a mechanism in place for incarcerated youth to have contact with attorneys. An attorney may seek judicial review and appropriate relief by filing a motion to have a review hearing, as was attempted in *O.S.*

There are additional steps that an individual lawyer concerned about a client can take if he/she suspects institutional abuse or the excessive use of isolation-type practices. The following list was developed by Sue Burrell, from the Youth Law Center in California. Different strategies can be used depending on the seriousness of the

situation. With each strategy, always make sure to tell the child what you plan to do, and make sure that they want you to proceed.<sup>165</sup>

(1) Make a Phone Call to the Facility Administrator

This is a good strategy when there is something specific you want to accomplish, such as getting the facility to take your client to a doctor, or arranging a personal visit with someone not on the visiting list. Keep a record of the person(s) you speak with, the date of the phone call, and notes about what was said. Also ask for a return phone call or written response when any requested action is carried out.

(2) Send a Letter or Fax to the Facility Administrator

If the request is urgent, such as a situation where you need to have a mental health clinician examine a child's mental health status, then you may want to fax a written request asking the administrator to investigate and take prompt, appropriate action to address the situation. Faxing has the added advantage of providing a written record of the request. Keep copies of the successful fax. You could also use e-mail, but because administrators get a huge number of e-mails, faxes stand out better as communications calling for a response. If the situation is very serious or if your less formal attempts to resolve them fail, then write a letter to the administrator of the facility asking for an investigation or specific action, outlining what you know about the matter, and request a prompt written response.

(3) Contact the Ombudsperson or Grievance Coordinator

If the request has to do with a relationship issue (for example, trouble with a particular staff member) or particular incident in the facility, then you may want to call the Ombudsperson, or if there isn't one, contact the grievance coordinator for advice.

165. Sae Burrell, Esq., Youth Law Center, San Francisco, California.

(4) Notify the Licensing or Regulatory Agency

If the facility or placement is licensed, or if there is a regulatory agency, then there may be a complaint process for investigation and action in individual cases. For example, group homes in California are licensed by the California Department of Social Services. Children (or anyone) may file complaints through the Foster Care Ombudsman.<sup>166</sup> Typically, state law requires investigation and response to occur within a specified period of time, and complaints are retained in the licensing file.

(5) Make a Child Abuse Report

Most states have provisions for the filing of complaints in relation to physical or sexual abuse of children, and this includes abuse by facility staff members or law enforcement officers. These reports may be confidentially filed, and the child welfare agency must respond to them.

(6) Involve Specialty Advocates for Assistance

A disproportionate number of youth in the juvenile justice system have disabilities qualifying them for special education services, or necessitating services for developmental disabilities or mental health conditions. Accordingly, in such cases, contact your local Protection and Advocacy ("P & A") office, or other agencies that provide educational, developmental disabilities and mental health advocacy services.

(7) Contact the Civil Rights Division of the United States Department of Justice

The Civil Rights of Institutionalized Persons Act<sup>167</sup> ("CRIPA") gives the Civil Rights Division of the DOJ the power to bring action

166. California Department of Social Services, The Office of the Foster Care Ombudsman, *Complaints Form*, <http://www.fosteryouthhelp.ca.gov/complaints.html> (last visited Nov. 26, 2011).

167. 42 U.S.C. § 1997 (1980).



