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Nicole Johnson  
*Touro Law Center*

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## **SOLITARY CONFINEMENT OF JUVENILE OFFENDERS AND PRE-TRIAL DETAINEES**

*Nicole Johnson\**

### **I. INTRODUCTION**

The Supreme Court has long recognized that juvenile offenders should not be held to the same standards of accountability or degrees of punishment as adults.<sup>1</sup> Despite recent changes in federal and state laws prohibiting the use of solitary confinement for juvenile offenders,<sup>2</sup> it continues to be used as a routine form of punishment for juveniles in most states. Although its use has been banned in New York State prisons, county facilities within the state are not held to the same regulations, and therefore continue to implement this harsh punishment regardless of its detrimental impact on juveniles.<sup>3</sup> Riker's Island Correctional Facility ("Riker's") stopped using solitary confinement for juvenile offenders after the 2015 suicide of Kalief Browder.<sup>4</sup> Kalief was arrested at the age of sixteen, accused of stealing a backpack from a delivery man.<sup>5</sup> He appeared in Bronx criminal court for the first time in May of 2010.<sup>6</sup> The judge placed a three thousand dollar bail on Kalief, despite his lack of a violent criminal background.<sup>7</sup>

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\* J.D. Candidate 2020, Touro College Jacob D. Fuchsberg Law Center, B.A. Forensic Psychology, John Jay College of Criminal Justice. I want to thank Professor Sepowitz for her advice and guidance in writing this note. I would also like to thank Steven Fink and Michael Morales for all of their help during the editing process.

<sup>1</sup> See *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>2</sup> Kevin Liptak, *Obama Bans Solitary Confinement for Juveniles in Federal Prison*, CNN POLITICS (Jan. 26, 2016), <http://www.cnn.com/2016/01/25/politics/obama-bans-juvenile-solitary-confinement/index.html>.

<sup>3</sup> Gary Gately, *Juvenile Solitary Confinement: Modern Day 'Torture' in the US*, CORRECTIONS.COM (Apr. 14, 2014), <http://www.corrections.com/news/article/35445-juvenile-solitary-confinement-modern-day-torture-in-the-us>.

<sup>4</sup> TIME: THE KALIEF BROWDER STORY (Weinstein Television 2017) [hereinafter THE KALIEF BROWDER STORY].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

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

He was then transferred to Riker's, where he was incarcerated for nearly three years.<sup>8</sup> Kalief Browder spent more than seven-hundred days of his incarceration in solitary confinement.<sup>9</sup>

Kalief was unjustly punished and placed in solitary confinement on multiple occasions, without being provided a misconduct hearing.<sup>10</sup> While in solitary, he was confined to a small cell for twenty-three hours per day, with only a metal bed, a sink and a toilet.<sup>11</sup> Inmates in solitary are not entitled to commissary, and therefore, are only able to eat when the guards slide a tray of food through a slit in the cell door.<sup>12</sup> However, Kalief was often given half eaten trays of food or not fed at all.<sup>13</sup> Kalief described feeling isolated, depressed and hopeless.<sup>14</sup> He pleaded for help from the jail psychiatrist, but his pleas fell on deaf ears.<sup>15</sup> He talked to himself and expressed to the psychiatrist that he felt like he was going insane.<sup>16</sup> During his time in Riker's, Kalief attempted suicide three times.<sup>17</sup> Despite his suicide attempts, he was immediately brought back to solitary confinement instead of receiving psychiatric treatment or placed into general population.<sup>18</sup> The correctional officers claimed that they believed Kalief was exaggerating his symptoms and faking his suicide attempts.<sup>19</sup> Because there was no mandatory procedure in effect, the guards had absolute discretion over Kalief's access to medical and psychiatric treatment.<sup>20</sup> Furthermore, one of his most important lifelines at the time, his legal aid attorney, made no attempt to have Kalief released from solitary or receive medical treatment.<sup>21</sup> Because of his refusal to join a gang, inmates and guards repeatedly assaulted Kalief.<sup>22</sup> Many of the assaults were captured on video at Riker's and showed guards clearly assaulting Kalief without cause and

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

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

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

<sup>16</sup> *Id.*

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

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

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

allowing inmates to assault Kalief in their presence without attempting to intervene.<sup>23</sup>

During the three years Kalief was incarcerated, he was transported to court over thirty times just to face the disappointment of prosecutorial delays and constant adjournments.<sup>24</sup> Despite the right to a speedy trial, New York's "ready rule" is blatantly abused by prosecutors to delay trial and force plea bargains on desperate inmates with no means to bail out.<sup>25</sup> Kalief was offered a plea on several occasions but refused every time.<sup>26</sup> He was told at one of his court appearances that if he accepted the plea bargain, he could go home that same day.<sup>27</sup> Unlike most inmates, who take plea bargains to avoid the delays and risks of trial, Kalief believed the system could still work for him.<sup>28</sup> He refused to take any deal and adamantly insisted on his innocence.<sup>29</sup> At his final court appearance, the prosecutors were forced to reveal that the complaining witness, whom they had not had contact with for an extended period of time, had left the country.<sup>30</sup> The prosecution asked for time to produce the witness but was not able to convince him to return to the United States to testify.<sup>31</sup> The court denied the People's request for additional time and Kalief was released on May 30, 2013 at 2:00 a.m. and given nothing but a metro card and the belongings he walked in with three years before as a 16-year old boy.<sup>32</sup>

Although Kalief became a national advocate for prison reform, after his release from Riker's, he struggled to overcome the trauma caused by solitary confinement and ultimately succumbed to the

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

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

<sup>25</sup> George Joseph & Simon Davis-Cohen, *Internal Documents Reveal How Bronx Prosecutors are Taught to Slow Down Cases*, APPEAL (Aug. 2, 2018), <https://theappeal.org/internal-documents-reveal-how-bronx-prosecutors-are-taught-to-slow-down-cases/>; 33 N.Y. JUR. 2D *Crim. L.: Proc.* § 1922, *Duty of Prosecution to Communicate Readiness for trial to Court and Defense Counsel*, Westlaw (database updated Feb. 2019) (explaining that in order to comply with speedy trial requirements in New York—guaranteed by the Sixth Amendment and CPL (New York Criminal Procedure Law) § 30.30 (The Ready Rule)—a prosecutor has ninety days from arraignment to be ready for trial).

<sup>26</sup> THE KALIEF BROWDER STORY, *supra* note 4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

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

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

trauma he suffered while in prison.<sup>33</sup> He received his GED after his release from Riker's, then enrolled in Bronx Community College where he excelled for a few months until he suffered a mental break in November of 2013.<sup>34</sup> He was brought to St. Barnabas Hospital in the Bronx, following an apparent suicide attempt.<sup>35</sup> Kalief became increasingly more paranoid and believed some of his professors were undercover police officers.<sup>36</sup> At home, he would sit in the dark and unplug the television because he thought it was "watching him."<sup>37</sup> On June 6, 2016, two years after his release, Kalief committed suicide in his home, by hanging himself from the window of his childhood bedroom.<sup>38</sup>

The effects of solitary confinement are irreversible and detrimental to a person's mental and physical wellbeing.<sup>39</sup> It is a severe and harsh form of punishment that the United Nations has deemed to be inhumane and torturous.<sup>40</sup> In a 2011 official press release, the United Nations called for a ban on solitary confinement except in very exceptional circumstances, and never for more than fifteen days.<sup>41</sup> The UN report also called for the complete prohibition of the use of solitary confinement for juveniles, the mentally disabled, and those in pre-trial detention.<sup>42</sup> The report cited to the long-lasting mental damage shown in scientific studies, which directly frustrates the purposes of rehabilitation.<sup>43</sup> To force juveniles into solitary confinement is undoubtedly cruel and unusual punishment.<sup>44</sup> It also contradicts the principles set forth by the Supreme Court in *Roper v. Simmons*<sup>45</sup> and *Graham v. Florida*<sup>46</sup> regarding the punishment of

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Juan Méndez, *Solitary Confinement Should be Banned in Most Cases, UN Expert Says*, UN NEWS (Oct. 18, 2011), <https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>46</sup> See *Graham v. Florida*, 560 U.S. 48 (2010).

juvenile offenders.<sup>47</sup> The Court has long recognized that juveniles should be treated with a different standard of care than adults, and the primary focus of the incarceration of juveniles is rehabilitation so that they can learn from their mistake.<sup>48</sup> Solitary confinement destroys the juvenile's potential rehabilitation.

Additionally, solitary confinement is being used egregiously for pre-trial detainees of all ages, despite not being convicted of the crime for which they are detained. Inmates who are presumed innocent are often subjected to punishment based on largely uncorroborated allegations made by correctional officers.<sup>49</sup> Subjecting pre-conviction detainees—people who are presumed to be innocent—to a punishment which causes irreparable harm is a clear violation of their liberty interests guaranteed by the Fifth and Fourteenth Amendments. The liberty interests of juveniles are even further violated because, unlike inmates in the general population, they are unable to receive an education in solitary. While most adults have graduated and received a basic education, juveniles are young and generally still attending school. Furthermore, the deleterious impact on juveniles is significantly greater than it is on adults.

This Note will focus on juvenile detainees and their pre-conviction rights by examining three major factors that contributed to the unjust confinement of Kalief Browder. It will address the effect of solitary confinement of juvenile offenders beyond the pre-conviction stage of legal proceedings. This Note will argue that the use of solitary confinement for juvenile detainees who have not been convicted of a crime offends the basic principles of due process. Additionally, it will argue that the use of solitary confinement for juveniles violates the Eighth Amendment. The Supreme Court has held that juvenile offenders are subject to less severe punishments than adults because youths are not fully developed mentally, more impulsive, and therefore less culpable.<sup>50</sup> Furthermore, the primary purpose of incarcerating juvenile offenders is for rehabilitation rather than deterrence or

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<sup>47</sup> *Id.* (explaining that the Eighth Amendment prohibits the imposition of life without parole on juvenile offender who committed homicide); *see also Roper*, 543 U.S. at 551 (prohibiting the death penalty for juvenile offenders).

<sup>48</sup> *Graham*, 560 U.S. at 71; *Roper*, 543 U.S. at 567.

<sup>49</sup> THE KALIEF BROWDER STORY, *supra* note 4.

<sup>50</sup> *See Roper*, 543 U.S. at 551.

incapacitation.<sup>51</sup> The use of solitary confinement is psychologically destructive and defies the principles of rehabilitation.<sup>52</sup>

This Note will further argue that allowing prison or jail personnel to serve as committee members for misconduct hearings also violates due process. To permit the correction officers and prison officials to decide if an inmate should be placed in solitary is the equivalent of allowing the police who arrested the defendant to serve as jurors at his trial.

This Note will be divided into five sections. Section II will provide an historical overview of solitary confinement in the United States. It will also examine New York's new Raise the Age legislation and its probable effect on the use of solitary confinement within the state. Section III will argue that the United States Supreme Court should declare the use of solitary confinement for juvenile offenders to be unconstitutional and will discuss the applicable constitutional and legal principles. Section IV will analyze prosecutorial misconduct and abuse of the "ready rule" in state courts. Finally, Section V will propose reform in both the state and federal prison systems regarding solitary confinement for juvenile offenders.

## II. SOLITARY CONFINEMENT

### A. Historical Overview and Background

Solitary confinement has been used as a form of punishment in the United States since the 1800s.<sup>53</sup> It was originally intended as a form of rehabilitation, whereby prisoners were supposed to think about their crimes, read the Bible and repent.<sup>54</sup> However, the harmful effects of solitary confinement became evident not long after its implementation.<sup>55</sup> Only recently has the constitutionality of the

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<sup>51</sup> See *Graham*, 560 U.S. at 71.

<sup>52</sup> Erica Goode, *Solitary Confinement: Punished for Life*, N.Y. TIMES (Aug. 3, 2015), <https://www.nytimes.com/2015/08/04/health/solitary-confinement-mental-illness.html>; Ian M. Kysel, *Banishing Solitary: Litigating an End to the Solitary Confinement of Children in Jails and Prisons*, 40 N.Y.U. REV. L. & SOC. CHANGE 675, 707 (2016).

<sup>53</sup> Madeleine Stern, *The Evolution of Solitary Confinement in The United States*, LAW STREET MEDIA (July 2, 2014), <https://lawstreetmedia.com/issues/health-science/evolution-solitary-confinement-united-states/>; Sandra Simkins, *Juvenile Solitary Confinement*, 296 N.J. LAW. 22 (2015).

<sup>54</sup> Stern, *supra* note 53.

<sup>55</sup> *Id.*

practice come into serious question.<sup>56</sup> Most adult and juvenile correctional facilities, as well as the United Nations,<sup>57</sup> define solitary confinement as confinement of 22-24 hours per day in isolation.<sup>58</sup> Prison cells are eight feet by ten feet on average and made of cement, with a hole in the metal door to slide meals through.<sup>59</sup> Every effort is made to minimize human contact.<sup>60</sup> Cells are often stripped bare and prisoners resort to habitual pacing around their cells to attempt to maintain their sanity.<sup>61</sup> Solitary confinement has been proven to induce side effects such as visual and auditory hallucinations, hypersensitivity to noise and touch, insomnia, paranoia, uncontrollable feelings of rage and fear, distortions of time and perception, increased risk of suicide and Post Traumatic Stress Disorder.<sup>62</sup> Despite all of the proven adverse effects of solitary confinement, the use of this punishment on children in local jails and state prisons is remarkably high and difficult to track.<sup>63</sup>

President Barack Obama announced a series of executive actions on restrictive housing in 2016, which banned the use of solitary confinement of juveniles in federal prisons and urged states to model the reforms implemented at the federal level.<sup>64</sup> The President referenced Kalief Browder and emphasized the deep psychological impact this punishment has on young inmates, severely impairing their ability to become functioning members of society again.<sup>65</sup> The United States is currently housing approximately 2.3 million inmates, with an estimated 80,000 of them being held in solitary confinement in state and local jails across the United States.<sup>66</sup> Kalief's death sparked

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<sup>56</sup> *Id.*; Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (inviting Eighth Amendment challenges to the use of solitary confinement and emphasized its especially harmful impacts on juveniles and the mentally disabled).

<sup>57</sup> *Supra* note 53.

<sup>58</sup> Kysel, *supra* note 52.

<sup>59</sup> Stern, *supra* note 53.

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

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Kysel, *supra* note 52.

<sup>64</sup> Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce\\_story.html?utm\\_term=.fbc53aba58fa](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?utm_term=.fbc53aba58fa); U.S. DEP'T JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING (Jan. 2016), <https://www.justice.gov/archives/dag/file/815561/download>.

<sup>65</sup> Obama, *supra* note 64.

<sup>66</sup> Stern, *supra* note 53.

reform in New York for juvenile offenders, but the majority of states currently have no legislation in the area.<sup>67</sup> Although there is a federal ban on solitary confinement for juveniles, the Supreme Court has not decided whether solitary confinement of juveniles who have not yet been convicted of a crime is constitutional, rendering state prisons and local jails virtually unregulated on its use. However, the Court set some procedural standards for the use of solitary confinement for the prison population in general in *Sandin v. Conner*<sup>68</sup> and *Wolf v. McDonnell*.<sup>69</sup>

In *Sandin v. Conner*, the Court held that the Due Process Clause does not guarantee a prisoner the right to a misconduct hearing, or any other procedural protections prior to being placed in solitary confinement.<sup>70</sup> However, the use of solitary confinement for pre-conviction detainees is only permitted for administrative or disciplinary purposes.<sup>71</sup> Administrators of state prisons and local jails have an unsettling amount of discretion over who is put in solitary and for how long.<sup>72</sup> In some cases, inmates, especially those who have not been convicted of a crime, are provided a misconduct hearing prior to being placed in solitary confinement.<sup>73</sup> However, these hearings are conducted inside the institution by employees of the facility.<sup>74</sup> Corrections officers can, and do, give inmates tickets arbitrarily which can lead to a loss of privileges and “good time,”<sup>75</sup> and often results in sending the inmate to solitary confinement.<sup>76</sup> Because of the broad discretion of corrections officers and prison administrators, there is

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<sup>67</sup> Anne Teigen, *States That Limit Or Prohibit Juvenile Shacking and Solitary Confinement*, NCSL (Aug. 16, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx>.

<sup>68</sup> 515 U.S. 472 (1995).

<sup>69</sup> 418 U.S. 539 (1974).

<sup>70</sup> *Conner*, 515 U.S. at 487.

<sup>71</sup> Stern, *supra* note 53. Administrative purposes refer to instances where the inmate is in danger of physical harm from other members of the general prison population and is placed in isolation for his own protection. Disciplinary purposes refer to punishment implemented for misconduct and behavioral infractions while an inmate is incarcerated.

<sup>72</sup> *Id.*

<sup>73</sup> See *Conner*, 515 U.S. at 485, *Wolf*, 418 U.S. at 545-46.

<sup>74</sup> *Conner*, 515 U.S. at 475-76.

<sup>75</sup> *Good Time Credit Law and Legal Definition*, US LEGAL, <https://definitions.uslegal.com/g/good-time-credit/> (last visited Apr. 11, 2019). “Good Time” refers to the amount of time deducted from time to be served in prison on a given sentence, at some point after the prisoner’s admission to prison, contingent upon good behavior or awarded automatically by the application of a statute or regulation. *Id.* Good time can be forfeited for misbehavior. *Id.*

<sup>76</sup> Stern, *supra* note 53.

virtually no oversight on the use of solitary confinement resulting in a dangerous abuse of discretion which can send an innocent person to solitary confinement for an indefinite amount of time based on the decision of one officer.

Kalief was sent to solitary confinement for a ten month period for fighting with another inmate.<sup>77</sup> Although Kalief was seen on video striking the first punch, approximately thirty inmates proceeded to attack him during the altercation.<sup>78</sup> Based on the video, prison guards did very little to prevent the incident or protect Kalief.<sup>79</sup> Immediately after the fight, Kalief was brought directly to solitary confinement without seeing a doctor or being provided any medical attention.<sup>80</sup> Prison authorities conducted no investigation into the reasons for the altercation or the identities of those involved.<sup>81</sup> However, Kalief was a target of a gang in Riker's because of his refusal to join.<sup>82</sup> Because of his resistance to conforming to prison lifestyle, Kalief faced constant threats and abuse from inmates and guards, which could have ultimately led to the altercation.<sup>83</sup>

### **B. Raise the Age Legislation**

New York State has taken steps to reform the criminal justice system's harsh treatment of juveniles. After the death of Kalief Browder and alleged prison misconduct at Riker's, New York passed legislation that became effective on October 1, 2018, which raised the age of criminal liability for juvenile offenders.<sup>84</sup> Prior to this legislation, juveniles aged sixteen and up were treated as adults and prosecuted in criminal court, regardless of the level of the offense of which they were accused.<sup>85</sup> Now, most juveniles, except those charged with violent felony offenses, will have their cases heard in family court.<sup>86</sup> The new legislation will prevent a significant number of

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<sup>77</sup> THE KALIEF BROWDER STORY, *supra* note 4.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *New York Raises the Age of Adult Criminal Responsibility*, N.Y. ST. ASSEMBLY (Apr. 7, 2017), <http://nyassembly.gov/Press/20170407c/>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

juveniles from ever entering the criminal justice system.<sup>87</sup> As of October 2018, the following changes have taken effect: (1) all misdemeanor charges are now handled in family court, (2) all felony charges are initially handled in a new youth court part of the criminal court that will be presided over by a family court judge, (3) non-violent felony charges are subsequently transferred to family court, absent exigent circumstances presented by the district attorney, and (4) violent felony offenses remain in the youth part of the criminal court and are subject to a three part test weighing the severity of the crime to determine if the case is eligible for transfer to family court.<sup>88</sup> Juveniles whose cases are determined to be ineligible under the three part test are transferred to family court and treated as adults for sentencing purposes, which places them at risk of being sent to adult correctional facilities.<sup>89</sup> All violent felony offenses are subject to this test to determine if the case should be heard in criminal or family court. Juveniles under seventeen years of age in New York's county jails were ordered to be moved to youth facilities in October 2018.<sup>90</sup> Beginning in October 2019, all juveniles under eighteen years of age will also be moved to youth facilities.<sup>91</sup> Juvenile offenders are now primarily held in youth facilities if convicted of a crime in New York.<sup>92</sup> Since state prisons in New York have banned solitary confinement for juveniles, they are only subject to solitary confinement if they are incarcerated in juvenile facilities, which remain dangerously unregulated because they are county facilities.<sup>93</sup> Juveniles who are sentenced as adults in criminal court are sent to state adolescent offender facilities, subject to the supervision of the Office of Children and Family Services.<sup>94</sup> The use of solitary confinement in these facilities is likely prohibited because they are regulated by the state, unlike juvenile detention centers run by the county. However, because the use of these facilities is relatively new, it is unclear whether the Office of Children and Family Services is enforcing the prohibition of solitary in state prisons within adolescent offender facilities. The use

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<sup>87</sup> *Id.*

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

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

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

of solitary confinement in county facilities varies per county. Kings County, for example, allows juveniles to be placed in solitary confinement if it is “necessary to prevent significant physical harm to the juvenile detained or to others when less restrictive alternatives would be ineffective.”<sup>95</sup> This standard grants detention officers substantial deference, allowing for a predictable abuse of discretion. In a recent report by an independent monitor, the county was found to have illegally used solitary confinement for juveniles fifteen times between July and November of 2018.<sup>96</sup>

The conditions of solitary confinement in juvenile detention centers are virtually the same as those in jails and prisons, and the centers have been the focus of an abundance of civil rights lawsuits on behalf of juvenile detainees across the country.<sup>97</sup>

### III. CONSTITUTIONAL ANALYSIS

The deleterious effects of isolation on prisoners have brought the constitutionality of solitary confinement under scrutiny in recent court decisions across the country.<sup>98</sup> Cases such as Kalief Browder’s have generated a growing awareness of the torturous and inhumane conditions of solitary confinement in U.S. correctional institutions. The detrimental effects of solitary confinement are even greater for juveniles and contradicts the Court’s well-established principle of attempting to rehabilitate juvenile offenders. The Supreme Court has noted in countless decisions that the basis for punishing juveniles should always be for rehabilitation rather than incapacitation.<sup>99</sup> Solitary confinement significantly diminishes the chances of rehabilitation into the community.<sup>100</sup> The American Psychiatric Association, the American Public Health Association, the National Alliance on Mental Illness, the Society of Correctional Physicians, and

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<sup>95</sup> Aaron Kunkler, *Kings County is Still Using Solitary Confinement for Juveniles*, *Brothel-Kenmore Reporter*, BOTHELL-KENMORE REP. (Mar. 26, 2019), <http://www.bothell-reporter.com/news/king-county-is-still-using-solitary-confinement-on-juveniles/>.

<sup>96</sup> *Id.*

<sup>97</sup> See *Peoples v. Annucci*, 180 F. Supp. 3d 294, 299 (S.D.N.Y. 2016); *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015).

<sup>98</sup> *Annucci*, 180 F. Supp. 3d at 299.

<sup>99</sup> See *Graham v. Florida*, 560 U.S. 48, 48 (2010); *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

<sup>100</sup> Lauren Kirchner, *Why Solitary Confinement Hurts Juveniles More Than Adults*, PAC. STANDARD (Oct. 9, 2014), <https://psmag.com/news/solitary-confinement-hurts-juveniles-adults-92054>.

Mental Health America have all issued formal policy statements opposing solitary confinement due to the significant psychological harm inflicted.<sup>101</sup> Inmates subject to solitary confinement are seven times more likely to harm themselves after being released from prison than those held in general population.<sup>102</sup> The reasoning behind the Court's decisions is especially true in the case of pre-conviction juveniles.

The Fifth and Fourteenth Amendments guarantee that no person shall be "deprive[d] . . . of life, liberty, or property, without due process of law."<sup>103</sup> Utilizing Kalief Browder's case as an example to apply the principles of due process, it seems inherently wrong to allow a juvenile, who has not been convicted of a crime, to spend over seven hundred days in solitary confinement. Kalief was denied his right to an education and deprived of three years of his childhood. He was then put in torturous conditions and abused and ignored. This was all done to a juvenile whose case was ultimately dismissed. Kalief, like so many others, had no procedural protections in place to prevent this injustice from happening.

#### A. Due Process: Fifth and Fourteenth Amendments

Solitary confinement used on pre-trial detainees contradicts the presumption of innocence that is guaranteed to every defendant accused of a crime. Inmates who have not been convicted of a crime should not be subjected to the same punishments inside of jails as inmates who have been convicted. Juveniles are particularly affected because they are deprived of any form of education while in solitary.<sup>104</sup> Although receiving an education is not a fundamental right guaranteed by the Fourteenth Amendment, the equal protection clause provides that all similarly situated individuals should be treated alike subject to varying standards of review.<sup>105</sup> Although school age children are all guaranteed the same access to education, the Court applies rational basis to determine if the disparity of the treatment is supported by a

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<sup>101</sup> *Annucci*, 180 F. Supp. 3d at 299.

<sup>102</sup> *Id.*

<sup>103</sup> U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XIV, § 5.

<sup>104</sup> Molly McCluskey, *What if This Were Your Kid?*, ATLANTIC (Dec. 24, 2017), <https://www.theatlantic.com/politics/archive/2017/12/juvenile-solitary-confinement/548933/>.

<sup>105</sup> *Toledo v. Sanchez*, 454 F.3d 24, 33 (1st Cir. 2006); Michael Salerno, *Reading is Fundamental: Why No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L., POL'Y & ETHICS J. 509 (2007).

legitimate state interest.<sup>106</sup> Juvenile offenders placed in solitary confinement experience gaps in their education which leave them unprepared or even unable to return to school after being released.<sup>107</sup> Between 2015 and 2016 over eighty juveniles were held in solitary on a regular basis at the Onondaga County Justice Center located in Syracuse, New York.<sup>108</sup> They were isolated for twenty-three hours per day and given an optional high school equivalency packet to complete without any educational instruction or guidance.<sup>109</sup> Because correctional institutions have absolute discretion in placing an inmate in solitary confinement, many of these juveniles were sent to solitary due to minor disciplinary infractions. The impact and long-term detrimental effects caused by solitary confinement are so severe that the decision to punish a juvenile in such a manner calls for judicial intervention.

### 1. *Pre-trial Detainees*

In *A.J. ex rel. L.B. v. Kierst*, the Eighth Circuit held that “the due process standard applied to juvenile pretrial detainees should be more liberally construed than that applied to adult detainees.”<sup>110</sup> The plaintiffs in *Kierst* filed a class action against the Jackson County Juvenile Justice Center alleging civil rights violations, due to conditions of solitary confinement they were exposed to while incarcerated.<sup>111</sup> The court noted that the appropriate test to apply to determine the constitutionality of solitary confinement for pre-trial detainees would be under the Fourteenth Amendment as opposed to the Eighth Amendment.<sup>112</sup> Furthermore, when a juvenile is being held in a juvenile detention center, rather than an adult facility, the appropriate standard of measurement would be to use the Fourteenth Amendment and not the Eighth Amendment because the conditions

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<sup>106</sup> *Sanchez*, 454 F.3d at 33.

<sup>107</sup> *McCluskey*, *supra* note 105.

<sup>108</sup> *Id.*

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

<sup>110</sup> *A.J. ex rel. L.B. v. Kierst*, 56 F.3d 849, 854 (8th Cir. 1995).

<sup>111</sup> *Id.* at 856. Plaintiffs complained of prison overcrowding, being forced to sleep on floor mattresses due to lack of available beds and various issues which led to an unfair trial.

<sup>112</sup> *Id.* at 854. The Eighth Amendment protects inmates from cruel and unusual punishment, whereas the Fourteenth Amendment provides juveniles who have not been convicted of a crime a due process interest in freedom of unnecessary bodily restraint.

leading to confinement may be drastically different.<sup>113</sup> Some juveniles are held in youth facilities due to a “runaway status” or from delinquency petitions that are not criminally based.<sup>114</sup> In both instances, the inmate has not been convicted of a crime; therefore, placing him in solitary confinement infringes an individual’s liberty interest guaranteed by the due process clause of the Fourteenth Amendment.<sup>115</sup> “[J]uveniles . . . , who have not been convicted of crimes, have a due process interest in freedom from unnecessary bodily restraint which entitles them to closer scrutiny of their conditions of confinement than that accorded convicted criminals.”<sup>116</sup> In *Santana v. Collazo*, the court weighed the legitimacy of the state’s interest in implementing solitary confinement on juveniles against the deleterious impacts that it has on them.<sup>117</sup> The court held that if the state can show a legitimate reason for placing juveniles in solitary, then solitary confinement will withstand constitutional scrutiny. However, “the possibility that some juveniles . . . have been and will continue to be subjected to unpleasant and perhaps physically and psychologically damaging restrictions on their liberty that are not reasonably related to legitimate government interests in imposing those restrictions” is troubling.<sup>118</sup> The court in *Collazo* applied a rational basis standard in analyzing the constitutionality of solitary confinement on juvenile offenders and acknowledged that solitary is a disciplinary measure which results in a substantial curtailment of an individual’s freedom.<sup>119</sup> However, the court failed to directly address whether solitary confinement of juveniles substantiates a legitimate interest or if it serves as an additional form of punishment.<sup>120</sup>

In *R.G. v. Koller*, the plaintiffs, three LGTB juveniles, were subjected to solitary confinement due to their sexual orientation.<sup>121</sup> Each of the plaintiffs endured physical and verbal abuse from guards while incarcerated at Hawaii Youth Correctional Facility (“HYCF”).<sup>122</sup> Many of the inmates housed at HYCF were placed there for non-

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983).

<sup>116</sup> *Id.* at 1182.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1181.

<sup>120</sup> *See id.* at 1172.

<sup>121</sup> *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006).

<sup>122</sup> *Id.* at 1140.

criminal offenses, such as skipping school or running away from home.<sup>123</sup> Juveniles are often held in detention centers for non-criminal offenses but are nevertheless subject to solitary confinement.<sup>124</sup> Inmates who are not charged with or convicted of a criminal offense are protected by the Fourteenth Amendment rather than the Eighth Amendment.<sup>125</sup> The court held that holding the inmates in isolation in an alleged attempt to protect them from other inmates was not an acceptable professional practice and violated their due process rights.<sup>126</sup> The court in *Koller* based its holding on several prior rulings which concluded that, except in extreme circumstances, the use of solitary confinement for juveniles is a violation of the Due Process Clause.<sup>127</sup>

## 2. *Misconduct Hearings*

Although the Supreme Court held in *Wolf v. McDonnell* that prisoners may claim the protections of the Due Process Clause, it also said that those rights are subject to restriction due to the nature of prison environments.<sup>128</sup> Those restrictions also include the right to an attorney, the right to cross examine one's accusers, and the right to present one's own defense at prison misconduct hearings.<sup>129</sup> Because the defendant is subject to "the most serious deprivations" in a criminal trial, the Court reasoned that prisoners should not receive the same procedural due process rights as free citizens, even if they have not yet been convicted of a crime.<sup>130</sup> Additionally, the Court said that the potential for havoc inside a prison is increased by the ability to cross examine accusers,<sup>131</sup> and emphasized the importance of prison institutions having discretion over their own disciplinary measures.<sup>132</sup> The Court was concerned about dangerous conditions inside prisons

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<sup>123</sup> *Id.* at 1154.

<sup>124</sup> *Id.* at 1155.

<sup>125</sup> *Id.* at 1154.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1154-55.

<sup>128</sup> *Wolf v. McDonnell*, 418 U.S. 539, 567 (1974).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 568. If a prisoner were allowed the ability to cross examine his accuser, he would be made aware of who made accusations against him leading to a disciplinary infraction, which in prison is likely to incite a physical altercation and make the informer a target among inmates.

<sup>132</sup> *Id.*

that could be exacerbated by “constitutional impediments.”<sup>133</sup> However, as discussed in the dissenting opinion, the Court implied that the Constitution requires that people, including prisoners, be afforded the right to present their own defense at misconduct hearings by calling witnesses and providing evidence.<sup>134</sup> Although the Court advised prison officials to grant prisoners such rights, it declined to hold that they are required to do so.<sup>135</sup> Several years later, the Court, in *Bell v. Wolfish*, narrowed this decision and held that placing an inmate in solitary confinement infringes on the inmate’s due process rights if done with an express intent to punish and without a legitimate institutional interest.<sup>136</sup> Therefore, correctional officers can simply claim that a prisoner was placed in isolation for a legitimate purpose without any procedural safeguards preventing them from abusing this discretion.<sup>137</sup>

In *Sandin v. Conner*, the Court, in a 5-4 decision, held that the Due Process Clause does not necessarily afford a prisoner the right to a misconduct hearing or any other procedural protections prior to being placed in solitary confinement.<sup>138</sup> The appellant in *Conner* was placed in solitary based on allegations of misconduct.<sup>139</sup> Although he was placed in isolation, fully bound in leg restraints and waist chains, and only allowed fifty minutes per day out of his cell to exercise and shower, the Court held that the conditions of his confinement were not substantially different from those of the general prison population.<sup>140</sup> However, as Justice Breyer pointed out in his dissent, the majority of prisoners who were not placed in solitary were given eight hours per day outside of their cells, interacted with other inmates and were able to work or take classes.<sup>141</sup> Although the majority based its decision in part on the assertion that solitary confinement did not pose an atypical hardship on the prisoner in this case, the dissent argued that the majority’s reasoning actually led to the opposite

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 581 (Marshall, J., dissenting).

<sup>135</sup> *Id.* (Marshall, J., dissenting).

<sup>136</sup> *Id.*; *Youngberg v. Romeo*, 457 U.S. 307 (1982).

<sup>137</sup> *Wolf v. McDonnell*, 418 U.S. 539, 581 (1974) (Marshall, J., dissenting) (explaining that prison officials have absolute discretion when placing an inmate in solitary confinement and that judicial intervention is not required).

<sup>138</sup> *Sandin v. Conner*, 515 U.S. 472, 487 (1995).

<sup>139</sup> *Id.* at 494 (Breyer, J., dissenting).

<sup>140</sup> *Id.* (Breyer, J., dissenting).

<sup>141</sup> *Id.* (Breyer, J., dissenting).

conclusion, and that the prisoner had a liberty interest protected by the Due Process Clause.<sup>142</sup> In determining if an inmate has been deprived of a procedurally protected liberty, the Court has relied on the nature and severity of the deprivation.<sup>143</sup>

Conner was held in solitary for thirty days after he was convicted of a crime, for which he received a sentence of thirty years.<sup>144</sup> Kalief had been placed in solitary for over seven hundred days, had not been convicted of a crime, and his case was ultimately dismissed.<sup>145</sup> The severity of the deprivation of Kalief's liberty interest far outweighed that of Conner's. The Court's decision in *Conner* relied on the conclusion that the inmate did not suffer an atypical hardship as a consequence of his time in solitary. The conditions and circumstances of Kalief's time in solitary are distinguishable from Conner's, rendering the holding inapplicable to Kalief's case. The Court reasoned that placing the inmate in solitary confinement without a misconduct hearing in *Conner* did not deprive him of any due process rights because the conditions of the inmate's confinement did not present an atypical hardship for him based upon the duration of time spent in solitary and the conditions of his confinement in comparison to the rest of the prison population in that facility.

Misconduct hearings are inherently unfair because they are held by correctional officers and employees of the same institution accusing the inmate of misconduct. Therefore, whether the inmate spends thirty or seven hundred days in solitary confinement, the correctional institution is imposing a severe punishment without any fair proceedings and is given too much discretion which often results in arbitrarily placing inmates in solitary. The Court in *Sandin v. Conner* emphasized the importance of allowing prisons to impose punishments free from too much government interference or guidelines due to the nature of the dangerous and chaotic environment.<sup>146</sup> However, the Court's decision jeopardizes the liberty interests of pre-trial detainees because it grants too much deference to prison officials, allowing inmates who are presumably innocent to be placed in solitary confinement without judicial review. The Fourteenth Amendment prevents states from depriving any person of "life, liberty,

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<sup>142</sup> *Id.* at 487.

<sup>143</sup> *Id.* at 493 (Breyer, J., dissenting).

<sup>144</sup> *Id.* at 475.

<sup>145</sup> THE KALIEF BROWDER STORY, *supra* note 4.

<sup>146</sup> *Conner*, 515 U.S. at 480.

or property, without due process of law.”<sup>147</sup> Since prison misconduct hearings are unduly biased and because implementing court proceedings prior to placing an inmate in solitary would not be efficient or feasible, the only reasonable solution should be to ban the use of solitary confinement for juveniles in its entirety.

Although the defendant in *Sandin v. Conner* was not a juvenile, the same procedural guidelines apply for all prisoners.<sup>148</sup> Correctional facilities ultimately have full discretion over their own disciplinary hearings and can place inmates in solitary for administrative and disciplinary reasons, without any intervention by courts or legislatures.<sup>149</sup>

## **B. Eighth Amendment Concerns**

Juvenile offenders are not usually held to the same standards of accountability as adults and, therefore, are not typically subject to the same severe punishments. Punishments such as life without parole and the death penalty are unconstitutional when imposed on juveniles, in part because neither gives juveniles any chance of rehabilitation in their lifetime.<sup>150</sup> Prison officials ignore basic principles that the Court has mapped out when implementing punishment. The unique harms caused to juveniles, along with the distinct legal differences between adults and juveniles, call for a higher standard in conditions of confinement because the ability to rehabilitate is significantly diminished due to the irreversible damage resulting from solitary confinement.

### **1. *Roper and Graham***

In *Roper v. Simmons*, the Supreme Court held that it is unconstitutional to sentence juveniles to death, reasoning that juveniles lack self-control, and are vulnerable and susceptible to their surroundings.<sup>151</sup> Punishments for juveniles should therefore not be as severe as they are for adults because “signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness

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<sup>147</sup> U.S. CONST. amend. XIV, § 1.

<sup>148</sup> See *Conner*, 515 U.S. at 472.

<sup>149</sup> *Id.*

<sup>150</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>151</sup> *Id.* at 570.

that may dominate in younger years may subside.”<sup>152</sup> In *Graham v. Florida*, the Court further asserted its view on the treatment of juvenile offenders in the criminal justice system, declaring it unconstitutional to sentence a juvenile to life without the possibility of parole.<sup>153</sup> The Court’s decision in this case relied on the principles of rehabilitation as a basis of punishment as opposed to deterrence, incapacitation or retribution, when dealing with juvenile offenders.<sup>154</sup> Additionally, the Court stated that “[a]n offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”<sup>155</sup> The application of these principles in the context of the detrimental impacts of solitary confinement on youths calls the constitutionality of this practice into question. Although the Court has not yet decided whether a juvenile should be subject to solitary confinement, prior decisions relating to the punishment and sentencing of juveniles have protected them<sup>156</sup> from the harsher and more permanent punishments which are imposed on adults. “Traditionally, juvenile detainees are afforded greater constitutional protection” than adult detainees.<sup>157</sup> The Court prohibits life without parole and the death penalty for juveniles because both of these forms of punishment contradict the underlying purpose to rehabilitate juvenile offenders. Similarly, due to the irreparable harm to juveniles caused by solitary confinement, the chance of rehabilitation is significantly diminished.<sup>158</sup>

## 2. Eighth Amendment Cases

The literature on the deleterious effects of solitary confinement is “virtually unanimous in its conclusion: prolonged supermax solitary confinement can and does lead to significant psychological harm.”<sup>159</sup> To assess the constitutionality of solitary confinement under the Eighth Amendment the Court looks at factors such as the length of time that the inmate spends in isolation and the likelihood of mental

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<sup>152</sup> *Id.*

<sup>153</sup> See *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 76.

<sup>156</sup> *Id.*; see *Roper*, 543 U.S. at 570.

<sup>157</sup> *A.J. ex rel. L.B. v. Kierst*, 56 F.3d 849, 854 (8th Cir. 1995).

<sup>158</sup> *Peoples v. Annucci*, 180 F. Supp. 3d 294, 295 (S.D.N.Y. 2016).

<sup>159</sup> See, e.g., *McCluskey*, *supra* note 105; *Kirchner*, *supra* note 101; U.S. DEP’T JUST., REPORT AND RECOMMENDATIONS, *supra* note 64.

deterioration.<sup>160</sup> The Court has been reluctant to hold that solitary confinement for adult inmates is unconstitutional; however, “[i]t would not be unreasonable to assume that society’s conscience might be shocked by the conditions of confinement imposed on a juvenile in an isolation cell, when it would be unwilling to label the same treatment, given to an adult, cruel and unusual.”<sup>161</sup> In *Turner v. Palmer*, the plaintiff, a sixteen year old girl, filed suit under 42 U.S.C. § 1983 for violations arising out of her incarceration at an Iowa juvenile detention center.<sup>162</sup> The teenage girl was placed in a small cement cell in complete isolation for weeks at a time, with only a small thin mat to sleep on.<sup>163</sup> She was held in solitary confinement for 289 out of the 528 days she was incarcerated, and prohibited from classroom instructions, homework, reading material or any outside communication.<sup>164</sup> During this period, the plaintiff repeatedly cried and banged her head against the wall.<sup>165</sup> The court denied defendant’s motion to dismiss based on qualified immunity and held that the plaintiff sufficiently alleged Eighth Amendment violations due to the conditions and extent of the plaintiff’s confinement.<sup>166</sup> The court based its reasoning on the decision in *A.T. ex rel. Tilman v. Harder*.<sup>167</sup> In *Harder*, the plaintiffs, two juvenile males, filed suit seeking injunctive relief due to conditions of solitary confinement at Broome County Correctional Facility in New York.<sup>168</sup> Plaintiffs were held in 8-foot by 10-foot cells for approximately 23 hours per day and deprived of education and related support services.<sup>169</sup> Correctional officers admitted to placing juveniles in solitary confinement at their own discretion for infractions such as not standing for count and throwing water in the cafeteria.<sup>170</sup> The plaintiffs cited to numerous cases where the courts have determined the confinement of adults to be

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<sup>160</sup> *Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983).

<sup>161</sup> *Id.* at 1179.

<sup>162</sup> *Turner v. Palmer*, 84 F. Supp. 3d 880, 881 (2015) (Plaintiff was a juvenile delinquent and deemed a child in need of assistance at age 16 and was thereby ordered to be placed in the Iowa Juvenile Home.).

<sup>163</sup> *Palmer*, 84 F. Supp. 3d at 881.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *A.T. ex rel. Tilman v. Harder*, 298 F. Supp. 3d 391, 398 (N.D.N.Y. 2018) (holding juvenile offenders are afforded more liberal due process protections than adults).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

unconstitutional and persuasively argued that juveniles are far more vulnerable than adults to the potential long-term effects of solitary confinement.<sup>171</sup> The court granted injunctive relief based on a showing of Eighth Amendment violations.<sup>172</sup>

In *Peoples v. Annucci*, prisoners filed a class action against the New York State Department of Corrections and Community Supervision for violations of the Eighth and Fourteenth Amendments, challenging solitary confinement practices across the New York State prison system.<sup>173</sup> Although the suit encompassed inmates of all ages, the settlement was groundbreaking and highlighted the disturbing abuse of discretion displayed by prison officials when determining if an inmate should be placed in solitary confinement and the length of the isolation. Peoples was sentenced to two years in solitary confinement for maintaining legal documents in his cell deemed to be contraband by correctional officers.<sup>174</sup> Counsel representing Peoples joined complaints of additional inmates, Richardson and Fenton, and an historic settlement was reached on behalf of thousands of prisoners.<sup>175</sup> Similar to Peoples, Richardson was also sent to solitary for three years over documents that he had in his cell.<sup>176</sup> Fenton was placed in solitary for two years for reporting a sexual assault which was deemed to be unsubstantiated by correctional officers, for helping another inmate buy sneakers and for sending a sample of food to the court claiming it had been tampered with.<sup>177</sup> The court found the settlement agreement to be fair and reasonable but also encouraged further reform which was not addressed in the settlement negotiations, such as enhanced mental diagnosis and treatment, improved food quality, warmer clothes and cells and reforms to protect inmates from disciplinary techniques that were used against them.<sup>178</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Peoples v. Annucci*, 180 F. Supp. 3d 294, 297 (S.D.N.Y. 2016).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 307.

While solitary confinement can be destructive to an adult, it can shatter a juvenile.<sup>179</sup> Its impact on juveniles is irreparable.<sup>180</sup> The practice is cruel and inhumane and often leads to neurological and psychological damage due to the torturous conditions inmates are forced to endure.<sup>181</sup> Juveniles who spend prolonged periods of time in solitary are more likely to commit suicide as a result.<sup>182</sup> Kalief Browder's case emphasizes the devastating consequences resulting from this senseless punishment.<sup>183</sup>

#### IV. PROSECUTORIAL MISCONDUCT AND THE STOP THE CLOCK GAME

It would be hard to imagine how any person could be in jail for three years without ever going to trial. However, this is a common problem that stems from prosecutorial misconduct.<sup>184</sup> In New York, a prosecutor has ninety days from arraignment to be ready for trial.<sup>185</sup> However, prosecutors can say that they are not ready at arraignment and request a one-week adjournment, but may not be given another court date for two months due to court congestion.<sup>186</sup> In those seven weeks in excess of what the prosecutors asked for, the clock stops running, which results in the defendant's having only one week accounted for in speedy trial considerations. When the next court date comes, the prosecutors may do the same thing and keep pushing the clock.<sup>187</sup> After they exhaust several not ready delays, they start asking for adjournments that do not count against them such as the unavailability of a witness or a conflict with another case on the same

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<sup>179</sup> Brittney A. Puckett, *Solitary Confinement of Juveniles and Our Evolving Standards of Decency: A Look at Recent Action Taken by the Court, Congress, the President and the States*, 38 U. LA VERNE L. REV. 63, 65 (2016).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Joseph & Davis-Cohen, *supra* note 25; 33 N.Y. JUR. 2D *Crim. L.: Proc.*, *supra* note 25, § 1922.

<sup>185</sup> Joseph & Davis-Cohen, *supra* note 25; 33 N.Y. JUR. 2D *Crim. L.: Proc.*, *supra* note 25, § 1922.

<sup>186</sup> Joseph & Davis-Cohen, *supra* note 25; 33 N.Y. JUR. 2D *Crim. L.: Proc.*, *supra* note 25, § 1922.

<sup>187</sup> Joseph & Davis-Cohen, *supra* note 25; 33 N.Y. JUR. 2D *Crim. L.: Proc.*, *supra* note 25, § 1922.

day.<sup>188</sup> Prosecutors are trained and encouraged to delay court proceedings as long as possible to put pressure on the defendant to take a guilty plea.<sup>189</sup> Kalief appeared in court over thirty times while incarcerated.<sup>190</sup> He was offered deals but refused to take a plea bargain and adamantly maintained his innocence.<sup>191</sup> Kalief was repeatedly sent to solitary confinement while awaiting the day that the People would eventually announce they were ready for trial. However, this day never came because the People were never ready for Kalief's case, and the People had no hope to be ready for trial in the future. The complaining witness left the country at an unknown time and was not in contact with the prosecution. The People did not have a victim or witness to produce and could not in reality go forward with trial. The judge finally dismissed the charges against Kalief after the prosecution revealed that they could not contact the complaining witness; however, the harm that Kalief suffered from his extensive time in solitary confinement was irreparable at that point. His time on solitary confinement caused him irreparable harm, ultimately leading to his death. Such prosecutorial misconduct alone is unjust, particularly when a juvenile is subjected to the inhumane conditions of solitary confinement before trial.

## VI. PROPOSALS AND CONCLUSION

Although New York has made tremendous improvement in decreasing the use of solitary confinement of juveniles in correctional institutions, substantial reform is still desperately needed. The federal government, along with several states, has banned the use of solitary confinement for juvenile detainees.<sup>192</sup> New York should follow the federal model and ban the use of solitary confinement for juvenile offenders within the state. Juvenile detention centers are not prohibited from imposing solitary confinement on juveniles because they are typically county facilities, not subject to the regulations of

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<sup>188</sup> Joseph & Davis-Cohen, *supra* note 25; 33 N.Y. JUR. 2D *Crim. L.: Proc.*, *supra* note 25, § 1922.

<sup>189</sup> Joseph & Davis-Cohen, *supra* note 25; 33 N.Y. JUR. 2D *Crim. L.: Proc.*, *supra* note 25, § 1922.

<sup>190</sup> THE KALIEF BROWDER STORY, *supra* note 4.

<sup>191</sup> *Id.*

<sup>192</sup> Anne Teigen, *States That Limit Or Prohibit Juvenile Shacking and Solitary Confinement*, NCSL (Aug. 16, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx>.

state prisons. Although New York's Raise the Age legislation should serve as a model for other states to follow in their prosecution of juvenile offenders, its use of solitary confinement is an archaic punishment that goes against the rehabilitative effects that confinement is supposed to enhance.

Moreover, in *Davis v. Ayala*, Justice Kennedy invited Eighth Amendment challenges to the use of solitary confinement for juvenile offenders, indicating that the Court may finally be willing to make a determination on the issue.<sup>193</sup> Intervention from the Supreme Court is desperately needed to prohibit the use of solitary confinement in all states. Despite the lack of litigation in the area, there seems to be a general consensus that solitary confinement causes irreparable harm to inmates, especially juveniles. In his concurring opinion in *Ayala*, Justice Kennedy called for litigators to challenge the constitutionality of holding all persons in solitary confinement in U.S. prisons and specifically referenced the tragic death of Kalief Browder.<sup>194</sup> Correctional facilities use biased disciplinary hearings to decide if a prisoner should be placed in solitary confinement without due process of law. The use of solitary confinement infringes upon pre-conviction detainees' due process rights, and the long-term effects are irreparable. Therefore, the use of solitary confinement for juvenile offenders—especially those who have not been convicted—should be prohibited under the Eighth and Fourteenth Amendments of the U.S. Constitution.

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<sup>193</sup> *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015).

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